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The LUMS Law Journal ("LLJ" or "Journal") is a peer-reviewed journal of the Shaikh Ahmad Hassan School of Law, Lahore University of Management Sciences ("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 at providing 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

The LLJ is nationally perceived as an esteemed platform for academic legal scholarship on a variety of topics. The editors are honoured to have had the privilege to serve a publication which has continued to foster an impressive standard of quality. In recent years, the number of submissions and publications on areas of interest to a more diverse audience have been growing in number. This has allowed the LLJ to establish greater relevance in the international legal community as well. Hence, we are proud to bring to you the tenth volume of the LLJ. As every year one volume is published, the tenth volume is also representative of our 10th anniversary.

We would like to extend our thanks to the contributors for their valuable submissions to this volume. Their patience during the rigorous rounds of review which often extended to long periods of time is highly appreciated by our team. The publication of this volume would not have been possible without the great support and helpful guidance of our Chief Editor, Dr. Sadaf Aziz and Co-Editor, Marva Khan. We would also like to extend our gratitude to the LUMS Law Journal Fellows, Sub Editors, and team members, namely Alina Arif, Bilquees Bano Vardag, Kehar Khan Hyder, Minahil Tariq, Momal Malik, Muhammad Talha Riaz, Muhammad Usman Mumtaz, Nimra Arshad, Sameen Ahmed, Sheheryar Atif Malik, and Syed Qasim Abbas for their untiring efforts in helping us ensure and maintain the quality of this volume.

The LLJ strives to produce rigorous and well-researched legal scholarship on topics that are pertinent, engaging, relevant to existing 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

Arooba Mansoor, Haanya Channa, Maryam Asad

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Criminal Liability of Child Soldiers and their Exclusion as Refugees under International Law

Tajwar Khan and Hira Fatima*

Abstract

The refugee crisis is one of the most critical issues faced by countries across the globe. To effectively address the problem, the international community negotiated the Convention Relating to the Status of Refugees 1951 ("Refugee Convention").[1] This Convention, with 146 states as parties, identifies individuals who qualify as refugees, the protections afforded to them, and describes the circumstances under which refugee status can be attained. However, an interesting feature of the Refugee Convention is Article 1(f), which restricts people who have committed war crimes from gaining refugee status or any protections under the law. It is imperative to note that Article 1(f) does not directly address the issue of child soldiers and the commission of any war crimes by them – perhaps because this is a relatively rare occurrence. Consequently, there is a lack of consensus around this issue. One thread of international discourse on this question proposes that child soldiers must not be denied refugee protection. This article further engages with this theme and supports the idea that the Conventions should be read as inclusive documents and should act as a tool to protect vulnerable groups. Therefore, child soldiers, irrespective of their crimes, must be given refugee protection.

Introduction

One of the most alarming practices in contemporary armed conflicts is recruiting children as soldiers. Article 1 of the Convention on the Rights of the Child ("CRC") defines the term "child" as a human being below the age of eighteen years, unless there is a specific law attributed to the child which allows majority to be acquired

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* Tajwar Waseem Khan has an LL.M. from Cardiff University and has been a law lecturer at The Institute of Legal Studies for the past six years.
Hira Fatima did her LL.M. from the Queen Mary University of London, United Kingdom. She is currently pursuing doctoral studies at the University of Limerick, Ireland.

[1] The Convention Relating to the Status of Refugees 1951 (adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, convened under General Assembly Resolution 429 (V) of 14 Dec 1950. Entry into force: 22 April 1954).

earlier.[2] The recruitment of children as soldiers and their use in active hostilities has been a concern for the international community for a long time. Under international criminal law, this is regarded as a war crime.[3] Usually, children between the ages of ten to twelve are recruited as soldiers, cooks, spies, porters, or sex slaves. As global numbers of such recruits are rising, the threat is becoming more alarming for the global community.[4]

Children recruited as soldiers often experience emotional and physical trauma.[5] Even though these soldiers are trained and brainwashed to carry out violence on the orders of recruiters, they often lack the *mens rea*, i.e., the intent, for it – as discussed later in the article. They are manipulated into committing mass atrocities and are also at risk of persecution at the hands of their recruiters.[6] Many of these children are either killed or wounded, as they are more susceptible to injuries, while most of them, after growing older, are replaced by fresh recruits.[7] To escape this persecution, a number of child soldiers seek asylum in other states.

There are a number of international multilateral treaties that regulate the granting and withholding of asylum, and the most significant one is the Refugee Convention. Article 1(a) of the Refugee Convention provides that a person qualifies as a refugee if they are outside the country of their nationality and are unable to return. This could be due to the fear of persecution for reasons of race, nationality, religion, membership of a particular social group, or political opinion.[8]

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[2] The Convention on the Rights of the Child, United Nations, Treaty Series vol.1577, p.3, (adopted on 20 Nov 1989. Entered into force: 2 Sep 1990), art 1.

[3] Pilar Villanueva Sainz-Pardo, 'Is Child Recruitment as a War Crime Part of Customary International Law?' (2008) 12 The International Journal of Human Rights, 12:4, 555–612, DOI: 10.1080/13642980802204750.

[4] Matthew Happold, 'Excluding Children from the Refugee Status: Child soldiers and Article 1(f) of the Refugee Convention' (2002) 17(6) American University International Law Review.

[5] Ibid.

[6] Ibid.

[7] Machal Graca, 'The Impact of War on Children: A Review of Progress since 1996', *United Nations Report on the Impact of Armed Conflict on Children* (Hurst and Company, London, 2001), 7.

[8] Convention Relating to the Status of Refugees, United Nation, Treaty Series, vol. 189 p. 137 (adopted on 25 July 1951. Entered into force: 22 April 1954), art 1, United Nations, Treaty Series, vol 606, p 267, (adopted 31 Jan 1967. Entered into force: 4 Oct 1967). See Article 1 of the Refugee Convention, 1951, that describes the rights and duties of the refugees and their host countries. See also the Additional Protocol of 1967 that amended the definition to include refugees after January 1951.

These persons shall not be expelled or returned to their country of origin, where they would be at risk of persecution or torture.[9]

In today's world, a majority of the asylum seekers are women and children who are fleeing persecution from non-international armed conflicts.[10] The developed world often puts forth the argument that the contemporary international legal regime regarding asylum places an enormous economic burden on them.[11] This has led to strict scrutiny of asylum seekers to determine whether a person, due to their past conduct, is "deserving" of refugee status – as international customary law does not grant an inherent right of asylum to any person.[12] Due to this intense scrutiny, not all individuals who suffer persecution or have a well-founded fear of persecution can avail themselves the benefit of Article 1(a) of the Refugee Convention. Article 1(f) of the Refugee Convention declares certain classes of people to be ineligible for refugee status due to reasons such as their past conduct, and an example of such past conduct could be the commission of war crimes. This raises a humanitarian question regarding the grant of asylum to child soldiers – as the Refugee Convention is silent on whether child soldiers fall within the exclusion of Article 1(f). Thousands of children are recruited by militias each year to commit war crimes. The question that arises is whether this disqualifies these children from seeking asylum, or whether there are individual circumstances to be considered. It is estimated that some 250,000 were used as child soldiers in the year 2022.[13] These children have committed mass atrocities in a number of recent international and non-international armed conflicts.[14] This article aims to explore the complexities of the application of the exclusion clause to child soldiers who have committed war crimes or crimes against humanity in the past, even though they may have lacked the intent.

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[9] Ibid art 33(1). This is also called the principle of non-refoulment, which is enshrined in Article 33(1) of the Refugee Convention. It also has the force of customary law.

[10] UNHCR Asia Pacific, *Figures at a Glance* (16 June 2022) <https://www.unhcr.org/figures-at-a-glance.html> accessed 6 Mar 2023.

[11] Dennis McNamara, *Exclusion Clauses: Closer attention Paid to the Exclusion Clauses in Refugee and Asylum Laws: Assessing the Scope for Judicial Protection* (International Association of Refugee Judges ed. 1997) 75.

[12] Colin Harvey, *Seeking Asylum in the UK: Problems and Prospects* (2000), 48–49.

[13] Their world, Child Soldiers <https://theirworld.org/resources/child-soldiers/> accessed 6 Mar 2023.

[14] Kelly E. Atkinson, 'Refugees and Recruitment: Understanding Violations Against Children in Armed Conflict with Novel Data' (2020) 15(1) Journal of Peacebuilding & Development 75.

Article 1(f) of the Refugee Convention

Article 1(a) defines the term "refugee" and classifies the groups of people who can avail refugee status on the basis of their race, religion, nationality, membership of a particular social group, or political opinion.[15] However, Article 1(f) restricts certain individuals from availing the status of a refugee even though they may meet the listed requirements. These individuals are generally those who are not afforded state protection due to crimes against peace, war crimes, and crimes against humanity.[16]

Article 1(f) is couched in mandatory language, as it uses the phrase "shall not apply to any person" who has committed any of the above-mentioned crimes, amongst others.[17] This provision indicates that it is not at any state's discretion to refuse the grant of refugee status to a person accused of war crimes or crimes against humanity from acquiring refugee status, but in fact, a state is bound to do so under international law.[18] The binding nature and enforceability of the international treaties is another concern. But for the scope of this paper, the history of this provision may be considered to discover the intent of the drafters. An *ad hoc* Committee on Statelessness and Related Problems proposed the initial draft.[19] During the Committee's sessions, the United States proposed that it should be left to the discretion of the state whether it wishes to exclude war criminals from refugee status.[20] This resulted in an amendment to the Refugee Convention; however, it did not lose its mandatory tone.

Under Article 1(f), there is no minimum age for the application of the exclusion clause. The provision appears to apply to "any person." Thus, Article 1(f) does not distinguish between children and adults. In their application of this provision, states do not make any distinctions on the basis of *mens rea*, and in compliance with this obligation, they do not grant refugee status to war criminals,

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[15] The Convention (n 1).
[16] Ibid.
[17] Ibid.
[18] Pilar (n 3).
[19] The Convention (n 1).
[20] Goodwin-Gill, *supra* note 6, 95–96.

irrespective of the age of the perpetrator.[21] Despite this clarity in international law, many law experts support that child soldiers should be seen as victims rather than perpetrators of crimes. It has been argued that children who have committed mass atrocities should not be subjected to exclusion from refugee status. In practice, however, child soldiers have been strictly prohibited from getting refugee status as a result of the application of Article 1(f).[22]

Child Soldiers and Armed Conflict

The violence that is associated with an armed conflict consumes numerous human lives and inflicts irreparable losses on communities. It is estimated that the past three decades have witnessed about 150-200 violent conflicts, both international and non-international.[23] People living in war zones are at an increased risk of atrocities such as ethnic cleansing, genocide, physical injuries, mental trauma, sexual violence, and deprivation of basic necessities like clean air and access to healthcare. Thus, most people are forced to leave their place of origin in order to survive.

Armed conflicts have especially severe effects on children. Children, by virtue of being inherently physically and psychologically weaker, are at a greater risk of being unable to or struggling to cope with the impact of war. Many of the affected are kidnapped or lured to work as soldiers. Young girls specifically are at greater risk of sexual violence and sex trafficking. Children in refugee camps and those affected by the violence are particularly vulnerable to being exploited by non-

[21] Sonja Grover, '"Child Soldiers" as "noncombatants": the Inapplicability of the Refugee Convention Clause' (2008) 12(1) The International Journal of Human Rights, this is also discussed by Matthew Happold in 'Excluding Children from the refugee status: Child soldiers and Article 1F of the Refugee Convention' (2002) 17(6) American University International Law Review.

[22] Exclusion Clause Guidelines, *supra* note 23, at page 22 ("Children under eighteen can and have been excluded in special cases."), see also Sibylle Kaepferer, *Exclusion Clauses in Europe – A Comparative Overview of State Practice in France, Belgium, and the United Kingdom,* 12 INT'L J. REFUGPF. L. 194, 214 (2000) (providing examples of Belgian and French cases where children under eighteen were excluded); see also Matthew Happold in "Excluding Children from the refugee status: Child soldiers and Article 1F of the Refugee Convention" (2002) 17(6) American University International Law Review.

[23] International Organization for Migration, 2020. *World Migration Report*. [online] Geneva: International Organization for Migration <https://publications.iom.int/system/files/pdf/wmr_2020.pdf> accessed 16 Dec 2021.

state armed groups to commit mass atrocities during armed conflicts.[24] Therefore, there seems to be a growing consensus among law experts that the exclusion clause of the Refugee Convention should not be applicable to child soldiers. Nonetheless, there is a section of experts who believe that these child soldiers should be excluded from asylum protection and instead be prosecuted in domestic courts or international criminal tribunals for committing war crimes.[25] Generally, under domestic and international criminal laws, a guilty verdict is rendered only when an accused commits an illegal act and has the intent to commit the same;[26] these two elements are known as the *actus reus* and *mens rea*, respectively.

Supporters of holding children liable for their acts believe that child soldiers should be prosecuted because they have committed atrocities voluntarily.[27] This belief is premised on the basis that some child soldiers join armed groups willingly and, thus, intentionally commit crimes.[28] Consequently, prosecuting them will provide justice to the victims and their families, as the theory of retribution demands as the foremost aim of a criminal justice system. They also argue that most child soldiers have developed psychologically at the time of committing war crimes, giving rise to intent.[29] Therefore, the *mens rea* requirement is being fulfilled. However, the exact age of psychological development of a child is unclear.[30] Some experts have also suggested that the recruitment of children under the age of fifteen has been preferred by non-state armed groups due to the child's lack of understanding, and, hence, they can be easily manipulated into committing mass atrocities.[31] For example, children who have been orphaned may find themselves without food and shelter and at the mercy of recruiters. The United

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[24] Janie Leatherman, 'Sexual violence and armed conflict: complex dynamics of pre-victimization' (2007) Int. J. Peace 12(1).
[25] Fanny Leveau, 'Liability of Child Soldiers Under International Criminal Law' (2014) 4.1 Osgoode Hall Review of Law and Policy 36.
[26] Ibid.
[27] Nienke Grossman, 'Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations' (2009) 38 Geo. J. Int'l L. 323.
[28] International Organization (n 23).
[29] Ibid.
[30] Ibid.
[31] Grover (n 21).

Nations Office for Children and Armed Conflict has revealed that recruitment of children has doubled in the Middle East and Africa since 2019.[32]

Child Soldiers and International Refugee Law

The major outcome of armed conflicts is mass displacement. A chief example of this is the displacement of Jews in the aftermath of World War II which led to the introduction of the Refugee Convention and the establishment of the Refugee Agency, the United Nations High Commissioner for Refugees ("UNHCR").[33] Another recent example is the displacement of Ukrainians due to the ongoing war between Ukraine and Russia.

The definition of refugees in the Refugee Convention enfolds child soldiers within itself. However, there are a number of concerns when refugee protection is denied to child soldiers on the basis of Article 1(f). Denying refugee status to those who otherwise qualify for it increases the risk of persecution and oppression, as they would have to remain wherever they are.[34] In the case of child soldiers, their refugee status can provide them with an opportunity for rehabilitation. Further, the consequences faced by child soldiers who are not granted refugee status may worsen through the creation of stigma, or the status of being considered a war criminal, and may lead to criminal liability.[35] Sadly, Article 1(f) prevents former child soldiers from seeking asylum for the same reason that they are seeking it, i.e., acts of violence.

While Article 1(f) does not contain any specific exception for children, there are rising concerns regarding the safety and reintegration of children affected by armed conflict.[36] The UNHCR has provided an insightful approach regarding the exclusion clause in its handbook on Exclusion Guidelines and an accompanying

[32] Mick Mulroya, Eric Oehlerich, and Zack Baddorf 'Begin with the children: Child soldier numbers doubled in the Middle East in 2019' (2022) Middle East Institute (April 14, 2020) <https://www.mei.edu/publications/begin-children-child-soldier-numbers-doubled-middle-east-2019> accessed 27 May 2022.
[33] Grover (n 21).
[34] Ibid.
[35] Michael A. Gallagher 'Soldier Boy Bad: Child Soldiers, Culture and Bars to Asylum' (2001) 13(3) Int J. Refugee Law 310, 333.
[36] Ibid.

Background Note. The approach adopted by the UNHCR requires decision makers in asylum cases to weigh the gravity of an excludable offence against the possible consequences of exclusion.[37] This balancing act is proposed to help minimise the strength of non-state armed groups while decreasing violence. Many states have rejected this balancing approach, and it has not attained any universal status or acceptance as a decision-making standard in asylum cases of child soldiers.

However, there are commentators who advocate fiercely that child soldiers should never be excluded from refugee protection based on their past involvement in an armed conflict.[38] To support this point, some argue that children, especially those who are under the age of fifteen, are legally protected from exclusion under Article 1(f) because they are not legal combatants. They are illegal participants in an armed conflict.[39] Moreover, uncertainty in international law regarding the minimum age for criminal responsibility of children favours the arguments of non-exclusion.[40]

Child Soldiers and International Criminal Law

The International Criminal Court ("ICC") was established in 2002 under the Rome Statute of 1998. The ICC is an international criminal tribunal with the jurisdiction to try individuals for international crimes such as genocide, crimes against humanity, and war crimes. Since the recruitment of children as soldiers is now an internationally recognised war crime, as iterated by the ICC, it thus falls under the jurisdiction of the Court. The ICC complements national judicial systems and can only exercise jurisdiction over international crimes if national courts are unwilling or unable to prosecute criminals, and the United Nations Security Council ("UNSC") or individual states refer cases to it.[41]

The international community has continually materialised the importance of protecting vulnerable individuals during armed conflict and violence and

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[37] UNHCR Handbook para 24, background note para 76–80; also see Grover (n 21) 572.
[38] Gallagher (n 35).
[39] Ibid.
[40] Magali Maystre, 'The Interaction between International Refugee Law and International Criminal Law with Respect to Child Soldiers' (2014) 12(5) J. Int. Crim Justice 975–996.
[41] Cryer, Friman, Robinson, Wilmshurst, *International Criminal Law, and Procedures* (3rd edn, 2014).

prosecuting the perpetrators of the most heinous of crimes, which are a threat to the international community as a whole. The UNSC has forcefully iterated the need to end impunity for violations of international humanitarian law and violations and abuses of human rights, simultaneously stressing that the responsible parties must be brought to justice.[42] This commitment has materialised through the establishment of several international criminal tribunals such as the International Criminal Tribunal for the former Yugoslavia ("ICTY"). These tribunals have been involved in the prosecution of the most serious wartime atrocities. There has been a growing trend of prosecuting international crimes through international tribunals since the 1990s. The ICC is also complemented by a new set of criminal bodies, which are often referred to as "hybrid" courts that incorporate both domestic and international characteristics of law.[43]

The commission of international crimes by child soldiers has posed a challenge to the international community's commitment to bring perpetrators to justice. There is an emergent unanimity in the international community that these children should not be prosecuted in courts of law; rather, they should be provided state protection and allowed to rehabilitate.[44] Previously, the ICC has successfully prosecuted and convicted recruiters of child soldiers, such as Thomas Lubanga, a known war criminal and commander of child soldiers. The complexity arises when former child soldiers apply for refugee protection and face exclusion from this status, given the gravity of their past criminal actions. There is no clear and universally accepted position on this issue. Firstly, the question arises as to whether child soldiers should be held individually accountable for their crimes. Secondly, under what circumstances should they be held criminally liable? A third question arises about the age that determines whether individual responsibility should be borne by children for their involvement in international crimes. Lastly, a question can arise as to what mitigating or "exculpatory effect" factors such as age, coercion, and other circumstantial elements ought to have on findings of individual responsibility.[45]

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[42] Statement by the President of the Security Council, February 2014.
[43] Harry Hobbs 'Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy' (2016) 16(2) Chicago Journal of International Law 5.
[44] Grossman (n 27).
[45] Jennifer Bond and Michele Krech, 'Excluding the most vulnerable: application of Article 1(F) of the Refugee Convention to the child soldiers' (2016) 20(4) The International Journal of Human Rights 567.

The Dilemma of Individual Culpability of Child Soldiers

The international community is divided over the issue of whether child soldiers should ever be held individually accountable for the international crimes they commit. Many have argued that the responsibility for war crimes committed by children should be placed entirely on the adults who recruit them.[46] Despite conflicting opinions, international criminal law does not provide immunity to child soldiers from individual criminal liability. International legal instruments do not explicitly forbid the prosecution of child soldiers.[47] Amnesty International also suggests that child soldiers should be held responsible for their actions in appropriate ways, while detaining them should be a measure of last resort.[48] Even the CRC allows for the prosecution of child soldiers so long as due process is observed.[49]

Although the CRC does not explicitly state that child soldiers should be prosecuted, it contains provisions that must be respected during trial if this does occur. The CRC is widely ratified, which is indicative that the international community agrees that prosecuting a child soldier is a possibility.[50] Under the domestic law of many states, the prosecution of children as young as ten years old is carried out.[51] This acceptance also reflects the belief of the international community that children below the age of eighteen may have the required *mens rea* to commit a crime. However, the minimum age to establish criminal liability for children remains vague.

A counter argument to prosecuting children for war crimes is that war crimes are different from domestic crimes. War crimes are committed at the time of war against civilians and enemy combatants, whereas domestic crimes take place

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[46] Asena Bosnak, 'Should child soldiers be prosecuted?' (*TRTWORLD*, 21 July 2017) <https://www.trtworld.com/mea/should-child-soldiers-be-prosecuted--9007> accessed 13 June 2019.
[47] Ibid.
[48] Amnesty International, 'Child Soldiers: Criminals or Victims' (Amnesty International 2000) <https://www.amnesty.org/en/documents/ior50/002/2000/en/> accessed 13 June 2019.
[49] The Convention (n 2).
[50] International Organization (n 23).
[51] Steven Freeland, 'Mere Children or Weapons of War - Child Soldiers and International Law' (2008) 29 U La Verne L Rev 19, 49.

in times of peace against civilians generally.[52] Thus, the reasons for prosecuting children at an international level should differ from the reasons for prosecuting them domestically.[53] It is debated that the *mens rea* required to commit war crimes is so strong that children can never truly understand the scope of the crimes they commit. Happold, however, disagrees and states that, apart from genocide, other war crimes do not require a high burden of proof. Thus, they are not entirely different from crimes committed domestically.[54] Apart from the CRC, the African Charter, as well as the jurisprudence developed by the European Court of Human Rights,[55] admits that juvenile justice under international law is allowed.[56]

There is reason to believe that the commission of criminal acts entails the complex concepts of *actus reus* and *mens rea.* The presence of both is required to hold an individual liable under criminal law.[57] However, child soldiers lack *mens rea* to be held accountable for their acts. The absence of reason and the lack of maturity sufficient to appreciate the consequences of their acts should be seen as a valid reason to omit them from the exclusion of Article 1(f) of the Refugee Convention and to not hold them criminally liable for their crimes.[58]

Case Study: The Conviction of Thomas Lubanga Dyilo

In understanding the usage and recruitment of child soldiers, the case of *The Prosecutor v. Thomas Lubanga Dyilo* holds great significance.[59] The judgment given in the case of *Lubanga* is the first ever at an international tribunal that concentrates specifically on the recruitment of child soldiers.[60] Thomas Lubanga was convicted in 2012 by the ICC for the conscription and enlistment of children under the age of fifteen years as child soldiers and using them actively for war

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[52] Ibid.
[53] International Organization (n 23).
[54] Pilar (n 3).
[55] *T v. United Kingdom and V v. United Kingdom* [2000] 30 EHRR 121.
[56] African Charter on the Rights and Welfare of the Child, 11 July 1990 (entered into force 29 Nov 1999).
[57] Ibid.
[58] Ibid.
[59] *The Prosecutor v. Thomas Lubanga Dyilo* [2012] (Trial Chamber Judgment) ICC-01/04-01/06-2842 (14 March 2012).
[60] David Smith, 'Congo Warlord Thomas Lubanga convicted of using child soldiers' *The Guardian* (Johannesburg, 14 Mar 2012) <https://www.theguardian.com/world/2012/mar/14/congo-thomas-lubanga-child-soldiers> accessed 3 Oct 2021.

crimes.[61] Lubanga was the leader of the Union of Congolese Patriots, which was accused of grave human rights violations in Congo. It was alleged by prosecutors that the Union was responsible for forcefully recruiting children and making them participate in ethnic fighting.[62] The decision in the case of *Lubanga* crystallises international belief that child soldiers are to be seen as passive victims of war crimes. Additionally, it reinforces the idea that criminal liability for war crimes should solely fall on warlords who recruit children to carry out mass atrocities.

The judgment in the *Lubanga* case lends support to the argument that child soldiers should not be held individually responsible for international crimes. Rather, their cases should be analysed in the broader social and political matrix they belong to. The ICC, in its decision, indicates that the real perpetrators are the recruiters who induct the child soldiers. As long as the international community takes this position, child soldiers should not be excluded from refugee protection for committing war crimes.

Case Study: The Imprisonment of Jawad

Another case involving a child soldier is the case of *Jawad v. Gates*.[63] Fifteen-year-old Jawad was arrested by Afghan authorities in connection to an attack on two American soldiers and their interpreter.[64] He was coerced to sign a prepared confession and was handed over to American authorities. Jawad was later sent to Guantanamo Bay when he was sixteen, where he continued to receive cruel, inhumane, and degrading treatment that often went unreported.[65] He later filed a habeas corpus petition and was released in 2009. In 2014, he then filed a case seeking from the United States damages that covered his illegal detainment, his status as an "unlawful enemy combatant," and the CRC, which the US had ratified. He highlighted the fact that the CRC as well as the Optional Protocol, which the US had also ratified, have provisions on how child soldiers should be released and rehabilitated, but the US had not abided by them.[66] The case, however, was

[61] The Prosecutor (n 59).
[62] Ibid.
[63] *Jawad v. Gates* 113 F. Supp. 3d 251, 259 (D.D.C. 2015).
[64] Ibid.
[65] Ibid.
[66] Ibid.

dismissed.[67] Jawad's case is a classic example of how child soldiers may be handled without care by authorities and are indeed in need of greater protection.

Factors the International Community considers when Prosecuting Child Soldiers

Even though it is argued that child soldiers should not be prosecuted due to a lack of *mens rea,* the international community still allows for the prosecution of child soldiers. However, harsh punishments for their crimes should be avoided. The United Nations Office for Children and Armed Conflict ("UNOCAC") emphasises that child soldiers should be made to understand the gravity of their acts through restorative justice that supports their inclusion in the community.[68]

Supporters of child prosecution argue that child soldiers should be prosecuted for the purposes of retribution and deterrence. Many debate whether child soldiers should be prosecuted for their own safety. Their prosecution is necessary for their own well-being as providing immunity to child soldiers will expose them to further exploitation.[69]

Many international lawyers also argue that child soldiers should be prosecuted to promote deterrence.[70] It is important to prosecute children to deter them from committing crimes in the future and also to deter others from committing similar atrocities. This concept, however, is flawed as many child soldiers are either coerced or forced to commit crimes against their will. Punishing children for crimes they committed while lacking the maturity to understand the gravity of their acts can be problematic.

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[67] Ibid.

[68] Special Representative, 'Release and Reintegration' <https://childrenandarmedconflict.un.org/our-work/release-and-reintegration/> accessed 12 June 2019.

[69] Stephen Leahy, 'Prosecuting Child Soldiers for their Own Safety' (*stephenleahy.net*, Jan 2009) <https://stephenleahy.net/non-environmental-journalism/prosecuting-child-soldiers-for-their-own-safety/> accessed 13 June 2019.

[70] 'International Law Barring Child Soldiers in Combat: Problems in Enforcement and Accountability – Question & (and) Answer Session,' (2004) 32(3) Cornell International Law Journal 19 <http://scholarship.law.cornell.edu/cilj/vol32/iss3/19>.

Many times, prosecution can be for the purpose of rehabilitation. Their therapy and reintegration into society are important as the child soldier not only suffers from trauma but is also shunned by society. Based on the theory of rehabilitation, child soldiers should be prosecuted in a manner that encourages their reformation and acceptance in society.[71]

Finally, some contend that child soldiers should also be prosecuted to provide justice to the victim. It is important that the victims feel that justice has been served.[72] Letting child soldiers go unpunished can leave the victim feeling aggrieved and helpless. Thus, for the benefit of the victim as well as the perpetrator, it is argued that child soldiers must be prosecuted and sanctioned.

However, it must be noted that the CRC emphasises the best interest of a child.[73] Taking a purposive approach to this provision indicates that prosecuting child soldiers can never be in their best interest; instead, the real focus must be on their rehabilitation and inclusion in society. This leads us to the view that a child soldier will only truly be included in society if they are not refused refugee status under Article 1(f).

International Consensus on Age of Criminal Responsibility for Child Soldiers

It is imperative to realise that the position of child soldiers in armed conflicts is even more sensitive than adults as they should not only be deemed as perpetrators but also as victims. A typical child soldier is usually abducted, brainwashed, coerced to train, and eventually turned into a criminal.[74] In most cases, child soldiers are forcefully recruited. However, José Luis Hernández, a United Nations Children's Fund ("UNICEF") officer, clarifies that it is a myth that all child soldiers are unwilling participants in armed conflicts.[75] Many children volunteer for various

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[71] Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (New York: Cambridge University Press, 2010) 31, 33.
[72] Ibid.
[73] Convention on the Rights of the Child (n 2).
[74] Jason Burke and Phil Hatcher, 'If you are old enough to carry a gun, you are old enough to be a soldier' *The Guardian* (London, 24 July 2017) <https://www.theguardian.com/globaldevelopment/2017/jul/24/south-sudan-child-soldiers> accessed 14 June 2019.
[75] Ibid.

reasons which include the opportunity to earn, protection for their family, and even revenge, although the latter is a rare occurrence specific to children that have reached a certain age.[76]

The conundrum here is this: should child soldiers be prosecuted, wholly or partly, for their involvement in international crimes? If yes, what should be the minimum age at which children are to be considered responsible for their involvement? International law has been unsuccessful in determining a fixed age at which a child soldier should be prosecuted for their participation in international crimes. The most important factor that comes into play when determining the minimum standard age for criminal liability is the element of *mens rea*.[77] International criminal law needs to decide the appropriate age at which a child can be held accountable for a guilty mind.[78] It is argued that the notion of criminal liability for children is difficult to determine for two major reasons.[79] Firstly, the proper development of a child's brain varies from one individual to another, and thus establishing *mens rea* becomes a subjective issue.[80] Secondly, as there is no consensus with regards to the minimum age requirement under international criminal law for criminal liability, there exists a conflict between different jurisdictions as to what the exact age should be.[81]

Under international law, an individual is considered a child if they are under the age of eighteen.[82] Yet this is not the minimum age set for the criminal liability of a person across all jurisdictions. Even though there is no consensus on a minimum age for liability, international law does provide various guidelines on the matter. The UN Standard Minimum Rules for the Administration of Juvenile Justice Beijing Rules ("Beijing Rules") explain that due to a lack of intellectual, emotional, and mental capacity in juveniles, there will not be a lower age limit for

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[76] Dima Zito, 'Between Fear and Hope – Child Soldiers as Refugees in Germany' (terre des hommes 2013) <https://www.redhandday.org/fileadmin/user_docs/Between_Fear_And_Hope_Child_Soldiers_as_Refugees_in_Germany_terre_des_hommes___BUMF_March2013_final.pdf> accessed 14 June 2019.
[77] Happold (n 4).
[78] Leveau (n 25).
[79] Ibid.
[80] Ibid.
[81] Ibid.
[82] Convention on the Rights of the Child (n 2).

the initial age in any legal system that has recognised juvenile criminal responsibility.[83] The CRC reconfirms this criterion provided by the Beijing Rules in Article 40(3).[84] The Committee on the Rights of the Child supports the concept that the minimum age set for criminal culpability should not be set too low.[85] Thus, the Committee does not accept criminal liability for children under the age of twelve.[86]

The ICC derives its authority to prosecute individuals from the Rome Statute, which iterates that those individuals who are above eighteen will be prosecuted for international crimes.[87] This indicates that the ICC does not have the jurisdiction to prosecute children. This leaves other jurisdictions to decide the minimum age of criminal liability on their own. Different international criminal tribunals have set different age limits. The statutes of the ICTY and the International Criminal Tribunal for Rwanda ("ICTR") do not provide any guidance on this issue.[88] The Special Court of Sierra Leone ("SCSL"), however, has set the minimum age limit at fifteen years.[89]

It has been suggested by experts that the minimum age for criminal liability should be set at mid-teens, as this is the time when children are able to distinguish between what may be legal or illegal.[90] This suggestion, however, is least helpful as international law cannot operate on vague proposals, and there needs to be a precise universal age limit that promotes clarity in the area. Besides, social factors like access to a basic legal education and active participation in the community can also impact this capability to distinguish.

[83] United Nations General Assembly, A/Res/40/33, (adopted on 29 Nov 1985) r 4.
[84] Convention on the Rights of the Child (n 2).
[85] Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: Australia, 16th Sess, UN Doc CRC/C/15/Add.79, (1997).
[86] Ibid.
[87] Rome Statute of the International Criminal Court, opened for signature 17 July 1998, (entered into force 1 July 2002) [Rome Statute], art 26(v).
[88] UN International Criminal Tribunal for Rwanda. International Criminal Tribunal for the former Yugoslavia.
[89] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed 16 Jan 2002, (entered into force on 12 April 2002).
[90] Happold (n 4).

This lack of consensus under the international law has a direct impact on the applicability of Article 1(f) of the Refugee Convention, primarily due to two factors.[91] Under international criminal law, a lack of consensus as to age directly correlates to a lack of consensus as to whether child soldiers should be prosecuted at all. Maystre suggests that until the time when international criminal law includes a minimum age of individual criminal responsibility, child soldiers must be included within the provisions of protection within the Refugee Convention.[92] He further goes on to say that the conditions surrounding child soldiers are extreme. In addition, the requirement that the spirit of the Refugee Convention, i.e., protecting people at risk of persecution in their home countries should never be compromised, indicates that child soldiers should be protected and not be subjected to exclusion under Article 1(f)(a).[93] Many international conventions and judicial decisions also reflect the same concern that child soldiers should primarily be seen as victims.[94] The Principles and Guidelines on Children Associated with Armed Forces or Armed Groups ("Paris Principles") also clearly state that child soldiers should be recognised predominantly as victims under international law.[95]

Primarily for the reasons stated above, it can be agreed that until there is a consensus reached with regards to the minimum age of criminal liability, child soldiers should not be excluded from asylum under refugee law.

Domestic Laws Regarding Determination of Age

The minimum age for criminal liability varies around the world.[96] In most Muslim majority states, for example, the age for criminal liability is determined on the basis of reaching puberty. This is nine for females and fifteen for males.[97] Alternatively, in England and Wales, the minimum age for criminal liability is ten years[98] while

[91] Bond and Krech (n 45).
[92] Maystre (n 40).
[93] Ibid.
[94] Elizabeth A. Rossi, 'A "Special Track" for Former Child Soldiers: Enacting a "Child Soldier Visa" as an Alternative to Asylum Protection,' (2013) 31 Berkeley J. Int'l Law 101.
[95] The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February 2007 art 3.6.
[96] Barry Goldson and John Muncie, *International Encyclopaedia of The Social and Behavioural* (2nd edn, James Wright 2015).
[97] Ibid.
[98] Ibid.

in Scotland, the age is set at eight (though in practice children under twelve years are not prosecuted). Belgium and Luxembourg have set this age at eighteen.[99] This difference shows that there is no consensus on a minimum age for criminal liability between the various states.

In Pakistan, the minimum age for criminal liability is set out in Sections 82 and 83 of the Pakistan Penal Code. Prior to 2016, this minimum age was set at seven years.[100] This, however, has now changed to a minimum of ten years.[101] Any child falling below the age of fourteen but who is older than ten will not automatically be prosecuted, as the trial judge will assess the child's level of maturity.[102] Children above fourteen will nevertheless have to face the consequences of their actions.[103] However, there are no criteria present to exactly determine this level of maturity, and it is thus left to the judge to work out a child's *mens rea*. In the case of child soldiers as well, the age limit of ten years would apply generally. As Pakistan is a signatory to the CRC, it must respect the provisions of the same, which do not accept criminal responsibility below the age of twelve.[104]

Effect of Circumstantial Elements in Individual Culpability of Child Soldiers

Establishing a child's criminal liability is a challenging issue. Establishing the *actus reus* for an act carried out by a child may be relatively simpler. However, determining a child's *mens rea* is where the problem lies. In instances where a child is too young to fully understand the effects of their action, the defence of infancy can be established. This defence applies to the actual age at which the child committed the act.[105] Many studies have found that, up to a certain age, the mind

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[99] Ibid.
[100] Pakistan Penal Code 1860.
[101] Mudasra Sabreen, 'The Age of Criminal Responsibility and Its Effect on Dispensation of Justice' (2017) 8 Pakistan Law Review.
[102] Ibid.
[103] Ibid.
[104] Ibid.
[105] Chris Cortolillo, 'Between a Rock and a Hard Place: The Challenges Facing Former Child Soldiers of the War on Terror in Seeking Asylum in the United States' (*birdsongslaw.com*, Jan 2011) <http://birdsongslaw.com> accessed 11 June 2019.

of a child has not developed enough for them to realise the gravity of their crimes.[106]

Other mitigating factors with regards to a child's criminal liability include the defence of intoxication. Many studies suggest that recruiters of child soldiers often encourage or even force them to take alcohol or other forms of drugs in order to impair their judgement and to instil courage in them.[107] The use of alcohol and drugs may compromise a person's moral judgement. This defence is even more important for child soldiers as their minds are already not developed enough to make informed choices. Involuntary intoxication is thus recognised as a possible defence under international law.[108]

Children are more vulnerable than adults and can easily be forced to commit crimes against their will. In circumstances like these, the defence of duress is most appropriate. It is suggested that child soldiers are exposed to extreme indoctrination methods by the groups that recruit them.[109] Weak child soldiers are often killed in front of their companions as a lesson to teach the others that only the fittest and strongest will survive.[110] Child soldiers are thus often under the constant threat that they will either be tortured or killed if they refuse to carry out the commands of their leaders. Consequently, international law accepts duress as a valid defence to mitigate the liability of a child soldier.[111] Even though international criminal law does recognise all of the abovementioned defences, a grey area exists in connection to the application of these defences. International criminal law does not provide any clear guidelines on the impact of these defences on individual criminal liability.[112] As a result, as long as no proper guidance exists as to the establishment of criminal liability for child soldiers, it can rightly be argued that children should not be automatically excluded from refugee protection under Article 1(a).

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[106] Leveau (n 25).
[107] UNICEF 'Weah Speaks out About Child Soldiers' UNICEF <http://www.unicef.org/infobycountry/liberia_19220.html> accessed 12 June 2019.
[108] Rome Statute, art 31(1)(b).
[109] Bond and Krech (n 45).
[110] Justice and Reconciliation Project, "Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen" (July 2008), JRP Field Note 7, online: <http://justiceandreconciliation.com/wpcontent/uploads/2008/07/JRP_FN7_Dominic-Ongwen.pdf> accessed 5 Oct 2021.
[111] Rome Statute, art 31(1)(d).
[112] Bond and Krech (n 45).

Conclusion

It has been reasoned that the current application of the exclusionary clause to child soldiers seeking asylum is against their best interests. Thus, it is recommended that for the best interests of the child to be upheld, there is a need for states to agree on a minimum age of criminal responsibility. This will promote certainty in applying the exclusion clause as well as a revision of the legal threshold of the exclusion clause to reflect the current legal threshold in international criminal law.[113]

Finally, it is important to remember that even if a child soldier is excluded from refugee protection under Article 1(f), it does not necessarily mean that they can be deported. Article 1(a) permits the exclusion of those who have a well-founded fear of persecution on the basis of race, religion, nationality, or membership of a particular social group or political opinion. However, at the same time, there are serious reasons to believe that they have committed war crimes, crimes against humanity, or genocide. Such persons can be protected from refoulment for reasons of fear for their safety. The important point here is that this obligation of states is not affected by individual conduct. This rule can also be applied to suspected war criminals or suspected terrorists.

If the child soldier is prosecuted for war crimes or other international crimes in the receiving state, then the manner in which the trial is being conducted should be considered. In such situations, child soldiers should be given refugee protection for multiple reasons. Firstly, there is no consensus on the minimum age for criminal responsibility. Secondly, there is an international consensus that children should not be prosecuted or executed for their criminal actions. The executive discretion in permitting child soldiers to stay in the country of refuge must be justified. However, it does not follow that those who have committed heinous crimes are given blanket immunity. It is for the state to inquire and decide according to the circumstances, but the age of the solider should be grounds for such an inquiry. War crimes and crimes against humanity are crimes of universal jurisdiction. If the alleged child soldier has committed heinous crimes, then the state may choose to

[113] Analysing the exclusion of child soldiers seeking asylum under Article 1(f) of the Refugee Convention 1951 on the principle of the best interest of child, Muthembwa Yvone.

prosecute child soldiers and must take steps to rehabilitate them, but this must be in accordance with individual circumstances.

Digital Privacy in Pakistan: Ending the Era of Self-Regulation

Muhammad Hammad Amin and Maira Hassan*

Abstract

In the current day and age, data protection and digital privacy are used interchangeably. With modern technology and tech giants constantly and blatantly violating the privacy of individuals, the need for data protection measures and appropriate framework is continuously increasing. In such circumstances, developing nations like Pakistan, which currently do not have an appropriate legal framework for the regulation of big data hoarding companies, are at a major risk of being exploited. This paper focuses on the broader constitutional framework of privacy in Pakistan along with associated legislation. The paper then delves into the current framework of data protection in Pakistan and discusses the steps that the regulators are taking with respect to data protection (for example, drafting the Personal Data Protection Bill 2023). For a better understanding of the development of data protection laws in Pakistan, the paper further engages in a comparative analysis of data protection laws enacted by the pioneers in the field of digital privacy, such as the General Data Protection Regulation ("GDPR") of the European Union ("EU") and the California Consumer Privacy Act ("CCPA") of the United States of America ("US"). The detailed analysis of foreign as well as domestic approaches and theories yields a way forward, which would be more suitable to the demands and capabilities of Pakistani regulators and consumers.

Introduction

Privacy as a concept has become indispensable in this day and age. The developed world struggles with understanding and enforcing the right to privacy. In such a situation, third-world countries face the larger peril of being blithe about the threats posed by ineffective safeguards to their citizens' right to privacy. Although the

* Muhammad Hammad Amin graduated with B.A.-LL.B (Honours) from LUMS in 2022. He is a litigator based in Lahore, handling prominent constitutional and political cases while providing expert counsel in corporate affairs.
Maira Hassan is a B.A.-LL.B (Honours) graduate from LUMS. She is currently working as a Judicial Law Clerk at the Supreme Court of Pakistan and serving as an Environmental Law Advisor for the Khyber Pakhtunkhwa Cities Improvement Project funded by the Asian Development Bank.

factors impacting the right to digital privacy are uniform around the world, the safeguards against them are strikingly different. These differences make the discussion about developing nations like Pakistan crucial.

Pakistan guarantees the right to privacy and dignity to its citizens under its constitutional framework. Under Article 14 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"), "the dignity of man and, subject to law, the privacy of home, shall be inviolable."[1] It is clear that the right to privacy under the Constitution is subject to certain limitations; various caveats arise from interpreting the right to privacy in light of digital spheres by virtue of the right to privacy not being an absolute right. First and foremost, what constitutes the state's right to intervene in a citizen's privacy is vital to the discussion. It is only when state limitations in the physical world are understood that they can be extended to private parties in the digital sphere. Privacy, as a right under the Constitution, requires additional theorisation on jurisprudential grounds.

Important Court Rulings on the Right to Privacy

The right to privacy as a fundamental right, along with its limitations, has been discussed in numerous seminal cases in Pakistan. Although the cases have mainly dealt with the right to privacy regarding state intervention, they set some very important general principles.

I. The Privacy of "Home" Paradox

The first seminal case in this regard is *Mohtarma Benazir Bhutto v. President of Pakistan*.[2] This case discussed the question of privacy in the context of state intervention in the form of intercepting calls of public servants. The Court discussed the right to privacy and the factors impacting it under the constitutional provision on the right to privacy. Article 14 provides protection to the "privacy of home." Justice Saleem Akhtar was of the view that the word "home" is not to be taken in its literal sense. Rather, it is to be construed in a manner that broadens the scope of the provision.[3] The Court relied on the leading judgment of the US

[1] The Constitution of Pakistan 1973, art 14.
[2] PLD 1998 Supreme Court 388.
[3] Ibid [29].

Supreme Court in *Katz v. United States*,[4] which extended the meaning of home as mentioned in the Fourth Amendment to the US Constitution. In *Katz*, the US Supreme Court held that the phrase "privacy of home" shall be interpreted in a liberal and broad manner. Relying on *Katz*, Justice Saleem Akhtar in his concurring opinion held the following in the *Mohtarma Benazir Bhutto* case:

> [T]he dignity of man and privacy of the home is inviolable, it does not mean that except in home, his privacy is vulnerable and can be interfered or violated.[5]

In the *Mohtarma Benazir Bhutto* case, the Court highlighted the importance of the fundamental right to privacy by interpreting it alongside the fundamental rights to the inviolable dignity of a person and freedom of speech and stated that an intervention in the life of a person is a hindrance to a person's right to speech.[6] This particular issue is important in the context of digital privacy since it is in direct connection with speech and expression, which causes broader privacy concerns to the identity and behaviour of a person. The Court also reads the right to life provision, enshrined in Article 9 of the Constitution, in conjunction with Article 14. Article 9 reads that "no person shall be deprived of life or liberty save in accordance with the law."[7] The *Mohtarma Benazir Bhutto* case is a substantial addition to the jurisprudence on Article 14 as it has broadened the scope of the provision, including all places where a person reasonably presumes to be protected from invasion. Furthermore, multiple rights were amalgamated with Article 14 to expand its interpretation and to highlight its importance within the fundamental rights. This case relied upon an important judgment of the Pakistani Supreme Court: *Kh. Ahmad Tariq Rahim v. Federation of Pakistan.*[8]

In *Mohtarma Benazir Bhutto,* the Court held that the state's action of surveillance was not only unconstitutional but also a blatant disregard of the principles laid down in Surah Al-Hujurat of the Holy Qur'an.[9] Article 227 of the Constitution provides, "All existing laws shall be brought in conformity with the

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[4] 389 U.S. 347.
[5] *Mohtarma Benazir Bhutto* (n 2) [29].
[6] Ibid [33].
[7] The Constitution (n 1) Article 9.
[8] PLD 1992 SC 646.
[9] *Mohtarma Benazir Bhutto* (n 2) [25].

Injunctions of Islam…”[10] Therefore, while holding that a disregard for one’s privacy is a disregard of Allah’s commandments, the Court consequently held that any future law or action by the state or any private person which infringes upon one’s privacy would be unconstitutional under Article 227 of the Constitution.

II. Privacy Being Subject to Law

Despite both aforementioned cases giving a broad recognition to privacy, Article 14 itself is restrictive and does not outright regard privacy as an absolute right. The phrase “subject to law” is important in Article 14. However, the extent to which the exercise of the right is restricted needs to be examined.

Most restrictions apply to the extent of state interventions. However, their analysis highlights important jurisprudence for application to private bodies. In *Riaz v. Station House Officer*,[11] the police conducted a raid on a purported brothel after obtaining a warrant under the Code of Criminal Procedure, 1898 (“CrPC”),[12] and caught two people committing *Zina* – a *Hadd* offence and strictly punishable under Sharia. In this case, the Magistrate issued a warrant without due consideration and in a mechanical manner, without considering the sensitivity and merits of the matter. Resultantly, the Court held that the Magistrate was wrong in awarding a search warrant in a mechanical manner as the privacy of the home of a person is constitutionally protected. Therefore, an instrument of a search warrant being powerful enough to allow infringement of one’s privacy must not be given in a mechanical manner without due consideration under statutory provisions of the CrPC.

Interestingly, this decision has been upheld in numerous other cases which further highlight the importance of this constitutional right. In these cases, the defendants were found committing *Zina*. The courts were, however, adamant about considering the point of privacy and gave it primacy over a *Hadd* crime. In *Zeeshan Ahmed v. The State*,[13] the Court held a raid conducted without a warrant to be unconstitutional and illegal. Furthermore, the Court cited two verses of the Holy

[10] The Constitution (n 1) Article 227(1).
[11] PLD 1998 Lah 35.
[12] The Code of Criminal Procedure 1898, ss 96, 98, 165.
[13] 2007 YLR 1269.

Qur'an to highlight the importance of the right to privacy in Islam. Similarly, in *Nadeem v. The State*, Justice Khurshid Anwar Bhinder stressed the significance of the right to privacy by invoking Islamic teachings and principles. Justice Bhinder quoted the following Hadith in the judgment:

> [H]oly Prophet (peace be upon him) had said that if you go to somebody's house knock the door once and if there is no reply knock it again and if there is no reply knock it for the third time and if still there is no reply, then do not try to enter the house and go back.[14]

By granting bail and requiring more inquiry, the Court stressed upon the importance of the right to privacy of home, not just under the constitutional framework but also under the Islamic principles.[15] This reasoning was similarly upheld by the Balochistan High Court in *Ghulam Hussain v. Additional Sessions Judge, Dera Allah Yar*,[16] thereby giving the phrase "subject to law" a very limited and specific interpretation.

Justice Qazi Faez Isa built on the above two principles and held that the right to privacy of the home does not restrict itself to the home only; instead, people, even in public spaces, have the right to limited privacy to the extent that it can be ensured.[17] Given the foregoing discussion, it can be argued that courts have given a very specific and limited interpretation to the phrase "subject to law" and a broad one to the "privacy of home." The foregoing discussion sets the ground broad and fertile enough for the creation and enforcement of the right to privacy against big technological private companies.

Why Regulate Big Data and Big Tech?

Big data hoarding technological firms started emerging without any regulation from state bodies and continued operating for a long period till users and officials realised the harms associated with them. This section of the paper discusses the

[14] 2009 PCrLJ 744, [7].
[15] Ibid; see also *Muhammad Abbas v. The State* 2005 YLR 3193.
[16] PLD 2010 Quetta 21, [6].
[17] *Chamber of Commerce and Industry Quetta Balochistan through Deputy Secretary v. Director General Quetta Development Authority* PLD 2012 Bal 31, [9].

harms associated with big tech and big data and why these should be regulated, with the era of self-regulation finally coming to an end.

Zuboff theorises the emergence of tech corporations as part of the power structures. She states that these corporations started off with a balance of power in contrast to their users. The feed-back loop or the recursive system placed the user and the company at an equal power scale with both learning from each other.[18] However, as time passed and with the advent of personal advertising, these tech corporations morphed into power and capital hungry entities. Instead of storing data generated by users into random sets, the corporations indulged in user profiling.[19] The data that users provided was intentionally stored, associated, and permanently glued to the user and later manipulated in various ways.[20] This created a power imbalance. This was highlighted in the case of Target Corporation wherein it was able to accurately predict that a woman was pregnant merely from the products that she purchased.[21] The researchers at Target were able to predict this by looking at the shopping habits of the customers: it was observed that women who were pregnant often bought scent free lotions and that during the first twenty weeks of their pregnancy, they bought calcium, magnesium, and other supplements.[22] This predictive power of corporations shook people to their core. A realisation sprung from this case that these corporations have become too powerful. Regulators and users realised the amount of information that was being collected and processed – all with their consent. Understanding the implications of this interplay between consent, information, and power imbalance is crucial in the modern-day world.

I. Information Asymmetry and the Issue of Consent

Information asymmetry is defined as the "information failure that occurs when one party to an economic transaction possesses greater material knowledge than the

[18] Shoshana Zuboff, *The Age of Surveillance Capitalism* (New York: Public Affairs 2019), ch 3.
[19] Ibid.
[20] Ibid.
[21] Jordan M. Blanke, 'Protection for 'Inferences Drawn': A Comparison Between the General Data Protection Regulation and the California Consumer Privacy Act' (2020) I(2) Global Privacy Law Review 81–92, 82.
[22] Ibid.

other party."[23] In the case of big tech and big data, this is relevant because these platforms operate on a notice-and-choice model. "Notice and choice" is the current paradigm for securing free and informed consent to business' online data collection and use practices.[24] The platform provides users with a consent form which, in strict terms, informs them that their information will be taken, stored, and used in a particular manner. The visualisation of terms by the platform serves as a notice; the acceptance of such terms is the choice of the user.[25] States have not intervened with this approach primarily to "facilitate autonomy and individual choice."[26] Furthermore, notice and choice are more than just contractual tools for the transfer of information: they embody the principle of privacy as well.[27] The model is based on the idealistic conceptualisation that platform visitors can give free consent and that "the combined effect of individual consent decisions is an acceptable overall trade-off between privacy and the benefits of information processing."[28] The efficacy of this approach, however, is questionable because of the complexity of the notice-and-choice model.

This approach is based on the idea that consumers are rational, and that they diligently read the terms set out by the platform, making them informed decision makers. There are, however, several caveats to this approach. The notices are written in a complex, wordy, and tautological manner. Even for those who read these terms, it is difficult to comprehend them effectively.[29] And it is common for users to accept the terms without even reading them.[30] This is primarily because of well-documented cognitive biases and the complexity of the ecosystem that people

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[23] Andrew Bloomenthal, 'Asymmetric Information' (INVESTOPEDIA, 7 Apr 2020) <https://www.investopedia.com/terms/a/asymmetricinformation.asp> accessed 4 Nov 2020.
[24] Robert H. Sloan & Richard Warner, 'Beyond Notice and Choice: Privacy, Norms, and Consent' (2014) 14 J High Tech L 370, 373.
[25] Ibid 374.
[26] Kritika Bhardwaj, 'Preserving Consent within Data Protection in the Age of Big Data' (2018) 5 Nat'l LU Delhi Stud LJ 100, 101.
[27] Ibid.
[28] Sloan & Warner (n 24) 374.
[29] Ibid; see also Susan E Gindin, 'Nobody Reads Your Privacy Policy or Online Contract? Lessons Learned and Questions Raised by the FTC's Action Against Sears' (2009) 8 Northwestern Journal Technology & Intellectual Property 1; Shara Monteleone, 'Addressing the 'Failure' of Informed Consent' (2015) 43 Syracuse J. Int'l L. & Com. 69, 79.
[30] Ibid; Sloan & Warner (n 24) 380.

are placed within.[31] Figure 1 shows the results of an online survey conducted independently for the purposes of this paper, which yielded more than two hundred responses. The participants had completed at least a bachelor's level education and were regular users of digital platforms. In the survey, people were asked whether they read the privacy policies of the platforms they use. A majority responded that they either partially read the privacy policy or do not read it at all. This implies that people are partially or entirely unaware of the terms they agree to when using a platform, putting themselves at a disadvantage when they are unaware of what data is being collected, processed, or stored, and how it is being used further for other services or businesses. This creates a power imbalance and an information asymmetry between the parties involved, with the platforms having an unfair advantage.

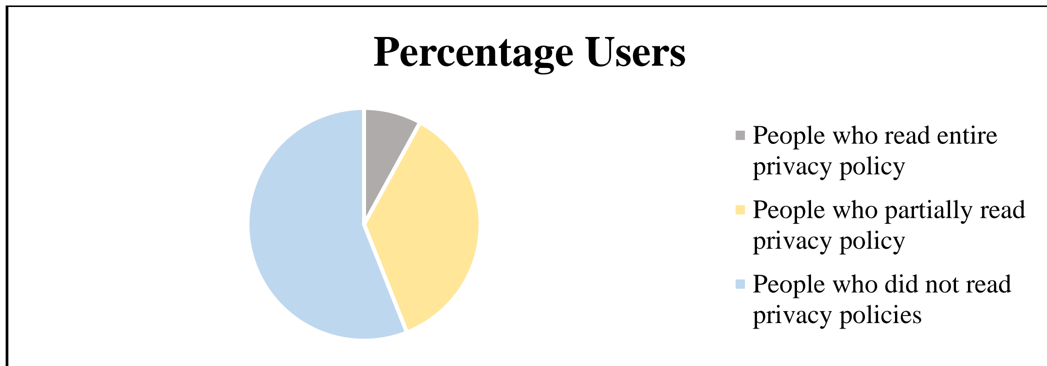

Figure 1: Percentage of users who read privacy policies completely, partially, or not at all.

The question arising here is whether such consent can still be regarded as free. Legally, it is regarded as free and informed consent since contemporary jurisprudence states that when the user has hypothetical knowledge of the platform and its services, it counts as informed consent.[32] This approach is extremely questionable in the case of online contracts as they heavily favour one party while putting the other at a disadvantage with no bargaining power. The contemporary jurisprudential approach to this matter is not adequate for the protection of a person's rights. Margret Jane Redin, a professor of law at the University of

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[31] Omer Tene and Jules Polonetsky, 'Big Data for All: Privacy and User Control in the Age of Analytics' (2013) 11(5) Nw J Tech & Intell Prop 239, 261.
[32] Sloan & Warner (n 24) 380; see also *One Stop Supply, Inc. v. Ransdell* 1996 WL 187576.

Michigan Law School, argues that only true and full knowledge of something can count as free and informed consent. Since non-readers cannot have complete information of the platform or its processes, their consent cannot be construed as free and informed.[33] This can at best be regarded as "passive acquiescence."[34] Furthermore, since the services provided by these platforms have become a necessity in today's world, users do not have much choice. Moreover, they cannot choose another service provider as all the service providers typically use the same framework. Therefore, users with practically no bargaining power cannot get a favourable contract from these platforms. Hence, the contracts are lopsided and highly favour the platform while keeping the users behind a veil of privacy.

Users, when signing up for services and upon seeing the term "privacy policy" believe that their information will be protected in specific ways. They assume that a website that advertises a privacy policy will not share their personal information." However, this is not the case; privacy policies often serve more as liability disclaimers for businesses than as assurances of privacy for consumers.[35] The concept of information asymmetry is relevant here as well since the platforms are generally more aware of the terms that people consent to and hence, they can benefit from those by essentially limiting or excluding their liability. So, where the platforms show their users that they are concerned about their privacy, they typically engage in liability excluding practices by incorporating privacy infringing clauses – essentially exploiting the users' cognitive biases and their own greater bargaining power and control through a lack of transparency and opaque platforms.

II. User Profiling and Predictive Exploitation

The notice-and-choice model, with its disclaimers and liability excluders, obtains the assent from users for data processing as well. Whereas consent ensures that people give access to their data, the actual processing of this data is the primary exploitation that big tech corporations indulge in. This directs the discussion towards the second issue under contention: the profiling of users.

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[33] Margaret Jane Radin 'Humans, Computers, and Binding Commitment' (2000) 75 Indiana Law Journal, Article 1125.
[34] Ibid.
[35] Ibid.

Sofia Grafanaki, a privacy expert who writes extensively on data protection, terms this as the "context" in any inquiry.[36] This concept will be relied on later in this paper. Profiling is essentially the attachment of any information that can be used to identify a user. Furthermore, "once any piece of data has been linked to a person's real identity, any association between this data and a virtual identity breaks the anonymity of the latter."[37] Another issue of data management is that data has an incremental effect: data tends to build on layers as more information is acquired, processed, and stored. A person may search for a query at one time using different keywords in a specific order and change them during a later search query. The processing of both these types of information will be different, yet the conclusion drawn by the algorithm will be attached to the user. With each layer of data added to a stream, it becomes increasingly revealing.[38]

One of the two-pronged issues of profiling is visualised when data sharing is considered critically. Generally, data administrators are involved in the practice of keeping data anonymous and sharing it with third parties. The data – immense and multi-layered – is susceptible to being used for re-identifying individuals. Administrators generally agree that such is the case. Google, one of the biggest data hoarders, made the following statement: "it is difficult to guarantee complete anonymization, but we believe these changes will make it very unlikely users could be identified…"[39]

Profiles are used for predictive analysis and automated decision making for individuals, which ultimately raises concerns about privacy, discrimination, self-determination, and the restriction of options.[40] The predictive analysis is based not on what the person needs or wants to see, but on what the algorithm thinks the

[36] Sofia Grafanaki, 'Autonomy Challenges in the Age of Big Data' (2017) 27 Fordham Intell Prop Media & Ent LJ 803, 831.
[37] Arvind Narayanan & Vitaly Shmatikov, 'Robust De-anonymization of Large Sparse Datasets' (2008) IEEE Symposium on Security & Privacy 111, 119.
[38] Tene and Polonetsky (n 31) 251.
[39] Chris Soghoian, 'Debunking Google's log anonymization propaganda' CNET NEWS (11 Sep 2008) <https://www.cnet.com/tech/services-and-software/debunking-googles-log-anonymization-propaganda/> accessed 1 Dec 2021.
[40] Tene and Polonetsky (n 31) 252.

person needs to see.[41] This strips away a person's autonomy in decision making. It is particularly crucial when considering news and the type of information passed on to individuals based on their "previous likings." This was highlighted in a widely popular case of Cambridge Analytica in which the company had to face severe consequences. The case involved the consultancy firm Cambridge Analytica, which used the data of around 87 million Facebook users to advertise the US elections in favour of Donald J. Trump.[42] Facebook, being able to track users across websites, procured information on people's biases and interests and delivered election advertisements to voters.[43] Segmentation in advertisments allowed the consultancy firm to "pigeonhole individuals into pre-determined categories,"[44] and "the automated decision making compartmentalised society into pockets"[45] of people that either supported or opposed Trump. In addition to that, Trump supporters received advertisements with information about polling stations.[46] Advertisers profited from user profiling and impacted the elections. This case received significant attention, even though predictive exploitation occurs every day with the misuse of user's information, behaviour, and their conjecture with other like-minded individuals. Figure 2 shows the results of a survey asking users if they feel, from the content they view on platforms, that their internet activity is monitored across websites and platforms. The results were worrisome, with more than 75% of survey participants answering in the affirmative.

[41] Kashmir Hill, 'Resisting the Algorithms' (2011) Forbes <https://www.forbes.com/sites/kashmirhill/2011/05/05/resisting-the-algorithms/?sh=44d547b45dc0> accessed 2 Dec 2021.

[42] Paul Lewis and Paul Hilder, 'Leaked: Cambridge Analytica's blueprint for Trump victory' (2018) *The Guardian* <https://www.theguardian.com/uk-news/2018/mar/23/leaked-cambridge-analyticas-blueprint-for-trump-victory> accessed 3 Dec 2021; see also Nicholas Confessore, 'Cambridge Analytica and Facebook: The Scandal and the Fallout So Far' (2018) *The New York Times* <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html> accessed 3 Dec 2021.

[43] Ibid.

[44] Tene and Polonetsky (n 31) 252.

[45] Ibid.

[46] Ibid.

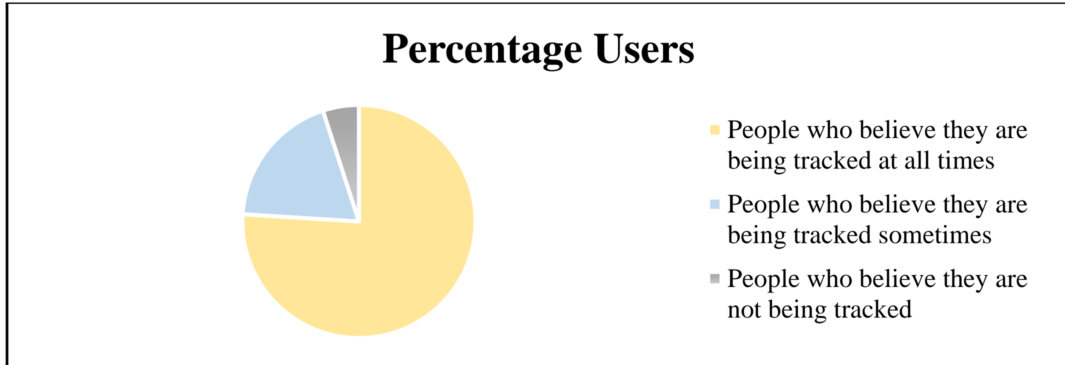

Figure 2: Percentage of users who believe their online activity is being tracked either all the time, some of the time, or not at all.

Referring to the concept put forth by Grafanaki, for a platform to work properly, it needs to understand two things. Firstly, the context of an inquiry or search needs to be understood. The context can be obtained by collecting the user's previous data and its subsequent processing. According to Grafanaki, this formation of context creates the issue of privacy,[47] as discussed above. Secondly, for platforms to work effectively, the relevance of what is presented to the user is required. This aspect of platform functioning creates challenges to autonomy.[48] For more relevant results, platforms need to have the most recent knowledge of a user's presence on the platform. Therefore, making their experience more relevant to their context whether it is in the form of results to their inquiries or advertisements. Based on this, a platform "assumes that users will continue to want the same thing they wanted in the past and will follow the same behavioural patterns. It also assumes that users will want the same as other people with similar traits. Whether the context of the inquiry is news, politics, or retail, the key to personalisation is that the results are relevant to the user."[49]

The actions of a digital platform and users' engagement create a reinforcing loop. This occurs as the act of clicking on a result or advertisement by a platform, influenced by the user's context, serves to validate its relevance for them; "therefore, in the eyes of the algorithm, the user will want to see more of the same

[47] Grafanaki (n 36) 831.
[48] Ibid.
[49] Ibid 832.

content."[50] Using this reinforcing loop, digital platforms are able to keep them in a constant back and forth flux of information. Past surveillance primarily guided the actions of the subjects, whereas contemporary surveillance is for capitalistic gains by keeping the person within the loop and using the data to slightly change opinions and create biases, as was seen in the Cambridge Analytica case.

Due to the various reasons for information asymmetry, including inadequate consent, lack of transparency in data collection and processing, user profiling and its exploitative aspects, the widespread use of platforms for control and surveillance, the involvement of platforms in illegal activities such as elections, illegal or uninformed sale and transfers of data, and other issues such as data breaches and wilful leakage of databases, nations worldwide believe that stringent governmental control should be imposed on big data and tech firms and corporations. Figures 3 and 4 show the results of an independent survey for the purposes of this paper. The users were asked if they believe that their data is protected adequately by these corporations or not and if they must be regulated by the states. A significant majority of 93% agreed that these corporations must be regulated under data protection law. Thereby, all countries are considering such regulations,[51] with the United States of America and the European Union currently in the lead by already having enforced regulations against the aforementioned entities.

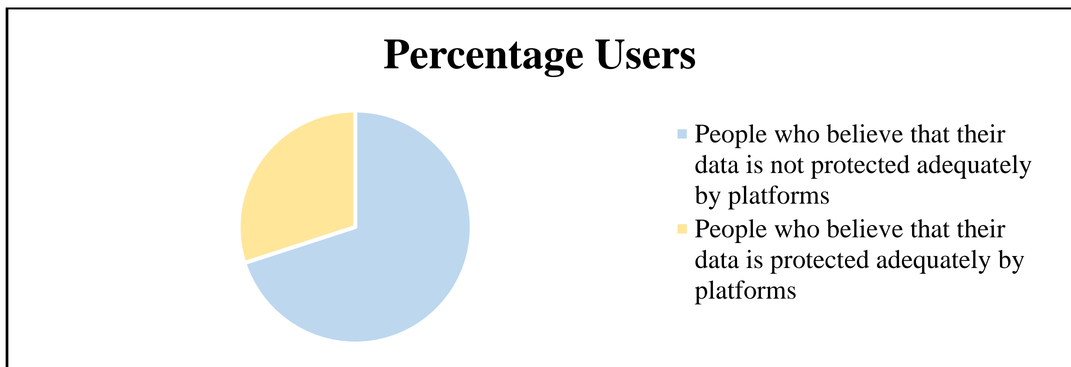

Figure 3: Percentage of survey participants on whether their data is protected by platforms.

[50] Ibid 833.
[51] Rys Farthing and Dhakshayini Sooriyakumaran, 'Why the Era of Big Tech Self-Regulation Must End' (2021) 92(4) Australian Institute of Policy and Science 3–10.

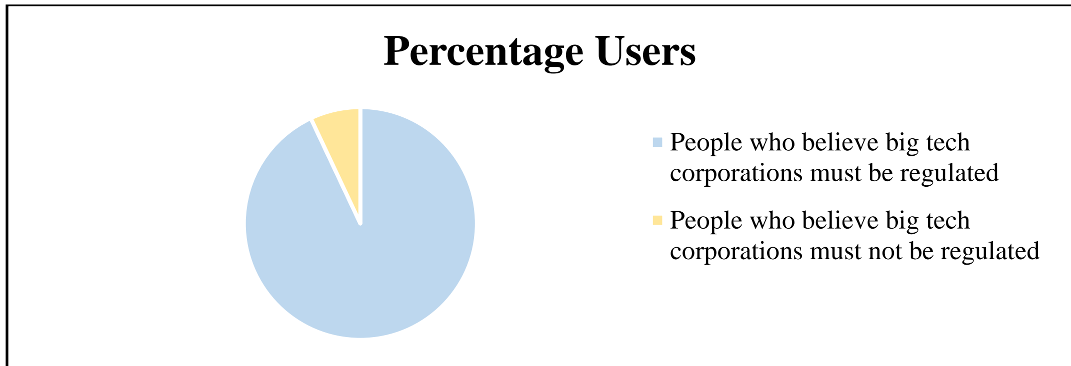

Figure 4: People who believe big tech corporations must be regulated.

A Comparative Analysis of Digital Privacy Laws of the US and the EU

The standard data protection framework of the world is mostly governed by the European Union ("EU") and the United States ("US") laws on digital privacy. The EU is a global leader and the hub of data protection as it has always been taking the initiative in enacting data protection laws according to changing times. In the EU, the concept of privacy emanates from the Charter of Fundamental Rights ("CFR") as it is considered to be a fundamental right that cannot be violated. Additionally, the EU considers privacy law as "data protection" and the whole privacy regime of the EU revolves around the idea that data protection is a fundamental right guaranteed by the European Convention on Human Rights as well as the EU Charter,[52] as mentioned above. The EU started enacting data protection laws in the early 1970s but the first comprehensive and exhaustive law applicable throughout the EU was the 95 Directive[53] enacted in 1995.[54] It was enacted to regulate the transfer of personal data of natural persons to third parties and countries outside the EU and to harmonise the data protection laws throughout the EU.[55]

[52] Anupam Chander, Margot E. Kaminski, and William McGeveran, 'Catalyzing Privacy Law' (2021) 105 MINN. L. REV. 1733, 1747.
[53] Directive 95/46/EC of the European Union.
[54] Kimberly A. Houser & W. Gregory Voss, 'GDPR: The End of Google and Facebook or a New Paradigm in Data Privacy' (2018) 25 Rich JL & Tech 1, 12.
[55] Ibid.

However, in the US, the concept of privacy comes from the Fourth Amendment to the US Constitution. Unlike the EU, the US did not have a holistic data protection law. In fact, the US deals with issues pertaining to data protection on a sectorial basis,[56] and different states have enacted their own data privacy laws. Moreover, data processing and transferring of personal data is regulated by both the federal government and state laws in the US.[57] The federal laws only cater to the security category of data protection for specific sectors like healthcare, financial data, and consumer information.[58]

The US and the EU have long been each other's biggest trade and investment partners. The 95 Directive of the EU limited the transfer of personal data of EU citizens to third-party countries which did not offer adequate protection of data under their domestic laws.[59] The US lacked comprehensive laws for data protection, hence it negotiated the Safe Harbor Agreement with the EU in fear of sanctions under the 95 Directive. The agreement stated that the US would be safe from any action by the European data protection authorities if it provided adequate protection of data being transferred to US companies by the EU. It also stated that the Federal Trade Commission of the US will take action against companies not complying with the agreement.[60] The Safe Harbor Agreement remained effective until invalidated by the European Court of Justice through the *Schrems* judgment.[61] *Schrems v. Data Protection Commissioner* clarified that the 95 Directive was inadequate and a replacement of the Safe Harbor Agreement.[62] The EU-US Privacy Shield was agreed between the countries to allow US companies to continue transferring and processing the personal data of EU citizens until the General Data Protection Regulation ("GDPR") came into force in 2018.[63] The GDPR replaced the 95 Directive and was "set to allay European concern about how U.S. companies handle private data. Under the GDPR, US companies were expected to fully

[56] Ibid 16.
[57] Ibid 17.
[58] Sahara Williams, 'CCPA Tipping the Scales: Balancing Individual Privacy with Corporate Innovation for a Comprehensive Federal Data Protection Law' (2020) 53 Ind L Rev 217, 221.
[59] Directive (n 53) art 25(1).
[60] Houser & Voss (n 54) 15.
[61] *Maximillian Schrems v. Data Protection Commissioner* (C-362/14, EU:C:2015:650).
[62] Ibid.
[63] Grace Park, 'The Changing Wind of Data Privacy Law: A Comparative Study of the European Union's General Data Protection Regulation and the 2018 California Consumer Privacy Act' (2020) 10 UC Irvine L Rev 1455, 1466.

comply with much more restrictive privacy laws or face steep fines."[64] The enactment of the GDPR influenced many countries to come up with their own data protection laws. The US was especially bound by its relationship with the EU and hence came up with the California Consumer Privacy Act ("CCPA") just two months after the enactment of the GDPR. The CCPA is the most exhaustive and ambitious law on digital privacy in the history of the US.[65] The US was also compelled to enact a comprehensive law after the Cambridge Analytica incident in which "Cambridge Analytica had collected and sold personal data of millions of Facebook users without their knowledge or consent" – an incident which is not public knowledge.[66]

Although it is argued that both laws are significantly similar, the differences make them unique and applicable to a variety of subjects. The GDPR and the CCPA cater to different privacy issues as the GDPR "focuses on protecting human rights and social issues," while "the U.S. seems to be concerned with providing a way for companies collecting information to use that information while balancing the privacy rights that consumers expect."[67] The reason behind this distinction in their applicability is the difference in the ideologies underpinning data protection laws in the EU and the US.[68]

I. Comparative Analysis of the CCPA and GDPR

The CCPA is often alleged to be a copy of the GDPR. However, if looked at closely, the CCPA is only similar to the GDPR on a surface level. Overall, it turns out to be fundamentally different from the GDPR.[69] The GDPR is a comprehensive piece of legislation extended upon 130 pages and divided into several chapters while the CCPA is a 25-page law covering the major aspects of data privacy in the US.[70] The CCPA is built upon the "consumer protection" model and relies on the "notice and choice" premise.[71] In contrast, the GDPR is built upon the foundation

[64] Ibid.
[65] Blanke (n 21).
[66] Park (n 63) 1457.
[67] Houser & Voss (n 54) 22.
[68] Ibid 9.
[69] Chander, Kaminski & McGeveran (n 52) 1746.
[70] Ibid.
[71] Ibid 1747.

that data protection is a fundamental right guaranteed by the Constitution and the CFR, just like the right to dignity, free speech, and free trial.[72] The GDPR resulted in many companies updating and changing their privacy policies either to go beyond the scope of GDPR or to block their services to EU citizens in order to avoid heavy penalties under the GDPR.[73]

An opt-in consent does not assume consent, but rather asks users for consent through a notice or form. However, opt-out consent assumes consent and is not actively obtained. The GDPR adopts an opt-in approach which means that data collectors need to ask the users for consent before collecting their data and the definition of consent under the GDPR is one that requires opt-in consent from the subjects prior to any data processing.[74] The GDPR has also eliminated any possibility of opt-out consent from its other articles as well.[75] Moreover, under the GDPR, the data subjects are allowed to withdraw consent at any time and the companies are under strict requirements by the GDPR to not process the data of subjects beyond the limit for which they have given informed consent. This requirement of the GDPR "changes the paradigm so that companies are under stringent standards to abide by new regulations and rein in ways that companies may have misused personal data for their own profit-generating purposes,"[76] and the companies choose compliance over heavy fines. However, the CCPA adopts an opt-out approach and requires the customers to opt-out of the businesses if they do not want the selling and processing of their personal data to third parties.[77] It also requires businesses to give customers a notice that their data is being sold to third parties and that they have the choice to end this sale of data by opting out. The businesses will not use the personal data of a customer who chose to opt out for about twelve months after receiving the opt-out request. The CCPA also requires corporations and businesses to have an active link to "Do Not Sell My Personal Information" on their websites as well as privacy policies for customers to opt-out.[78] The CCPA gives a narrower right to the users to opt-out as compared to the GDPR's broader right to opt-in with informed consent because in the former, the

[72] Ibid.
[73] Park (n 63) 1468.
[74] Ibid 1476.
[75] Ibid.
[76] Ibid 1477.
[77] Ibid.
[78] Ibid 1478.

personal data of the user is being collected by default unless they actively opt-out."[79] The only time the CCPA mentions opt-in measures is for financial incentives to the customers for selling and processing their data.

The GDPR, under Articles 16 and 17, gives data subjects the right to be forgotten which essentially empowers them to erase or rectify their personal data by putting a request to the controllers. Controllers are under the duty to act upon such requests and also inform the recipients of that data.[80] In contrast, the CCPA has a "right to delete" provision and there is no mention of the right to be forgotten. This right to deletion empowers the users to put a request for deleting their personal data and the controllers are obliged to act upon the request and inform the businesses under their privacy policy. However, unlike GDPR's "right to be forgotten," CCPA's "right to delete" is subject to some exceptions like the contract between the user and the controller.[81] The GDPR's right to be forgotten finds its roots in the *Google Spain SL* case[82] while the CCPA's right to delete is a narrow scheme of providing some control to the user over their data.

The CCPA and the GDPR both have extra-territorial scope and apply to corporations operating out of the territorial bounds of the EU and the state of California. The scope of the CCPA can be analysed by looking at the definition of "business" which includes entities of any legal form such as sole proprietorship, partnership, company, or other separate legal entities which collect personal information of consumers, operate in the State of California, and satisfy "at least one of the thresholds identified in the CCPA."[83] The corporations do not need to be physically present in California or be a Californian corporation or entity to fall under the scope of the CCPA.[84] Similarly, the scope of the GDPR can be found in its Article 3 which states that it applies to i) the data processor or controller in the European Union irrespective of whether the processing is done in the Union or not; ii) the data subjects in the European Union irrespective of whether the processing

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[79] Ibid.
[80] Park (n 63) 1483.
[81] Ibid.
[82] *Google Spain SL v. Agencia Espafiola de Protecci6n de Datos (AEPD) and Mario Costeja Gonzales,* 2014 E.C.R 317.
[83] W. Gregory Voss, 'The CCPA and The GDPR are not the Same: Why You Should Understand Both' (2021) CPI ANTITRUST CHRONICLE 1, 3.
[84] Ibid.

of their data is done in the Union or outside of it; and iii) the data processors and controls outside of the Union as long as they come under the ambit of the laws of the member states of the Union by virtue of public international law.[85] Furthermore, the CCPA applies only to for-profit entities while the GDPR applies to both for-profit as well as non-profit entities.[86]

Although the CCPA and the GDPR define "personal information" and "personal data" very broadly, the former excludes publicly available information or data from the definition while the latter does not.[87] Apart from that, the GDPR creates certain categories of sensitive data and calls them "special categories of data" and sets the bar higher for the protection of such data while CCPA does not have such a taxonomy of data.[88] Another important difference between the CCPA and the GDPR is the range of penalties. Under the CCPA, the civil penalty for unintentional breach is 2,500 dollars and for intentional breach, it is 7,500 dollars.[89] Under the GDPR, serious breaches can result in fines of up to 20 million euros or 4% of global turnover.[90] Google, in 2019, faced the highest amount of fine under the GDPR, amounting to fifty million euros for violating the GDPR rules.[91] It was justified by saying that Google deprived its customers of the guarantees provided by Article 6 of the GDPR regarding the "lawfulness of processing."[92]

The CCPA has a separate provision for the "Right to Be Free from Discrimination" which prohibits controllers and businesses from discriminating against users if they exercise any of their rights under the CCPA, such as the right to delete their personal information.[93] The GDPR does not have a separate provision for non-discrimination, however, it prohibits controllers from discriminating against any user. The GDPR under the "special categories of data"

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[85] The General Data Protection Regulation, art 3.
[86] Voss (n 83) 4.
[87] Ibid.
[88] Ibid.
[89] Erin Illman & Paul Temple, 'California Consumer Privacy Act: What Companies Need to Know' (2019-2020) 75 The Business Lawyer 1637, 1645.
[90] Houser & Voss (n 54) 105.
[91] Olivia Tambou, 'Lessons from the First Post-GDPR Fines of the CNIL against Google LLC' (2019) 5 Eur Data Prot L Rev 80.
[92] Ibid 82.
[93] Illman & Temple (n 89) 1643.

sets a high bar for protection against information that may lead to discrimination and such data includes:

> [P]ersonal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.[94]

While the EU remains firm in protecting data against controllers and businesses, the US still faces challenges as the companies try to bypass the CCPA. The CCPA and the GDPR are still leaders in the field of data protection and their influence would impact businesses and service providers to amend their privacy policies as well as their handling of users' personal data. The biggest impact of the GDPR was the enactment of the CCPA which cannot yet be predicted as it is a "landmark act that is yet untested, covering new grounds in the state of California, and therefore remains a fertile ground for businesses to continue the fight to weaken the CCPA."[95] However, the regulatory rule under the CCPA is expected to shift in 2023 from the Attorney General having authority under the CCPA to the California Privacy Protection Agency under the California Privacy Rights Act ("CPRA"), which would increase the obligations of businesses as well as the protection of consumer's personal data.[96] This would be a milestone for the US in the field of data privacy and the adoption of federal privacy law.[97]

The Current Data Protection Law in Pakistan

Unlike the US and EU, Pakistan does not have a defined legislation that deals with the aforementioned caveats of tech and data. Nevertheless, other legislations deal with this issue to some extent. The first and foremost issue of information asymmetry is the hallmark of the notice-and-choice model. Since the notice-and-choice model is simply an online contract, primary contract law may deal with the

[94] Voss (n 83) 5.
[95] Park (n 63) 1489.
[96] Voss (n 83) 5–6.
[97] Ibid.

issue to some extent. In this regard, the Contract Act 1872 ("Contract Act") must be discussed.

I. The Contract Act 1872

Under the Contract Act, a communication, offer, or notice is deemed to be "complete when it comes to the knowledge of the person to whom it is made."[98] In the digital world, this essentially means that once the platform has shown users the privacy policy, it has completely and entirely fulfilled its duty of communication of offer to the user and it is now up to the user to either accept or reject it. With the proposer's duty being fulfilled, the next step is to be taken by the acceptor. Section 7 of the Contract Act deals with acceptance. It stipulates that acceptance must be absolute, unqualified, and in a reasonable manner. And if the method of acceptance is stipulated in the proposal, then acceptance must be in that manner.[99] The phrases used in these provisions are problematic in the digital world. An acceptance being absolute typically means that the user must accept the proposal right there without having any choice of negotiation. In the digital environment, this practically favours the platforms as they usually present a standardised form. In this situation, the users have no bargaining power. Therefore, when users accept the offer, it is an absolute acceptance. The method of acceptance is the clicking of the "Agree" button at the bottom of a notice. When the user makes the click, the contract is practically complete under the purview of the Contract Act.

If the Contract Act were to govern the notice-and-choice model as inherited by digital spaces, the issues discussed would persist as both parties would have essentially completed their duty under the Act. Even when both parties have fulfilled their duties, the user is partially, and in most cases, entirely unaware of the terms of the contract.[100] The Contract Act is based entirely on the principle of rational consumers. A rational consumer gives their consent when they agree with the other party.[101] Whether or not they are aware of what they agreed to is not of much significance as they had the opportunity to make themselves aware and they

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[98] The Contract Act 1872, s 4.
[99] Ibid s 7.
[100] Lior Strahilevitz and others, 'Report on Privacy and Data Protection' (George J. Stigler Centre for the Study of the Economy and the State, 2019) <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/data---report.pdf> accessed 4 Nov 2020, 12–13.
[101] The Contract Act (n 98), s 13.

chose not to avail it. The discussion above makes it clear that consumers do not act rationally on these platforms while signing up. The Contract Act being entirely for rational consumers cannot effectively regulate digital contracts. This can be highlighted from jurisprudence on non-reading of contract.

Non-readers of contract, under Pakistani law, are not granted any protection. The failure of one party to read and understand contractual terms cannot be held against the innocent one, provided that sufficient notice was given to the accepting party. However, *pardanashin* ladies are afforded special protection under Pakistani law. This is so because such women are deemed to be illiterate and any contract with them must be done carefully as they are incapable of understanding complex written documents. In such cases, it is essential that the party in power explains the contract and its consequences appropriately to the *pardanashin* ladies before they sign the document. This was highlighted in *Siddiqan v. Muhammad Ibrahim*,[102] where the Court held that since the *pardanashin* lady was not informed about the contract appropriately, the contract was therefore executed under undue influence. Nevertheless, this is a special protection afforded to *pardanashin* ladies only. When the acceptor is capable of reading the contract but chooses not to the benefit does not lie in their favour.

Nevertheless, users can raise the defence of being unduly influenced under the Contract Act. However, this plea is also most likely to fail considering other dynamics. Section 16(3) of the Contract Act states that where the balance of power lies in favour of one party, the dominated party enters into a contract with such party, and the transaction appears on the face of it to be unconscionable, then the presumption of undue influence will lie in favour of the party being dominated.[103] However, considering that digital contracts are standardised, and the user base is huge, the plea of undue influence will fail as the market is structured in such a manner. Illustration (d) of Section 16 pertains to Subsection (3) and further makes the provision clear that where the market is the key factor for an unconscionable-looking contract, such a contract will not be considered to have been caused by undue influence.[104] Therefore, the Contract Act fails to protect individuals from the perils of notice and choice.

[102] 1993 MLD 1979.
[103] The Contract Act (n 98), s 16(3).
[104] The Contract Act (n 98), s 16(3) and Illustration (d).

Where the Contract Act fails to adequately protect individuals from improper incorporation into platforms, consumer protection laws must be evaluated to consider protection to individuals after incorporation onto the platform user database.

II. Consumer Protection Act 2005

In some countries such as the US, consumer protection law has intentionally been kept so broad as to bring digital platforms under its purview. Recently, the CCPA was enacted which protects individuals from privacy invasions and illegal data usage and practices. However, the Punjab Consumer Protection Act 2005 ("Consumer Protection Act") is an outdated law considering new challenges. This Act is applicable only to products supplied by any person or company and not to services on digital platforms.[105]

Nevertheless, even if the Consumer Protection Act applied to digital platforms, the law is inadequate for providing protection to users. The primary reason is that just like the Contract Act, this law is premised on the principles of rational consumerism. The Consumer Protection Act imposes a duty on suppliers to disclose information to consumers. In the general sense, the notice in the form of the privacy policy shall serve this purpose and should be enough to fulfil the obligation. Furthermore, digital platforms also tend to manipulate user choices through advertisements and other means.

Section 21 of the Consumer Protection Act protects individuals from such manipulation. Nevertheless, corporations can identify consumer biases and cognitive lacunas to practically target their vulnerabilities in favour of the platform.[106] Even so, Section 21 does not adequately protect individuals as a rational consumer is required to read the terms of the privacy policy, which essentially enumerate all of these "services." The privacy policy acts as a liability waiver for the platforms while the user is afforded no protection under consumer protection law. Thereby, the consumer protection law in Pakistan does not adequately protect individuals during and after incorporation into the platform.

[105] The Punjab Consumer Protection Act 2005, s 2(j); see also The Sales of Goods Act 1930, s 2(7).
[106] Strahilevitz (n 100) 34–36.

However, to completely assess the efficacy of the current system, it is essential to discuss the protection and remedies available to users of these platforms from data system breaches and their illegal usage.

III. Prevention of Electronic Crimes Act 2016

The Prevention of Electronic Crimes Act 2016 ("PECA") is critical for this discussion. Sections 3-8 and 20 of PECA primarily deal with the issues of criminal data breaches and forging. Where these sections elaborately cover individuals who engage in such data breaches, the PECA does not talk about platform accountability. The cases that have been registered under these Sections of the PECA pertain to private individuals who breached data, as hoarded by platforms, and used them illegally. In *Junaid Arshad v. The State*, a person was tried for acquiring images of a woman from social media and forging them to make them graphical.[107] The case did not talk about platform accountability even though the accused was using a fake account to acquire images of the victim.

In *Muhammad Usman v. The State*, the accused was tried for leaking nude photographs of a lady which were acquired and transmitted through WhatsApp.[108] While the Court successfully incriminated the accused for his acts, WhatsApp was not involved in the process. Nevertheless, the law is somewhat effective in penalising individuals who engage in data-breaching activities.

Moreover, PECA provides a provision for illegal usage of identifying information under Section 14. This provision offers protection to identifying information of any person, but it is all subject to approval. If approval is gained through an agreement, then the person cannot be held accountable. The platforms are thereby protected under their privacy policy because it is accepted by their users. So, this provision makes way for privacy policies to act as liability disclaimers for the companies. Consequently, all cases brought under this section are against individuals and not against platforms. In *Muhammad Nawaz v. The State*, the accused was prosecuted for forgery and unauthorised usage of a car's invoice.[109] Platform liability and duties in this case were not discussed either.

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[107] 2018 PCr.LJ 739.
[108] 2020 PCr.LJ 705.
[109] 2021 YLR 328.

In addition to the aforementioned reasons for not taking any action against corporations, Section 35 of the PECA limits the liability of service providers in cases where the platform simply failed to act. The PECA does not place any liability on platforms for not adequately protecting their users' data, which is primarily the reason for not registering any case against a platform under this Act even though other countries have prosecuted companies for the same breaches. In 2018, Careem, a ride-hailing company, revealed that the data of its users had been compromised. Nevertheless, Pakistani authorities were unable to hold the company accountable regarding the data breach of Pakistani users despite Careem having its offices in Pakistan.[110] Similarly, when 50 million Facebook accounts were compromised, Pakistan did not have adequate laws to cater to the issue. In contrast, the European Union acted against Facebook and imposed fines under the GDPR.[111] The positive aspect of the PECA is that the authorities work with the platforms to bring about justice for the victims as seen in *Kashis Dars v. The State*.[112] Nevertheless, as a failure of the law, it must be noted that no method of platform accountability has been ensured under the PECA.

The current data protection regime in Pakistan is not effective at protecting its users against the perils of big data and big tech. They fail to protect individuals against inadequate consent, profiling, dark pattern manipulation, and data breaches. Therefore, there is a need for data protection laws in Pakistan such as those enacted in countries around the world. Owing to this need, the Ministry of Information Technology & Telecommunications has been working on drafting data privacy legislation since 2018. The fourth draft of the bill was published in the latter half of 2023. The next section of this paper will discuss the efficacy of the Personal Data Protection Bill 2023 ("Bill") along with suggestions and recommended amendments.

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[110] 'Careem Admits to Mass Data Leak' *The Express Tribune* (23 April 2018) <https://tribune.com.pk/story/1693146/careem-admits-mass-data-leak> accessed 3 Dec 2021.
[111] Rosie Perper, 'Facebook could be fined up to $1.63 billion for a massive breach that may have violated EU privacy laws' *Business Insider* (1 Oct 2018) <https://www.businessinsider.com/facebook-eu-fine-163-billion- massive-data-breach-50-million-users-2018-10> accessed 3 Dec 2021.
[112] *Kashis Dars v. The State and Two Others* 2020 PCr.LJ 259.

Personal Data Protection Bill 2023

The pivotal section of the Bill is the one containing definitions. Section 2(f) defines consent as "any freely given, specific, informed, and unambiguous indication of the data subject's intention by which the data subject by a statement or by clear affirmative action, collecting, obtaining and processing of personal data."[113] On the face of it, the definition seems very elaborate. However, there are several lacunas involved in this. First, the Bill does not define what the term "free" means. This can cause several issues as discussed in Section II of this paper. This is because it is difficult to ascertain whether consent means "informed consent" if it is obtained by acceptance of terms that appear before a person through a click or "informed consent" is that which requires the person to read the terms before accepting. If so, there is no way to be sure that users have read the terms and are entering into an agreement after making an informed decision. Therefore, the Bill needs to particularly establish what free and informed consent means and how it is to be obtained through the procedure stipulated in subsequent sections. The second issue with regard to definitions concerns the applicability of the law.

Under Sections 2(a) and 2(ee), the Bill provides the definition for anonymised data and pseudonymisation respectively. It also needs to be highlighted here that under Section 2(z), personal data has been defined, which has been afforded due protection through this Bill. Nevertheless, Section 2(z) stipulates, "anonymised, or pseudonymised data which is incapable of identifying an individual is not personal data."[114] Essentially, this Bill does not cover or protect anonymised or pseudonymised data. This is particularly worrisome as it has been discussed in Section II of this paper that anonymised data is not really anonymised and can be used to retrace the origin or source of the data.[115] Anonymised or pseudonymised data is identifiable and hence requires to be treated as personal data. The drafters should focus on broadening the scope of the Bill to include all information that is directly or indirectly identifiable to ensure maximum protection for individuals.

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[113] The Personal Data Protection Bill 2023, s 2(f).
[114] Ibid s 2(k).
[115] Arvind Narayanan & Vitaly Shmatikov (n 37).

Sections 5 and 6 of the Bill retract back to the issue of consent. Section 5 of the Bill does not explicitly state that special consent is required for the collection of data. This can be problematic in cases of collection of data such as the internet activity of a person. Section II of this paper discusses that such data can be identifiable, and therefore adequate protection must be afforded to it. Furthermore, Section 6 states that data controllers must obtain the consent of users or data subjects before they can process the data, similar to the opt-in approach adopted by the GDPR. However, unlike Article 32 of the GDPR which stipulates the method of obtaining consent through different means, no method of acquiring consent has been mentioned in the Bill. This essentially makes the law inadequate as companies can be entirely compliant with the law by practically working the way they currently do. Therefore, the Bill must explicitly state the method of consent. It is recommended that a special obligation must be imposed on data controllers to design the consent form or the notice in such a way that it includes less text and more digital representation of the harms and benefits associated with collection and processing. This is known as the visceral notices approach for consent and has been held effective for obtaining informed consent through research.[116]

Similarly, Section 7 of the Bill requires data controllers to send notices to data subjects informing them about the processing and collection of their data. This is similar to the CCPA's requirement of giving notice to the user before their data is being processed. It is encouraging that the Section covers the bases very broadly. However, it is concerning that the primary issue of consent and inadequate notices is not being resolved. Including more text into notices and consent forms is destined to fail for the reasons of the complexity of language, the inability of the users to read and understand the lengthy and ambiguous notices, non-reading by the users, and cognitive bias of the reader – as discussed in Section II. Therefore, special consent should be obtained through visuals, text, and affirmative actions such as multiple pages of terms and conditions with an "accept" button instead of one display page. Furthermore, all data subjects must be given notice and asked for consent as default on any given platform while joining the platform. Cognitive biases of people cause them to accept terms without reading them and generally stick to default options. Therefore, it must be ensured that each website takes

[116] Shara Monteleone, 'Addressing the 'Failure' of Informed Consent' (2015) 43 Syracuse J. Int'l L. & Com. 69, 110; see also, Ryan Calo, 'Against Notice Scepticism in Privacy (an Elsewhere),' (2012) 87 Notre Rev. 1027, 1033.

consent for the bare minimum data required for the platform to function for the user from the initial consent form. Furthermore, for any future services or enhancing layer on data procurement and processing, a special consent shall be obtained.[117]

In addition to the issues on consent, Section 7 does not impose an obligation to obtain consent and give notice to the users about their profiling from tracking on and across platforms, automated decision making, and whether the data controller intends or has provisions for transferring data to third countries. Furthermore, the Section fails to put any sanctions in case the data controllers fail to comply with the provisions on consent and notices. The issue of tracking and profiling needs to be dealt with very strictly under this Bill, which has been largely excluded. Profiling and its subsequent usage for advertising, predictive analysis, and other processes has immense issues such as manipulation and dark patterns. In this regard, retention and usage of data is also very important.

Section 10 of the Bill is significant as it imposes restrictions on the retention of data and puts an obligation on the controllers to delete the data when it is no longer required for the purpose for which it was collected. This Section is similar to the "right to delete" given in the CCPA but is also distinguishable from that right in the sense that it puts an obligation on the controllers to delete data. However, under the CCPA, the users are under an obligation to request the deletion of their data when it is no longer required. It must be noted here that the conditions stipulated are considerably weak. Platforms like Google essentially keep data to continue building on it and to keep using previous and new data together. It is recommended that data erasure shall be made mandatory on a yearly basis. Only the very basic information of each user shall be retained. Furthermore, every data subject shall have the right to unconditional data erasure. The concept of the "right to be forgotten" as conceived in the GDPR should be included within the Bill as it gives the users more control over their data and empowers them to not just erase their data but also rectify it. Section 26 of the Bill is more similar to the CCPA's "right to delete" as it grants the data subjects the right to erasure of their personal data. It is problematic for being conditional and for not providing complete deletion of all information of the data subject whether identifiable or not. Furthermore, the provision for erasure within fourteen days is too lax considering that personally

[117] Ibid.

identifiable information is at stake. Nevertheless, the provisions for erasure under Section 26 and data correction under Section 11 are appreciated. However, there is a need for both provisions to be broadened to ensure better protection of users' data. Most of the provisions of the Bill deal with the collection and processing of information. However, another issue associated with data hoarding is that of data breaches.

Section 13 of the Bill imposes a duty on data controllers to disclose to users and the commission when data is breached. The lacuna under this section is that where the controller believes that the breach is not likely to cause harm to the rights and freedom of subjects, they are not obligated to notify users of the breach. Furthermore, the provision does not talk about the platforms' accountability in cases of breach. GDPR of the EU provides provisions for actions against platforms in case of breach. Due to this provision, the Information Commission Office was able to fine British Airways €20 million for the breach affecting more than 400,000 customers.[118] Therefore, it is essential that provisions for such sanctions and fines are put in place within the law while it is still at the initial stage.

Chapter VI of the Bill talks about cross-border data transfers. These sections are like the GDPR as they also require the recipient countries of data to have data protection at least equivalent to the extent to which this Bill provides. Where the sections provide adequate safeguards regarding the level of protection afforded, it is unclear as to which Pakistani authority is to ascertain the adequacy of the foreign country's data privacy laws. Article 45 of the GDPR lays down all the elements which need to be examined by the Commission to assess the adequacy of the level of protection provided by third countries.[119] Under the GDPR, the Commission is required to maintain a list of countries that have adequate privacy protection laws for such transfers. It is suggested that the Commission shall be given the power and duty to maintain such a list. Furthermore, it must be mandatory for controllers to obtain permission before such transfers.[120]

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[118] Information Commission Office, 'ICO fines British Airways £20m for data breach affecting more than 400,000 customers' Information Commission Office (16 Oct 2020) <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2020/10/ico-fines-british-airways-20m-for-data-breach-affecting-more-than-400-000-customers>.
[119] The General Data Protection Regulation, art 45.
[120] Ibid.

The next important provision is Section 24 of the Bill which talks about disclosure other than the purposes for which the data subject consented. This section sets out certain conditions under which personal data can be collected and processed without the data subject's consent. This section is problematic as it assumes consent from users. Subsections (c) and (d) allow data controllers to disclose data where they have a "reasonable belief" that it is legal for them to do so, or that they would have had consent if they asked the subject for it. The provision is too broad and the standard of "reasonable belief" is too low. Therefore, it needs to be amended to something more rigid. Furthermore, the assumption of consent should be allowed in limited circumstances, and the Bill should spell them out explicitly rather than allowing the controller to decide.

Overall, the law covers some bases regarding consent, which need to be made more stringent. Moreover, special provisions are necessary with regard to data disclosure, transmission, deletion, and the right to be forgotten. Profiling users' needs to be regulated to protect the autonomy and privacy of individuals. Conclusively, the Bill is a step in the right direction, nevertheless, it still requires major changes to come to an equal standing with its counterparts.

Conclusion

The right to privacy in Pakistan emanates from the Constitution as well as Islamic principles which forbid invading the privacy of others. It is considered a fundamental right in Pakistan and has been interpreted in a way as to include digital privacy. Unlike many other countries, Pakistan does not have an exhaustive data protection law. The existence of such a law has become crucial due to the tangible harms attached with big data and big tech, such as information asymmetry; inadequate consent mechanisms; opacity of data collection and its processing; user profiling and the exploitation associated with it; mass use of platforms as tools for control and surveillance; platform's use in illegal involvements such as elections; illegal or uninformed sale and transfers of data; and other issues such as data breaches and wilful leakage of databases. Pakistan's current regulatory framework like the Contract Act 1872, Consumer Protection Act 2005, and the Prevention of Electronic Crimes Act 2016 are not adequate to deal with issues pertaining to digital privacy. The drafting of Pakistan's Personal Data Protection Bill 2023 is a step in the right direction. The fact that this is the fourth amended version of the

Bill shows the ministry's interest and seriousness towards solving the issue of data protection in Pakistan. The Bill possesses substantial similarities to the CCPA and the GDPR but fails to adopt their practical aspects. Although the Bill tries to hold the data controllers accountable and give the users control over their personal data, it has practical lacunas that need to be amended.

Sedition Law in Pakistan: An Infringement upon the Right to Free Speech

Marha Fathma and Zarak Ahmed Swati*

Authors' Note: We are delighted to learn that Justice Shahid Karim of the Lahore High Court has declared Section 124 of the Pakistan Penal Code, which pertains to sedition, as unconstitutional on the grounds of violating the fundamental rights guaranteed under the Constitution of the Islamic Republic of Pakistan ("Constitution"). It is commendable that this draconian law from the colonial era has finally been deemed illegal. However, it should be noted that the verdict was passed by a single member bench, and is subject to an appeal.

This Article was originally written in 2021 and emphasises on the importance of examining how the law has impacted Pakistani society and its continuing effects on the formation of laws and policies.

Abstract

The sedition laws of Pakistan are a colonial relic often seen as a political tool to crush dissent. This paper analyses the historical development of these laws in Pakistan and performs a cross-jurisdictional analysis of similar laws in other jurisdictions. It examines case law in light of the right to free speech granted under different Pakistani constitutions while discussing current events in relation to sedition laws. Finally, the paper attempts to draw a conclusion regarding whether the country's sedition laws infringe upon the right to freedom of speech granted under Article 19 of the Constitution.

Introduction

This paper will address whether the sedition law, as set out in Section 124-A of the Pakistan Penal Code 1860 ("PPC"), violates the right to freedom of speech under the Constitution.[1] It examines whether Section 124-A aligns with the purpose of

* Marha Fathma graduated with B.A.-LL.B (Honours) from LUMS in 2023.
Zarak Ahmed Swati graduated with B.A.-LL.B (Honours) from LUMS in 2023 and is currently working as an associate at AlphaSights in Dubai.
[1] The Constitution of Islamic Republic of Pakistan 1973, art 19.

Article 19, if it is a proportionate restriction, and if it meets the reasonable standard set by Article 19. As Section 124-A is part of the PPC, it is indeed a restriction imposed by law. However, it is crucial to address whether and to what extent the sedition law falls under any of the exceptions in Article 19.

Article 19 of the Constitution does not confer an absolute right to freedom of speech, and it is subject to certain reasonable limitations imposed by law, for example, in the interest of the glory of Islam or the integrity, security, or defence of Pakistan. It lays down caveats to the right to free speech which can be broken down into being subject to reasonable restrictions, imposed by law, and falling under the exceptions mentioned above.

Section 124-A of the PPC characterises sedition as a criminal offence under which any speech which "…brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Federal or Provincial Government established by law shall be punished."[2] The severity of this punishment can include imprisonment for life or imprisonment for three years with a fine.

The Colonial Origin of the Sedition Law in Pakistan

It is crucial to first discuss the historical provenance of the sedition law and how it was used to establish colonial control. A bare reading of the law and relevant case law makes it clear that the government has applied and continues to apply sedition laws to maintain public order and retain control. In fact, it was introduced in the Indian Penal Code by colonist Thomas Macauley in 1860 for similar purposes of countering dissent. "Sedition," as described by Fitzgerald, J. in *R. v Sullivan*,[3] was quoted with approval in *Niharendu Dutt Majumdar v King Emperor*:[4]

> [S]edition embraces all those practices, whether by word, deed or writing, which are calculated to disturb the tranquillity of the State and lead ignorant persons to subvert the Government. The objects of sedition generally are to induce discontent and insurrection, to stir up opposition to the Government

[2] The Pakistan Penal Code 1860, s 124-A.
[3] (1868) 11 Cox. C. C. 54.
[4] AIR 1942 Federal Court 22.

> and to bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion.[5]

The Chief Justice of the Privy Council in a 1947 case on Section 124-A explained, "Public disorder or the reasonable anticipation or likelihood of public disorder, is thus the gist of the offence. The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency."[6]

The Council acknowledged that this rule was extensively broader than the PPC as it involved not just the *actus reus* of committing the offence but also "an act which is intended or likely to bring [or] brings or attempts to bring" public disorder.[7] However, they resolved that "incitement to violence was not a necessary ingredient of the crime of sedition as thereby defined"[8] nor is the intention to incite. Removing the intention and context from words altogether would mean a broad application of Section 124-A with every statement which is critical of, or expressing disaffection towards, the State falling under this category. From the application of the law and jurisprudence over the years, courts decide considering the facts of the specific case whether the words or acts uttered can count as harmless criticism or hatred.

Explanation 3 under Section 124-A explicitly states and attempts to limit the scope of the provision by noting that "comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this Section."[9] However, it has been held that explanations have no bearing on the meaning of the statute or the legislature's intent as "these are added to remove any doubt as to the true meaning of the Legislature; they do not add to or subtract from the section itself; and the words used in the rules ought to be interpreted as if they had been explained in the same way."[10]

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[5] Ibid 55.
[6] *Emperor v. Sadashi v Narayan Bhalerao* PLD 1947 Privy Council 32.
[7] Ibid 5.
[8] Ibid 7.
[9] The Pakistan Penal Code 1860, s 124-A.
[10] *Niharendu* (n 4) 50.

More recently in *Ali Raza v. the Federation of Pakistan*, the Islamabad High Court laid down all the requirements for a sedition charge under Section 124-A:

> [(a)] offence must contain promotion of feeling of enmity, hatred or ill-will between different religious or racial or linguistic or regional groups or castes, (b) words, deeds or writing used to disturb the tranquillity of the State or to subvert the Government, (c) incite the people to incursion and rebellion, (d) complaint must be initiated by the Federal or Provincial Government and by authorised person under the law after considering the relevant factors of the alleged incident with reasons, (e) private persons cannot agitate the matter regarding seditions of charge rather it should be initiated, inquired and investigated by the Government or at least on their direction, (f) criminal conspiracy can only be considered if the other principle offence comes on record on the basis of allegations referred in the complaint in each case whereas, is not a sedition, therefore, criminal conspiracy is not available in the instant matter, and (g) authorised officer shall state reason before issuing any sanction in terms of Sections 196 and 196-A, Cr.P.C. with speaking order.[11]

The vague wording of Section 124-A and the lack of strict standards lead to an arbitrary application of sedition charges. It may leave the door open for governments to weaponise it against political opponents or journalists. According to the internationally recognised principle of legality, an offence must be clearly defined in the law to make sure individuals can act accordingly. However, such vague laws "…leave the door open to selective prosecution and interpretation, based on discriminatory policies of government officials and the personal predilections of judges."[12]

However, with decades of history and the frequent use of this law, it is the need of the hour to assess whether sedition laws are in fact necessary to meet the public order objective especially considering its real-world application.

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[11] PLD 2017 Isl 64.

[12] Reema Omer, 'Sedition and Its Discontents' *DAWN* (2020) <https://www.dawn.com/news/1532177> accessed 23 June 2021.

I. Purpose

The purpose of the legislature when introducing a law involves a value laden judgement and "not every purpose can justify a limitation on a constitutional right."[13] The purpose of the law and its limitation are both derived from societal values. The purpose of Article 19 is to promote and preserve democratic discourse. It gives people the right to their own speech, their opinion, the right to protest, and the right to dissent. The purpose of the sedition law is to preserve public order and maintain social control. However, in a seminal Lahore High Court case, Justice Syed Mansoor Ali Shah held that the fundamental rights in our Constitution enshrine our democratic values and "the proper purpose behind sub-constitutional legislations is to uphold these constitutional values."[14]

Looking at the real-world application of the sedition law, many instances have occurred where the law is in violation of this constitutional purpose. More recently, former Minister for Information and Broadcasting, Fawad Chaudhry, was arrested in a case of sedition following his comments against the Election Commission of Pakistan ("ECP"). The broad and ambiguous nature of sedition laws can be assessed from the fact that though Chaudhry's comments included calling an ECP official a "clerk" and noted how "somebody from the government calls ECP and passes an order, and ECP commissioner, like a clerk, just signs the order and passes it on," the case filed accused him of inciting violence against the government.[15] The broad nature of these laws makes them highly susceptible to misuse, resulting in the curtailment of the freedom of expression under Article 19 of the Constitution. This potential for misuse makes it crucial to re-evaluate the law to ensure that it aligns with democratic principles and does not violate constitutional rights.

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[13] Gehan Gunatilleke, 'Justifying Limitations on the Freedom of Expression' (Human Rights Review 22), 91–108 (2021) <https://doi.org/10.1007/s12142-020-00608-8>.
[14] *D.G. Khan Cement Company Ltd. through Chief Financial Officer v. Federation of Pakistan through Secretary Ministry of Law* PLD 2013 Lah 693.
[15] Abid Hussain, "Pakistan Arrests Top Leader from Imran Khan's PTI for 'Sedition'." Imran Khan News | Al Jazeera, Al Jazeera, 25 Jan 2023 <https://www.aljazeera.com/news/2023/1/25/pakistan-arrests-top-leader-from-imran-khans-pti-for-sedition> accessed 23 June 2021.

II. Rational Connection Test

The next element in renowned legal academic and jurist Professor Aharon Barak's definition is the "rational connection" test. This requires that the "means used by the limiting law fit (or are rationally connected to) the purpose the limiting law was designed to fulfil. The requirement is that the means used by the limiting law can realise or advance the underlying purpose of that."[16] Accordingly, the means used to apply the sedition law are arrests which are often made without proper criminal procedure being followed – police barging into homes, or journalists being picked up from the street without being told why. The frequency with which the government applies and uses this provision against its critics and opponents, even if they are later acquitted by the courts, results in it acting as an intimidation tactic to silence dissent. Such was the case of politician Javed Hashmi in which a case under Section 124-A was filed against him by private individuals through the local police.[17] The Lahore High Court, reversing the decisions of the lower courts, held, "there is no concept of registration of case under Section 124-A, P.P.C. by the local police…it can only be taken on the complaint instituted by the Federal Government [under Section 196, Cr.P.C]."[18]

III. Necessity

The third element of proportionality for Professor Barak is the "necessity test," by which he means that "the legislator has to choose – of all those means that may advance the purpose of the limiting law – that which would least limit the human right in question."[19] It is safe to say that upholding the natives' fundamental right to free speech was not the intention of the original legislators of Section 124-A. As mentioned earlier, the sedition law is a colonial relic to suppress those who posed a challenge to the British colonial government. Looking back at its history, from the 1920s to the 1940s, hundreds of independent activists who opposed British rule were tried under the sedition law, such as M. K. Gandhi, Maulana Mohammad Ali

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[16] *D.G. Khan Cement Company* (n 14) [21].
[17] *Javed Hashmi v. the State* 2010 PCr.LJ 1809.
[18] Ibid [27].
[19] *D.G. Khan Cement Company* (n 14) [24].

Jauhar, Bhagat Singh, and M.N. Roy.[20] M. K. Gandhi once famously said that Section 124A (under which he was charged) is perhaps the "prince among the political Sections of the Indian Penal Code designed to suppress the liberty of a citizen."[21] Being booked under this provision was seen as a badge of honour for these freedom fighters as a way of standing up to their oppressors.

However, post-partition, "…the nation-states of India and Pakistan were confronted with the paradox of acquiring the twin inheritance of anti-colonial politics premised on popular sovereignty and a colonial state apparatus that was geared towards silencing and terrorising the population."[22] This colonial legacy is still part of both nations and is used by those in power to subdue their critics. In 1951, Marxist poet Faiz Ahmed Faiz was charged with sedition and imprisoned for four years by Liaquat Ali for his role in the Rawalpindi Conspiracy.[23] Such authoritarianism can still be witnessed in Pakistan with the example of Manzoor Pashteen and P.T.M. Similarly, in India, people protesting against the C.A.A. and other policies of the Modi government were booked under the sedition provisions.[24] The sedition law very clearly fails the necessity test as the disproportionate means used to achieve its purpose of public order have always been used discriminatorily to suppress the very basic right of free speech under Article 19.

In support of the above, it is crucial to look at comparative international jurisprudence such as the Universal Declaration of Human Rights 1948 ("UDHR") and the Constitution of South Africa. Article 29(2) of the UDHR contains a general limitation clause according to which restrictions are to be determined by law "…solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[25]

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[20] Bansari Kamdar, 'Sedition Laws and Their Post-Colonial Legacy in India and Pakistan' (Thediplomat.com, 2020) <https://thediplomat.com/2020/02/sedition-laws-and-their-post-colonial-legacy-in-india-and-pakistan/>> accessed 23 June 2021.
[21] Ibid.
[22] Gunatilleke (n 13).
[23] Estelle Dryland, 'Faiz Ahmed Faiz and The Rawalpindi Conspiracy Case' (1992) Journal of South Asian Literature 27, no. 2, 175–85. http://www.jstor.org/stable/40874124.
[24] Anumeha Yadav, 'How India Uses Colonial-Era Sedition Law Against CAA Protesters' (Aljazeera.com, 2022) <https://www.aljazeera.com/news/2020/1/21/how-india-uses-colonial-era-sedition-law-against-caa-protesters> accessed 23 July 2022.
[25] Universal Declaration of Human Rights, art 29(2).

IV. Proportionality

The principle of proportionality is a long-standing *grundnorm* in law used to decide whether the restrictions imposed on a fundamental right are reasonable and appropriate. The Lahore High Court has laid down numerous tests that need to be followed in light of Professor Barak's definition when "applying the principle of proportionality to balance and weigh the competing interests of an individual and the society, in order to maintain constitutional equilibrium."[26] In another case, Justice Waqar Hassan Mir advised that the "government should therefore strike a just and reasonable balance between the need for ensuring the people's right of freedom of speech and expression on the one hand and the need to impose social control on the business of publication and broadcasting."[27]

In recent judgments on the sedition law in light of Article 19, such as in *Ali Raza v. Federation of Pakistan*, the courts have clearly moved towards taking a more restrictive reading of the section.[28] In *Mst. Tehmina Doltana v. the State*, the following was held:

> [I]t has also been held repeatedly, by the superior Courts of this country, including in the judgements discussed in this order that the Court has to consider such speeches in fair, free and liberal spirit and not in a narrow-minded or sectarian way nor are we to pick out isolated words or sentences as held by Hamood-ur-Rehman, J. in *Sanghad v. The Province of East Pakistan.*[29]

The right to freedom of speech granted under the 1973 Constitution is identical to that granted under the 1962 Constitution, therefore rendering a similar application. The Court concluded in *Sardar Attaullah Khan Mengal*'s case that "truth and justification is no defence in a case under Section 124 A, P. P. C."[30] However, in the international community, there has been an express intent of the

[26] *D.G. Khan Cement Company* (n 14) [21].
[27] *Pakistan Broadcaster Associations v. PEMRA* PLD 2016 SC 692.
[28] Omer (n 12).
[29] *Mst. Tehmina Doltana v. the State* 2001 PCr.LJ 1199.
[30] *Sardar Attaullah Khan Menga v. the State* PLD 1964 (W. P.) Kar 323.

Supreme Courts to move towards interpreting limitations on freedom of expression restrictively, especially by the Argentinian Supreme Court and the New Zealand Supreme Court.[31] With defences available for journalists such as truth and good-faith reporting, this ensures the scope of the sedition laws is further limited.

Despite the above, Pakistani courts do not allow these defences as they have explained that in cases of sedition, the context must always be considered through judging the speaker's intent from their words and the effect it is likely to have on the specific audience. *Mashiur Rehman v. The State* established that it does not matter whether the allegations made by the offenders are true or not, and whether their speech incited violence is not relevant for determining the guilt of the accused under Section 124-A.[32] Justice Cornelius went into detail to discuss the question of statements being true or false, noting that this is not relevant for the determination of a sentence as "the only question for the Court to decide is whether the effect of the language used is such that it is calculated to create in the minds of those who see or hear it a feeling of revulsion towards the Government by law established, so strong as to amount to hatred or contempt."[33]

By observing and analysing the sedition law in Pakistan in relation to Professor Barak's four elements of proportionality, it becomes apparent that Section 124-A fails to meet the requirements and tests. In its application, it is used as an authoritative tool to curb dissent under the guise of protecting public order. Originating as a colonial weapon, the usefulness of this law in modern democracies, which cherish and protect fundamental rights such as the freedom of speech, has become obsolete.

Section 124-A: A Reasonable Restriction

Sedition laws act as a limitation on the right to free speech. We must first assess whether this limitation aligns with the purpose of the right to free speech and meet the standard of a "reasonable" restriction under Article 19.

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[31] Library of Congress, 'Limits on Freedom of Expression' (2019) <https://irp.fas.org/eprint/lloc-limits.pdf> accessed 26 July 2022.
[32] Ali Raza (n 11).
[33] *State v. Attaullah Khan Mengal* PLD 1967 SC 78.

Freedom of speech in Pakistan is not an absolute right. Article 19 of the Constitution lays out multiple restrictions on the right to free speech such as, but not limited to, public order, decency, or morality, or in relation to contempt of court. However, it also states that the restrictions must be reasonable and imposed by law. Courts have extrapolated on what exactly qualifies as a "reasonable" restriction. The test they reached in *Pakistan Broadcaster Associations v. PEMRA*[34] was:

> [I]n examining the reasonableness of any restriction on the right to freedom of expression it should essentially be kept in mind as to whether in purporting to exercise freedom of expression one was infringing upon the right of freedom of expression of others, and also violating their right to live a nuisance free life, and as to whether one is right to time and space was being violated. No one could be forced to listen or watch that he may not like to, and one could not be invaded with unsolicited interruptions while eagerly watching or listening to something of his interest. State was not supposed to remain oblivious of such violation/invasions and could not detract from its obligation, to regulate the right to speech when it came in conflict with the right of the viewers or listeners.

According to the European Convention on Human Rights, free speech is a right that is essential to and must be protected in every democratic society. A determination as to whether a restriction on freedom of expression is necessary "requires the existence of a pressing social need, and . . . the restrictions should be no more than is proportionate."[35]

Sedition Laws and The International Community

Countries around the world have by now recognised that this law is archaic, oppressive, and in violation of the freedom of speech, which is the crown jewel of every democratic society. Britain's law commission had recommended the

[34] *Pakistan Broadcaster Associations v. PEMRA* PLD 2016 SC 692.
[35] Ruth Levush, 'Limits on Freedom of Expression' (Loc.gov, 2019) <https://www.loc.gov/law/help/freedom-expression/compsum.php> accessed 23 June 2021.

abolition of sedition laws in 1977, and they repealed it in 2009.[36] At the time of the repeal, the Parliamentary Undersecretary of State at the Ministry of Justice, Claire Ward, said:

> [S]edition and seditious and defamatory libel are arcane offences – from a bygone era when freedom of expression wasn't seen as the right it is today … The existence of these obsolete offences in this country had been used by other countries as justification for the retention of similar laws which have been actively used to suppress political dissent and restrict press freedom.[37]

Similarly, Article 36 of the Constitution of the Republic of South Africa lays down the requirements for such a limitation to be acceptable:

> […] the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: (a) The nature of the right; (b) The importance of the purpose of the limitation; (c) The nature and extent of the limitation; (d) The relation between the limitation and its purpose; and (e) Less restrictive means to achieve the purpose.[38]

Moreover, the Federal Constitution of Switzerland 1999 adds that restrictions on fundamental rights must have a legal basis, be justified in the public interest or for the protection of the fundamental rights of others, be proportionate, and ensure that the essence of fundamental rights is sacrosanct.[39] For similar reasons, seditions laws worldwide, for example, in New Zealand, Australia, Indonesia, and the US, have been repealed. Pakistan inherited the sedition law from the British and the British have repealed their Sedition Act. It is now crucial to question why Pakistan and India have not.

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[36] Clare Feikert-Ahalt, 'Sedition in England: The Abolition of a Law from A Bygone Era' (In Custodia Legis: Law Librarians of Congress, 2012) <https://blogs.loc.gov/law/2012/10/sedition-in-england-the-abolition-of-a-law-from-a-bygone-era/> accessed 27 July 2022.
[37] Ibid.
[38] The Constitution of the Republic of South Africa 1996, art 36.
[39] The Federal Constitution of Switzerland 1999, art 36.

Conclusion

Pakistan prides itself as a democratic state and a key feature of any democratic state is the freedom of speech and the right to protest. However, sedition under Section 124-A comes in direct conflict with this right. Courts in Pakistan have recognised these tensions and noted that "in a civilised and democratic society, restrictions and duties co-existed in order to protect and preserve the right to speech."[40] They have emphasised on reaching a balance.

Therefore, in conclusion and in light of the aforementioned discussion, Section 124-A is an unreasonable restriction on the right to free speech and it is not necessary to meet the public order objective in light of its real-world application. The international community and Pakistan's neighbouring states have accepted the oppressive impact of such laws and how they can be weaponised as an authoritative tool by the state to suppress dissent. Taking from their example, it is due time that the Pakistani superior courts follow suit.

[40] Ali Raza (n 11) [10].

Enforced Disappearances in Iraq: Attribution of Accountability to Government under International and Domestic Legal Framework

Mohammad Bitar and Dr. Benarji Chakka*

Abstract

Enforced disappearances are among the most prominent strategies utilised by states or their functionaries for spreading terror in societies. They are no longer limited to being weapons in the hands of dictatorial regimes, but in fact have become an unfortunate by-product of internal conflicts used by opponents to achieve political gains. Over the course of six successive governments in Iraq, from 2005 to 2021, the deterioration of the security situation and the decline in the rule of law have contributed to the exacerbation of enforced disappearances. Using Iraq as a case study, this paper analyses the current international and domestic legal framework that deals with enforced disappearances to understand the responsibility of the Iraqi government for such crimes by governmental and non-governmental forces under the pretext of combating ISIS and protecting national security. The deliberate negligence of the Iraqi government is evident by the absence of tangible measures to prosecute and punish the perpetrators.

Introduction

Adolf Hitler's command, "*Nacht und Nebel*" (Night and Fog) in the winter of 1941,[1] represents the first roots of enforced disappearances as a phenomenon as thousands of people were picked up and sent to concentration camps with no legal recourse.[2] In the early 1960s, enforced disappearances were used by several Latin

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* Mohammad Bitar is a Research Scholar from the VIT-AP School of Law, VIT-AP University, Andhra Pradesh, India.
Dr. Benarji Chakka is a Professor of Law and Dean, VIT-AP School of Law, VIT-AP University, Andhra Pradesh, India.

[1] Triffterer O and others, *Commentary on the Rome Statute of the International Criminal Court Observers' Notes, Article by Article* (Beck, C H 2015) 221.

[2] OHCHR, 'Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles - Article 6' (OHCHR 15 Nov 2018) <https://www.ohchr.org/en/press-releases/2018/11/universal-declaration-human-rights-70-30-articles-30-articles-article-6> accessed 10 Oct 2022.

American military regimes and dictators.[3] Hundreds of thousands of people have been reported missing during past and present armed conflicts.[4] An enforced disappearance is defined as:

> [T]he arrest, detention, abduction, or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.[5]

This tactic is one of the most serious offences under international law because it results in a continued violation of human rights.[6] For the families of the victims, an enforced disappearance is a tragedy like no other. They are denied the right to know the whereabouts and fate of the forcibly disappeared person, precluding them from seeking any kind of remedy or justice. The consequences of enforced disappearances are more severe for children and women, who may suddenly find themselves helpless with no source of income and a lack of protection.[7]

Enforced disappearances are generally perpetrated against civilians and members of opposition groups.[8] Under the international human rights regime, the

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[3] The dictatorships that ruled Brazil, Argentina, Chile, and Uruguay are responsible for the enforced disappearance of an enormous number of people. See Ariel E. Dulitzky, 'The Latin-American Flavour of Enforced Disappearances' (2019) 19 The Chicago Journal of International Law 423.

[4] Tullio Scovazzi and Gabriella Citroni, 'The Struggle against Enforced Disappearance and the 2007 United Nations Convention' (M Nijhoff 2007) 4.

[5] International Convention for the Protection of All Persons from Enforced Disappearance, art 2.

[6] 'The General Assembly of the Declaration on the Protection of all Persons from Enforced Disappearance.' See also Federico Andreu-Guzmán, Katharine West and Jill Heine, *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction* (ICJ, International Commission of Jurists 2015) 24.

[7] United Nations General Assembly, UN Human Rights Council, Enforced or involuntary disappearances, UN Doc. A/HRC/14/L.19, 14 June 2010 <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G10/143/22/PDF/G1014322.pdf?OpenElement> accessed 22 Feb 2022.

[8] Scovazzi T and Citroni G (n 4) 1.

act of enforced disappearance is considered a crime against humanity.[9] Further, the international human rights treaty mechanisms consider enforced disappearance not only a serious violation of the rights and lives of victims but also of their relatives.[10] The sudden disappearance of a family or community member, the non-availability of information about them, and the lack of any governmental or legal support mechanisms result in indelible suffering. The crime of enforced disappearance is rampant in Iraq, a country that continues to have one of the highest numbers of forcibly disappeared persons worldwide.[11]

It is not an exaggeration to say that almost every family in Iraq has been affected by the crime of enforced disappearance.[12] The Ba'ath regime between 1968-2003 was notorious for employing the tactic of enforced disappearance. The Saddam Hussein regime committed widespread human rights violations. The state's security services used killings, torture, and enforced disappearances to suppress opponents. Human Rights Watch estimated around 250,000 to 290,000 enforced disappearances during this period.[13] A great number of Iraqi civilians were abducted due to their real or perceived political, ethnic, and religious affiliations.[14] Even during the US-led invasion of Iraq in 2003, Iraqi citizens were forcibly disappeared and taken by the US-led coalition forces.[15] Moreover, the successive Iraqi governments, which assumed power after the US forces left Iraq, have seemingly failed to address this issue, making enforced disappearances a source of widespread fear, discontent, and discord among Iraqis as they strive to live their everyday lives.

Following its invasion of the country, the US Army engaged in grave human rights violations in Iraq, committing widespread killings and enforced

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[9] ICPPED (n 5) art 5.
[10] ICPPED (n 5) art 18.
[11] ICRC, 'Iraq: Hundreds of Thousands of People Remain Missing after Decades of War, Violence' (ICRC 30 Dec 2020) <https://www.icrc.org/en/document/iraq-hundreds-thousands-people-remain-missing-after-decades-war-violence> accessed 6 Oct 2022.
[12] HRW, 'Iraq: Human Rights Watch Submission to the Working Group on Enforced or Involuntary Disappearances' 2020.
[13] HRW, Justice for Iraq, Policy Paper, December 2002.
[14] HRW, 'Justice for Iraq a Human Rights Watch Policy Paper' (HRW, December 2002) <https://www.hrw.org/legacy/backgrounder/mena/iraq1217bg.htm> accessed 6 Oct 2022.
[15] GICJ, 'Iraq Enforced disappearance A widespread challenge' 5.

disappearances with impunity.[16] During this time, US forces committed widespread killings and enforced disappearances with impunity. Detainees were held in prisons for long periods without any charges against them.[17] With the withdrawal of US forces from Iraq and the ensuing fragile security and political situation, the second and perhaps the most dangerous phase of enforced disappearances began, with an unprecedented increase in their number.[18]

Between 2014-2017, ISIS carried out enforced disappearances of members of the Iraqi army, government officials, and political and tribal leaders who were residing in ISIS-controlled areas.[19] It abducted about 6,500 women from the Yazidi minority[20] to force them into marriage and sexual slavery, and trafficked them to the *Sinjar* region in 2012.[21] The expansion of ISIS in Iraq was offset by the growing power and influence of the Iraqi Shi'ite militias, signalling the rise of sectarian politics and escalating tensions between the Shia and Sunni groups. The Popular Mobilisation Force ("PMF"), a paramilitary organization consisting of around 67 armed factions mostly affiliated with Shi'ite ideology[22] played a crucial role in fermenting sectarian tensions.

[16] Harmeet Sooden, The US-led Coalition's Human Rights Record in Iraq, August 2015.
[17] International Federation for Human Rights (FIDH) and Global Policy Forum, 'Open letter to members of the Security Council concerning detentions in Iraq' 2008 <https://www.globalpolicy.org/images/pdfs/0422detention.pdf.> accessed 10 Oct 2022.
[18] UN Human Rights Council, 'Disappearances and missing persons in Iraq 2003–2013' A/HRC/22/NGO/157, 25 Feb 2013.
[19] UNAMI and OHCHR, Unearthing Atrocities: Mass Graves in Territory Formerly Controlled by ISIL, Baghdad, 6 Nov 2018.
[20] Cetorelli V and others, 'Mortality and Kidnapping Estimates for the Yazidi Population in the Area of Mount Sinjar, Iraq, in August 2014: A Retrospective Household Survey' (2017) 14 PLOS Medicine.
[21] Minority Rights, 'Yezidis' (Minority Rights Group 6 Feb 2021) https://minorityrights.org/minorities/yezidis/ accessed 5 May 2022.
[22] Mansour R Mansour F, 'The Popular Mobilization Forces and Iraq's Future' (*Carnegie Endowment for International Peace, 28 April 2017*) <https://carnegie-mec.org/2017/04/28/popular-mobilization-forces-and-iraq-s-future-pub-68810> accessed 25 Feb 2023.

Although PMF was established as a response to ISIS in Iraq, the group enjoyed an affiliation with the Iraqi army[23] due to its similar structure and ideology – which further contributed to the discord between the two religious factions.[24] The PMF was involved in forcibly disappearing dozens of the Sunni men and children who fled from conflict-ridden areas, only to end up in the hands of the PMF at security checkpoints, and their fate remains unknown.[25] They also carried out enforced disappearances in Fallujah and Ramadi of individuals suspected to be from ISIS.

The enforced disappearances were not limited to just the PMF, with the Iraqi and Kurdish security forces arresting individuals at security checkpoints and later denying their presence in detention centres or refusing to provide any information about their whereabouts.[26] Since 2016, the International Committee of the Red Cross ("ICRC") has estimated the number of victims of enforced disappearances to be between 250,000 and 1 million.[27] Human rights organisations have lamented the absence of serious measures by the Iraqi government to punish the perpetrators of these crimes, including security officials and other non-governmental actors.[28]

In 2018, the defeat of ISIS coincided with the emergence of a political and economic crisis that ignited protests across the country, resulting in a harsh response by the Iraqi government. The Iraqi security forces conducted

[23] Ceasefire Centre for Civilian Rights and Minority Rights Group International, Civilian Activists under Threat in Iraq, 2018. <https://minorityrights.org/wp-content/uploads/2018/12/MRG_CFRep_IraqCiv_EN_Dec18_FINAL2.pdf > accessed 5 May 2022.
[24] EASO, Iraq: Targeting of Individuals, 2019 <https://www.ecoi.net/en/file/local/2003960/Iraq_targeting_of_individuals.pdf> accessed 5 May 2022.
[25] UNAMI and OHCHR, 'Enforced Disappearances from Anbar Governorate 2015–2016: Accountability for Victims and the Right to Truth' Baghdad, 2020.
[26] Amnesty International, 'The Condemned: Women and Children Isolated, Trapped and Exploited in Iraq' London, 2018.
[27] HRW, 'Iraq: Human Rights Watch Submission to the Working Group on Enforced or Involuntary Disappearances' 2020.
[28] OHCHR, 'Statement of the UN committee on enforced disappearances upon the conclusion of its visit to Iraq' Nov 2022.

indiscriminate killings and detentions, resorting to enforced disappearances to intimidate protestors and opponents.[29]

Presented with this bleak situation in Iraq with thousands of forcibly disappeared people, it seems that the first step to addressing the problem of enforced disappearances is to reach a comprehensive understanding of the legal framework related to the issue of missing persons. To apply this understanding to the Iraqi national law in a way that enables the elimination of enforced disappearance and redress for its victims, and to achieve the objective of this research, various primary and secondary sources, which are available in English and Arabic, will be used.

Legal Framework for Prohibiting Enforced Disappearances

Enforced disappearances essentially deprive victims of any legal rights, not just through their confinement but also by concealing any information about them while denying any connection to their disappearance.[30] United Nations General Assembly Resolution No. 133/47 of 1992[31] was the first tool that dealt with enforced disappearances, which reflected the international community's position on the matter.[32] Even though the term "enforced disappearance" was not included in this resolution, it did include a description of the content of the crime and its victims.[33] It formed the basic nucleus of the first binding international convention for enforced disappearance. Within the American countries, The Inter-American Convention on Enforced Disappearance, signed in 1994,[34] was the first internationally binding instrument addressing the practice, which highlighted its systematic nature, the burden of evidence, the extent of government duty to uphold

[29] Amnesty International, 'Iraq: The road to justice – a long way to go' Submission for the UN Universal Periodic Review (UPR), 34th session of the UPR Working Group, November 2019.
[30] ICPPED (n 5) art 2.
[31] UNGA, Res. 47/133, Supp. (No. 49) at 207 U.N. Doc. A/47/49 18 Dec 1992 <http://hrlibrary.umn.edu/resolutions/47/133GA1992.html> accessed 14 July 2022.
[32] Nikolas Kyriakou, 'An Affront to the Conscience of Humanity: Enforced Disappearance in International Human Rights Law' (thesis European University Institute 2012) 84.
[33] Para 2 of art 1 of the Declaration on the Protection of all Persons from Enforced Disappearance states "Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families."
[34] The Convention signed and ratified by The Organization of American States.

and safeguard human rights, and the implications surrounding forced disappearances.[35]

In order to achieve a comprehensive understanding of the legal framework that prohibits enforced disappearances, it is important to analyse international humanitarian law, international human rights law, international criminal law, and Iraqi law to understand the position of international law on this crime and the shortcomings in the existing Iraqi law.

I. International Human Rights Law

Iraq has signed the International Convention for the Protection of All Persons from Enforced Disappearance ("ICPPED").[36] According to the ICPPED, "the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law."[37] ICPPED prohibits enforced disappearances and obligates member states to end this practice, reveal the fate of the forcibly disappeared, and prosecute the perpetrators of these crimes when committed without the "authorisation, support, or acquiescence" of the government.[38] Under ICPPED, signatory states are obligated to formulate national laws prohibiting enforced disappearances.[39] In addition, it talks about taking necessary measures to deter this crime.[40]

ICPPED prohibits secret detention and places an obligation on state parties to regulate detention issues and the deprivation of liberty through legislation.[41] Furthermore, states are under an obligation to establish an updated database that includes information about the detainees.[42] This information must be made available to anyone who has a legitimate interest in obtaining it.[43] The convention

[35] Reed Brody and Felipe Gonzalez, 'Nunca Mas: An Analysis of International Instruments on Disappearances' (1997) 19 Human Rights Quarterly 365.
[36] Iraq joined the ICPPED under Law No. (17) of 2009.
[37] ICPPED (n 5) art 5.
[38] ICPPED (n 5) art 4–15.
[39] ICPPED (n 5) art 3.
[40] ICPPED (n 5) art 4, 6, 8, and 12.
[41] ICPPED (n 5) art 17.
[42] ICPPED (n 5) art 17.3 and 21.
[43] ICPPED (n 5) art 18.1.

also acknowledges the right of every individual who has been directly impacted by a crime to know about the missing person, the circumstances of their detention, and the results of investigations in this regard. [44]

The Convention also compels states to provide compensation to the victims.[45] The Committee against Torture in its commentary on Article 14 of the Convention against Torture ("CAT") also recommended providing compensation to victims of torture for the crime of enforced disappearance.[46] CAT also requires states to determine the legal status of forcibly disappeared persons as well as the processes associated with property and family rights.[47]

The Committee on Enforced Disappearances ("CED") keeps track of ICPPED implementation[48] through approved reporting mechanisms. The parties must submit an initial report, which is reviewed by the committee, which then submits its final observations and oversees and follows up on whether the member states are implementing the committee's recommendations.

In June 2014, Iraq submitted its first report to CED, which requested that it provide more information and clarification on Iraqi compliance with ICPPED. [49] In 2020, after reviewing the additional information, CED called for the prohibition of enforced disappearances through appropriate provisions in Iraq's legislation. Additionally, CED required Iraq's government to guarantee that no one would be held in secret detention.[50] In 2020, CED expressed its concerns about the continued

[44] ICPPED (n 5) art 24.1.
[45] ICPPED (n 5) art 24.4 and 24.5.
[46] CAT, General comment No. 3 'on the implementation of article 14 by States parties' CAT/C/GC/3 (2012) <https://www.ohchr.org/en/documents/general-comments-and-recommendations/catcgc3-general-comment-no-3-2012-implementation> accessed 22 Oct 2022.
[47] ICPPED (n 5) art 24.6.
[48] CED is the body of independent specialists which supervises the implementation of ICPPED by the Signatory states (OHCHR) <https://www.ohchr.org/en/hrbodies/ced/pages/cedindex.aspx> accessed 22 Feb 2022.
[49] OHCHR, 'Consideration of reports submitted by States parties under article 29, paragraph 1, of the Convention' 26 June 2014.
[50] UN HRC 'Iraq: UN Committee Urges End to Impunity for Enforced Disappearances' 2020 <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26550&%3BLangID=E> accessed 22 Feb 2022.

enforced disappearances in the majority of Iraq.[51] Impunity from prosecution and punishment is a permanent feature of enforced disappearances in the country. Under ICPPED, CED enjoys broad powers within the framework of monitoring enforced disappearances. It has the right to ask member states to take appropriate and urgent measures to locate victims.[52] It also has the right to visit member states.[53] CED was allowed to visit Iraq, but Iraq did not agree to Article 31 regarding additional procedures for individual complaints or the procedures between countries included in Article 32.[54]

ICPPED is not the only international instrument dealing with enforced disappearances. Basic human rights relating to enforced disappearances are protected under the International Covenant on Civil and Political Rights ("ICCPR"), by virtue of which member states are under an obligation to impose and respect those rights.[55] CAT also contains similar obligations.[56] Although Iraq has ratified ICPPED, ICCPR, and CAT,[57] Iraqi national law lacks legal provisions criminalising enforced disappearances. Iraq has not enacted any legislation in response to Articles 16, 17, and 18 of ICPPED, which require member states to adopt national legislation to ensure the implementation of its provisions. On the other hand, according to Article 61(4) of the Iraqi Constitution,[58] international conventions do not have legal superiority over Iraqi national legislation. Therefore, ICPPED also does not have any legal superiority over Iraqi law. Additionally, in practice, Iraqi judges are bound only by the provisions of Iraqi national legislation and not by the provisions of international conventions ratified by Iraq, especially those regarding criminal justice[59] until such an international treaty is ratified and

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[51] OHCHR, 'Enforced Disappearances: UN Committee to Hold Special Online Dialogue with Iraq' (3 Sep 2020) <https://www.ohchr.org/en/statements/2020/09/enforced-disappearances-un-committee-hold-special-online-dialogue-iraq> accessed 7 Oct 2022.

[52] ICPPED (n 5) art 30.

[53] ICPPED (n 5) art 33.

[54] OHCHR, (Treatybody.internet) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=82&Lang=EN> accessed 8 Oct 2022.

[55] ICCPR, art 5 and 9.

[56] CAT, art 2.

[57] Iraq ratified ICPPED on 23 Nov 2010, ICCPR on 25 Jan 1971 and CAT on 7 Jul 2011.

[58] Art 61(4) of Constitution of Iraq 15 Oct 2005.

[59] Al-Hijami, 'The authoritativeness of the international treaty before the Iraqi judge' (Supreme Judicial Council, 8 Aug 2021) <https://www.sjc.iq/view.68708/> accessed 25 Feb 2023.

published according to the provisions of the Iraqi Constitution.[60] This makes the ratification of ICPPED by Iraq ineffective and without any legal value.

II. International Humanitarian Law

International Humanitarian Law ("IHL") specifically applies to the situation of armed conflict, whether international or non-international. IHL treaty mechanisms do not make specific reference to enforced disappearances. However, this does not mean that enforced disappearances are not prohibited in situations of armed conflict. The IHL treaties prohibit enforced disappearances; the most prominent are the four Geneva Conventions[61] and the rules of customary international law.[62] The families of any individuals missing or forcibly disappeared during armed conflicts must be informed of their whereabouts.[63] The United Nations Security Council requires revealing the fate of those arbitrarily detained and informing their families about their places of detention.[64] Iraq is a party to the four Geneva Conventions of 1949 and its Additional Protocol I ("AP I").[65] Thus, their provisions bind the Iraqi government.[66]

Furthermore, enforced disappearances constitute a violation of Customary International Law ("CIL"). Rule 99 of CIL prohibits arbitrary deprivation and lays down the "prohibition of torture and cruel or inhuman treatment." Rule 89 of CIL deals with provisions relating to the detention of persons in disputes of an international character, such as registration, information transfer, and visits, which are enshrined in the prohibition of enforced disappearances.[67] In the context of

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[60] Constitution of Iraq, art 61(4) read with art 73(2) and art 80 (6).
[61] Common art 3 of the Geneva Conventions demands the humane treatment of all persons detained by the enemy. They are not discriminated against or subjected to harm and explicitly prohibit murder, mutilation, torture, cruel, inhuman and degrading treatment, hostage-taking, and unfair trial.
[62] Rule of customary international law 98 and Rule 123.
[63] Geneva Convention IV, art 136 and 141; Additional Protocol art 32 and 33.
[64] UNSC, Res 2474 (2019) S/RES/2474. <https://daccess-ods.un.org/tmp/5555756.68811798.html> accessed 22 Oct 2022.
[65] Iraq ratified the Geneva convention on 14 Feb 1956 and AP I on 1 Apr 2010.
[66] Constitution of Iraq, art 61(4) read with art 73(2) and art 80 (6).
[67] Chapter 37, 'Persons Deprived of Their Liberty' Customary IHL - persons deprived of their Liberty <https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v2_cha_chapter37> accessed 22 Feb 2022.

internal armed conflicts, customary IHL requires each of the parties to the conflict to keep a record of everyone who has been detained.[68] To ensure respect for everyone's family life,[69] the member states, including Iraq, must also commit themselves to taking necessary measures to keep the relatives of victims informed.[70] Therefore, it is evident through these rules that IHL prohibits enforced disappearances.

Furthermore, Resolution 2474 of the United Nations Security Council[71] relates to the protection of disappeared persons in warfare by providing adequate guidelines to the Member States on enforced disappearances. It must be noted that this Resolution does not impose any binding commitments on governments.[72] Thus, it cannot compel states to respect their obligations to protect victims of enforced disappearances.

III. International Criminal Law

ICPPED requires Iraq to have a national law to prohibit enforced disappearances in compliance with current provisions of international criminal law. It refers to enforced disappearance as a widespread or systematic practice[73] constituting a crime against humanity that must be punished under relevant international law. Therefore, it is imperative that member states consider enforced disappearance a crime against humanity when it is committed as part of a widespread or systematic attack following the provisions of the Rome Statute.[74] Iraq is not a signatory to the Rome Statute, but it has ratified the ICPPED, which provides for the classification of enforced disappearance as a crime against humanity. Therefore, Iraq is under an obligation to classify it accordingly.

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[68] ICRC, Customary IHL - Rule 123. Recording and Notification of Personal Details of Persons Deprived of their Liberty, 2005 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule123> accessed 22 Feb 2022.
[69] ICRC, Customary IHL - Rule 105. Respect for Family Life.
[70] ICRC, Customary IHL - Rule 117. Accounting for Missing Persons.
[71] UNSC Res 2474 (2019).
[72] Ibid.
[73] ICPPED (n 5) art 5.
[74] Rome Statute, art 7.

Iraq's Domestic Law

Unlike ICPPED, Iraq's domestic law does not have provisions criminalising enforced disappearances.[75] A draft bill titled "The Protection of Persons from Enforced Disappearance" was initiated in the Parliament in 2017 but is yet to be enacted. The bill's extended delay is mainly due to the pressure exerted by influential government agencies and personalities involved in the crimes of enforced disappearances.[76] These politically dominated personalities and groups create obstacles in the path of laws aiming to regulate, prosecute, and punish the crime of enforced disappearance. [77]

Certain provisions of Iraq's law can be invoked in relation to enforced disappearances. The country's Constitution affirms that security and freedom are the rights of every individual.[78] It also prohibits unlawful detention, torture, and other cruel treatment.[79] It forbids arrests in places other than those authorised for that purpose.[80] Moreover, the current Iraqi Penal Code criminalises acts that may lead to enforced disappearances.[81] Therefore, it is forbidden to detain people without any legal basis, and it is also forbidden to detain them in places other than those designated for detention to ensure the oversight of the arresting authority and prevent abuses that occur during this period. Penalties are increased if they are committed by an official in uniform as this entails a violation of the confidence that citizens give to state officials.[82]

The Iraqi Constitution obligates law enforcement officials to present arrestees before a court within 24 hours of the arrest.[83] Under the current legislative

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[75] ICPPED (n 5) art 1.
[76] Muhammad Al-Salami, the head of the Citizenship Association for Human Rights, said in an interview conducted on Al-Ghad channel on 19 Sep 2021 <https://www.youtube.com/watch?v=3JHEh24zD-w> accessed 22 Oct 2022.
[77] Ibid.
[78] Constitution of Iraq, art 15.
[79] Constitution of Iraq, art 19 (12) (a) and art 19 (13).
[80] Constitution of Iraq, art 19 (12) (b).
[81] Iraqi Penal Code, arts 421–429.
[82] Iraqi Penal Code, art 322.
[83] According to art 19 Thirteenth of the Constitution of Iraq, the accused is to be brought before the investigating judge within a period not exceeding 24 hours.

framework, no one can be arrested without charges for a period greater than 24 hours; this is significant to prevent enforced disappearances. Where detention turns into enforced disappearance is when the deprivation of liberty is accompanied by a failure to recognise this deprivation.[84] However, it appears that these rules are often disregarded since individuals are detained for a long time without any investigation, and arrest warrants are issued many days after the actual arrest.[85]

Iraq's Penal Code does not specifically mention enforced disappearance as a crime. Nevertheless, Article 322 states that "any public official who arrests, imprisons, or detains a person in circumstances other than those stipulated by law" shall be punished with imprisonment of up to seven years. The imprisonment increases to ten years if the same individual carries out an illegal arrest again in contravention of Article 322. Article 323 also provides that "any public official or agent who, while being aware of the violation of his duty to the law, punishes a convicted person or orders him to be punished by a penalty greater than that imposed on him by law or by a penalty to which he has not been sentenced, is punishable by detention."[86]

The Iraqi Penal Code provides a penalty of imprisonment for every official employee who performs the task of guarding places designated for the detention of persons without legal basis, or if the employee refuses to release the person for whom an order of release has been issued.[87] The punishment will be increased if the official has any connection with the arrest of the person or deprives him of his liberty without any legal basis.[88] The Iraqi Criminal Procedure Code also stipulates that detention must follow a court ruling or any other procedure as stipulated in law.[89]

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[84] *Yrusta v. Argentina* [2016] no 1/2013.
[85] MENA Rights Group, 'Iraq: Alternative Report' 2020.
[86] Iraq Penal Code No. 111 of 1969, art 322.
[87] Iraq Penal Code (n 86) art 324.
[88] Iraq Penal Code (n 86) art 421.
[89] Iraqi Criminal Procedure Code No. 23 of 1971, art 92.

I. The Iraqi Draft Bill on Combating Enforced Disappearances

The Iraqi draft law to combat enforced disappearances does not meet any international human rights standards because of many serious gaps, which will be discussed in this section. The definition of enforced disappearance in the draft law is limited to "victims and perpetrators", meaning that it only covers people who are directly involved in the crime of enforced disappearance. This definition is inconsistent with Article 24 of ICPPED which provides that the definition of enforced disappearance shall extend to direct victims, perpetrators, and other individuals who suffer harm as a direct result of enforced disappearances.[90] Importantly, the draft law does not designate enforced disappearance as a crime against humanity. This indicates a lack of political will to combat enforced disappearances. The Iraqi High Criminal Court Law No. 10 presently restricts authorities to classifying widespread and deliberate enforced disappearances as crimes against humanity, only to the instances committed between 1968 and 2003 i.e., during the Al Ba'ath period. It explicitly excludes the crimes committed after 2003.[91] The draft bill also does not stipulate enforced disappearances as "part of a widespread or systematic attack on a civilian population."[92]

Article 6(1)(b) of the ICPPED explains the concept of command responsibility, under which the commander is responsible for an enforced disappearance not only when he orders its commission, but also when he knew or should have known that the enforced disappearance was about to be committed and he did not take the necessary measures to prevent this crime. The expansion of the commander's responsibility provides a greater guarantee that this crime will not occur. In contrast, the responsibility of the commander in the Iraqi draft bill seems narrow,[93] which considers that the commander is responsible only when he orders the commission of an enforced disappearance. Narrowing the commander's responsibility in this way allows the continuation of this crime and enables the commander to evade responsibility.

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[90] ICPPED (n 5) art 24.
[91] Michael Newton, 'The Iraqi High Criminal Court: Controversy and Contributions' (2005) 88 International Review of the Red Cross 399.
[92] Iraqi Draft Bill, art 2.
[93] Draft Bill (n 92) art 9.

Furthermore, Article 6(2) of ICPPED states that "no order or instruction from any public authority, civilian, military, or other, may be invoked to justify an offence of enforced disappearance." Here another gap emerges in the current draft bill, which absolves subordinates of responsibility when the action is in response to their commander's order – when they are obligated to obey the order, or they feel obligated to obey it.[94]

Another shortcoming of the draft bill is that it does not adequately lay out the mechanisms for the administration of justice. The draft states that cases of disappearance "will be brought by the public prosecutor before the competent courts."[95] It does not mention the specific court which will have jurisdiction under this law, and further does not expressly exclude recourse to military courts. The draft also does not expressly rule out the application of the statute of limitations. Given the seriousness of the crime and the risk of retaliation, which means that it may take some victims time to file complaints, the application of any statute of limitation can have a harmful effect on victims' rights to a remedy. Additionally, it provides insufficient measures for reparation. The draft, falling short of the requirements laid out in Article 17 of ICPPED, also neglects to mention the information that should be mentioned in the context of establishing a database on forcibly disappeared persons.[96] In another departure from ICPPED, the draft bill also fails to grant any rights to the relatives and lawyers of the forcibly disappeared to obtain information about the place and conditions of detention.

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[94] Iraq Penal Code (n 86) art 40 "There is no crime if the act is committed by a public official If he commits the act in performance of an order from a superior which he is obliged to obey or which he feels he is obliged to obey."

[95] Draft Bill (n 92) art 22.

[96] Art 17(3) of ICPPED obligates state parties to maintain a database of persons deprived of their liberty. The state party should record the identity of the detained person, the place and time of his detention, the authority that ordered his detention, and the health status of the detainee. The states are also committed to registering deaths during the detention, circumstances, and causes of death, and the date of the release of the detainee, and in the event of transferring the detainee to another destination, the states are committed to determining the new destination and the date of its transfer.

II. The Responsibility of the Iraqi Government for the Crimes of Enforced Disappearance.

The ICPPED is the first universally legally binding instrument regarding enforced disappearances.[97] It was adopted due to the urgent need and demands of the families of the disappeared and human rights organisations around the world to end the crimes of enforced disappearance. This convention is binding on all signatories. Responsibility for enforced disappearances committed by non-state armed actors can also be attributed to the state of Iraq under the rules of attribution as established in international law.[98]

The Articles drafted by the International Law Commission in 2001 ("RSIWA") are considered the basic secondary rules[99] which deal with state responsibility in accordance with international law and which have been relied upon by human rights bodies.[100] According to these Articles, the state is responsible for illegal acts under international law,[101] and even those committed by actors who are not affiliated with state agencies when these actors practice their actions based on instructions or orders from a government agency.[102] The government is also responsible for the actions of non-state actors when the state recognises and adopts these behaviours.[103]

With the increase of enforced disappearances for decades in Iraq and the escalation of voices calling for the release and disclosure of the fate of the forcibly

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[97] OHCHR, 'Reporting under the International Convention for the Protection of All Persons from Enforced Disappearance' (2022) 8.
[98] RSIWA, art 8 and 9. Rule 149 Customary IHL. "A State is responsible for violations committed by its organs, including its armed forces."
[99] Primary rules establish legal obligations and prohibitions, while secondary rules govern the process of enforcing those obligations. In this context here, primary rules include ICPPED, Convention against Torture (CAT) art 2, UDHR Art 9, And International Covenant on Civil and Political Rights, art 7.
[100] Ineke Boerefijn, 'Establishing State Responsibility for Breaching Human Rights Treaty Obligations: Avenues under UN Human Rights Treaties' (2009) 56 Netherlands International Law Review 167.
[101] Art 4 and 7 International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001.
[102] ILC Draft Articles, art 5 and 8.
[103] ILC Draft Articles, art 11.

disappeared, the Iraqi government claims that enforced disappearances are an issue of the past and avoids recognising this as an ongoing crime.[104] The Iraqi government ignores the fact that government agencies or groups linked to the state, in addition to the armed Shi'ite militias, have practised and are currently practising enforced disappearances in a systematic, persistent, and widespread manner under the cover of combating terrorism and eliminating ISIS sleeper cells.[105] This is in violation of Security Council Resolution No. 1456 of 2003, which requires the state to respect its human rights obligations when taking any measures aimed at combating terrorism.[106]

Additionally, CED expressed in its report on Iraq its growing concern about human rights violations committed against persons deprived of their liberty under the Federal Anti-Terrorism Act of 2005 and suspected terrorists. These individuals were arrested without a court order and not allowed to contact a lawyer while being questioned by the police or other security forces, and their relatives were not informed of any information about their whereabouts.[107] On the part of the Iraqi government, there is a deliberate omission to take action aimed at putting an end to the violations committed by the security forces, counter-terrorism forces, the PMF, and other armed non-state actors.[108] The Iraqi government is obligated under international human rights law to prosecute those responsible for enforced disappearances. This can be done by conducting comprehensive and prompt investigations into violations of enforced disappearances committed by governmental and non-governmental persons, targeting the right to life and detention without legal basis, and subjecting them to prosecution under the law.[109]

[104] GICJ, Iraq Enforced disappearance A widespread challenge, (2015) 5.
[105] Ibid 5.
[106] UNSC Res 1456 (2003) S/RES/1456. adopted on 20 Jan 2003, in Annex 6 stresses that States must guarantee that whatever step is taken to fight terrorism meet with all their commitments under international law and should adopt such steps in consistent with international law, in specifically, IHRL, IHL and international refugee law. Tullio Scovazzi and Gabriella Citroni, 'The Struggle against Enforced Disappearance and the 2007 United Nations Convention' (M Nijhoff 2007) 60.
[107] United Nations CED (2020) CED/C/IRQ/OAI.
[108] Local Police and SWAT, Prime Minister's Forces, Iraqi Hezbollah, Iraqi Popular Mobilization and Badr militia.
[109] UNCHR, 'Report of the independent expert to update the set of principles to combat impunity' 2005 E/CN.4/2005/102/Add.

Furthermore, the Iraqi government is also obligated under ICPPED to work on locating the whereabouts of the forcibly disappeared, returning them if they are alive, and revealing the fate of the deceased. In addition, there is a need to criminalise enforced disappearances through the formulation of a law that defines enforced disappearance as an independent crime violating basic human rights. Iraq should also consider the need to amend the law on enforced disappearance so that it is consistent with Articles 2, 3, 6, and 7 of ICPPED and other international law instruments. Iraq must also abide by the provisions of Article 5 of the Convention, which defines enforced disappearance "as a crime against humanity."

Conclusion

It seems clear that enforced disappearance is a grave crime that threatens international law and human rights. Countries should take serious and decisive steps to combat it. The enforcement of international law related to enforced disappearances is no longer sufficient, especially since it is not in practice. States should not be satisfied with meeting the minimum requirements of the provisions of ICPPED, given that the provisions may not comply with other international law obligations. This has been realised by the drafters of ICPPED as this Convention has indicated many times that it is permissible to adopt standards more stringent than those found in the convention. For Iraq to fulfil its obligations – as a member state of ICPPED and other instruments of international law – it must conduct urgent investigations into cases of enforced disappearance, identify illegal places in which victims are held by security forces and armed militias, and punish the perpetrators. It must also prosecute the military and security leaders known to be involved in ordering complicity to commit the crimes of enforced disappearances. In addition, it is essential to provide information about the fate of the forcibly disappeared, reveal the circumstances of their deaths, and return their bodies to their relatives. It is also important to follow the basic standards of international law when accusing detained persons of whom there is evidence of having committed crimes. Moreover, there should be emphasis on the release of others who did not commit crimes, as well as providing compensation for persons detained without legal basis. The Iraqi government should ensure the implementation of ICPPED with the potential of contributing to changes in the existing legislation in the country. Thus, it is important to ensure that Iraq fulfils its commitments by considering enforced

disappearances as an independent crime under the Iraqi Penal Code and imposing deterrent penalties against its perpetrators. Besides, there is a need to remove Article 40 of the Iraqi Penal Code, which states that there is no crime if the act is committed by an employee, or a person charged with public service in the implementation of the order of his superior. Iraq must respect Article 6 of ICPPED regarding the command responsibility to become more comprehensive and consistent with the provisions of international law. Finally, in the aftermath of the Corona pandemic, the Iraqi government must not invoke precautionary measures to suspend visits and access to persons detained in Iraqi prisons.

The Contractual Liability of the Air Carrier in Jordanian Legislation and the International Conventions: The Modern Judicial Jurisprudence

Tareq Al-Billeh*

Abstract

The study deals with the contractual liability of the air carrier, particularly in terms of passenger and freight transport, in Jordanian legislation and international conventions. It analyses the relationship between error and the damage caused, and it clarifies the limits to the contractual liability of the air carrier mentioned in the Convention for the Unification of Certain Rules of International Carriage by Air commonly known as Montreal Convention of 1999. This Article stems from the General Assembly of the Jordanian Cassation Court's decision to apply the Montreal Convention of 1999 to the entire air transport industry, despite its limitation to Article 31, which specifically addresses cases of baggage defects or delays. However, in cases of loss and damage, it is not required to submit the objection stipulated in Article 26 of the Warsaw Convention. The study concludes with several outcomes and recommendations, the most important of which is the necessity of amending the Jordanian Civil Aviation Law to be in line with the Montreal Convention by adding new Articles regulating the contractual relationship between the air carrier and the passenger.

Introduction

The contractual liability of an air carrier is one of the most crucial issues in the air transport industry. It ensures that both passengers and air carriers are aware of their rights and obligations to each other.[1] The importance of the study lies in clarifying the state of availability of the air carrier's and its implications. At the same time, the failure to address this issue leads to ambiguity and weakness in the texts of the Montreal Convention of 1999 and the Warsaw Convention and its 1929

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* Tareq Al-Billeh holds a PhD in Public Law from the University of Jordan. He is currently working as an Assistant Professor of constitutional and administrative law at the Faculty of Law at the Applied Science Private University and practices the legal profession.

[1] Hozan Abdullah, 'The Civil Liability of the Air Carrier for the Safety of Passengers, A Comparative Study' [2017] 1(3) TUJL <https://www.iasj.net/iasj/Article/141625> accessed 27 July 2021.

amendments. Thereupon, these Conventions do not clarify the nature and elements of the air carrier's contractual liability, the causal relationship between the error or accident and the damage, and the nature of the damage and compensation for psychological harm. Furthermore, they do not address the limits to the air carrier's contractual liability, the permissible extent of consent to violate these limits, and the practical importance of these limits.[2] The deficiency of these texts will be addressed by consulting the Montreal Convention of 1999 and provisions of the Warsaw Convention of 1929 and its amendments. Additionally, references will be made to the Jordanian Civil Aviation Law, Consumer Protection Instructions ("JCPI"), the Jordanian Civil Law ("JCL"), the Jordanian Trade Law ("JTL"), and the provisions of the Jordanian Cassation Court ("JCC"). These additional sources will be utilised to address certain issues that are not specifically mentioned in the conventions.[3]

This study aims to clarify the controversy surrounding the nature of the air carrier's liability, type of compensable error, application of compensation for psychological damage, delay in transportation, damages caused to hand luggage, and the role of the discretionary authority of the national judge in adjudicating the dispute between the passenger and the air carrier. It also looks at the maximum limits for compensation for death and bodily harm, determining the air carrier's liability in delays in the carriage of passengers and their luggage and damage to their luggage, and tightens the air carrier's liability.

The paper aims to answer several questions, including the liability of air carriers and the role of presumptive error as a component of air carrier liability. It will also discuss compensation for psychological harm, delays in the carriage of passengers and their luggage, and the nature of the air carrier's liability. Moreover, it will analyse whether the term "accident" meant to include any form of incident, or does it have to be tied to regular aviation risks.

The desired objective of the study is to address the shortcomings in some provisions of Jordanian Civil Aviation Law and the JTL to align with what is stated in the Montreal Convention of 1999 by adding new Articles to align with the

[2] The Unification of Certain Rules of International Carriage; Warsaw Convention 1929.

[3] The Jordanian Civil Law (JCL) Act 1976; The Jordanian Trade Law (JTL) Act 1966; Jordanian Civil Aviation Law Act 2007; Jordanian Consumer Protection Instructions (JCPI) Act 2020, s 209.

amendments made to the conventions. However, the Montreal Convention did not modify or define the terms “accident” and “bodily injury,” which has resulted in significant ambiguity in interpretation. Furthermore, no limit of liability appears to be acceptable today, and special emphasis has been paid to consumer protection.

Methodology

A comparative approach will be adopted in this study due to the diversity of legislations. It will clarify the differences between these legislations and determine the strengths and weaknesses of these trends and how they are considered. Furthermore, the study also follows an analytical approach to analyse relevant legislative provisions related to the subject of this study to determine its contents, implications, and objectives.

The Elements of the Contractual Liability of the Air Carrier of Passenger and Freight Transport

The Montreal Convention 1999 states that air carriage is carried out according to a contract between the air carrier and the passenger, making it no different from other transport contracts except by the medium of transport, which is the aircraft. Therefore, the agreement has clearly defined the air carrier's liability for transporting passengers and their baggage as contractual and personal responsibility, considering the evidence related to the presumed error.[4] Article 41 of the Jordanian Civil Aviation Act stipulates:

> [a.] The provisions of the Montreal Convention apply to persons, luggage and goods in commercial international air transport.
> b. The provisions of the Montreal Convention apply to persons, luggage and goods in commercial inland air transport, unless otherwise provided in this Act.
> c. The air carrier is not liable to the shipper for dumping the goods shipped during flight for reasons of safety of the aircraft, provided that the air carrier and its followers have taken all necessary measures to avoid damage.

[4] Yahya Al-Banna, ‘The Impact of International Terrorism on the Liability of the Air Carrier’ (DPhil thesis, Alexandria University, 1993).

d. The air carrier shall not be responsible for removing any passenger from the aircraft who breaches the system or may pose a threat to the safety of the aircraft or its passengers.

e. The air carrier shall verify that the passengers meet the necessary documents required to enter or exit the Kingdom at the intended airport, and it shall bear the consequences in case of any failure to do so.

Moreover, Article 77(1) of the JTL mentions that passenger transport contracts, such as goods transport contracts, occur as soon as consent is obtained.[5] Deciding the existence of this contract is at the discretion of the national judiciary; however, a decision of the JCC stated that "the liability of the air carrier to compensate for the death of passengers is a contractual liability arising from the contract of carriage represented by the travel ticket."[6]

With regards to error, it states that it is a breach of a contractual obligation or a deviation in the conduct of the person bound by this obligation, which the ordinary individual does not come to in most cases.[7] Additionally, the Montreal Convention of 1999 adopts the supposed error concept as evidence that can prove the contrary. For the air carrier to discharge its liability, it must prove that it has performed a duty of care necessary to complete the carriage.[8]

For this purpose, Article 17(1) of the same convention stipulates that the carrier shall be liable for damage arising in the event of a passenger's death or bodily harm, provided that the accident which caused the death or harm occurred only on board the aircraft or during any operation of the operations of embarking or disembarking.[9]

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[5] The Jordanian Civil Law, art 41. The Jordanian Trade Law (JTL), art 77(1).

[6] *Alia Royal Jordanian Airlines Corporation v. Salim Shukri Cass civ* [1986] The Jordanian Cassation Court (JCC) 391, [1986].

[7] Adnan Al-Sarhan and Nouri Khater, *Explanation of Civil Law, Sources of Personal Rights Obligations Comparative Study* (11th edn, House of Culture for Publishing and Distribution, Jordan 2009) 307–301.

[8] Ahmed Ghatasha, *The General Provisions and Air Carriage* (11th edn, Dar Al-Safa Publishing and Distribution, Jordan 2002) 168.

[9] The Unification of Certain Rules of International Carriage, art 17(1).

Therefore, the air carrier must prove that it has performed the terms of the contract of carriage within the limits of the care required from a common carrier; in such a situation, the carrier must take the necessary precautions in selecting and monitoring the crew and the supervising staff. They must also follow up on the periodic inspection of the aircraft and any required updates. If they do not implement these steps, they will be liable towards passengers. In addition, the air carrier is responsible if the plane takes off in bad weather conditions that were previously announced in the weather forecast, and it had to be late to take off.[10]

I. Error in Delaying the Carriage of Passengers and Their Luggage

As mentioned in the travel ticket, the carrier shall carry the passengers and luggage to the specified destination by good transportation and along the agreed path.[11] This is reflected in Article 77(2) of the JTL, which states that the carrier must deliver the passenger safely to their destination. Within the agreed period, if an emergency occurs, the liability arising from the contract shall be denied by the carrier by establishing evidence of force majeure or fault occurred by the victim.[12]

It clarifies that the carrier's obligation to ensure the passenger's safety is an obligation to exert care. The carrier can be absolved from this liability by demonstrating that caution has been taken when implementing the contract. Therefore, there is no liability to the air carrier for the accident when transporting the passenger and their baggage from the air carrier's offices in the city centre to the airport or vice versa. Moreover, this liability does not include the period while the passenger is in the waiting area.[13] Therefore, Article 17(1) of the Montreal Convention of 1999 stipulates that the carrier is responsible for damages arising from a passenger's death or bodily injury, given that the accident resulting in the death or injury occurred exclusively on board the aircraft or during the processes of embarking or disembarking.[14]

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[10] Talib Musa, *The Sky Law* (11th edn, Dar Al Thaqafa Publishing Library, Jordan 1998)144–140.
[11] Akram Yamalki, *The Aviation Law a Comparative Study* (11th edn, Dar Al Thaqafa Publishing Library, Jordan 1998) 121–118.
[12] The Jordanian Trade Law, art 77(2).
[13] Elias Haddad, *Aviation Law* (11th edn, Syria, University Press, Damascus 2005) 83–80.
[14] The Unification of Certain Rules of International Carriage, art 17(1).

This convention does not specify the meaning of “accident.” The most common explanation is that an accident is every sudden incident resulting from the process of air carriage and related to the use of the aircraft. Thus, the air carrier is not liable for the harm caused to a passenger due to another passenger’s assault on them. Furthermore, the incident of assault, even if it occurred during the air carriage process, should not be originally related to the process of using the aircraft. For example, the air carrier is responsible for compensating the damages caused to passengers due to the hijackers changing the path of the aircraft and landing at a destination other than the agreed destination.[15]

As a result, the air carrier is not accountable for the injury caused to a passenger by anything not initially linked to the process of air carriage and the use of the aircraft, even if it occurred during the air transport process. This confirms that the air carrier’s liability is contractually based on the presumed error; the air carrier is liable to pay passengers for losses incurred due to the hijackers altering the flight route and landing at a location other than the agreed-upon destination. In addition to the carrier’s liability for the carriage of passengers, they are also obligated to transport their baggage. Article 17(2) of the Montreal Convention of 1999 states that the carrier is liable for damage to checked baggage, including damage, loss, or harm, but only if such events occurred on board the aircraft or during any stage when the carrier had custody of the checked baggage. However, the carrier will not be held liable to the extent that the damage, loss, or harm was caused by a fundamental defect, quality, or material defect of the baggage. In the case of unchecked baggage, including personal baggage, the carrier is liable if the damage is due to its fault or the fault of its crew or agents.[16]

Additionally, the air carrier is liable for loss, detriment, or damage to checked baggage. This baggage is what the passenger’s hand over to the air carrier, for which they get a receipt, and this liability is based on the supposed evidence of error considered by the Convention. Hand baggage is in the passenger’s custody; thus, the air carrier is not liable for its loss or damage, and it is subject to the provisions of national law.[17]

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[15] Adly Khaled, *Air Carriage Contract* (11th edn, New University House, Egypt 2006) 74–71.
[16] The Unification of Certain Rules of International Carriage, art 17(2).
[17] Tharwat Al-Assiouty, *The Air Carrier Liability* (11th edn, the International Press, Egypt 1960) 288–286.

Accordingly, the JCC ruled that Article 35 of the Montreal Convention of 1999 applies, whereby the right to compensation is forfeited if a lawsuit is not filed within two years from the date of the aircraft's arrival at its destination, the scheduled arrival date, or the suspension of the transfer process. The JCC's jurisprudence has established that this time period constitutes a forfeiture of the right rather than a statute of limitations. This interpretation has been consistently upheld by the court in cases involving cassation rights lawsuits, as the Convention explicitly uses the term "forfeiture of right" rather than "prescription of right" for all forms of international air carriage. Regardless of whether the subject matter was the carriage of passengers, baggage, or cargo, on all claims arising from contracts of carriage against the air carrier, as mentioned earlier, adopting the idea of forfeiture of right results in the unification of rules globally due to the various laws related to the causes of endowment and suspension. Thereupon the competent court dealing with the subrogation lawsuit to verify on its own that the right of the policyholder to the compensation for which the insured company was dissolved has not passed the period stipulated in Article 35 of the Montreal Convention of 1999. This applies even if the air carrier, as the party responsible for the damage, did not raise it as a defence in the case or submit a request before delving into the details, in accordance with Article 109 of the Law of Civil Procedure. At the same time, if it is proven that this period has passed then the policyholder is not entitled to raise a liability lawsuit against the cause of the damage "air carrier"; thus, the subrogation lawsuit loses one of its conditions and is subject to rejection. In the previous cassation decision adopted by the Court of Appeal, the issue of submitting objections or complaints from the consignee to the carrier was discussed in relation to the application of Article 26 of the Warsaw Convention. It was determined that Article 31 of the Montreal Convention of 1999, which encompasses all rules of carriage by air, specifically limits complaints to cases of defective or delayed baggage or merchandise where delivery has taken place. However, it does not specify any objection terms in cases of losses and damages, as provided for in Article 26 of the Warsaw Convention. As a result, it is essential to refrain from addressing the issue of objection in the context of the damage to the entire goods in question in this lawsuit, as the provisions of Article 26 of the Warsaw Convention do not apply to the facts of this case. Furthermore, the Court of Appeal adopted a different approach in applying the Warsaw Convention to the circumstances of this lawsuit, considering the objection in the event of damage to

the goods as stipulated in Article 26 of the Warsaw Convention, contrary to the provisions of the Montreal Convention of 1999, which is the applicable framework for this lawsuit.[18]

Because one of the most important elements of air carriage is the speed and shortened time on the aircraft, the air carrier is obligated to carry out the air carriage process according to the period agreed upon in the travel ticket, and if they violate this obligation, they will be liable for this fault.[19]

In cases where the flight is later than the agreed time between the air carrier and the passenger, it may cause a passenger to miss an important event such as a profitable business deal, assigned duty, a surgery, a conference, or a sports match.[20] Article 19 of the Montreal Convention of 1999 stipulates that "the carrier is liable for damages arising from delays in the air carriage of passengers, baggage, or cargo; however, the carrier will not be liable for damage caused by delay if it proves that he and his crew and agents have taken all reasonable measures necessary to avoid the damage or that it was impossible for him or them to take such measures."[21]

It can be noted that this Article did not specify an objective criterion by which we can determine what is meant by delay.[22] While most court rulings have generally upheld the terms established by the air carrier in the air carriage contract, this is contingent upon non-compliance with the specified departure date and the absence of justifiable reasons for the unexpected delay. The air carrier is obligated to carry out the air carriage within a reasonable time without a specific agreement.[23] If there is an agreement on a specific time for implementing the air carriage process, the air carrier's liability will be to achieve a result in line with this agreement, while

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[18] *Jordan International Insurance Company v. Alia Company - Royal Jordanian Airlines Cass civ* [2021] The Jordanian Cassation Court (JCC) 2028, [2021].
[19] Khaled (n 15) 75–73.
[20] Abdel Fattah Murad, *Explanation of the New Egyptian Trade Law No. 17 Of 1999* (11th edn, Al Mezan Library, Egypt 2003) 707–704.
[21] The Unification of Certain Rules of International Carriage, art 19.
[22] Hafiza El-Sayed, *Aviation Law* (11th edn, Arab House of Legal Encyclopedias, Egypt 1989) 153–149.
[23] Muhammad Al-Areni and Jalal Muhammadin, *Aviation Law (Air Navigation and Air Carriage)* (11th edn, University Press, Egypt 1998) 407–404.

if no specific time is agreed upon, it is the conveyor's commitment to carry out the due diligence.[24]

Subsequently, the JCC rendered its decision in Judgment No. 4586 of 2021, issued on November 29, 2021. The Court ruled that the settled jurisprudence mandates the application of the Montreal Convention of 1999 to all regulations pertaining to air carriage. It emphasised that Article 31 of the Convention specifically addresses objections related to luggage or cargo defects or delays. However, in cases of damage and loss, it is not required to submit the objection stipulated in Article 26 of the Warsaw Convention. Consequently, as a benefit from the provisions of Article 35 of the Convention, the right to compensation shall be forfeited if the lawsuit is not filed within two years from the date of the plane's arrival at its destination or the planned arrival date to its destination, or the date of suspension of the carriage process, and this period would be considered a period of forfeiture and not one of prescription. Furthermore, in its contested judgment, the Court of Appeal adopted the provisions and texts of the Montreal Convention of 1999 regarding the carrier's liability as stipulated in Article 18 of the Convention. It stipulated that Article 35 of the Convention remains applicable, regardless of whether the air carrier, as the responsible party for the damage, has raised it as a defence against the claim. Additionally, even if it is evident that the two-year period specified in Article 35 of the Convention has elapsed from the date of the aircraft's arrival at its destination, the scheduled arrival proposed to the destination, or the date on which the carriage process was suspended, the insured party is not entitled to initiate a lawsuit against the party responsible for the damage.[25]

Consequently, the Montreal Convention of 1999 creates a separate liability regime for baggage, luggage, and cargo. The carrier airline is strictly generally liable for damage sustained resulting from the case of destruction, loss of, or damage to checked baggage. Correspondingly, in the case of unchecked baggage, the baggage liability regime is based on fault. For damage sustained in the event of destruction, loss of, or damage to the cargo, the Montreal Convention of 1999 accepts liability for delays in the carriage of passengers, baggage, luggage, and cargo based on freight due to fault with a reversed burden of proof.

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[24] Khaled (n 15) 75–74.

[25] *Eastern Services Company v. Jordan International Insurance Company Cass civ* [2021] The Jordanian Cassation Court (JCC) 4586, [2021].

II. The Material, Physical, and Psychological Damages to Passengers and Their Luggage

The air carrier's liability does not arise from the mere occurrence of the error, but rather the harm must arise from that error. "Harm" is the infringement of a person's rights or legitimate interests, such as a plane crash leading to the injury or death of one of the passengers.[26] Moreover, since the Montreal Convention of 1999 has adopted the air carrier's contractual liability, compensation is only for foreseeable damage, not in case of unforeseen damage.[27]

When the air carrier fails to fulfil its obligations to transport passengers and their luggage, it results in tangible damages. Consequently, the air carrier becomes liable for compensating these damages. Part of these material damages to passengers are damages to their luggage such as shortage, damage, or loss, provided that such luggage is in the carrier's custody and registered in the contract of carriage.[28]

However, Article 17(2) of the Montreal Convention of 1999 stipulates that unless otherwise stated, the term "baggage" in this convention means both checked baggage and unchecked baggage. The carrier should be liable for damage arising in the event of damage, loss, or defect in checked baggage, provided that the event

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[26] Murad (n 20) 708–702.

[27] Al-Sarhan and Khater (n 7) 315–313.

[28] *International Airlines, United Arab Emirates v. Mohammed Nnaji Cass civ* [2003] The Jordanian Cassation Court (JCC) 3773, [2004]; "The decision stated that, it is benefited from the text of Article 79(2) of the court cassation No. 12 Of 1966, and its amendments, and Article 122(A) of Civil Aviation Law No. 50 of 1985, that the Warsaw Convention of 1929 and its amendments apply to the contract of air carriage which is the subject of lawsuit, it also benefits from Article 18(1) of the Warsaw Convention of 1929, which defines the liability of the carrier for damage that arises in the event of luggage spoilage, loss or damage registered in the contract of carriage, and Article 23, which considers every provision intended to exempt the carrier from liability as null, and Article 26, which relates to the person authorised to receive luggage or merchandise, and what he must do to object to the condition of the baggage/merchandise or damage on the date on which the baggage or merchandise were placed in his custody, and Article 29 which provides for the forfeiture of the right to compensation if the lawsuit is not filed within two years from the date of the aircraft's arrival at its destination, the passenger's right to claim compensation for his lost baggage does not depend on filing an objection or complaint stipulated in Article 26 related to the merchandise or luggage that has been delivered in defective or damaged condition, and his claim remains applicable for two years from the date the aircraft arrives at its destination." *Air Algerie company v. Oman Insurance Company Cass civ* [2006] The Jordanian Cassation Court (JCC) 1816, [2007].

causing the damage, loss, or defect occurred solely onboard the aircraft or during any period during which the checked baggage was in the custody of the carrier. Additionally, if the damage is caused by a quality or fundamental defect of the baggage, the carrier will not be liable. In the case of unchecked baggage, including personal baggage, the carrier is liable if the damage was caused by them. If the carrier acknowledges the loss of the checked baggage, or if the checked baggage has not arrived within twenty-one days from its planned arrival, the passenger is entitled to take advantage of the rights arising from the contract of carriage against the carrier.[29]

Still, Article 17 of the Jordanian Consumer Protection Instructions ("JCPI") Part 209 of 2020 states that the air carrier must inform the passengers of their rights by displaying a sign at the boarding gate, its official website, and sales offices that includes the phrase: "if you are denied boarding or if your flight is cancelled or delayed, ask the boarding desk about your rights." Another informative signboard shall also be displayed in the baggage receiving area, related to baggage rights. Therefore, an air carrier that prevents passengers from boarding an aircraft or cancels or delays a flight for at least two hours must notify passengers by any written means, including electronic means, of their rights. Additionally, the air carrier shall provide alternative means of informing blind and visually impaired passengers of their rights under recognised international standards.[30]

Also, part of the material damages to the passengers are damages resulting from the delay in transporting them and their baggage. Therefore, it is not enough for an error due to be due to delay. Rather, it must result in damage to the passengers and their baggage. However, the Montreal Convention of 1999 does not specify this type of damage. Therefore, such damage is subject to the discretion of the national judge. Consequently, the air carrier informs the passenger in every possible way before the date of the flight or at any time before the passenger receives the boarding pass with the actual air carrier's identity. The airport operator decides on an appropriate contingency plan which facilitates the coordination between airport operations and airport users in possible instances of flight

[29] Montreal Convention of 1999, art 17.
[30] The Jordanian Consumer Protection Instructions (JCPI) (Part 209) Act 2020, s 17.

cancellations and delays which may result in large numbers of passengers being stranded at these airports.[31]

Hence, Article 19 of the Montreal Convention of 1999 states that the carrier shall be liable for damage arising from the delayed carriage of passengers, baggage, or cargo by air. However, the carrier shall not be liable for damage caused by delay if it is proven that all reasonable measures necessary to avoid the damage have been taken or that it was impossible to implement such measures.[32]

This Article is in line with what is stated in Article 77(2) of the JTL, which is that "the carrier is obligated to deliver the passenger safely to the designated destination and within the agreed period, and in case of emergency, the liability arising from the contract shall be excluded from the carrier by proof of evidence of force majeure or the fault of the aggrieved."[33]

As a result, the carrier is liable for any damage caused by a delay in carrying checked luggage on board the aircraft or when the checked baggage was in the carrier's possession. Nonetheless, the carrier is not responsible for harm caused by delay if it and its employees took all reasonable precautions to avoid the damage. Additionally, the air carrier is liable for damages resulting from the passengers' death or bodily harm. Such damages occur onboard the aircraft or during boarding and disembarking operations, and the passenger does not cause these damages. For example, the suicide of a passenger on the plane, and whether the death was caused by the weak health of the passenger, as well as physical damage to the passenger as a result of an assault by another passenger, are excluded from the liability of the carrier. Thus, this is where Article 17(1) of the Montreal Convention of 1999 becomes relevant and protects the rights of passengers.[34]

Since the phrase, any other bodily harm contained in the text includes all kinds of harm that may befall the traveller, whether physical or psychological, the

[31] El-Sayed (n 22) 155–151.
[32] The Unification of Certain Rules of International Carriage, art 19.
[33] The Jordanian Trade Law, art 77(2). The Warsaw Convention Act 1929, art 19.
[34] Ghatasha (n 8) 171–169.

correct interpretation is limited to physical harm without psychological harm.[35] It has been agreed internationally that compensation for psychological harm is not permissible unless it is accompanied by bodily harm.[36] However, some US court rulings have adopted a broad interpretation of psychological harm and have allowed compensation even if it is not accompanied by any bodily harm.

Consequently, an air carrier is liable for damages resulting from passengers' death or bodily harm, provided such damages occur onboard the aircraft. It is also important that the passenger does not cause these damages, as clarified above with the example of a passenger suicide. However, the Montreal Convention of 1999 did not change or clarify the words "accident" and "bodily injury," which has caused considerable interpretative difficulties. Of course, one can always hope that the courts will solve the problem in the future. Some argue that an aggrieved party may file two kinds of lawsuits: one, according to the convention related to bodily harm, and the other, according to national laws, for psychological and moral harms.[37]

For this purpose, a ruling issued by the JCC referred to the texts of Articles 79(2) and 277(2) of the JCC, Articles 70 and 73 of the Civil Aviation Law, and Articles 17 and 20 of the Warsaw Convention. It stated that although the liability of the air carrier for the safety of the passenger in carriage accidents and its risk is assumed, this liability lapses if the harm is caused by force majeure. The carrier is also exempted from liability if they implement necessary precautions to avoid damage or if they cannot implement them. Moreover, since the evidence presented in the lawsuit proved to the trial court that the deceased child was traveling with his father, "the first distinguished" for treatment without the knowledge of the carrier, and this was also proven by technical evidence that the death on the plane resulted from the final cessation of the function of the kidneys, which cannot be expected in carrier conditions. In addition, the flight crew did not hesitate to take all possible measures to help the child on the plane since the symptoms appeared on him during the flight, including the assistance of a pediatrician among the

[35] Carolina Bani Abd al-Rahman, 'Air Carrier's Liability for Delays in Carriage Cargo: A Comparative Study' (Master Thesis, Yarmouk University 2016).
[36] Khaled (n 15) 77–75.
[37] Alaa Al-Din Al-Momani, 'Compensation for Harms Arising from Air Carriage Comparative Study' (Master Thesis, Al Al-Bayt University 2005).

passengers, while providing possible medical assistance and providing the patient with oxygen. Therefore, based on the preceding, the reasons for the exemption from liability are available to the carrier on the basis that the death had nothing to do with the conditions of air carriage, that it was caused by an unexpected force majeure on the part of the carrier, and that the carrier did not fail to take the necessary precautions to ward off or prevent it.[38]

Another ruling of JCC stated the damage to the human body is graded in severity and amount, from minor to serious injuries, to disabilities that disable movement and senses partially and then completely, and the maximum harm and damage to the human body: death.[39] Thereupon, an air carrier's liability lapses if the harm is caused by force majeure on the carrier's part. Moreover, the carrier is also exempted from liability if the necessary precautions to avoid damage are implemented.

III. The Causal Relation Between Error and Harm

If the air carrier committed a fault resulting in harm, this is not sufficient to prove the responsibility of the air carrier; rather, this fault must be the cause of the harm.[40] Therefore, it is noted that the Montreal Convention of 1999 does not refer to the basis of the causal relationship between the carrier's fault and the harm. Instead, it left this matter to the provisions of national laws.

The fault must be the cause of all harm. For example, in an accident during the process of air carriage that slightly injured a passenger who demanded compensation for the injuries and permanent disability suffered by him, there must be a relationship in causation between the fault of the air carrier and the occurrence of the accident. So that if it turns out that the accident was not the result of the carrier's fault but rather due to an external cause such as a storm or because of the

[38] *Farouk Muhammad v. Royal Jordanian - Alia Corporation Royal Jordanian Airlines Cass civ* [1987] The Jordanian Cassation Court (JCC) 484, [1987].
[39] *Alia Royal Jordanian Airlines Corporation v. Salim Shukri Cass civ* [1986] The Jordanian Cassation Court (JCC) 391, [1986].
[40] Al-Sarhan and Khater (n 7) 316–311.

action of the aggrieved, the liability does not fall on the air carrier as a result of these damages to the passenger.[41]

Thereupon, a ruling issued by the JCC stated that it is an established rule for the Court of First Instance's jurisdiction to be subject to the supervision of the cassation court in legal matters, particularly when determining whether an act on which the request for compensation is based constitutes an error or a denial of the given description. However, the extraction of the error that entails liability and its attribution and causal relationship with the damage is within the limits of the discretionary authority of the trial court, without the supervision of the court of cassation over it, if its conclusion is justified and derived from the elements leading to it and the evidence presented in the case.[42]

Accordingly, the mere occurrence of an accident does not give rise to a presumption of carelessness on the carrier's side; the passenger claiming loss or damage must demonstrate the claimed carelessness in line with the established criteria of proof.

The Consequential Legal Effects on the Contractual Liability of the Air Carrier

If the elements of the air carrier's liability are met, and the air carrier is unable to defend against such liability, it will result in their responsibility towards the passenger for the damages incurred. These damages encompass cases of death, bodily injury, and carriage delays. Moreover, regarding the Montreal Convention of 1999, it will be observed that it has set maximum limits on the air carrier's liability to compensate for the damages that arise from the air carriage process; this is to encourage economic activity in the air carriage industry.[43]

[41] Al-Momani (n 37).
[42] *United Insurance Company v. Bassem Ahmed Cass civ* [2003] The Jordanian Cassation Court (JCC) 2503, [2003].
[43] Al-Sarhan and Khater (n 7) 316–312.

I. The Compensation in the Event of the Death or Injury of a Passenger

In the event of contractual liability of the air carrier, compensation awarded shall be for expected damages. However, if the damage results from fraud committed by the air carrier or a gross error, the compensation shall be for all expected and unexpected damages.[44]

Thereupon, the ruling of the JCC stated that if the relationship between the plaintiff and the defendants is contractual, then a breach of any contractual obligation gives rise to contractual liability, the extent of which is determined by Article 363 of the Civil Law by compensation for damage already caused when it takes place. This liability shall not be judged by compensation for lost profits.[45] Additionally, by considering the process of air carriage that may lead to serious harm, such as death or bodily harm, the air carrier is obligated to compensate the passengers for such harm arising during the air carriage process.[46]

Article 21 of the Montreal Convention of 1999 ruled that concerning the damages stipulated in Paragraph 1 of Article 17, whose value does not exceed 100,000 of the special drawing rights unit per passenger, the carrier may not deny or limit its liability. However, for the damages whose value exceeds 100,000 of the special drawing rights unit per passenger, the carrier shall not be liable if it is proven that the damage was not caused by the negligence, error, or omission of the carrier, his crew, or agents, or the damages arose solely due to negligence, error, or omission of others.[47]

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[44] The Jordanian Civil Law (JCL) Act 1976, art 263 states that if the guarantee is not estimated in law or the contract, the court must estimate if it is equal to the actual damage done. Furthermore, s 358(2) of the same law stipulates that, in all cases, the debtor shall remain liable for any fraud or gross error committed by him.

[45] *Saed Abdul Majeed v. Lucien Maral Cass civ* [2009] The Jordanian Cassation Court (JCC) 1180, [2009]; *Basel Burgan Company v. Sadouf Fouad Cass civ* [2008] The Jordanian Cassation Court (JCC) 2645, [2009].

[46] Alaa Hassanein, ‘The Air Traffic Controller’s Liability for Air Traffic Safety: A statistical study on the causes of aircraft accidents in the world and the percentage of air traffic control errors in it,’ [2020] (74) JLERA<https://mjle.journals.ekb.eg/Article_156197.html> accessed 18 Nov 2021.

[47] The Unification of Certain Rules of International Carriage, art 21.

Determining compensation for these damages is of economic importance. This is because the air carrier may incur huge financial losses that they may be unable to pay, leading them to bankruptcy. Also, given that the plane is carrying large numbers of passengers, in the event of a plane crash, the compensation incurred by the air carrier would be enormous. Therefore, the determination of compensation for such damages is in the interests of the air carrier and the passengers as they can know their rights.[48]

Consequently, Article 23 of the Montreal Convention of 1999 states that amounts shown in the form of special drawing rights units in this convention refer to the special drawing rights unit defined by the International Monetary Fund. Such sums shall be converted into national currencies upon litigation by the value of those currencies denominated in special drawing rights units on the day of the judgment. The value of the national currency of the state party, that is, a member of the IMF, is calculated in terms of special drawing rights based on the evaluation method applied by the IMF about its transactions and operations in force on the day of the verdict. Accordingly, the national currency value is calculated in special drawing units for a party state, not a member of the IMF, by the method established by that state.

States that are not members of the IMF and whose laws do not allow the application of the provisions in Paragraph I of this Article have the option to declare, upon ratification, accession, or subsequently, that the carrier's liability specified in Article 21 shall be capped at 1,500,000 monetary units per passenger when legal proceedings take place within their jurisdiction. This amount can be converted into the applicable national currency using rounded figures. The respective state's law converts this amount into the national currency. Therefore, the calculation mentioned in the last sentence of Paragraph I of this Article and the method of transfer mentioned in Paragraph II of this Article shall be made in such a way as to reflect, as far as possible, the national currency of the state party, for the same actual value of the amount mentioned in Articles 21 and 22. This is what

[48] Yassin El-Shazly, 'The Theory of the Inappropriate Court and its Impact on International Jurisdiction in Air Carriage Disputes: A Comparative Study' [2020] (71) JLERA<https://mjle.journals.ekb.eg/Article_156061.html> accessed 19 Nov 2021.

results from the application of the first three sentences of Paragraph I of this Article.[49]

Hence, the State Parties shall inform the Depositary Party of the method of calculation by Paragraph I of this Article or the result of the transfer provided for in Paragraph II of this Article. This is when the instruments of ratification, acceptance, approval, or accession to this Convention are deposited and when any change is made in the method or results of the calculation. Therefore, the presiding judge may order compensation in the form of a salary, provided that the total payment does not exceed the maximum limit for compensation. The Warsaw Convention emphasized this so that the salary does not circumvent the specific liability provisions.[50]

Subsequently, if maximum compensation is determined, this amount does not include the expenses of the liability, lawsuit, attorneys' fees, or any other related expenses. However, the court may rule that those expenses and amounts, based on the provisions of its internal law, may be added to the maximum compensation.[51]

Consequently, Article 22(6) of the Montreal Convention of 1999 states that the limits outlined in Article 21 and in this Article shall not prevent the Court from ruling, in addition to its law, on an amount equal to all or some of the costs of the lawsuit and other litigation expenses incurred by the plaintiff, including interest. However, this judgment's provision shall not apply if the amount of damages awarded, excluding the costs of the lawsuit and other litigation expenses, does not exceed the amount provided by the carrier in writing to the plaintiff within six months from the date of the event that caused the damage or before the lawsuit was filed, if it was filed at a later date than that period.[52]

[49] The Unification of Certain Rules of International Carriage, art 23.
[50] Alaa Mohammed and Zainab Hashim, 'The Commitment to Ensure the Safety of the Passenger in the Contract of Air Transport: A Comparative Study [2019] 14(32) JBS<https://iasj.net/iasj/download/549960e1da8c5b72> accessed 23 Nov 2021.
[51] Hani Dowidar, *'Maritime and Air Carriage'* (11th edn, Al-Halabi Publications for Rights, Lebanon 2008) 414–411.
[52] The Unification of Certain Rules of International Carriage, art 22(6).

Thus, the passenger and the air carrier may agree to exacerbate the air carrier's liability by setting a maximum limit for compensation beyond what is specified in the convention, where this agreement must exist. Accordingly, the insurance concluded by the air carrier in favour of passengers as an amount exceeding the maximum compensation is not considered an agreement to raise the maximum compensation.[53]

Unquestionably, the uniform responsibility of air carriers for passengers and property appears to be evolving along reasonable lines, with state legislation facilitating further development of uniformity. In addition, national law can enhance consistency in air-carrier liability further.

II. The Limitations of the Contractual Liability of an Air Carrier for Delay and Luggage

The international legislator has set maximum limits on the liability of the air carrier to compensate for delays and damage to passenger luggage. This determination considers the interests of the air carrier and the interests of the passengers since these international conventions sought to find a balance between the two parties, where the air carrier may waive this protection and pay amounts higher than the limits stipulated in these conventions.[54]

Article 23(1) of the Montreal Convention of 1999 states that the amounts shown in this convention refer to the special drawing rights unit defined by the IMF. Accordingly, such sums shall be converted into national currencies upon litigation by the value of those currencies denominated in special drawing rights units on the day of the verdict. For a party that is not a member of the IMF, the value of the national currency is computed in special drawing units according to the procedure set by that State. States that are not members of the International Monetary Fund and whose laws prohibit the application of the provisions of

[53] Mohamed Al Shikhi, 'The Extent of the Air Carrier's Commitment to Ensuring the Passenger's Safety and His Liability for it: A Comparative Study Between Algerian Law and the Warsaw Convention of 1929 and the Montreal Convention' [2017] (4) AJMCL<https://www.asjp.cerist.dz/en/Article/83284> accessed 29 Nov 2021.

[54] Mahmoud Abu Shawar, 'The Cases of Air Carrier Exemption from Liability According to the Montreal Convention and The Jordanian Legislations' (Master Thesis, Middle East University 2013).

Paragraph 1 of this Article may declare, upon ratification or accession, or at any time after that, that the carrier's liability in respect of Paragraph 1 of Article 22, and the amount of 15,000 monetary units per passenger about Paragraph 2 of Article 22, and in the amount of 250 monetary units per passenger about Paragraph 3 of Article 22, is 62,500 monetary units. Consequently, the parties shall inform the depositary party of the calculation method by Paragraph I. This is when the instrument of ratification, acceptance, approval, or accession to this convention is deposited, and any change is made in the method or results of the calculation.[55]

Also, Article 19 of the JCPI Part 209 of 2020 stated that the air carrier cannot be exempt from liability in whole or in part under these instructions. Any agreement to exempt the contracting air carrier or operator from liability under these instructions shall be null and void. Furthermore, the contracting air carrier or operator, concerning air carriage offered or sold in the Kingdom, shall inform the passengers by any written or electronic means, of two key aspects: the upper limit of liability of the air carrier applicable to a particular flight in respect of death or injury, if any, and the maximum liability of the air carrier applicable to a particular flight in respect of baggage defect, loss or damage. Additionally, the carrier may require a passenger to disclose the value of baggage that exceeds its maximum liability. Hence, the air carrier's liability extends to damages resulting from flight delay, change of departure time, cancellation, refusal of boarding, or downgrading seat category. The passenger has the right to submit to the air carrier a special statement showing the value of the baggage before the time of travel.[56]

Accordingly, JCC No. 4586 of 2021, issued on 29th November 2021, stated that since it has been proven that the shipment was destroyed due to non-observance of the principles of transporting goods and medicines as stated in the air waybill, there is no need to address the objection raised by the observers in these reasons. Additionally, Article 41(a) of the Civil Aviation Law allows for applying the provisions of the Montreal Convention of 1999 to persons, baggage, and cargo

[55] The Unification of Certain Rules of International Carriage, art 23.
[56] The Jordanian Consumer Protection Instructions (JCPI), s 19.

in air carriage, making it the primary governing framework for air carriage contracts.[57]

To conclude, regarding the aspects described in this article, the Convention marks a substantial advancement in a process that must never be considered complete. No legal code can ever be considered flawless or comprehensive; the most that can be anticipated is a functional model that can be refined occasionally.

Conclusion

Admittedly, the liability of the air carrier is a contractual liability that is determined according to the travel ticket and is based on a presumed error that can be proven reversible. The liability of the air carrier is based on three elements: fault, damage, and the causal relationship between fault and damage. Furthermore, the air carrier is not liable for damage to hand baggage since this baggage is not under their custody, but the custody of the passenger. The air carrier is liable for foreseeable damage and not for unexpected damage unless it results in fraud or serious error.

Therefore, determining the compensation owed by the air carrier would help reduce hesitancy in carrying passengers. This, in turn, would encourage the air carrier to continue operating. It should be noted that the maximum compensation ruling does not cover expenses related to the liability lawsuit, attorney's fees, or any other fees and expenses associated with the legal proceedings. Moreover, the court may determine these expenses and amounts in accordance with the provisions of its internal law. It is also permissible for the

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[57] *Eastern Services Company v. Jordan International Insurance Company Cass civ* [2021] The Jordanian Cassation Court (JCC) 4586, [2021]. Also It was stated in *International Airlines, United Arab Emirates v. Mohammed Nnaji Cass civ* [2003] JCC 3773, [2004] that benefits from Article 18(1) of the Warsaw Convention of 1929 define the liability of the carrier for damage that arises in the event of luggage spoilage, loss or damage registered in the contract of carriage, and Article 23, which considers every provision intended to exempt the carrier from liability as null, and Article 26, which relates to the person authorised to receive luggage or merchandise, and what he must do to object to the condition of the baggage/merchandise or damage on the date on which the baggage or merchandise were placed in his custody, and Article 29 which provides for the forfeiture of the right to compensation if the lawsuit is not filed within two years from the date of the aircraft's arrival at its destination, the passenger's right to claim compensation for his lost baggage does not depend on filing an objection or complaint stipulated in Article 26 related to the merchandise or luggage that has been delivered in defective or damaged condition, and his claim remains applicable for two years from the date the aircraft arrives at its destination.

passenger and the air carrier to mutually agree to limit the liability of the air carrier, allowing the air carrier to waive off this liability as much as possible.

Finally, the key principles of the Montreal Convention of 1999 and Jordan's national legislation controlling air carrier liability will help speed up the settlement of disputes over the carrier's obligation to carry persons, baggage, and cargo by air. However, it is unfortunate that the Montreal Convention of 1999 did not modify or define the terms "accident" and "bodily injury," which has resulted in significant ambiguity in interpretation. The lack of an answer to whether the air carrier is accountable for incidents that are not inherent dangers of air travel implies that difficulties will persist under the new Convention.

A TWAIL Perspective on the Challenges Associated with Upgrading International Arbitration in Developing Countries like Pakistan

Syeda Eimaan Gardezi and Faqiha Amjad*

Introduction

Arbitration is instrumental to domestic and international transactions in the modern world and has dramatically changed how dispute resolution can function. One of the main aims behind improving legislation on arbitration in developing nations, such as Pakistan, and harmonising it with the best international practices, is the need to attract foreign direct investment ("FDI"). This is because foreign companies bringing investment to developing countries rely heavily on the arbitration mechanism to ensure effective dispute resolution. Thus, it is essential to ensure that legislation regarding arbitration is conducive to the successful functioning of local and foreign companies. However, cementing sustainable and efficient arbitration policies comes forth as an issue of complexity for multiple reasons. While keeping both commercial and investor-state arbitration in mind, this article attempts to shed light on the challenges faced by developing nations. This article first highlights the Third World Approaches to International Law ("TWAIL") and arbitration, alongside the inherent biases against developing nations in the international arena. Second, it underlines the inability of developing nations to balance the needs of the investor and the third-party (often the public) due to the government's socio-political restraints and affiliations. Third, this work examines the legal framework regarding arbitration in Pakistan and concludes with the observation that while the country has developed substantial legislation regarding international arbitration, there is still a long way to go until its laws are aligned with international standards.

TWAIL and International Arbitration

Developing countries need FDI based on transnational agreements and contracts to promote economic development. These are often governed by international laws biased towards the Global North or developed countries. However, FDI is crucial

* Syeda Eimaan Gardezi and Faqiha Amjad are final year students who are pursuing their BA-LL.B (Honours) degree at LUMS.

to the economic development of developing nations. These inward investments for the exploitation of developing countries rich in minerals and raw materials take the form of loans, subsidiaries, power projects, mergers and acquisitions, and joint ventures.[1] To resolve disputes arising from such trans-national agreements, developed countries prefer international arbitration over the local legal systems of developing countries. This is because, compared to the local legal systems, international arbitration is assumed to be a more neutral and updated dispute resolution instrument.[2] Consequently, developing countries rely heavily on international arbitration to attract FDI and boost their economy. However, international arbitration is subject to scrutiny by TWAIL scholars. They contend that TWAIL is a reaction to decolonisation and the end of direct British colonial rule over the colonies.[3] It is both proactive and reactive in nature.[4] TWAIL is proactive as it aims for the "internal transformation" of circumstances in developing countries, but it is reactive as well because it views international law as an imperial project.[5]

TWAIL scholars also argue that international arbitration is not neutral rather, it exhibits a "regime bias" towards developed countries. Laws, such as commercial and anti-trust laws, in the First World have evolved over time and are updated to meet the market's novel demands. These laws form the basis of international arbitration and provide developed countries with a way to mould national laws in a manner conducive to the realm of international litigation. This phenomenon is referred to as "regime bias." Regime bias involves the organisation of various regimes of international law that are imperialistic and solipsist in nature.[6] Such that each regime has its own biases, depending on the area of international law it aims to regulate. Each regime has a distinct set of vocabularies and rules depending upon its structural prejudice towards underlying values like

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[1] Antonius Rickson Hippolyte, 'Third World Perspectives on International Economic Governance: A Theoretical Elucidation of the 'Regime Bias' Model in Investor-State Arbitration and its Negative Impact on the Economies of Third World States' (2012) SSRN Electronic Journal 1 <https://ssrn.com/abstract=2080958> accessed 11 May 2022.
[2] Ibid.
[3] Makau Mutua and Antony Anghie, 'What is TWAIL?' (2000) 94 American Society of International Law 31 <http://www.jstor.org/stable/25659346> accessed 2 May 2022.
[4] Ibid.
[5] Ibid.
[6] Alexander Somek, A Bureaucratic Turn?' (2011) 22(2) The European Journal of International Law 345 <https://doi.org/10.1093/ejil/chr028 > accessed 17 Apr 2022.

"international trade, investments, human rights or bringing the wrongdoers to justice."[7] This results in some regimes taking precedence over others, thus creating an international legal hierarchy, which also influences the arbitration proceedings and legal decisions, putting the economically weaker or less influential countries at a disadvantage. Therefore, TWAIL scholarship argues that international arbitration serves as a key to promoting the interests of First World countries. It mirrors "continental legal thought shaped during the imperial period of European expansion,"[8] and legitimises the concentration of power, preservation, and expansion of private property rights in favour of the Global North. So, the ambitions of developed countries are imposed on developing countries in the form of international laws. The hegemony created through the recognised system of arbitration reproduces imperial control.[9] This is because investor-state arbitration reflects a colonial and post-colonial outlook of the developed countries, with the abuse of natural resources of developing countries at its focal point.[10] By analysing the techniques and tools utilised by global powers, TWAIL scholars have observed the parallel between colonial and contemporary conventional international legal practices.

Additionally, TWAIL scholars have recorded that the laws and legal structure created by international relations sustain global inequality.[11] Moreover, laws governing global trade, commerce, and investments are formulated and arbitrated in such a way that a "regime bias" is fostered, promoting the benefit of international capital and giving developed countries a greater advantage.[12] Thus, the international commerce regime marginalises the weaker members of the international trading community through its regime bias.

It is further argued that international law turns a blind eye to the issues that concern developing nations but are not in the interests of the First World. For example, research has unveiled international law's implicit biases in civil and

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[7] Ibid 349.

[8] Mohsen Al Attar and Rosalie Miller, 'Towards an Emancipatory International Law: The Bolivarian Reconstruction' (Third World Quarterly 2010) <http://www.jstor.org/stable/27867929> accessed 11 May 2022.

[9] Somek (n 6).

[10] Hippolyte (n 1).

[11] Ibid.

[12] Ibid.

criminal court proceedings and discrimination in employment and immigration proceedings in the US.[13] Regime affiliation is not only detrimental to the economies of developing nations but also creates hostility in these nations towards the First World. According to TWAIL scholars, international law implicitly disseminates prejudice against developing countries and contradicts its purpose. For instance, while international law aims at fostering values of self-determination and state sovereignty, it gives little heed when the actions of international arbitration, i.e., "regime bias," constantly violate international legal principles. Hence, TWAIL scholars attempt to confront the tensions between "universality and pluralism, rejection and reform, and the use of law to advance elite interests and its use to respond to social problems such as poverty, racism, and corruption."[14]

In addition, regime bias indicates how the rules of international trade and commerce can be produced, applied, and adjudged to damage the economies of underdeveloped countries. It examines the internal procedures utilised to interpret laws applied in arbitration.[15] In this context, Van Harten examines regime bias and argues, "international law is not a neutral and objective set of rules, but an instrument employed in a context of power relations among Western and Third World States."[16] He further builds on the idea by arguing that international arbitration reflects an underlying bias against the previously colonised countries by "otherising" them in the international society. TWAIL scholars, therefore, express their doubts regarding the effectiveness of international law and call for restructuring the internally biased international arbitration through "legal paganism." Legal paganism refers to the idea that the restructuring of the current biased regime and legal order can be done by actively engaging developing countries through the revision of international economic relations.[17] Moreover, international laws, especially relating to commercial transactions, being developed and inspired by the West, have an institutionalised affiliation with developed states.

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[13] Machiko Kanetake, 'Blind Spots in International Law' (2018) 31(2) Leiden Journal of International Law 209 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3111823>.
[14] Van Hatten Gus 'TWAIL and the Dabhol Arbitration' (Comparative Research in Law & Political Economy 2011) <https://core.ac.uk/download/pdf/232618132.pdf> accessed 17 Apr 2022.
[15] James Thuo Gathii, 'Third World Approaches to International Economic Governance' (London: Routledge 2008) <https://doi.org/10.4324/9780203926512> accessed 17 Apr 2022.
[16] Gus (n 14) [137].
[17] James Thuo Gathii, 'International Law and Eurocentricity' (1998) 9 European Journal of International Law 184 < http://www.ejil.org/pdfs/9/1/1476.pdf> accessed 17 Apr 2022.

Through regime bias, this affiliation determines the application and interpretation of rules in global arbitration and where and how they are applied.[18]

Besides the institutionalised regime bias, developing countries, like Pakistan, are further put at a geographical and jurisdictional disadvantage because the major arbitration centres in the world are concentrated in the Global North. The First World countries bringing in foreign investment find it convenient to settle their disputes in well-known dispute resolution centres, such as the International Criminal Court ("ICC"), the London Court of International Arbitration ("LCIA"), the American Arbitration Association ("AAA"), the Singapore International Arbitration Centre ("SIAC"), and the Swiss Chamber's Arbitration Institution ("SCAI").

These arbitration centres are preferred for their fast proceedings and decision-making, whereas commercial arbitration centres in developing countries struggle with interpreting and applying laws. Furthermore, Paul D. Friedland states that six conditions are analysed while selecting an international arbitration institution:[19] first, the relative pros or cons of any differences among the set of institutional rules;[20] second, the relative skills and preferences of the organisations in relation to the appointments of arbitrators;[21] third, the relative reputation of the centre in the enforcement of arbitral awards;[22] fourth, the "relative experience and ability of the institutions' administrators" to value case administration;[23] fifth, the administrative and arbitrator cost;[24] and sixth, the geographical location of the centres.[25] The major dispute resolution centres in the Global North check all the conditions and are preferred by major investors for dispute settlement. This naturally puts the centres in developing countries at a comparative disadvantage.

[18] Hippolyte (n 1).
[19] Paul D. Friedland, *Arbitration Clauses for International Contracts* (Juris Publishing 2007) <https://arbitrationlaw.com/library/choosing-arbitral-institution-chapter-4-arbitration-clauses-international-contracts-2nd > accessed 17 Apr 2022.
[20] Ibid 43.
[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Ibid.

Claiton Fyock conducted a Marxist analysis of the TWAIL approach to shed more light on the issue and highlighted the political economy of international investment law. He argues that "international investment law is couched almost entirely in the rational, market-driven economics of contemporary capitalism."[26] Moreover, scholars argue that the idea of "economic development" employed as the goal of international arbitration is restrictive.[27] For example, the International Centre for Settlement of Investment Disputes ("ICSID"), the leading dispute resolution body for investor-state arbitration, does not have any reliable definition of "investment," which is a determining factor for most arbitration agreements and jurisdictions. To overcome this gap, the regime undertakes controversial tests like the "Salini test," which determines economic development and investment based on the "contribution of assets, risks, duration, and a contribution to the host state economy."[28] Moreover, there are no clear criteria for what "contribution to the host state economy" means. This supports the Marxist approach to international law, which states that foreign investors do not invest in the Third World host state out of its "goodwill" or to aid in economic development.[29] Rather, the goal behind foreign investment is the withdrawal of increased levels of surplus value.[30] Thus, First World states employ the tool of international law to pursue this goal.

The Dilemma of Balancing Interests

Often, developing countries give more importance to economic gains while overlooking the interests of third parties during investor-state arbitration. However, if arbitration is to be sustainable in a country, it must satisfy the interests of all parties.[31] There have been many instances whereby large-scale investments in

[26]Claiton Fyock, 'International Investment Law and Constraining Narratives of 'Development: 'Economic Development' in the Definition of Investment.' (Afronomics Law 2020) <https://www.afronomicslaw.org/2020/02/23/international-investment-law-and-constraining-narratives-of-development-economic-development-in-the-definition-of-investment/ > accessed 11 May 2022.
[27] Alex Grabowski 'The Definition of Investment under the ICSID Convention: A Defense of Salini' (2014) 15(1) Chicago Journal of International Law 287 <https://chicagounbound.uchicago.edu/cjil/vol15/iss1/13 > accessed 11 May 2022.
[28] Ibid.
[29]Fyock (n 26).
[30] Ibid.
[31] Lorenzo Cotula, and Mika Schröder, 'Community Perspectives in Investor-State Arbitration' (International Institute for Environment and Development 2022) <https://pubs.iied.org/sites/default/files/pdfs/migrate/12603IIED.pdf> accessed 17 Apr 2022.

industries such as mining, petroleum, and agriculture have yielded widespread implications on the interests and rights of local communities, such as environmental degradation or the destruction of important cultural sites. Thus, the major question that arises through such instances is whether investor-state arbitration is conducive to the "proper consideration of the rights, interests, and perspectives of others who are affected by, but not party to, the dispute."[32]

It must be recognised that it is the state's responsibility to ensure that the nation's best interests are aligned with investments. This can be done, for example, by setting strict environmental requirements which need to be fulfilled or by enforcing appropriate taxes. The case of *Pac Rim Cayman LLC v. Republic of El Salvador* identifies certain issues that arise when arbitration tribunals have considered community perspectives in the past in other jurisdictions.[33] It stipulates that "community perspectives" in arbitration deals tend to receive less attention when awards are given.[34] This is because procedures for third parties to make submissions to the tribunals are not efficient in ensuring that the local community participates effectively. It also reflects a rift between the legislative approach of the tribunal and the socio-political and economic reality. Thus, such a situation can create conflicts between balancing the demands of the community and satisfying the investors.[35] Therefore, it brings to light the need for more adequate institutional arrangements to manoeuvre and operate today's often "complex and multi-faceted investment disputes."[36]

Another major concern is the contradiction between the priorities of the government and the interests of the local communities. Often, the government's viewpoint may differ from that of the community. State action violating the rights of the people may be the main cause of the dispute, for example, in cases where authorities approve investment without consultation from the communities that reside in that area.[37] Politics can also be complexly woven into how such deals are made. Coupled with this, capacity constraints lead governments to prioritise their economic gains at the expense of third parties. To further understand the nature of

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[32] Ibid 1.
[33] Pac Rim Cayman LCCLLC v. Republic of El Salvador (ICSID Case ARB/09/12).
[34] Cotula (n 31).
[35] Ibid.
[36] Ibid.
[37] Ibid.

issues that affect the harmonious implementation of arbitration that aligns with community values, a reference may be drawn to *William Ralph Clayton v. Government of Canada*.[38] In this case, the government denied approving a project, and an arbitration claim seeking damages was filed by the investor. The tribunal reflected that "domestic legislation did not explicitly provide for the core community values standard, this standard was unclear and open to different interpretations, and the investor had not been given advance notice that this standard would be applied."[39] Given the context in which Pakistan exists, it is evident that it suffers from the same inadequacies. The government is reluctant to restrict investors as it adversely affects foreign investments.

Consequently, the above leads to leniency on labour and environmental laws, increasing exploitation. For example, the Bhopal disaster in India and the Rana Plaza incident in Pakistan occurred because the government had allowed multinational companies to operate with low security and maintenance, leading to incidents of mass destruction where hundreds of people lost their lives.[40] These instances reflect a lack of government attention and contradictory priorities in arbitral proceedings. Thus, as investor-state arbitration increases, countries like Pakistan must balance the rights of those living in the concerned areas.

Current Legal Framework in Pakistan

In the subcontinent, it can be argued that arbitration in different forms has a rich and ancient heritage, stemming from the system of *panchayat*, which flourished even with the advent of British colonial rule.[41] However, in its modern version, arbitration draws its roots in the Indian Arbitration Act of 1899. The current legal framework in Pakistan revolves around two main pieces of legislation: The Arbitration Act 1940 ("Arbitration Act") and the Recognition and Enforcement

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[38] William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada (PCA Case 2009–04).
[39] Cotula (n 31) 26.
[40] Annie Banerji, 'Factbox: Grief and Neglect - 10 Factory Disasters in South Asia' (Reuters 2019) <https://www.reuters.com/article/us-india-fire-workers-factbox-idUSKBN1YE1PT> accessed 12 May 2022.
[41] Shazia Bilal, 'Legal Framework of International Commercial Arbitration in Pakistan' (Master's Thesis University of Oslo) <https://www.duo.uio.no/bitstream/handle/10852/39962/Final-thesis-Bilal--Shazia.pdf?sequence=1&isAllowed> accessed 12 May 2022.

(Arbitration Agreements and Foreign Arbitral Awards) Act 2011 ("Foreign Awards Act").[42] Although it may be argued that the Arbitration Act lacks consistency with other developed jurisdictions, it is still a well-established legislation on commercial matters. It provides for arbitration with and without the intervention of the court. It defines an arbitration agreement as "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."[43] It grants significant freedom to the parties as they can choose the arbitrator(s), procedural rules to be followed, interim awards, and any other flexibilities stipulated by the two domestic or international parties. However, as per Section 30 of the Arbitration Act, if the umpire or arbitrator either misconducts the proceedings or presents an award after the court has issued an order, the same can be set aside.[44] Moreover, it can also be set aside if the time for the issuance of the award has expired because of the pendency of legal proceedings or improper procurement of the award. For example, the award can be challenged where the arbitrators lack jurisdiction or where the irregularity in evidence leads to substantial injustice.

Moreover, being a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("Convention"), it was important for Pakistan to harmonise its laws with international best practices.[45] Thus, the Convention has become part of the Pakistani legal system through the Foreign Awards Act and has been enforceable since July 15, 2011. A party against whom legal proceedings have been initiated in a foreign agreement may apply to the court under the Foreign Awards Act to refer the matter to arbitration. This would be done unless the court finds that the agreement was "null and void, inoperative or incapable of being performed in accordance with the Convention."[46] This was a monumental step towards entrenching the principles of arbitration in the Pakistani legal system. Before this, when legal proceedings were initiated against a party to a foreign arbitration, the court had complete discretion to refuse or allow the arbitration proceedings. The courts were barred from judicial

[42] RIAA, 'A Study of the Arbitration Law Regime in Pakistan' (*RIAA*, 2015) <https://www.riaabarkergillette.com/usa/wp-content/uploads/Insight-Article-A-Study-of-the-Arbitration-Law-in-Pakistan.pdf> accessed 17 Apr 2022.
[43] Section 2(a) of the Arbitration Act, 1940.
[44] RIAA (n 42).
[45] Bilal (n 41).
[46] RIAA (n 42).

intervention and refusing the "recognition and enforcement of arbitration awards" under Sections 6 and 7 of the Foreign Awards Act. However, this was conditional on the award or agreement not contradicting the premises set in Article V of the Convention, which states that an award may be refused "at the request of the party against whom it is invoked." Additionally, in *Abdullah v. CNAN Group SPA*, the High Court of Sindh held that a foreign award could not be nullified through a civil suit for the reasons stipulated in Article V of the Convention as that can only be taken as a defence by an award debtor to any legal proceedings initiated by the award creditor for enforcement and recognition of the foreign awards, such that it is a shield and not a sword.[47]

Moreover, recent legal advancements have set significant pro-arbitration precedents in Pakistan. For example, in *Lakhra Power Generation Company Limited v. Karadeniz Powership Kaya Bey*,[48] while the Supreme Court declared the main contract void, the Sindh High Court successfully enforced the arbitration agreement. The High Court applied the "doctrine of separability" while referring to the landmark judgment of *Harbour Assurance Co. (UK) Ltd. v. Kansa General International Insurance Co. Ltd.*,[49] where the court concluded that "the doctrine of separability can save the arbitration agreement even where the main contract was void ab initio and not merely voidable."[50] Similarly, in *Louis Dreyfus Commodities Suisse S.A. v. Acro Textile Mills Ltd.*,[51] the Court recognised and enforced the impugned award and agreement by the combined interpretation of Sections 6 and 7 of the Foreign Awards Act. Under such interpretation, an award cannot be declared invalid unless it is against Article V of the Convention.[52] Since the agreement met the requirements set in Article V(1)(a) of the Convention, the Court declared it valid and imposed the foreign arbitration award.

Moreover, a promising principle has been propagated in *Louis Dreyfus Commodities Suisse S.A. v. Acro Textile Mills Ltd* by Justice Ajmal Mian, suggesting that the court should take an approach that is "dynamic" in nature, and unless there are compelling reasons, the arbitration clauses should always be

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[47] PLD 2014 Sindh 349.
[48] 2014 CLD 337.
[49] [1993] 3 All ER 89.
[50] Ibid.
[51] PLD 2018 Lahore 597.
[52] Ibid.

respected.[53] He stipulated that arbitration clauses have become far more common with the growth and development of international commerce and trade, which has increased with the modernisation of transport and communication systems. Thus, a speedy and effective mechanism must be made to facilitate them.[54] Therefore, there have been positive developments. However, the laws still need amendments in the codified Arbitration Act, but binding precedents from superior courts are gradually addressing the issues that arise.

Moreover, projects like the China-Pakistan Economic Corridor ("CPEC"), having a well-developed and trusted dispute settlement mechanism, are essential. In practice, foreign arbitration is still lacking in Pakistan. Among several reasons, one of the commonly used grounds is *forum non conveniens,* which refers to the discretionary ability of the courts to dismiss a case when a better, more suited forum is available.[55] Thus, it enables domestic courts to deny the continuation of legal proceedings regarding foreign arbitration agreements and, consequently, has been used to delay proceedings.[56] Such issues act as hindrances to the successful completion of projects like CPEC. In fact, one of the biggest concerns regarding the project is how conflicts will be resolved in the future.[57] There can be various methods for resolving disputes. Firstly, they may use international commercial courts.[58] For example, China introduced three international commercial courts for its Belt and Road Initiative, which had several advantages. They proved far more flexible and cost-efficient than normal court proceedings. Moreover, the contracting parties had more autonomy, allowing them to save the business relationship as it was a less adversarial approach compared to litigation. Third, the two countries may establish Joint Arbitration Centres, similar to how, in 2015, the "China Africa Joint Arbitration Centres" were established to settle investment and trade disputes between South Africa and China.[59] The basic logic behind

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[53] Ibid.
[54] RIAA (n 42).
[55] Cornell, 'Forum Non Conveniens' (Cornell Law School's (Legal Information Institute) <www.law.cornell.edu/wex/forum_non_conveniens> accessed 12 May 2022.
[56] Ibid.
[57] Bushra Aziz and Mehwish Batool, 'China-Pakistan Economic Corridor: The Quest for A Dispute Resolution Mechanism' (2019) LUMS Chinese Centre for Legal Studies 1 <https://ccls.lums.edu.pk/sites/default/files/2023-01/01_-_china-pakistan_economic_corridor_-_the_quest_for_a_dispute_resolution_mechanism.pdf> accessed 8 May 2022.
[58] Ibid.
[59] Ibid.

developing these centres was to avoid the involvement of domestic courts and national and international arbitration institutions. Thus, a joint institution was established to ensure neutrality and efficiency. Fourth, another option could be the creation of mediation centres for dispute resolution.[60] Although this can prove to be a speedy and cheap option, such centres' decisions are not legally binding and might not be enforced. So, Pakistan must analyse and work towards developing a feasible mechanism for dispute resolution; otherwise, it will be susceptible to suffering a great loss during such processes, as highlighted by the recent case of *Reko Diq,* where the ICSID gave it a fine of nearly $6 billion.[61]

Conclusion

Conclusively, local and international arbitration is complex, particularly in developing countries like Pakistan. While inherent biases exist in the international arena whereby the Global North is at a significant advantage, improvements can be made by strengthening local laws and balancing the interests of all parties. Governments should not forget the role arbitration plays in facilitating foreign direct investment to boost the economy significantly. Thus, if developing nations like Pakistan are to establish themselves, they must keep in line with international best practices and create an atmosphere conducive to arbitration despite existing in a highly polarised world. For example, they should implement clear, modern arbitration laws establishing a strong foundation for arbitration proceedings.

Additionally, it is important to establish reputable arbitration institutions, as they enhance the credibility and efficiency of the arbitration process. These institutions often possess well-defined rules, procedures, and experienced arbitrators, ensuring a fair and effective resolution of disputes. Developing nations like Pakistan should also prioritize aligning their judicial systems with arbitration by enforcing arbitration agreements and respecting arbitral awards. Limiting judicial intervention in arbitration can safeguard the integrity and autonomy of the arbitral process.

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[60] Ibid.

[61] Wajid Ali Syed, 'Pakistan Fined Rs950 Bn in Reko Diq Case' *The News* (Washington, 14 July 2019) <https://www.thenews.com.pk/print/497999-pakistan-fined-rs950-bn-in-reko-diq-case> accessed 12 May 2022.

Protection of the Indian Coastal Ecosystem through CRZ Notifications: An Analysis

Dr. M. Sakthivel and Nagma Khan*

Abstract

The Indian subcontinent is characterised by its lengthy peninsular coastline, home to a large and rich diversity of flora and fauna. However, increasing urbanisation, industrialisation, tourism, recreation, and other developmental activities have taken a toll on one of the world's most delicate ecosystems by severely disturbing the ecological equilibrium. While these coastal regions are of great importance to the economy, they usually receive little attention from the ecological point of view. Until 1991, the activities carried out in the coastal areas were unregulated. Hasty clearances, rampant norm violations, and the unchecked and uncontrolled establishment of thermal and nuclear power plants, ports, ship-breaking yards, shrimp farms, etc., have unsurprisingly destroyed the fragile coastal ecosystem. This has led to the salinisation of groundwater as well. Massive deforestation for industrialisation and urbanisation around these areas has made them further susceptible to flooding and other environmental calamities, including climate change. Most developmental activities in the coastal areas, including the No Development Zone ("NDZ"), are unscientific and unsustainable. Though the Coastal Regulation Zone ("CRZ") Notifications have been aimed at addressing the coastal ecosystem's concerns and balancing conflicting interests, they have not yielded the desired results. In light of this background, this paper aims to evaluate the efficacy of these notifications by comparing the various CRZ areas in these notifications. Considering the proactiveness shown by the adjudicating forums and the civil society in safeguarding the coastal ecosystem, the authors would provide comprehensive and realistic suggestions for better conservation of CRZ.

* Dr. M. Sakthivel currently serves as an Assistant Professor, University School of Law and Legal Studies, Guru Gobind Singh Indraprastha University, New Delhi, India.
Nagma Khan currently serves as an Additional Chief Judicial Magistrate, Firozabad, Uttar Pradesh, India.

Introduction to the Coastal Area Ecosystem & its Significance

A 'coast' is an area that integrates land with sea. It is characterised by open space and high economic productivity.[1] Generally, the 'coastal region' is marked by abundant resources. Similarly, the Indian Coastal Zone features a rich and unique ecosystem consisting of "coral reefs, sand dunes, mangroves, seagrasses, and estuaries."[2] Richness in biodiversity marked by a myriad of flora and fauna in the coastal ecosystems, a wide variety of minerals, and other resources present in these waters portray the immense significance of coastal stretches to humankind.[3] While maintaining the climate cycle, the coastal ecosystem supports the fisheries and facilitates the establishment of some specific industries.[4] Marine products are exported for various industrial and pharmaceutical uses, which signifies the economic importance of these coastal ecosystems.[5] Coasts have also enhanced global trade with marine waters, providing major international trade routes, thus highlighting that the economy derives a great deal of its Gross Domestic Product from the riches of these waters. However, this ecologically rich and economically profitable region faces specific inherent threats. The Indian coasts include significant low-lying coastal areas that are sensitive to frequent cyclones and other

[1] Frank Ahlhorn, *Integrated Coastal Zone Management: Status, Challenges and Prospects* (Springer Vieweg Wiesbaden 2018) 3.

[2] Govt. of India, Ministry of Environment and Forests, 'Report of the Expert Committee on Coastal Regulation Zone Notification 1991' (9 Feb 2005) New Delhi <http://iomenvis.in/pdf_documents/MSS_Report.pdf > accessed 12 Sep 2021; and also see for detailed discussion on the significance of mangroves and need for protecting the same, M. Sakthivel, 'Protection of Mangroves: A Study with Special Reference to India' (2010) 5 *Madras Law Journal* 52; Coral reefs can be defined as large underwater structures composed of the skeletons of colonial marine invertebrates called coral. Sand dunes can be defined as mounds of sands formed by wind along the beach or desert. Mangroves may mean trees or shrubs with long and thick roots that grow in coastal intertidal zones. Sea grasses are plants that grow in the sea and are similar to grass. Estuaries are areas where a freshwater river meets the ocean and resultantly the water becomes brackish.

[3] Timothy Beatley, David J. Brower and Anna K. Schwab, *An Introduction to Coastal Zone Management* (2nd edn, Island Press 2002) 2.

[4] Ahlhorn (n 1) 9.

[5] Bert W Hoeksema, 'Biodiversity and the Natural Resource Management of Coral Reefs in Southeast Asia' in Leontine E. Visser (ed), *Challenging Coasts: Transdisciplinary Excursions into Integrated Coastal Zone Development* (Amsterdam University Press 2004), 51.

natural disasters. They are vulnerable to rising sea levels.[6] In addition to being an area of enormous productivity, coasts are natural buffers against tall winds and waves resulting from natural calamities.[7]

When left to itself, the coastal ecosystem can recover and maintain its equilibrium amidst natural pressures, but the external anthropogenic pressure negatively affects the very dynamics of the coastal area.[8] The physical alteration of coastal areas by tourism, industrialisation, rapid urbanisation, lack of planning, and excessive pollution tilts the coastal equilibrium.[9] Climate change, algal blooms caused by eutrophication, and other human factors degrade coastal ecosystems.[10] The ever-increasing pulls from tourism and urbanisation dilute the uniqueness of coastal landscapes. The scenic beauty of coastal waters has suffered a setback by the activities often quoted as being *pro bono publico*. They also threaten the natural habitats of species thriving in the marine ecosystems, damaging the coastal equilibrium. These natural and anthropogenic pressures, coupled together, threaten the very existence of the coastal ecosystem and make it susceptible to disasters; thereby, the livelihood of the coastal population has been substantially influenced.[11]

The Need for the Protection of Coastal Areas

Given the changing circumstances, there is an ever-increasing need to focus on preserving coastal areas. One cannot shun the use of new and rare resources derived from coastal areas in *Toto*, but the ecological cost and irrevocable changes that hasty and impulsive actions entail in terms of prolonged damage to the rare coastal ecosystem cannot be ignored either. Hence, the sustainable utilisation of resources

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[6] Swarna Latha S and Bala Krishna Prasad M, 'Current Status of Coastal Zone Management Practices in India' in Ramanathan A.L., Bhattacharya P., Dittmar T., Prasad M.B.K., Neupane B.R. (eds), *Management and Sustainable Development of Coastal Zone Environments* (Springer, Dordrecht 2010) 48.

[7] Beatley (n 3) 1–4.

[8] Ibid.

[9] Food and Agriculture Organization, 'Legislative Study 93 on Integrated Coastal Management Law: Establishing and Strengthening National Legal Frameworks for Integrated Coastal Management' (2006).

[10] Latha S (n 6) 42.

[11] Beatley (n 3) 7.

should be the guiding principle for meeting present and future needs.[12] As interpreted by the Supreme Court of India ("SCI"), the right to life includes the right to live in a clean and healthy environment, and the same can be extended to include the "right to clean and healthy coastal areas,"[13] Thus, it can be argued that protecting and maintaining coastal areas is a constitutional mandate.

Initially, at the international level, during the Earth Summit 1992, deliberations opened upon integrated coastal area management and protection of coastal areas under Agenda 21, Chapter 17.[14] In the Indian context, besides the existing constitutional mandate, the earliest step in protecting coastal areas was initiated in 1981, by which states were directed not to carry out developmental activities within the 500-metre range from the High Tide Line ("HTL").[15] This effort could be termed the first stern directive issued to conserve coastal waters and is the genesis of the 1991 notification ("1991 Notification").[16] Abrupt clearances, unbridled establishment of thermal power plants, widespread ports, and ship-

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[12] *Karnataka Industrial Areas Development Board v. Sri C. Kenchappa* 2006 (6) SCC 371.

[13] In many cases related to 'right to life' under the Indian Constitution, the SCI has ruled that 'life' is not a mere animal existence. It is something beyond that. For the detailed discussion, see *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi* AIR 1981 SC 746; *Maneka Gandhi v. Union of India* AIR 1978 SC 597.

[14] Ahlhorn (n 1) 35; United Nations, 'Technical Report of Agenda 21 - United Nations Conference on Environment and Development,' Rio de Janeiro (3–14 June 1992).

[15] Govt. of India, Ministry of Environment and Forests, Centre for Environment Education, 'Report of the Public Consultation with Fisherfolks and Community to Strengthen Coastal Regulation Zone (CRZ) Notification, 1991' (March 2010) New Delhi; Mrs. Indira Gandhi, then Prime Minister, wrote a letter to Chief Ministers of coastal states in November 1981 and extracted portion reads as: "The degradation and misutilisation of beaches in the coastal States is worrying as the beaches have aesthetic and environmental value as well as other values. They have to be kept clear of all activities at least up to 500 metres from the water at the maximum high tide. If the area is vulnerable to erosion, suitable trees and plants have to be planted on the beaches without marring their beauty. Beaches must be kept free from all kinds of artificial development. Pollution from industrial and town wastes must also be avoided totally."; *Indian Council for Enviro Legal Action v. Union of India* (1996) 5 SCC 281; Claude Alvares, C, 'Towards Ruin: The Coast Is Finally Clear' *Outlook* (5 Feb 2022) <https://www.outlookindia.com/magazine/story/towards-ruin-the-coast-is-finally-clear/270032> accessed 31 Dec 2021.

[16] Manju Menon, Meenakshi Kapoor, Preeti Venkatram, Kanchi Kohli and Satnam Kaur, 'CZMAs and Coastal Environments: Two Decades of Regulating Land Use Change on India's Coastline' (2015) *Centre for Policy Research-Namati Environmental Justice Program* <https://namati.org/resources/czmas-and-coastal-environments/> accessed 31 Dec 2021.

breaking activities were the norm in India before the introduction of the CRZ Notification in 1991.[17]

Several violations in apparent disregard of regulations corrupted the marine environment, affecting fisheries and deteriorating the quality of coastal waters.[18] This was a corollary of weak implementation of the rules due to the lethargic attitude of authorities and ignorance of the notification by state governments.[19] Unsustainable development practices and bypassing of norms for narrow interests were the conventions until the SCI intervened through public interest litigation ("PIL").[20] After that, owing to external pressures from the aviation and tourism sectors, the Government of India overrode the first notification and introduced an amended CRZ Notification in 2011. This facilitated the construction of greenfield airports and the flourishing of tourism activities in the CRZ areas.[21] In 2019, an altogether new notification was brought forth to facilitate more developmental activities in coastal areas. It is, therefore, pertinent to evaluate the efficacy of these notifications by comparing the various CRZ areas in these notifications.

Comparison of Protection of Coastal Areas Notifications

India is part of the limited group of countries that have afforded some degree of protection to the coastal ecosystem by introducing the CRZ Notifications.[22] As stated, the CRZ Notification in 1991, notified by the Central Government, is an inceptive step towards protecting coastal areas in the country.[23] Many committees

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[17] S. Gopikrishna Warrier, 'The Coasts Need Science-Based Policy Action' *Mongabay* (11 May 2018) <https://india.mongabay.com/2018/05/commentary-the-coasts-need-science-based-policy-action/> accessed 31 Dec 2021.

[18] Govt. of India (n 15).

[19] Equations, *Coastal Regulation in India, Why do we Need a New Notification?* (Equations, Bangalore 2008) 4.

[20] See detailed discussion in subsequent paragraphs of the paper, *Indian Council for Environment-Legal Action v. Union of India* (1996) 5 SCC 281; *S Jagannath v. Union of India* AIR 1997 SC 811; *Piedade Filomena Gonsalves v. State of Goa* AIR 2004 SC 3112; *Vaamika Island (Green Lagoon Resort) v. Union of India* (2013) 8 SCC 760.

[21] Equations (n 19) 29.

[22] Latha S (n 6) 50; Mascarenhas, A. 'Coastal Sand Dune Ecosystems of Goa: Significance, Uses and Anthropogenic Impacts' (1998) *Current Science* 43.

[23] Section 3 of the Environment Protection Act 1986. It confers the power on the Central Government to issue the same.

were constituted between 1992 and 2005 to change the 1991 Notification.[24] Various amendments to the original 1991 Notification have been carried out chiefly to cater to the needs of tourism and other specific sectors based on those committees' recommendations.[25] As many as 25 amendments were carried out in the 1991 Notification.[26] After that, a new notification was brought in, specifically in 2011, for coastal zone regulation. Furthermore, in 2019, the earlier one was replaced by a new notification in the domain. Let us examine the same in detail based on the CRZ categories.

I. Objectives of CRZ Notifications

While examining the paramount objective(s) of the CRZ notifications, it is evident that the 1991 Notification did accord a certain level of protection to the coastal

[24] At first, B. B. Vohra Committee was constituted on 01.01.1992 to study the 1991 Notification and its implications *vis-a-vis* coastal tourism. Based on the Vohra Committee recommendations, an amendment was carried out vide SO 595(E), Ministry of Environment, Forest, and Climate Change of India ("MoEFCC") dated 18 August 1994. Secondly, Prof. N. Balakrishnan Nair Committee was constituted on 30 December 1996. Based on the Nair Committee's suggestions an amendment was carried out on 9 July 1997 vide SO 494(E). Thereafter, Fr. Saldanha Committee (I) was constituted on 5 December 1996. Based on Saldanha Committee's recommendations, the notification got amended by permitting mining of sand in CRZ. Subsequently, Dr. Arcot Committee was constituted which submitted its report in 1996. However, no action was taken on this report. Later Fr. Saldanha Committee (II) was constituted on 26 June 1997 to examine specific issues pertaining to CRZ and it submitted its report in September 1998. However, no action was taken on this report either. Soon after, D. M. Sukthankar Committee(s) I & II were asked to examine the issues with respect to Mumbai and Navi Mumbai as well as to prepare a National Coastal Zone Policy of India. However, no action was taken on both these reports. Finally, Dr. M. S. Swaminathan Committee was constituted in 2004 for a comprehensive review of the 1991 Notification. Swaminathan Committee recommended a departure from regulation to management emphasising the integrated management zone model. Based on these recommendations, a draft notification was circulated. However, the same was abandoned. See Govt. of India, Ministry of Environment and Forests, Department of Environment, Forests and Wildlife, Report of the Committee chaired by Prof. M. S. Swaminathan to review the Coastal Regulation Zone Notification 1991 (February 2005); Also see Equation (n 19) 59–62.

[25] Manju Menon, Sudarshan Rodriguez, and Aarthi Sridhar, 'Coastal Zone Management Notification '07 – Better or bitter fare?' (2007) 47(38) *Economic and Political Weekly* 3838–3840 <https://www.jstor.org/stable/40276415> accessed 31 Dec 2021.

[26] V Sundararaju, 'Why We Need a Coastal Zone Protection Act' *Down To Earth* (18 Jan 2019) <www.downtoearth.org.in/blog/environment/why-we-need-a-coastal-zone-protection-act-62876> accessed 31 Dec 2021; Ashoo Gupta, 'Coastal Regulation Zone Notification 2011: An Evaluation' *Business Standard* (20 Jan 2013) <https://www.business-standard.com/article/economy-policy/coastal-regulation-zone-notification-2011-an-evaluation-111032600092_1.html> accessed 31 Dec 2021.

ecosystem. The original 1991 Notification declared "coastal stretches of seas, bays, estuaries, creeks, rivers, and backwaters which are influenced by tidal action (in the landward side) up to 500 metres from the High Tide Line (HTL) and the land between the Low Tide Line (LTL) and the HTL as Coastal Regulation Zones."[27] Further, it aimed to place restrictions on establishing and expanding industries, operations, or processes in CRZs.

However, CRZ Notification, 2011 ("2011 Notification") overruled the 1991 Notification. The objective of the 2011 Notification was to invoke management practices that were sustainable and backed by scientific principles while considering the potential hazards, along with conserving pristine resources.[28] It is worth pointing out that the 2011 Notification was based on inputs from the M. S. Swaminathan committee.[29] The committee recommended integrated management against regulation and instilling coastal management zones in place of coastal regulation zones.[30] Further, the 2011 Notification envisaged creating a Coastal Zone Management Authority ("CZMA") to achieve the objectives. However, the Committee drew flak, even though it aimed to deploy scientific principles into the regulations, as it failed to obtain and consider the views of the coastal communities.[31]

The third and latest notification on the subject, the CRZ Notification, 2019 ("2019 Notification"), has been introduced due to the Shailesh Nayak Committee, 2014.[32] The Committee's recommendations on conserving coastal stretches were

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[27] Govt. of India, Ministry of Environment and Forests, Department of Environment, Forests and Wildlife, Coastal Regulation Zone Notification, SO 114 (E) (19 Feb 1991) <https://envisjnu.tripod.com/envlaw/legislation/crz/crz1.html> accessed 31 Dec 2021.

[28] Govt. of India, Ministry of Environment and Forests, Department of Environment, Forests and Wildlife, Coastal Regulation Zone Notification, SO 19 (E) (06 Jan 2011) <http://faolex.fao.org/docs/pdf/ind143981.pdf> accessed 31 Dec 2021.

[29] The Committee was constituted primarily to review the elementary 1991 Notification, its successive amendments, and to identify and fill the lacuna therein, so as to bring the norms and rules relating to the coastal ecosystem in tune with scientific principles.

[30] Latha S (n 6) 52.

[31] Latha S (n 6) 53.

[32] The Committee was constituted in 2014 to examine the concerns raised by various states, Union Territories and other stakeholders regarding the earlier notification precisely relating to sustainable development in coastal areas including ecotourism, coastal ecosystem management and conservation. Govt. of India, Ministry of Environment, Forest and Climate Change, Coastal

considered, and changes have been introduced accordingly in the 2019 Notification.[33] The objective of the latest notification is to conserve the coastal ecosystem by emphasising "sustainable development based on scientific principles" along with securing the livelihood of the local population.

II. Classification of CRZ and Limits of Permissible and Prohibited Activities

A common characteristic of all three notifications is that they classify the CRZ areas based on the vulnerability of the areas bounded by coastal waters into the following four categories: CRZ - I, CRZ - II, CRZ - III, and CRZ - IV. However, these areas have been further classified in the evolution of the coastal legal framework. Let us examine the classification of the coastal areas under these three notifications in depth.

A. CRZ - I

Under the earliest 1991 Notification, ecologically sensitive areas including marine parks, coral reefs, mangroves, hubs of biological resources, and areas between Low Tide Line ("LTL") and High Tide Line ("HTL") found a place under CRZ - I. Further, the notification prohibited new constructions within the 500 metres of HTL and between HTL and LTL.[34] Besides certain exceptions, there was a near-complete ban considering the susceptibility of these ecologically important areas.

In the 2011 Notification, ecologically sensitive areas and geomorphological features maintaining the coastal integrity were clubbed under CRZ - I. These included mangroves, sand dunes, mudflats, salt marshes, turtle nesting grounds, seagrass beds, heritage sites, and the area between LTL and HTL, among others. There could not be any new construction except such activities relating to government works, including the atomic energy projects, pipelines, and greenfield airport in Mumbai, among other specified activities. Furthermore, in the non-ecologically sensitive areas falling between LTL and HTL, exploration of natural

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Regulation Zone Notification, GSR 37 (E) (18 Jan 2019) <https://faolex.fao.org/docs/pdf/ind213892.pdf> accessed 31 Dec 2021.

[33] Ibid.

[34] Govt. of India (n 27).

gas and its extraction, salt harvesting, desalination plants, trans harbour sea links, and other things were permitted, with safety measures being taken. Unlike the previous two notifications, the most recent 2019 Notification has sub-categorised CRZ - I into CRZ - I-A and CRZ - I-B; the former consists of environmentally fragile areas such as mangroves, coral reefs, national parks, sand dunes, turtle nesting grounds, horseshoe crabs' habitats, heritage sites, etc.; the latter comprises intertidal areas between LTL and HTL.

As a general rule, no developmental activities are permitted in CRZ - I-A. In comparison to the 1991 Notification, certain exceptions like ecotourism activities are allowed, provided an ecotourism plan is in an approved Coastal Zone Management Plan ("CZMP"). Similarly, activities relating to public utilities, like laying pipelines and transmission lines, are allowed in mangrove buffers. For defence, strategic purposes, and public amenities, laying highways and roads on stilts is allowed through land reclamation in these areas. Further, the Notification mandates an Environment Impact Assessment to be carried out to undertake the developmental activities. Additionally, it advocates for initiating afforestation measures if the developmental activities fall within the mangrove areas. In the intertidal areas of CRZ - I-B under the 2019 Notification, activities such as land reclamation for defence and other purposes requiring foreshore facilities are allowed. Further, it permits power generation through renewable energy resources and the development of cargo facilities in the selected ports, alongside salt harvesting and desalination plants, among other activities.

When comparing the 2019 Notification with previous ones, it is evident that the activities permitted within the CRZ - I areas are more detrimental to the fragile ecosystem, which would undermine the very intent of the CRZ notification. In particular, activities like land reclamation, which can potentially hamper the equilibrium of the coastal areas, have been given the go-ahead for sea links and other activities.[35] Furthermore, the activities allowed in the name of defence, public interest, or public purpose projects and the abovementioned ecotourism activities cause severe and irreparable damage to the CRZ areas. Based on the above discussion, it is worth summarising here that the 2019 Notification is more diluting

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[35] Han Lindeboom, 'The Coastal Zone: An Ecosystem under Pressure' in John G. Field, Gotthilf Hempel and Colin P. Summerhayes, *Oceans 2020 Science, Trends, and the Challenge of Sustainability* (Island Press 2002) pt. 1, 49.

in nature. Hence, it could also be pointed out that the permitted activities are against the sustainable utilisation approach.

B. CRZ - II

Under the 1991 Notification, developed areas proximate to the coastal stretches formed part of this category. This category included substantially built-up places within the urban areas. In CRZ - II, some restrictions were placed for constructing new buildings and laying down roads, and compliance with local bodies' regulations was necessitated for these activities; the design of the buildings also had to be consistent with the landscape.[36] Like the 1991 Notification, the 2011 Notification also covered the developed areas with infrastructure and sanitation facilities proximate to the shoreline. It also imposed some restrictions while undertaking the construction and infrastructure developmental activities in this area, subject to some specific conditions.[37]

Under the latest 2019 Notification, this category contains the developed urban areas near the shoreline. Unlike the previous notifications, the 2019 Notification mandates developed areas of land having more than 50% of constructed areas that are provided with basic civic amenities for inclusion within this category.[38] Developmental activities given the go-ahead in CRZ - I-B are also allowed in CRZ - II in the 2019 Notification. Similarly, structural units could be created subject to municipal regulations. Further, any developmental activity for tourism has also been regulated in the 2019 Notification. As per this Notification, in case of any change in the Floor Space Index ("FSI"), the urban local body shall approach the MoEFCC through the State Coastal Zone Management Authority ("SCZMA"). Then, the SCZMA would bring the same to the notice of the National Coastal Zone Management Authority ("NCZMA"). It can very well be seen that the FSI can be increased under the 2019 Notification to expand tourism activities in these areas.

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[36] Govt. of India (n 27).
[37] Govt. of India (n 28).
[38] Govt. of India (n 32).

C. CRZ - III

Under the 1991 Notification, relatively undisturbed areas belonging to neither of the two categories, CRZ - I and CRZ - II, were classified and clubbed under this category. In this zone, an area up to 200 metres was described as an NDZ, within which structural units were not allowed. These areas could be utilised only for agriculture, gardens, parks, salt manufacture, etc., between 200 and 500 metres of the HTL. However, the establishment of resorts and motels was permitted upon approval by the MoEFCC. The construction of dwelling units by the native residents as part of their customary land use practices was also subject to certain conditions.[39] Nevertheless, in the actual 2011 Notification, those undisturbed areas belonging to neither CRZ - I nor CRZ - II, in both rural and urban, as well as developed and underdeveloped areas were brought under this category. This category contained an NDZ which extended up to 200 metres from the HTL. However, a range of activities were permissible in NDZ, including mining rare minerals, weather radars, construction of schools, community toilets, etc., on a case-to-case basis, and greenfield airport development at Navi Mumbai. Furthermore, areas falling between 200 and 500 metres were allowed to be used for storage of non-hazardous cargo and renewable energy generation, among other activities. Furthermore, NDZs were made inapplicable for the excluded port areas through notification.

As per the 2019 Notification, relatively undisturbed areas not falling under CRZ - II form a part of CRZ - III. It further introduces a sub-categorisation of CRZ - III-A and CRZ - III-B; the former refers to a zone with a human density exceeding 2,161 per sq. km., and the remaining areas fall under the latter.[40] According to the 2019 Notification, densely populated areas (CRZ - III-A) have been granted more developmental opportunities by reducing the NDZ from the earlier 200 metres to 50 metres from the HTL. Hence, the NDZ has been drastically cut. This change translates to more construction activities near the HTL. This increases the vulnerability of the coastal population to natural events.[41]

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[39] Govt. of India (n 27).

[40] Ibid.

[41] Kukreti Ishan, 'Coastal Regulation Zone Notification: What Development Are We Clearing Our Coasts For' *Down To Earth* (04 Feb 2019)

This category also permits similar activities that could be carried out in CRZ - I-B. In NDZ, activities like agriculture, construction of schools, bridges, public toilets, units for domestic sewage treatment, temporary tourism facilities where national highways or state highways pass through the NDZ, and mining of atomic minerals, among others, are permitted subject to regulations.[42] Streamlining the activities outside the NDZ includes establishing beaches, hotels, tourism, airports, construction of dwelling units, limestone, atomic minerals mining, and drawing groundwater by local communities.

D. CRZ - IV

The 1991 Notification defined the "coastal stretches in Andaman & Nicobar, Lakshadweep, and small islands" apart from those designated under the above three zones as CRZ - IV.[43] As per the initial notification, in these areas, construction could not be raised within 200 metres of the HTL, and restrictions were placed on the design, construction, height, and area of the buildings that could come up between 200 and 500 metres from the HTL.[44] Prohibitions were placed on the use of corals and sand. Further, in some islands, categorising coastal stretches into CRZ - I, II, and III could be done with prior approval from the MoEFCC. For Lakshadweep and other small islands, similar restrictions were placed on the design, height, etc., of the buildings that could come up in CRZ, and the distance from the HTL for construction depended on the size of the island.

As per the 2011 Notification, CRZ - IV areas included water areas from the LTL to 12 nautical miles on the seaward side and the water areas of the tidal-influenced water body from the mouth of the water body, at sea, up to the influence of tide measured as five parts per thousand during the driest season of the year. In CRZ - IV areas, certain activities like shipping, oil pollution, gas exploration, and mining were regulated. However, no restriction was placed on traditional fishing. Furthermore, certain coastal areas were identified as requiring special

<https://www.downtoearth.org.in/coverage/governance/coastal-regulation-zone-notification-what-development-are-we-clearing-our-coasts-for-63061> accessed 31 Dec 2021.

[42] Govt. of India (n 32).

[43] Govt. of India (n 27).

[44] Ibid.

consideration in the 2011 Notification. These included CRZ areas of Mumbai, Kerala, Goa, and other vulnerable ecosystem regions, like Sundarbans, identified under the EPA in 1986.

Under the 2019 Notification, CRZ - IV consists of the water area and has been sub-categorised. CRZ - IV-A includes "the water area and the sea bed area between the Low Tide Line up to twelve nautical miles on the seaward side," whereas CRZ - IV-B refers to "the water area and the bed area between the LTL at the bank of the tidally influenced water body to the LTL on the opposite side of the bank and extending from the mouth of the water body at sea up to the influence of the tide…"[45] Regulation of activities like traditional fishing, land reclamation, atomic energy projects, weather radar, construction of monuments and memorials, etc., can be found under the 2019 Notification, and the public hearing can be dispensed with under certain conditions. Under the 2019 Notification, greater autonomy is granted to the state authorities. The 2019 Notification has streamlined the process of obtaining CRZ clearances. The MoEFCC has the exclusive jurisdiction to deal with clearances for the projects falling under the CRZ - I and CRZ - IV areas, and State governments and the State CZMA give clearances for the remaining two categories.

From the above discussion, a trend of systematic toning down of the efficiency of CRZ norms through the amendment process can be very well observed. This is evident in the exempted developmental and recreational activities under these notifications. Compared with the 1991 Notification, in the 2019 Notification, the number of exemptions is much higher. Similarly, in 2011, the number of exemptions was higher. This gradual onslaught on the vulnerable coastal stretches has further complexed the fragile area. There is no evidence to corroborate that these developmental and other recreational activities allowed in a phased-out manner are either scientific or sustainable. Many stakeholders, including civil society, are alleging that these developmental activities are merely to reap the economic benefits.

Furthermore, the authority to alter the essence of these notifications is in the hands of the executive through a simple notification. The delegated power given

[45] Govt. of India (n 28).

to the executives to amend these notifications rather than subjecting them to the rigorous legislative amendment process may easily pave the way for the further dilution of these notifications to accommodate commercial short-term interest-oriented projects. However, the judiciary has aptly intervened and safeguarded the coastal areas in many such circumstances. In this regard, it is worthwhile to highlight the contribution of the Indian adjudicating forums in the conservation of the coastal environment with the help of a few landmark decisions.

The Judiciary on the Protection of Coastal Areas

Environmental jurisprudence has been on a roller coaster in the run-up to the debate on environment versus development. It has evolved over the past three decades, undergoing many upswings and downturns. Environmental law has received its present form after facing many historic episodes. The judiciary has shaped Public Interest Environmental Litigation by taking recourse to many revolutionary steps. These include relaxing the *locus standi* and incorporating international laws and principles relating to the environment in the municipal legal system.[46] In its pilgrimage on the environment protection route, the SCI has often expressed sharp criticism towards the government's inaction on implementing notifications and regulations concerning the protection of coastal areas.[47] Indian Courts have been at the forefront of environmental protection and have served as a harbinger of environmental justice. However, sometimes they have been guided by the policy of self-restraint, and thereby larger projects were green signalled in the name of public importance while keeping environmental concerns at the backseat.[48] Courts later pushed forward the cause of environmental justice and reprimanded the central and state governments in dilly-dallying with implementing the notifications and playing with the ecology of sensitive areas.

[46] Jona Razzaque, 'Linking Human Rights, Development, and Environment: Experiences from Litigation in South Asia' (2007) 18 *Fordham Environmental Law Review* 587.
[47] For the detailed discussion, see *Indian Council for Enviro-Legal Action* and *S Jagannath* (n 20).
[48] Sakthivel M, 'Larger Projects v. Environment Protection: An Analysis of Judicial Trends in India' (2020) 15 *Ambedkar University Law Journal* 179–198.

Taking inspiration from various international environmental documents, the Indian Judiciary has circumferenced the environmental jurisprudence in India.[49] The judiciary has incorporated these vital international documents in the environmental sphere into municipal laws.[50] One of the earlier cases is the *Konkan Railway* case, wherein the Bombay High Court dealt with constructing a railway line passing over rivers, creeks, etc., sans clearance.[51] The High Court observed that development is bound to affect the ecology, and the extent of damage in the present case was negligible in contrast to the advantages offered by the impugned project. The Court invoked the rule of 'later will prevail over the earlier' and held that since Section 11 of the Railways Act, 1989 was passed subsequent to the Environment Protection Act, 1986 ("EPA"), the construction/maintenance of a railway line in the ecologically fragile ecosystem which comprises of the coastal area too would not attract the provisions of the EPA.[52]

The *Indian Council for Enviro-Legal Action* case constitutes a significant breakthrough in the discourse on the protection of coastal areas.[53] The instant case arose out of a PIL filed to enforce the 1991 Notification alleging a violation of the 1991 Notification due to the mushrooming of industries illegally, damaging the ecology of the coastal areas. The MoEFCC had taken no further steps beyond the issuance of the notification. Further, it was alleged that the 1994 amendments to the 1991 Notification, which were incorporated after the Vohra Committee report, if implemented, would be against the principles of scientific development. In response, the full bench of the SCI issued clear directions to the government to implement the 1991 Notification. While deviating from its previous practice of judicial restraint, the Supreme Court held that it is very well within its domain to pass necessary directions and orders to protect fundamental rights relating to a clean environment. Nevertheless, the day-to-day enforcement falls in the

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[49] World Commission on Environment and Development, 'Our Common Future' (1987) <http://www.un-documents.net/our-common-future.pdf> accessed 31 Dec 2021; United Nations, 'Transforming Our World: the 2030 Agenda for Sustainable Development' (2015) <https://sustainabledevelopment.un.org/post2015/transformingourworld> accessed 31 Dec 2021; United Nations (n 14).

[50] There are many instances in which the Indian judiciary has ruled that they are part of the law of the land. For illustration, see *Vellore Citizens Welfare Forum v. Union of India* 1996 (5) SCC 647.

[51] *Goa Foundation v. The Konkan Railway Corporation* AIR 1992 BOM 471.

[52] Ibid.

[53] *Indian Council for Enviro-Legal Action* (n 20).

executive's domain, and thus the amendments were upheld.[54] It was further held that allegations concerning infringement of the main notification would be taken up before the respective High Courts, and the erring states would be directed to submit CZMP within one year.

Soon after, in the *S Jagannath* case, a petition was filed by the Gram Swaraj Movement to enforce the 1991 Notification and stop the rigorous prawn farming in the ecologically sensitive areas near the coast.[55] The Court ruled that any shrimp or aquaculture industry in the ecologically fragile CRZ areas should pass an environmental test since the precautionary principle and the polluter pays principle had gained acceptance under Indian laws. It was further held that a specially established authority would conduct the test by applying the twin principles and the intergenerational equity principle, and calculate the compensation for the affected people.[56] The onset of the 21st century witnessed some landmark cases that have shaped jurisprudence in this area. Furthermore, the discourse has gained acceleration in present times due to the vast repercussions being felt worldwide due to climate change. There is an inundation of environment-related pleas before Indian courts on account of greater awareness.

Foremost among them is the *Goa Foundation* case, wherein the judgment of the Bombay High Court allowing a holiday resort that was alleged to be falling within the CRZ area was questioned before the SCI. The High Court had cited that a balance had to be struck between preserving the ecology and permitting hotels for the State's economic development. It dismissed the writ, declaring that the permission granted was not illegal. It was alleged before the Supreme Court that the clearances had been obtained in contravention of the provisions of the EPA. It was argued that the area where the hotel was to come up should have been classified as CRZ - I and that allowing hotels to develop in such areas would result in irreversible damage to the pristine sand dunes present. After going through the approved State plans and relevant notification, the Supreme Court ruled that the area for the hotel's construction fell within CRZ - III, so the sanctions were termed to be rightfully obtained.[57]

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[54] Ibid.

[55] *S Jagannath* (n 20).

[56] Ibid.

[57] *Goa Foundation, Goa v. Diksha Holdings Pvt. Ltd.* AIR 2001 SC 184.

In yet another case, the Supreme Court reiterated the much-celebrated *Vellore Citizens* case findings and ruled that proper care and attention should be given to coastal areas.[58] This particular case is related to the Dahanu Taluka of Maharashtra, the last surviving green zone between Bombay and Surat, declared an ecologically fragile coastal area under the 1991 Notification. There was a deviation from the original developmental plan approved by the Central Government, resulting in the mushrooming of industrial activity, and the same was challenged. While deciding the case, the Court mandated establishing the authority under Section 3(3) of the EPA and implementing the 1991 Notification.[59]

In the *Piedade* case, the Supreme Court vehemently criticised the illegal construction activities in the prohibited areas in violation of the CRZ notification. The respondent alleged that the structural unit in question was falling well within the ambit of an NDZ. Further, it was alleged that the new construction was raised over the old without permission from the CRZ authorities. Speaking sternly, the Court ruled that the constructions raised contravened the CRZ regulations, and such obvious violations could not be condoned.[60]

Similarly, in the *Vaamika Island* case, specific constructions violated the 1991 and 2011 notifications in an island named Vettilla Thuruthu in the Vembanad Lake, a critically vulnerable coastal area in the State of Kerala.[61] It was observed that the Vembanad lake and the adjacent areas (wetland) were brought within the purview of the Ramsar Convention in 2002.[62] The Court also opined that India, being a party to the Convention, is obligated to protect this vulnerable wetland that is socio-economically important and use it wisely.[63]

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[58] *Vellore Citizen* (n 50); *Bittu Sehgal v. Union of India* (2001) 9 SCC 181.

[59] Ibid.

[60] *Piedade* (n 20).

[61] *Vaamika Island* (n 20).

[62] The Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 1971. In general wetland sites that are of international significance are designated as Ramsar sites as per the 1971 Convention. For further details about the Vembanad Lake, please see: <https://rsis.ramsar.org/ris/1214>accessed 21 Jan 2022.

[63] *Vaamika Island* (n 20).

DLF Universal case is an interesting judgment. In the present case, DLF, without obtaining prior clearance due to delayed permission by the relevant authorities, proceeded to construct a housing project based on a deemed clearance under Clause 8(3) of the Environmental Impact Assessment (EIA) Notification, 2006. The Court severely criticised the lethargic approach of the authorities and observed that if such an approach were permitted, it would cause grave uncertainty. Thus, by taking cognizance of the same, the Court imposed a fine of Rs. 1 crore, and warned and mandated the authorities to comply with the CRZ notifications. The Court also directed that prior clearances and necessary clarifications should be issued well within the time limits prescribed. [64]

Concerning constructions carried out in an NDZ without obtaining permission from the relevant authorities, the SCI in the *Maradu Municipality* case recently took a complex view and ordered the demolition of such illegal structure(s) constructed in the CRZ area.[65] While disposing of the case, the Court reiterated that the notification forms a part of the law of the land and thus should be strictly complied with.[66] As per the CRZ notification, construction of structural units in the designated coastal areas could only be permitted upon the prior approval of the Appellate Authority constituted by the Government of India. In the present dispute, construction activities on the shores of the backwaters were challenged. The construction area was a part of the tidally-influenced waterbody, and no construction could be carried out in that area as per the coastal notification. It was alleged that permissions were granted in clear violation of the legal framework governing coastal areas and that these construction activities were taking place in highly susceptible areas of CRZ - III. Hence, citing the illegalities in granting permissions, the court revoked the approval given by the local body and mandated the concurrence of the respective SCZMA as a precondition.[67] While ordering the

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[64] *The Secretary, Kerala State Coastal Management Authority v. DLF Universal Ltd.* 2018 (2) SCC 203.

[65] *The Kerala State Coastal Zone Management Authority v. Maradu Municipality* (2019) 7 SCC 248.

[66] Ibid; the dispute was related to construction activities on the shores of the backwaters in Ernakulam, a biological diversity hotspot and one of the most extensive wetlands in the State of Kerala.

[67] Ibid; a three-member committee was constituted by the SCI to report upon the legality of the construction and under what category the area fell. The committee submitted that the Maradu area fell under CRZ - III, an NDZ.

removal of the structures, the Court emphasised the landmark *Indian Council for Enviro-Legal Action* case, under which crucial directions were issued by the SCI for the formation of appellate authorities, and other measures for coastal protection were also spelled out.[68]

In the *Conservation Action Trust* case, environmental clearance by the MoEFCC for the up-gradation of the existing shipyard for recycling was under challenge before the National Green Tribunal (NGT).[69] In this case, NGT ruled that sustainable development should be carried out using the principle of proportionality. The NGT took a cue from Paragraph no. 35 of *T. N. Godavarman* case, wherein the Court had ruled that the benefit to a large section of the people resulting from a commercial venture has to be given primacy over difficulty resulting to a small number of people.[70] Employing the principle of proportionality, the tribunal stated that shunning ship-breaking activities altogether would do no good; instead, the activity needed strict and proper regulation and monitoring.

A significant judgment on mangrove protection was passed in the *Kachchh Camel Breeders* case,[71] whereunder the violation of the 2011 Notification by rampant mangrove clearance in the habitat of Kharai Camel living in the mangrove regions in Kachchh was alleged. The NGT emphasised the importance of mangroves as a productive ecosystem performing diverse functions, including carbon storage, water filtration, and the prevention of coastal erosion. While observing that the construction of bunds across creeks for creating salt pans had led to the death of mangroves, the tribunal directed the removal of obstruction in creeks and assessment of the quantum of the damage by the relevant authorities.[72]

Thus, from the above discussion, it is crystal clear that because of necessary judicial directions, the 1991 Notification was actually implemented. Every attempt to further dilute the existing CRZ protection standards has been addressed by the judiciary, and thereby, at least a minimal degree of protection has been ensured for

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[68] *Indian Council for Enviro-Legal Action* (n 20).

[69] *Conservative Action Trust v. Union of India* Appeal No. 49 of 2018.

[70] *T. N. Godavarman Thirumalpad v. Union of India* 2002 (10) SCC 606.

[71] *Kachchh Camel Breeders Association v. Union of India* Original Application No. 111/2018 and I.A. No. 20/2019.

[72] Ibid.

these vulnerable coastal stretches. At times, the judiciary has also cleared larger projects in these CRZ areas, considering the public interest involved. It is a fact that the judiciary can merely intervene and monitor the effective implementation of the CRZ notifications if warranted. However, there are inherent limitations to bridging the inadequacy of the CRZ notifications as they fall within the domains of the legislature and executive. At this juncture, it is equally essential to critically examine the adequacy of these CRZ notifications in addressing the concerns of the coastal area in detail.

Analysis of the CRZ Notifications

More than a quarter-century has passed since the introduction of the first set of rules for protecting the Indian coastal ecosystem. India's long coastline of 7,500 km marks the significance of coastal areas against ever-increasing anthropogenic and development activities.[73] India has the distinction of being among the few countries to take steps towards protecting coastal areas by formulating a notification as early as 1991, by which several activities have been restricted in different coastal zones. However, this first notification was subjected to around 25 amendments within its lifespan of 20 years, and the scope of activities, especially in NDZs, was also expanded.[74] This resulted in the proliferation of environmentally unsound policies and practices.

A committee of experts headed by Prof. Swaminathan was formed after that to review the 1991 Notification and suggest integrated coastal zone management on scientific lines.[75] The report preached for a change from regulation to management of the coastal zones, but it was not robust enough and fell short on many grounds. However, it also pointed out the flaws in implementing the earliest notification and recommended addressing the issues and concerns of the coastal communities. In addition, it served as a harbinger for the coming of an altogether new notification in 2011.

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[73] Govt. of India (n 2).

[74] Govt. of India, Ministry of Environment and Forests, 'Final Frontier-Agenda to Protect the Ecosystem and Habitat of India's Coast for Conservation and Livelihood Security: Report of the Expert Committee on the draft Coastal Management Zone (CMZ) Notification' *Indian Environmental Portal* (16 July 2019) <https://moef.gov.in/wp-content/uploads/2018/04/cmz_report_2.pdf> accessed 31 Dec 2021.

[75] Govt. of India (n 2).

The Shailesh Nayak Committee report was revealed to the public through a right-to-information application 18 months after its submission. The report argued for the decentralisation of regulatory powers by empowering the state and local bodies over the coastal stretches.[76] The mandate of the committee was to scrutinise the discrepancy and complexities in the 2011 notification along with other pertinent issues of coastal states concerning this new notification.[77] The recommendations have been put forth to boost a range of developmental and recreational activities, including tourism and port construction.[78] Considering the complexities of the 2011 Notification relating to jurisdiction and definitions, it advocated for a new notification. Thus, the 2019 Notification has been brought in.

Even the 2019 Notification has been aimed at advancing tourism and recreational activities in the sensitive ecosystem like the 2011 Notification, and thus it perpetuates unsound development in CRZs.[79] The *raison d'etre* of carrying out recreational and tourism activities in vulnerable areas amid rising tensions on water resources is unknown.[80] What public good can the so-called pro bono development activities bring when no good results from the excessive harms attached to activities in the long run, given the present vulnerabilities of our earth's climate? Environmentalists have raised concerns about the efficacy of the coastal protection framework as it is often diluted through amendments. Recently, an environmental action group called *Vanashakti* challenged the constitutionality of the 2019 Notification. The PIL claimed that the 2019 Notification decreased the area falling under the NDZ and reduced the prohibited activities, thereby increasing the vulnerability of coastal zones and doing away with EIAs for a range of

[76] Shreeshan Venkatesh, 'Sailesh Nayak Committee Report on Coastal Zone Regulations Released 18 Months After Submission' *Down To Earth* (21 June 2016) <https://www.downtoearth.org.in/news/governance/sailesh-nayak-committee-report-on-coastal-zone-regulations-released-18-months-after-submission-54482> accessed 30 Dec 2021.
[77] Govt. of India, Ministry of Environment and Forests, 'Report of the Committee to review the issues relating to the Coastal Regulation Zone Notification, 2011' <https://www.indiaspend.com/wp-content/uploads/2020/06/Shailesh-Nayak-Committee.pdf> accessed 30 Dec 2021.
[78] Ibid.
[79] Ishan (n 41).
[80] Ibid.

constructions.[81] However, the petitioner was asked to approach NGT as the Government of India finalised CZMP during the pendency of proceedings.[82] Though the 2019 Notification has received negative reviews from industrialists and environmentalists, the Government has expressed that the new notification is based on sustainable development; thus, it respects ecological concerns and empowers the state to green signal developmental activities supporting the economy.

Further, the Government is deliberating on exempting prior clearance requirements for exploratory drilling operations in intertidal areas and has invited comments from the public.[83] It is also attempting to retain provisional and impermanent structures with adequate safety measures. In this regard, SCZMA would grant clearances to stand-alone jetties, breakwaters, groynes, salt works, slipways, and manual erosion control bunds.[84] If such exemptions are brought, it will further dilute CRZ protection norms and would cause a severe threat to the fragile ecosystem.

Considering the susceptibility of the terrestrial environment adjoining coastal stretches, it is needless to point out that science and not economics should guide policymakers to bring about a just and environmentally sound regulation. Today, our society is knowledge-based, as put forth in the Earth Summit in 1992, and human activities in different areas are interconnected.[85] Hence, policymakers are to tread with extra care and, therefore, consider and envision the varied

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[81] Express News Service, 'NGO filed PIL in Bombay High Court against 2019 Coastal Regulation Zone Notification' *The Indian Express* (Mumbai, 2 April 2021) <https://indianexpress.com/article/cities/mumbai/ngo-filed-pil-in-bombay-high-court-against-2019-coastal-regulation-zone-notification-7254907/> accessed 30 Dec 2021.

[82] *Vanshakti v. Union of India* PIL No. 28 of 2021.

[83] Mohan Vishwa, 'Government Moots Exempting Exploratory Oil Drilling from prior CRZ nod' *The Times of India* (19 Nov 2021) <https://timesofindia.indiatimes.com/india/government-moots-exempting-oil-drilling-from-prior-crz-nod/articleshow/87788753.cms> accessed 30 Dec 2021; See Govt. of India, Ministry of Environment and Forests, Department of Environment, Forests and Wildlife, Coastal Regulation Zone Notification, SO 4547(E) (01 Nov 2021), <https://moef.gov.in/en/s-o-4547e-date-01-11-2021-seeking-public-comments-on-proposed-amendments-in-coastal-regulation-zone-crz-notification-2019/> accessed 30 Dec 2021.

[84] Ibid.

[85] United Nations (n 14).

ramifications of different policies in the environmental domain.[86] The need of the hour is an inclusive process taking the views and concerns of all the stakeholders connected with the CRZ.[87]

Conclusion

A range of curative steps could be considered for the wise use of CRZs. Priority should be given to the formulation and finalisation of CZMP for the meaningful implementation of CRZ Notification after consultation with all the stakeholders, including coastal communities. Also, there is a need to strengthen the CZMA by providing them with the power to prosecute and punish the violators appropriately. It may be noted that repeated changes to the coastal legal framework have toned down its efficacy, and thus, development activities have been permitted without any scientific basis. The continuous amendment process should be halted for certainty in CRZ conservation. This uncertainty in coastal protection, clubbed with the non-implementation of the prevailing provisions, has induced the judiciary to step in for the conservation of the coastal ecosystem. Considering the lacunas in the existing CRZ notifications, as discussed above, policymakers may consider enacting exclusive legislation on coastal zone protection by introducing punitive measures, which are patently lacking in the current framework. The world is to go green now as there is a more substantial need today than ever for sustainable developmental activities. The only way forward is for environmental protection and industrial growth to go hand in hand for the ultimate benefit of humanity in the long run.

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[86] Frank Ahlhorn, *Long Term Perspective in Coastal Zone Development: Multifunctional Coastal Protection Zones* (Springer-Verlag Berlin and Heidelberg Gmbh & Co. Kg 2009) 165; United Nations (n 13).

[87] Ahlhorn (n 86); Richard Munton, 'Deliberative Democracy and Environmental Decision-Making' in F. Berkhout, M. Leach and I. Scoones (eds), *Negotiating environmental change: New Perspectives from Social Science* (Edward Elgar 2003) 109–136.

Ownership of Unsettled Land Belonging to the Indigenous Tribes in Balochistan

Sher Zaman v. The Government of Balochistan
Constitutional Petition No. 1269 of 2018 & 1128 of 2020

Kehar Khan Hyder*

Introduction

The Balochistan High Court's ("BHC") judgment in *Sher Zaman v. The Government of Balochistan*[1] is a landmark decision that has declared that the ownership of "unsettled land" belongs to the indigenous tribes of the poorest province of Pakistan.[2] "Unsettled land" means land that does not have any formal or written documents authorised by the state.[3] Geographically, more than 90% of the land in Balochistan constitutes unsettled land which has been possessed by the indigenous tribes for centuries.[4] The BHC has ordered that the presumption of the ownership of these unsettled lands, under Section 50(2)[5] of the Land Revenue Act 1967 ("LRA"), belongs to the local tribes and that the government is responsible for conducting the settlement records.

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* Kehar Khan Hyder is a B.A.-LL.B (Honours) graduate of LUMS.

[1] Constitutional Petition No. 1269 of 2018 and 1128 of 2020 in the Balochistan High Court.

[2] Hasnaat Malik, 'Landmark judgment: 'Unsettled land' Belongs to Local Tribes: BHC' *The Express Tribune* (Islamabad, 24 Mar 2021) <https://tribune.com.pk/story/2291055/landmark-judgment-unsettled-land-belongs-to-local-tribes-bhc> accessed 19 Aug 2021.

[3] Ibid.

[4] Ibid.

[5] Land Revenue Act 1967, Section 50.

> 50. Presumption as to ownership of forests, quarries and waste-lands.– (1) When in any Record of Rights completed on or before the eighteenth day of November, 1871, in territories where the Punjab Land Revenue Act, 1887 (Punjab Act XVII of 1887), was, with or without modifications, in force immediately before the commencement of this Act, or completed on or before the seventeenth day of July, 1879, in territories where the Bombay Land Revenue Code, 1897, (Bombay Act V of 1879), or the Sindh Land Revenue Code, 1879 (Sind Act V of 1879), was so in force, it is not expressly provided that any forest or quarry, or any unclaimed, unoccupied, deserted or waste-land or any spontaneous produce or other accessory interest in land belongs to the land-owners, it shall be presumed to belong to Government.
> (2) When in any Record of Rights completed after eighteenth day of November 1871, or the seventeenth day of July 1879, as the case may be, it is not expressly provided that any forest or quarry, or any such land, produce or interest as aforesaid, belongs to Government, it shall be presumed to belong to the landowners concerned.

This note critically evaluates this significant judgment by first summarising the facts of the case, followed by its ruling. Afterward, it will briefly provide the background and prior case law on the evidentiary requirements regarding the proof of ownership and the remarkably progressive interpretation of Article 172[6] of the Constitution of Pakistan 1973 ("Constitution"). Subsequently, it will highlight the societal importance of the judgment in safeguarding the fundamental rights of subaltern tribes, considering the meta-political and economic development within Balochistan. At the same time, the conclusion will critique the historically inadequate role of superior courts in protecting the rights of the most vulnerable communities in the era of land dispossession.

Facts and Ruling

As per the facts of the judgment, two separate petitions of an identical claim are filed by the agriculturalists of the area before the BHC under Article 199 of the Constitution. The petitioners' grievance is that the Provincial Government of Balochistan ("GOB") is denying them ownership over the unsettled land and is proclaiming to be the owner of the concerned land. The petitioners argue that inhabitants of the unsettled land are the indigenous tribes and communities of Balochistan who have been living on these lands for centuries through the practice of collective and individual ownership over their village's agricultural lands, grazing fields, and forests. Since almost 90% of the province's land is unsettled, the petitioners point out that the GOB failed to compile the revenue settlement records of these lands as per the provisions of the LRA. Without such compilation, the ownership of the unsettled land will belong to the indigenous tribes under Section 50(2) of the LRA.

[6] The Constitution of Pakistan 1973, art 172.

> 172. Ownerless property. – (1) Any property which has no rightful owner shall, if located in a Province, vest in the Government of that Province, and in every other case, in the Federal Government.
> (2) All lands, minerals and other things of value within the continental shelf or underlying the ocean beyond the territorial waters of Pakistan shall vest in the Federal Government.
> (3) Subject to the existing commitments and obligations, mineral oil and natural gas within the province or the territorial water adjacent thereto shall vest jointly and equally in that Province and the Federal Government.

On the other hand, the Advocate General, appearing on behalf of the GOB, argues that the unsettled land is without a record of the names of landowners. Therefore, the presumption is that the ownership should belong to the GOB under Section 50(1) of LRA. Relying on Article 172 of the Constitution, the Advocate General argues that the absence of a rightful owner will allow the GOB to be the owner of the unsettled land.

The BHC re-examined the relevant provisions of the LRA and the scope of Article 172 of the Constitution. The Court held that the "collective possession and control" over the unsettled land by the indigenous communities since their forefathers is a strong proof of ownership.[7] The GOB and the concerned parties to this case do not have any formal documented record, so the presumption of ownership of these lands will belong to tribal communities as they have a possessory right. While interpreting Article 172 of the Constitution, the BHC takes a restricted yet progressive approach by holding that the article only relates to the law of escheat, where the state becomes the owner of the ownerless property when there is no rightful owner. Here, the BHC holds that the indigenous tribes and subtribes have been residing on these unsettled lands and have longstanding possession which, despite the documentary proof or records, would "give a good legitimate title to them against the Government on the basis whereof, they claim to be owners of the same."[8] Lastly, the BHC orders the GOB to start conducting settlement proceedings for these unsettled lands in the formalised records.[9]

Background and Prior Law

As the judgment of the BHC rules after looking at the evidentiary requirement for the proof of ownership of unsettled land, it is important to look at well-established case law on the said subject. As per the Supreme Court of Pakistan ("SC"), the legal status of the ownership of property is to "certainly be a mixed question of law and fact to be decided in the light of the evidence."[10] There are two ways through which a party can claim rightful and legitimate ownership over property: (i) if there exists a legal document and formal record about the property in favour of that party,

[7] *Sher* (n 1).
[8] Ibid.
[9] Ibid.
[10] *Shajar Islam v. Muhammad Siddique* PLD 2007 SC 45, [4].

or (ii) if the party is in a longstanding possession of that property.[11] In *Bibi Babo v. Muhammad Aslam*,[12] the Court held that there is always a presumption of truth attached to the revenue record unless it could be proven otherwise with sufficient rebutting evidence. The Court further ruled that the rightful ownership by the established and documented record supersedes the possessory right. "It is settled that a claim on the basis of possession is good against the whole world except the rightful owner; it is not a good defence against a true owner."[13] In *Muhammad Muzammal Khan v. Imtiaz Bibi*,[14] the Lahore High Court rejects the only stance of longstanding possession in favour of the person who is an actual owner of the property. It was held that "it is settled proposition that in order to prove adverse possession, the person claiming is required to prove his open hostile, adverse, uninterrupted possession to the owner."[15]

In the instant case, the distinct fact is that the unsettled land is without any documentary proof of ownership. It is not just the indigenous tribes that are without any formal record, but also the GOB has no equivalent legal right over the unsettled land. "For argument's sake, if documents are believed to be the only source of the proof of ownership, then such principle is equally applicable to the Government."[16]

In the absence of formalised documents, the possessory right prevails. In *Administrator Municipal Corporation, Peshawar v. Taimoor Hussain Amin*,[17] the possession of the disputed property by the corporation is seen as sufficient evidence of a right of ownership over that property. In another case, the SC held that the Court would have accepted the party's argument about continuous possession of the disputed property only if the party had proved such possessory right by presenting sufficient evidence.[18] In *Abdul Manan v. Asmatullah*,[19] the BHC ruled that possession is the incident of ownership; hence, "possession is important when there is no title document and other relevant record, but once a document and record

[11] Although these two requirements are not exhaustive, but they are often considered substantive as per various case law and relevant provisions of the Transfer of Property Act 1882.
[12] 2015 CLC 1555.
[13] Shajar (n 10) [10].
[14] 2008 CLR 789 Lahore.
[15] *Bibi* (n 12) [8].
[16] *Sher* (n 1) [18].
[17] PLD 2020 SC 249, [13].
[18] *Haji Wajdad v. Provincial Government* 2020 SCMR 2046, [8].
[19] 2019 CLC 1096 Balochistan.

of title came before the Court, it is the title, which has to be taken into consideration. Possession cannot be considered in a vacuum."[20]

In *Noorani Gul v. Government of N.W.F.P.*,[21] there was a similar issue at hand, where the people of the concerned area acquired the land as a verbal and oral gift from the ex-ruler of Swat. The people had nothing to show about the origins of their ownership of the property in a formal record except their longstanding possession. Hence, the Peshawar High Court recognised the right of the petitioner over the ownership of the property based on continuing possession.[22] Moreover, the BHC looks at Article 172 of the Constitution and takes on a restrictive approach to the article by declaring:

> [T]his Article relates to the law of escheat, on the basis of which, the Government becomes owner of the property, which has no rightful owner…Thus, any property which is unclaimed because of death or disappearance of its owner, leaving behind no legal heir, his/her property passes to the Government concerned, after declaring it as ownerless.[23]

This interpretation of the aforementioned Article is consistent with prior case law. In *Secretary, Muktagachha Abbasia Senior Madrassa v. Province of East Pakistan*,[24] Article 146[25] of the Constitution of the Republic of Pakistan 1962 was declared as relating to the law of escheat or *res nullius*.[26] In *Nanney Khan v. Muhammad Dawood Khan*, the Court held that the property would be escheated as per Article 172 of the Constitution if "none is available to claim ownership of immovable property in his own right or by means of inheritance."[27] The State has

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[20] Abdul (n 19) [22].
[21] 2012 MLD 1731.
[22] 2012 (n 21) [9].
[23] Sher (n 1) [17].
[24] PLD 1964 Dacca 64, [33].
[25] Article 146 of the Constitution of The Republic of Pakistan 1962 is an identical provision to Article 172 of the 1973 Constitution.
[26] Similarly, held in *Ghulam Rasool v. Abdul Rashid* 2007 MLD 515; M*uhammad Sadiq v. Taj Muhammad* 1994 CLC 326; *Muhammad Boota v. Member (Revenue), Board of Revenue, Punjab* PLD 2003 SC 979; *Kalsoom Akhtar v. Sardar Muhammad* 2018 YLR 1652.
[27] 2015 YLR 1652, [11].

a duty to protect private property under Article 24[28] of the Constitution, so it will be the custodian of such property unless the Court is satisfied that no one is known to the Court who claims the right or entitlement to the property.[29] In *Idara-e-Noor-e-Haq v. Public-at-Large*,[30] the Sindh High Court held that the property would be declared ownerless under Article 172 of the Constitution after the law-enforcement agencies made all efforts to locate the owner or legal heirs of the property. Once the property is rendered ownerless, the Court has a duty "to protect it from being misappropriated or wasted or damaged."[31]

While interpreting the term "rightful owner" in Article 172 of the Constitution, the BHC held that a person can be a rightful owner if they have a "just or legally established claim."[32] Such a claim can be established either through "a form of documented proof or in case there is no record of right, longstanding possession or control over the land."[33] This shows a progressive and liberal approach to interpreting Article 172 by restricting its scope. Here, "progressively restricting" the scope of the said article has two meanings. Firstly, the Court is narrowing down the broader meaning of Article 172, which has the capacity to empower the state to claim ownership over ownerless property excessively. Secondly, the Court is tilted towards a "rights-based approach" to expand the civil, political, and socio-economic rights of people against the state's escheating.

Analysis

This note appreciates the political and social significance of the above judgment by protecting and safeguarding the property rights of indigenous communities. In the neoliberal epoch, Bahria Towns, DHAs, Askaris, etc., are the causes for the

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[28] The Constitution of Pakistan 1973, art 24.

> 24. Protection of property rights. -
> (1) No person shall be deprived of his property save in accordance with law.
> (2) ….
> (3) Nothing in this Article shall affect the validity of – (a) … (b) … (c) … (d) any law providing for the taking over of the management of any property by the State for a limited period, either in the public interest or in order to secure the proper management of the property, or for the benefit of its owner; or ….

[29] Secretary, Muktagachha (n 24).

[30] PLD 2020 Sindh 563.

[31] *Idara-e-Noor-e-Haq* (n 30) [5].

[32] *Sher* (n 1) [18].

[33] Ibid.

exploitation of the subaltern classes by the state and private actors. David Harvey's famous thesis of "dispossession by accumulation" constitutes the process of:

> [C]ommodification and privatisation of land and the forceful expulsion of peasant populations; the conversion of various forms of property rights (common, collective, state, etc.) into exclusive private property rights; the suppression of rights to the commons; the commodification of labour power and the suppression of alternative (indigenous) forms of production and consumption.[34]

The dispossession by accumulation is what Harvey calls "the new imperialism" of the contemporary era.[35] The acquisition of land from indigenous communities in Balochistan under the garb of "mega-development" is what characterises the neoliberal project. It is exclusive to the elite for profit accumulation, with no benefit to the common people.[36] Balochistan has massive amounts of natural resources like gas, minerals, strategic coastline, etc., and has become a "huge corporate empire" for some dominant state actors, i.e., military and multinational capital.[37] Hence, the above judgment needs to be appreciated because it has safeguarded the rights of indigenous communities over the land from capitalist dispossession in the poorest province of Pakistan.

As sociological studies were relied on in *Brown v. Board of Education*,[38] the BHC has comprehensively examined historical archives in the judgment. Historically, the pre-colonial province was divided between the British Balochistan[39] and Balochistan Agency.[40] Unlike other provinces of British India, where formal revenue records existed, the colonial administration accepted the indigenous communities' collective and individual ownership of the unsettled land.[41] The formalisation of records and land settlement into ownership rights, title,

[34] David Harvey, *The New Imperialism* (Oxford University Press 2005) 202–3.
[35] Ibid 249.
[36] Aasim Sajjad Akhtar, 'Balochistan versus Pakistan' (2007) 42 (45/46) Economic and Political Weekly 73, 76.
[37] Ibid.
[38] 347 US 483 (1954).
[39] Region constituting Chagai, Quetta, Zhob, Sibi and Naseer Abad Divisions.
[40] Region compromising Princely States, namely Khanate of Kalat, Kharan, Mekran and Las-Bela.
[41] *Sher* (n 1) [6].

interest, and liabilities is part of the colonial civilisation process. The civilisation process was, however, not extended to the tribal societies of Balochistan because of the colonial stereotypical assumption of "ungovernable" subjects. Furthermore, Aijaz Ahmad argues that British imperialism in Balochistan was primarily of a military and geopolitical nature.[42] As a result, the Raj treated Balochistan as a "buffer" to safeguard its empire from other empires' expansionism.[43] Therefore, the intention of colonial authority was never to govern the province under the rule of law. Thus, the absence of the rule of law meant the absence of formal revenue records, which rendered the land unsettled.

The aforementioned judgment is significant with respect to international law as well. The mandate of the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") requires the preservation and promotion of the cultural, political, and economic rights of indigenous communities.[44] Article 10 of the UNDRIP states that "indigenous peoples shall not be forcibly removed from their lands or territory. No relocation shall take place without the free, prior, and informed consent of the indigenous people…" Article 8 of the UNDRIP creates an obligation over the state to put in place "effective mechanisms" in the prevention of their "dispossessing them of their lands, territory or resources." Though the declarations are not binding over states, they are important in customary international law.[45] Since Pakistan is a signatory to the UNDRIP, the BHC has correctly safeguarded the rights of indigenous tribes over unsettled land in Balochistan.[46] The BHC also looked at the UN Habitat's "A Guide on Land and Property Rights in Pakistan" for 2011 and 2012.[47] Both these documents, as the BHC rightly noted, "did not collect any evidence or law to recognise the Government as the owner of the unsettled land."[48]

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[42] Aijaz Ahmad, 'The National Question in Baluchistan' (1973) 3 Pakistan Forum 4–18+37, 9.
[43] Ibid.
[44] James S. Phillips, 'The Rights of Indigenous Peoples under International Law' (2015) 26 Global Bioethics 120, 120.
[45] Ibid.
[46] There are also other international law treaties and conventions that safeguard the rights of indigenous communities. Like, Article 27 of the International Covenant on Civil and Political Rights (ICCPR) supports the protection and promotion of cultural and religious rights of indigenous minorities. ILO Convention 169 is about indigenous and tribal peoples.
[47] This detailed research document of the UN Habitat is an important guideline in assisting the government over land and property rights in Pakistan.
[48] *Sher* (n 1) [16].

Conclusion

The judgment in *Sher Zaman v. The Government of Balochistan* is a significant decision in terms of constitutional, human rights, and public international law. The BHC restrictively interprets the scope of Article 172 of the Constitution, which limits the power of the state in taking over ownerless property. Regarding human rights law, the judgment promotes the rights of local tribes over their land through their longstanding possession in the absence of any formalised record. This decision is also consistent with customary international law, which leans towards recognising the indigenous communities' cultural, economic, and social rights.

The BHC's decision is quite surprising, considering that Pakistan's judiciary has consistently legitimised the illegal land dispossessions of vulnerable classes. For example, the SC recognised the fact that Bahria Town Karachi ("BTK") was illegally developed, but the apex Court ignored this illegality after accepting BTK's offer of Rs. 460 billion.[49] In other instances, courts have declared encroachments upon land and the eviction of poor people legal. For instance, the SC, in a *suo moto* case, ordered that the homes of people living near the Gujjar Nala in Karachi be dismantled and demolished.[50] The cases of BTK and Gujjar Nala show the contradiction in the attitude of the superior courts in dealing with the interest of the common people relative to the elites. Muhammad Azeem similarly argues that the Pakistani judiciary has "strongly resisted" any legislative changes or social reforms which would have greatly favoured the socio-economic rights of the people.[51]

The rights of indigenous and local communities in Pakistan will be adversely affected under the neoliberal age, where the executive of the modern state has been termed as "a committee for managing the common affairs" of the

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[49] Haseeb Bhatti, 'SC Accepts Bahria Town Karachi's Rs460bn Offer, Halts NAB References' *Dawn* (Karachi). <https://www.dawn.com/news/1471002> accessed 9 Sep 2021.

[50] *Niamatullah Khan Advocate v. Federation of Pakistan* 2021 SCMR 1849; *Shehri - Citizens for a Better Environment v. Federation of Pakistan* PLD 2021 SC 743.

[51] Muhammad Azeem, *Law, State and Inequality in Pakistan* (1st edn, Springer 2017), 4. Azeem gives, specifically, an example of *QazalBash Waqf v. Chief Land Commissioner* PLD 1981 FSC 23, where the Federal Shariat Court declared the pro-people land reforms as un-Islamic.

elites.[52] Asim Sajjad Akhtar rightly says, "the destruction of traditional livelihoods and dispossession has been a consistent feature of our 'development' for hundreds of years."[53] Considering this, it is argued that the state must rethink its role; it needs to be an active agent in protecting socio-economic rights rather than being a passive bystander of capitalistic dispossession. Therefore, it is recommended that effective legislation is the need of the hour for the protection and promotion of the rights of indigenous communities in Pakistan.

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[52] Karl Marx, *The Communist Manifesto* (Lahore, Readings 2016) 14.

[53] Asim Sajjad Akhtar, 'Fish, Farm, Forest' *Dawn* (Karachi). <https://www.dawn.com/news/1644221/fish-farm-forest> accessed 3 Sep 2021.

A Case for Animal Sentience in Pakistan: "Kaavan" The Elephant's Incredible Story

Islamabad Wildlife Management Board v. Metropolitan Corporation Islamabad
PLD 2021 Isl 6

Altamush Saeed*

Introduction

This case is a landmark judgment delivered by the Islamabad High Court based on a culmination of public interest petitions that highlight the natural and legal rights of animals. Of particular interest is the idea of animals having sentience, which translates into the ability of an animal to feel and understand emotions in interaction with its environment. The idea of sentience is legally established and has achieved formal acceptance by the European Union.[1] The notion of animals being sentient is a gateway to not just animal welfare[2] but also animal rights.[3]

This unprecedented decision, issued under three consecutive orders by the Islamabad High Court, declares animals as inmates and orders the Marghazar Zoo, Islamabad (the "Zoo") to shut down operations and relocate animals to sanctuaries so the animals can fulfill their species-specific needs.[4] This ruling further declares that animals also have a right to enjoy a conducive environment that enables their

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* Altamush Saeed holds an Animal Law LL.M from Lewis and Clark Law School, being the first Pakistani recipient of the Brooks Institute for Animal Rights and Policy International Scholarship.

[1] The treaty of functioning of the European Union Article 13 states: "*In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research, and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions, and regional heritage.*"

[2] Animal welfare is the idea to minimise unnecessary pain and suffering for the animal based on its guardian/owner.

[3] Animal rights is the idea of animals having rights based on their existence, similar to human fundamental rights.

[4] The ability of the animal to engage in natural, niche-specific behaviors, their emotional state, and their fundamental health and functioning are the three overlapping characteristics that make up animal welfare from a scientific perspective (natural living), Anne Peters, 'Global Animal Law: What It Is and Why We Need It' (2016) 5(1) Transnational Environmental Law 9, 11; Mark James Learmonth, 'Dilemmas for Natural Living Concepts of Zoo Animal Welfare' (2019) 9(6) Animals 318.

social, behavioural, and physiological well-being. Therefore, the Court further extended this right to animals living as prisoners in all zoos across Pakistan, stating that throwing animals behind bars and confining them in environments that are not even remotely like their natural habitat breaks their natural behaviour and undermines their well-being.

Facts

The case was a culmination of three public interest writ petitions, filed under Article 199 of the Constitution of Pakistan 1973 (the “Constitution”),[5] for the determination of the relationship between animals and human beings. Through this judgment, the Court also dealt with the question of whether animals have basic rights that ought to be regarded. To ensure human survival, the government has a responsibility to defend animal rights.

I. Petition no. 1

A. Kaavan

The first petition was in direct reference to the deplorable conditions of the Islamabad Marghazar Zoo. Particularly, it highlighted the case of Kaavan: “the world’s loneliest elephant,”[6] who had spent over 36 years as an inmate in a small enclosure in the Marghazar Zoo.

Kaavan’s story started in 1985 when the Government of Sri Lanka gifted him as a one-year-old baby to the State of Pakistan. Originally, Kaavan lived with his female companion, but she died in 2012, and since then, he had been living in isolation, constantly bobbing against the wall of his tiny enclosure to make his plea.

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[5] Article 199 (1) of the Constitution of Pakistan 1973 stipulates the original jurisdiction of the High Courts of Pakistan wherein a petition can be filed before said courts if they are satisfied that no other remedy is provided under the law.

[6] Nicole Pallotta, “After Groundbreaking Animal Rights Ruling, Islamabad High Court Continues to Affirm Original Decision” (Animal Legal Defense Fund 4 March 2021) <https://aldf.org/article/after-groundbreaking-animal-rights-ruling-islamabad-high-court-continues-to-affirm-original-decision/> accessed 12 Oct 2022.

This petition further referred to the conditions of other animals residing in the Marghazar Zoo, which included two brown bears, the marsh crocodile, and other captive non-human beings.

B. The Two Brown Bears[7]

Suzie and Babloo are two brown Himalayan bears in the Marghazar Zoo of Islamabad who, just like Kaavan, had been spending their entire lives in under-equipped tight spaces where the animals' health, basic hygiene, nutrition, and food were not adequately looked after and were constantly neglected.

C. The Marsh Crocodile[8]

The marsh crocodile, an exotic species, also resided in a confinement where it could hardly move. It had also lived in captivity and shown severe signs of illness.

D. Other Captive Non-Human Beings: Lions, Bird, Wolves, Ostriches etc.

These animals included a lion, an International Union for Conservation of Nature declared vulnerable species on the Red List of threatened species, several birds, wolves, and ostriches confined in inadequately constructed cages.[9] The interior of the enclosures falls short of the minimum international standards, and the Marghazar Zoo, as a whole, reflects severe neglect as it deprived the animals of exhibiting their basic behavioural, social, and physiological needs.[10]

II. Petition no. 2: The Black Bear Case

The second petition was about a rescued black bear kept as a circus animal in deplorable conditions, where he was asked to dance and perform other tricks. Furthermore, the bear had a rope passed through its muzzle, and its teeth had been

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[7] Ali A, "Islamabad Zoo bears Suzie and Babloo arrive in Jordan" (Samaa 17 Dec 2020) <https://www.samaaenglish.tv/news/2204119> accessed 12 Oct 2022.
[8] "Islamabad Zoo Animals Handed over to SWD" (The Express Tribune July 19, 2020) <https://tribune.com.pk/story/2255686/islamabad-zoo-animals-handed-over-to-swd> accessed 12 Oct 2022.
[9] PLD 2021 Isl 6, [16].
[10] PLD 2021 Isl 6, [15].

taken so its human owner could exercise control over him. This case involved a transfer of this black bear from a person named Muhammad Riaz to Farman Ali based on a purported license from the Punjab Wildlife Board. Since this bear was in the territory of Islamabad and was being mistreated purely for entertainment purposes, the Islamabad High Court ordered Farman Ali to produce documentation under the Islamabad Wildlife (Protection, Preservation, Conservation and Management) Ordinance, 1979 (the “Wildlife Ordinance of 1979”).[11] The Court ordered that Farman Ali must establish that he was legally entitled to the bear. Farman was unable to prove the same and, therefore, the Court ordered that the bear be seized and shifted to the Balkasar Bear Sanctuary.[12]

III. Petition no. 3: The Dog Culling Case

The third petition was about the inhumane culling of dogs in the Islamabad Capital Territory using bullets or poisoned meat. The Court was requested to address the matter and call for more humane ways of dealing with dog culling.

Questions Framed by the Court

Since all the above petitions aimed to address a similar subject matter, the Islamabad High Court combined the same and framed the following issues:

1. What authority is empowered under the law and exercises jurisdiction to administer and manage the Marghazar Zoo’s daily operations?
2. Does an animal enjoy basic rights? If yes, then whether the state and the humans have a responsibility to take care of the welfare of said animals?

The Court’s Answers to the Questions Framed

A poetic prologue: The 67-page judgment, which pronounces upon the three petitions, begins with contemplating the destructive impact of COVID-19 on the lives of human beings. The Court highlighted the fact that the pandemic had

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[11] Islamabad Wildlife (Protection, Preservation, Conservation and Management) Ordinance, 1979, Ss 9, 10.

[12] Abbasi K, “Black Bear, Shifted to Balkasar Sanctuary, Becomes a Mystery” (The News 12 July 2021) <https://www.thenews.com.pk/print/863067-black-bear-shifted-to-balkasar-sanctuary-becomes-a-mystery> accessed 12 Oct 2022.

threatened the very existence of the species that topped the food chain and exposed how vulnerable even human beings are because of the same. As a result of COVID-19, the world has shifted into a self-imposed lockdown in order to save itself; holy places all over the world were completely devoid of humans, and what was ironic was how "the race for acquiring superiority in manufacturing weapons to kill and destroy humans has been superseded by a race to develop a vaccine to fight the threatening virus."[13] The court beckons this as an opportunity for humans to reflect on their choices and empathise with the pain and suffering of these sentient beings shoved in captivity and silenced for the human race's momentary entertainment.

The judgment then makes a poetic jump to the question of animals having rights *vis-à-vis* humans' interdependence on other living beings and jumps to directly answering the questions framed. The Marghazar Zoo was founded in 1978. According to the Capital Development Authority Ordinance 1960 ("1960 Ordinance"), it was initially run and maintained by the Capital Development Authority until 2016, when its operations were transferred to the Metropolitan Corporation Islamabad (the "Corporation") the same year. The Court notes that when these petitions were filed, it was under the control of the Corporation. However, what was appalling was that the Corporation did not have any resources nor willpower to fulfill its duties in safeguarding the basic rights and general wellbeing of the captive animals. Along with the Corporation, it was the duty of the Federation, more specifically, the Ministry of Climate Change and the Islamabad Wildlife Management Board (IWMB), and these entities were given time to comply with their obligations. The Court then observed something completely unexpected, as only the IWMB and dedicated private individuals were passionate about protecting the welfare of the animals, and for the rest, it was a political contest in order to gain control of the Marghazar Zoo. The Court, on this point, stated:[14]

> [I]t does not appear to be a priority to take immediate steps to provide the adequate habitat or abode for the behavioural, social and other needs of the animals kept in captivity, nor can sufficient resources be allocated for this purpose. The caged living beings in the Zoo are undoubtedly in pain, distress and agony, definitely disproportionate to the purpose intended. The

[13] PLD 2021 Isl 6, [3].
[14] PLD 2021 Isl 6, [6].

conditions at the Zoo definitely amount to criminal treatment of living beings.

Therefore, as the Corporation was inefficient in its role, it employed help from the World Wildlife Fund, Pakistan, to submit a report on the current conditions of the Marghazar Zoo. The report stated that 878 animals were forced into captivity in dire and disturbing conditions with utter disregard for their respective habitats necessary for their survival.

Question 1

The Court finds that the Board of Management established under the Wildlife Ordinance of 1979 has jurisdiction over the Zoo, its management, and all other matters pertaining thereto.

The Court delves into an analysis of all the concerned laws and boils down its conclusion to this answer based on two grounds. First, they state that the Corporation does not have express approval from the Federal Government to have authority over the Zoo. Second, it states that special law trumps general law, which is explained in detail later.

Capital Development Authority Ordinance, 1960

The history of this law begins from the point in time when the Islamabad Capital Territory model plan was submitted by Dr. Doxiadis, a renowned international planner, which was approved by the Federal cabinet, and the 1960 Ordinance was promulgated. Under the above-mentioned Ordinance, the Capital Development Authority ("CDA") was developed to execute the model plan.

However, the management or administration of a zoo by CDA is not contemplated or provided by this Ordinance. On the other hand, the Wildlife Ordinance of 1979 was passed as a special law with the express purpose of establishing a national park in the Islamabad Capital Territory and stipulating the protection, preservation, conservation, and administration of wildlife.

The Islamabad Wildlife (Protection, Preservation, Conservation and Management) Ordinance, 1979

The Wildlife Ordinance of 1979[15] covers the whole area of the capital territory of Islamabad. This Ordinance empowered the Federal Government to appoint a board, which was not formed until later in 2014. Additionally, it authorised the Government to demarcate any piece of land as a national park or sanctuary in order to protect its flora and fauna, which it did in the case of the Zoo. Based on this Ordinance, the Zoo was to be protected. However, there is an abject violation by the invasive species, i.e., humans, as they have deprived the wildlife native species of their habitat.

The Islamabad Wildlife (Protection, Preservation, Conservation and Management) Rules, 1983

Empowered under Section 21 of the Wildlife Ordinance of 1979, the Federal Government then decided to draft rules and regulations and notified the same in 1983. These rules define and describe the constitution of the wildlife management board.

Islamabad Capital Territory Local Government Act, 2015

Under this Act, an elected local government system was to be established. As per the Act, [16] a Metropolitan Corporation was to be established, and as per clause 9 of the Ninth Schedule of this Act, the Corporation was given control over the zoo's operations.[17]

However, the Court ruled that the Corporation could not exercise this power without the express approval of the Federal Government, in light of *Mustafa Impex*

[15] The Islamabad Wildlife (Protection, Preservation, Conservation and Management) Ordinance, 1979, ss 2, 4, 9, 21, 26.
[16] Section 2(w) defines the term local government to be either the metropolitan corporation or a union council formulated under this law.
[17] Islamabad Capital Territory Local Government Act 2015, S 8(8): These clauses suggest the local government can hold fairs and shows with cattle and with the approval of the government in charge, aid in the conservation or development of zoological gardens.

v. The Government of Pakistan,[18] which was not provided to the Corporation. Secondly, the Court also ruled that as the Wildlife Ordinance of 1979 was a special law, it therefore trumps any general law, in light of *State Life Insurance v. Mst. Sardar Begum*.[19]

For the second issue, the Court answered in the affirmative that animals have the status of sentient beings and, therefore, have rights. The Court begins its analysis by looking at the international precedents of several landmark cases related to animal welfare.[20]

International Case Law

These cases include the tragic stories of animals who either won their freedom or lost their lives and became eternal symbols for non-humans. Those who won their freedom include the famous story of Sandra, the Orangutan who was declared to have similar rights to those of the human species. Second, Cecilia, a chimpanzee in a zoo, was another animal that had spent 30 years in solitary confinement. However, in her case, it was decided that Cecilia had a right to the same treatment because she was a part of the zoo's community, and the preservation of the natural and cultural patrimony is part of the basic animal right to have a decent and conducive environment. The third landmark case is of Arturo, a polar bear who had also lived most of his life in captivity. Unfortunately, he lost his case and later eventually died. The fourth case was of Morgan, the orca whale. His case was linked to the thirteenth amendment[21] of the US Constitution, which linked Morgan being captured and forced to live in captivity as being equivalent to slavery.

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[18] *Mustafa Impex v. Government of Pakistan* PLD 2016 SC 808.
[19] *State Life Insurance Corporation v. Mst. Sardar Begum* 2017 SCMR 999.
[20] Elassar A, “Sandra the orangutan, freed from a zoo after being granted ‘personhood,’ settles into her new home”(CNN Nov 9, 2019) <https://www.cnn.com/2019/11/09/world/sandra-orangutan-florida-home-trnd/index.html> accessed Oct 12, 2022; Choplin L, “Chimpanzee Recognized As Legal Person”(Non-Human Rights Blog Dec 5, 2016) <https://www.nonhumanrights.org/blog/cecilia-chimpanzee-legal-person/> accessed 12 Oct 2022; “'Depressed' Argentina polar bear Arturo dies at 30” (BBC News July 5, 2016) <https://www.bbc.com/news/world-latin-america-36711345> accessed Oct 12, 2022; Mountain M, https://whalesanctuaryproject.org/morgan-orca-tale-betrayal/ (The whale Sanctuary Project Dec 9,2017) <https://whalesanctuaryproject.org/morgan-orca-tale-betrayal/> accessed 12 Oct 2022.
[21] The 13th Amendment to the United States Constitution, 1789, provides that “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

Morgan was denied relief solely on the ground that he was not a human being,[22] but the judgment did mention that the thirteenth amendment does not say that animals have no legal rights.

The Court further cited several landmark decisions from India. These included a Kerala High Court judgment, which concluded that legal rights are not the sole domain of human beings but should also be extended to other living beings.[23] In an Indian Supreme Court judgment,[24] it was held that the right to life under the Indian Constitution also extends to animals. In another case, the Bombay High Court held that "Sundar the Elephant," who was treated in a cruel manner, be

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[22] Also See https://law.justia.com/cases/new-york/appellate-division-first-department/2017/150149-16-162358-15.html (While it may be arguable that a chimpanzee is not a 'person', there is no doubt that it is not merely a thing"), '*National Society for the Prevention of Cruelty to Animals v. Minister of Justice and Constitutional Development* {[2016] ZACC 46}, https://www.nonhumanrights.org/client-happy/. The United States Non-Human Rights Project approach to securing the right to *habeas corpus*, i.e., bodily integrity is linked to the deliverance of a right to legal personhood for animals as if animals can approach the court and ask for any right, not necessarily *habeas corpus*, they would become legal persons. Declaration of animals as legal persons would create a favourable situation for animals; however, the current legislative system would perhaps be unable to deal with the slippery scope of animal legal personhood for other kinds of animals such as farm animals which are objected to the most heinous amount of animal cruelty daily. As a result, the court would never agree to the declaration of animal legal personhood of animals. In the case of Kaavan, a claim of animal legal personhood was never made, but rather he was afforded Islamic animal rights and an extension of the human fundamental right to life.

[23] *N. R. Nair v. Union of India* AIR 2000 Kerala 340 ("Though not homosapiens, they are also beings entitled to dignified existences and humane treatment sans cruelty and torture. In many respects, they comport better than humans, they kill to eat and eat to live and not live to eat as some of us do, they do not practice deception, fraud, or falsehood and malpractices as humans do").

[24] *Animal Welfare Board of India v. A. Nagaraja'* (2014) 7 Supreme Court Cases 547 ("When we look at the rights of animals from the national and international perspective, what emerges is that every species has an inherent right to live and shall be protected by law, subject to the exception provided out of necessity. Animal has also honour and dignity which it cannot be arbitrarily deprived of, and its rights and privacy have to be respected and protected from unlawful attacks").

relocated in order to safeguard its welfare.[25] The Chhattisgarh High Court has also held that the court acknowledges the need to protect wild animals from being treated in an inhumane manner.[26]

National Case Law

The Court further analysed various Pakistani judgments and drew wisdom from all of them while answering this question, which are mentioned as follows. In *Muhammad Arif v. S.H.O. City Police,*[27] the Lahore High Court granted[28] relief in *habeas* petitions to two persons detained along with their cattle. In *Ghulam Asghar Gadehi v. Senior Superintendent of Police Dadu,*[29] the High Court of Sindh held that cultural sports such as donkey and bull-cart racing fell under the ambit of "cruelty"[30] under the Pakistan Cruelty to Animals Act, 1890 ("PCA Act").[31] In the landmark *Houbara Bustard* case[32], the August Supreme Court highlighted the nexus between migratory birds and the environment and the right to life of humans.

[25] *Dr Manilal V. Valliyate v. The State of Maharashtra* Writ Petition No.2662/2013. There is a nuanced difference between protecting property under public trust versus ensuring environmental preservation. In either case, the specimen is a property and has a limited scope of protection. The public as a collective essentially decides on the rights of the subject in question. Fundamental rights on the other side, assume certain intrinsic rights within a subject, whether property or person. Article 51 (g) of the Indian Constitution states that it is a fundamental duty of Indian citizens to protect, improve, and preserve the natural environment including wildlife. The Supreme Court of India held that Article 51 (g) of the Indian Constitution is the "Magna Carta of animal rights" Due to the lack thereof any constitutional protections for animals and a limited public understanding of the intrinsic rights of animals, thereby making the public trust concept infructuous; a fundamental right approach, which assumed intrinsic rights for animals was an appropriate approach for the effective delivery of rights to Kaavan.

[26] *Nithin Singvi v. Union of India* Writ Petition No.06/2016.

[27] *Muhammad Arif v. S.H.O. City Police* PLD 1994 Lahore 521.

[28] The judgment stated "As per Article 4 of the Constitution every citizen has the inalienable right to be treated in accordance with law and no action detrimental to, life, liberty, body, reputation, or property can be taken except in accordance with law. Under Article 24 of the Constitution, no person is to be deprived of his property, except in accordance with law. Equality before law and equal protection of law is guaranteed to every citizen, under Article 25." If the Constitution is guaranteeing such wide protection to the citizens, why not the same protection to the cattle and animals of the country?"

[29] PLD 2018 Sindh 169.

[30] Prevention of Cruelty to Animals Act 1890, s 3. This section defines cruelty to animals and sale of animals killed with unnecessary cruelty.

[31] This law was developed by the British and has, since 1890, only been prematurely amended once in 2018. The law at face value is highly deficient when it comes to addressing animal cruelty in the 21st century.

[32] *Province of Sindh v. Lal Khan Chandio* PLD 2016 SC 48.

It went on to declare hunting of the Houbara Bustard, a migratory bird, to be banned unless a valid permit license is provided [33]. Even though this decision was overturned in review,[34] the essence of the original judgment, which was the protection of vulnerable species, was a duty of the state.

The Court further referred to the Universal Declaration of Animal Rights,[35] a soft law instrument that recognizes animals as sentient creatures and, therefore, deserving of the right to liberty and to freely live in their natural environment, where they can potentially exhibit their species-specific behaviour.

As enshrined in the preamble of the Constitution and Article 2 thereof, with Islam being the core religion of Pakistan, the Court heavily relied on primary sources from the Quran[36] and Sunnah to derive the value of life and animal rights. The Court states:

> [L]ife is most important because it is the best creation of Allah, the Creator. 'Life' is not restricted to human life but includes all forms of life, whether a breathing animal or a plant. Human has been made superior to other forms because of its cognitive attributes, intelligence and the ability to think and

[33] The court further observed: "The fundamental right to life and to live it with dignity (Articles 9 and 14 of the Constitution) is one lived in a world that has an abundance of all species not only for the duration of our lives but available for our progeny too. It has now been scientifically established that if the earth becomes bereft of birds, animals, insects, trees, plants, clean rivers, unpolluted air, soil it will be the precursor of our destruction/extinction. The United Nations World Commission on Environment and Development, chaired by the former Norwegian Prime Minister Gro Harlem Brundtland, published the report "Our Common Future" in 1987 (also known as the 'Brundtland Report') which was the forerunner of innumerable reports and treaties, including CITES and CMS."

[34] *Government of Punjab v. Aamir Zahoor ul Haq* PLD 2016 SC 421.

[35] UDAW, "Universal Declaration on Animal Welfare" <https://www.worldanimalprotection.ca/sites/default/files/media/ca_-_en_files/case_for_a_udaw_tcm22-8305.pdf> accessed 12 Oct 2022.

[36] The judgment specifically cites the following versus of the Holy Quran "And it is He who has created horses, mules, and donkeys, for you to ride and as an adornment; And he has created other things of which you have no knowledge." Surah An Nahl 16:8 "We have made animals subject to you, that ye may be grateful." Surah Al Haj 22:36 "Although there is no animal that walks on earth and no bird that flies on its two wings which is not God's creature like yourself." Surah Al-Anam 6:38 "Seest thou not that it is Allah whose praise all beings in the heavens and on earth do celebrate, and the birds (of the air) with wings outspread? Each one knows its own (mode of) prayer and praise, and Allah knows well all that they do." Surah An-Noor 24:41 "transgress not in the balance, and weigh with justice, and skimp not in the balance...earth, He set it down for all beings." Surah Ar Rahman 55:8–10.

> reason. The other forms of life are not inferior but each have a specific and distinct purpose.[37]

In order to come to a conclusion, the Court looks at the PCA Act,[38] which shows that the notion of animals not being subject to unnecessary pain and suffering has a very wide meaning and scope. The Court eloquently links the above argument to zoos and states:[39]

> [W]ith the advancement of technology, there are far better and more informative opportunities to observe and gain knowledge about the animal species. Above all, and as already held, the Zoo definitely does not provide facilities nor has the resources to be able to provide for the behavioral, social and physiological needs of the animals, who have been deprived of their natural habitats and have been kept in shockingly deplorable conditions. This Court, therefore, has no hesitation in declaring that the animals in the Zoo have been subjected to unnecessary pain and suffering.

It then refers to the Pakistan Penal Code,[40] specifically Sections 428[41] and 429,[42] in making an argument that as zoo animals are public property, they are protected under these provisions if the ingredients of the above-stated provisions stand fulfilled.

Lastly, the Court connects Article 9[43] of the Constitution,[44] on the human right to life, with dependency on plants and animals. The Court places additional reliance on the United Nations' warnings that failure to protect wildlife can cause irreversible damage to our ecosystem, and as a result, humans could face extinction.

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[37] PLD 2021 Isl 6, [47]–[48].
[38] Prevention (n 30); Section 2(1) defines an "animal" and Section 3 penalises cruelty to animals.
[39] PLD 2021 Isl 6, [53].
[40] Pakistan Penal Code, 1860, s 428.
[41] Ibid s 425 of the Code defines mischief.
[42] Ibid s 429.
[43] The Constitution of the Islamic Republic of Pakistan 1973, art 9.
[44] The August Supreme Court in the case titled *Ms. Shehla Zia v. WAPDA* PLD 1994 SC 693 has observed and held that the word life is very significant because it covers every facet of human existence. "Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally." An animal's right to life includes meeting its behavioural, social, and physiological needs.

Therefore, "The welfare, wellbeing and survival of the animal species is the foundational principle for the survival of the human race on this planet. Without the wildlife species, there will be no human life on this planet."[45]

Thus, to conclude, the interrelationship of humans and non-humans creates constitutional obligations on the state and its authorities to protect animals against cruel and illegal treatment and provide them with a natural habitat by virtue of their sentient status.

Analysis

Although the idea of sentience is not a new one, the acknowledgement of legal status for animals is rather new. Accordingly, this analysis will focus on the notion of sentience and its impact on all animals.

The judgment begins by answering the question of whether animals have legal rights in the affirmative while further labelling animals as inmates in the zoo and illustrating that a zoo, despite being very well-equipped, is still a concentration camp for these sentient beings.

The Court's decision used wording referring to an animal's right to an environment that can meet their physiological, social, and behavioural needs. The then Chief Justice of the Islamabad High Court, Justice Athar Minallah, determined that since animals are sentient beings with rights of their own, depending on their nature and particular requirements, they have a right to an environment that supports their development and overall well-being.

What is crucial to note is that, even outside of the Islamabad High Court's legal jurisdiction, Justice Minallah went ahead and extended his criticism not just at the Marghazar Zoo but to all zoos that confine animals in conditions asymmetrical to their natural habitats, which ends up preventing an animal from exhibiting its normal behaviour.

[45] PLD 2021 Isl 6, [55]–[56].

In July 2020, the Islamabad High Court further issued a follow-up judgment that provided an update on the relocation of Kaavan to Cambodia and other animals to various sanctuaries.[46] What is remarkable to note is that the Government of Pakistan had fully endorsed the Court's previous judgment and had initiated the procedure for the relocation of animals. This is significant because various court judgments in Pakistan, which set up foundational jurisprudence regarding particular issues, remain unimplemented and, therefore, only retain symbolic value.[47]

While this judgment is legally enforceable in the Islamic Capital Territory, it can serve as a persuasive precedent for other jurisdictions in Pakistan. It has also created an international example of Pakistan as a pro-animal welfare country, similar to the EU countries, the UK, and Switzerland, which can fuel the desires of other nations, especially underdeveloped ones, to become advocates for animal welfare.

Why Was the Enlargement of the Scope of Fundamental Rights Necessary?

The PCA Act, a colonial relic, was originally designed to reduce unnecessary pain or suffering for farm or street animals. It was never designed to cover zoo animals. Section 2 of the Act defines animals to only include domestic or captured animals, and the punishments prescribed from Section 3 to 5 have a threshold of unnecessary pain or suffering. The term unnecessary pain or suffering is not defined under the Act, leaving it to the discretion of the government or concerned officials. In the case of Kaavan, who was subjected to solitary confinement in 2012 after the loss of his companion, mental and emotional suffering were never prescribed under the PCA Act. In 2020, the Punjab Government even tried to bring in additional

[46] Order Sheet in The Islamabad High Court, Islamabad (Judicial Department) C.M. No. 1630 Of 2020 In W.P. No. 1155/2019.

[47] An example of this would be the history of Article 251 of the Constitution of Pakistan and the Supreme Court judgment titled: *M. Kowkab Iqbal v. Govt. of Pakistan through Secretary Cabinet Division, Islamabad* PLD 2015 SC 1210. This judgment attempted to implement Article 251 which was brought into force in 1973 and had to be implemented in 15 years, i.e., by 1988, whereas the above judgment was delivered in 2015, i.e., 45 years after 1973. It can still be debated whether Article 251 has actually been fully implemented or not.

elephants, but given the deplorable condition of animals at the Lahore Zoo, the move was never realised.[48]

The PCA Act only covers physical suffering, and that too when it crosses the discretionary threshold of unnecessary pain and suffering; thereby, such an act could never do complete justice to the suffering of Kaavan and his fellow inmates at the zoo. Therefore, the rather expansive fundamental rights approach was an appropriate step in advancing the rights of animals through the human right of public health. The fundamental rights enshrined under the Constitution are an anthropocentric framework and offer direct protection to humans alone. However, given Islam is a part of the Constitution and animal cruelty violates Islamic principles and the human right to life, the Court was correct in its approach to enlarge the scope of fundamental rights.

The Supreme Court, in its seminal judgment, *Shehla Zia v. WAPDA*,[49] held that the right to life or the word “life” must be construed broadly and that it covers all facets of human existence. In *Kamil Khan Mumtaz v. Province of Punjab*,[50] the Lahore High Court distinguished the broad meaning given by the superior judiciary to the right to life guaranteed by Article 9 of the Constitution in the following terms:

> [T]he expression 'life' has, likewise, received an expansive meaning at the hands of the superior courts in Pakistan and includes the right to protection against adverse effects of electromagnetic fields (Shehla Zia case PLD 1994 SC 693); the right to pure and unpolluted water (Salt Mines Union case 1994 SCMR 2061); the right of access to justice (Azizullah Memon case PLD 1993 SC 341; Al-Jehad Trust case PLD 1997 SC 84; and Khan Asfandyar Wali v. Federation PLD 2001 SC 607, 924).

By indoctrinating the elements of Islam, which extensively grants rights to both animals and nature, the now enlarged scope of the right to life is closely

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[48] Asif R, ‘Zoo Struggles to Import Elephants Following Ban’ (*The Express Tribune*, 7 Sep 2019) <https://tribune.com.pk/story/2051199/zoo-struggles-import-elephants-following-ban> accessed 9 Mar 2024.
[49] PLD 1994 SC 693.
[50] PLD 2016 Lahore 699.

inching towards the interconnection of human welfare with animal and environmental welfare. This is referred to as the One Health principle.[51]

Animals in Islam

God created Earth for all beings, and he placed a duty of trusteeship on all humans to make sure they keep the planet in their trust. Anyone who violates this trust will bear the burden of disbelief.

> “[H]e laid out the earth for all beings” (Quran 55:10).
>
> “It is He Who made you vicegerents in the earth. So, whoever disbelieves will bear the burden of his unbelief” (Quran 35:39).

The Quran mentions animals as communities, just like Muslims: “There is not an animal that lives on the earth, nor a being that flies on its wings, but they form communities like you. Nothing have we omitted from the Book, and they all shall be gathered to their Lord in the end” (Quran 6:38).

The word community translates to the term *Ummah*, which means the community for whom the religion is made. The Quran also mentions that animals have a form of prayer as well: “Do you not see that Allah is glorified by all those in the heavens and the earth, even the birds as they soar? Each ‘instinctively’ knows their manner of prayer and glorification. And Allah has ‘perfect’ knowledge of all they do” (Quran 24:41).

While we, as humans, cannot understand animal speech, they do have a specific method of prayer. The form of a horse or a giraffe bowing down on its knees symbolises the prayer Muslims make five times a day. The Quran designates a punishment for animal cruelty as well as a reward for being kind to them. The following Hadith relate to this matter:

[51] ‘One Health Definitions and Principles’ (*World Health Organization*) <https://www.who.int/publications/m/item/one-health-definitions-and-principles> accessed 9 Mar 2024.

> [W]hoever is kind to the creatures of God, is to himself. There is no man who kills {even} a sparrow or anything smaller, without its deserving it, but God will question him about it (Hadith, Bukhari).

> The Prophet cursed the one who treated animals harshly. Whoever treats harshly a living being and then does not repent, God will treat him just as harshly on judgment day (Hadith, Bukhari).

Similarly, all events of animal cruelty are recorded, and animals will be given a chance to make their statements on the day of judgment. It is an Islamic belief that all Muslims will eventually die and be resurrected on the day of judgment, where all their actions will be judged for their entry into heaven or hell. Heaven or hell is a constant mention in all Abrahamic religions.

One Health in Islam:

Islam, in all its forms, is a religion of peace for all life, be it humans, animals, or the environment. The Quran has laid down the following:

> [I]t is Allah who made for you the earth a place of settlement and the sky a ceiling and formed you and perfected your forms and provided you with good things. That is Allah, your Lord; then blessed is Allah, Lord of the worlds (Quran 40:64).

> And He has cast into the earth firmly set mountains, lest it shift with you, and [made] rivers and roads, that you may be guided (Quran 16:15).

> Indeed, we offered the Trust to the heavens and the earth and the mountains, and they declined to bear it and feared it; but man [undertook to] bear it. Indeed, he was unjust and ignorant (Quran 33:72).

> Do not strut exultantly on the Earth. You will never split the Earth apart nor will you rival the mountains in stature (Quran 17:37).

> Allah also says, ‘Indeed, the creation of heaven and Earth is greater than the creation of humankind, but most people do not know it (Quran 40:57).

God mentions in the Quran that he created Earth for all life and placed it in the form of a trusteeship to humans. However, man has transgressed, which is evident from the amount of climate change and natural disasters occurring in the era of the Anthropocene.

Conclusion

The aftermath of this judgment led to several positive developments for the animals of Pakistan. First, it was the closure of the Marghazar Zoo; second, the relocation of Kaavan to Cambodia in an elephant sanctuary; third, the relocation of Suzie and Babloo to Balkasar Bear sanctuary; fourth, the relocation of the marsh crocodiles; and finally, but significantly, Pakistan taking the first positive step in making this country a safe place for animals.

With Kaavan becoming a symbol of hope for all animals, Pakistan, despite being an underdeveloped country in comparison to Europe and the West, has established itself as one of the forerunners of animal welfare and, eventually, animal rights. However, this is merely the starting line of a very arduous long race, and Pakistan has made its first step towards recognising animal sentience.[52]

[52] This case has been cited in the following Lahore High Court cases, thereby extending its evidentiary value in the case of animal rights in Pakistan: *Mr. Faizullah Khan Niazi v. Express Entertainment* (Pakistan Regulatory Media Authority) F. No. 14(02)/RO-LHR/106/36309 Of 2021. *Zawar Hussain v. Province of Punjab* PLD 2022 Lahore 445, *Sanita Gulzar v. Province of Punjab* Lahore W.P No. 30173 of 2021.

The Status of *Hadeeth* in Islam

Izhar Ahmed Khan*

Introduction

'The Status of *Hadeeth* in Islam'[1] is a landmark book ("Book") that challenges the authoritative status of the *Sunnah* of the Prophet Muhammad as a source of Islamic law. Using "*Hadith*" and "*Sunnah*" interchangeably, the Book critically evaluates the legal authority of *Sunnah*, the historical authenticity of the *Hadith* literature, and the concept of revelation in terms of its relationship with the Sunnah of the Prophet Muhammad. Shunning the idea that Islam is based on the Quran and the *Sunnah* of the Prophet Muhammad, the Book posits that Islam, unlike other religions, is a complete code of life based entirely on the Quran. It theorises that the *Sunnah* of the Prophet Muhammad is incorrectly regarded as a source of Islamic law because the Prophet Muhammad neither aimed to make his *Sunnah* binding on his followers nor made any arrangements for its preservation. Holding the Quran in the highest esteem, the Book designates it as the only source of Islam and rejects the authority of *Ahadith*[2] altogether, regardless of what they purport to narrate from the Prophet Muhammad.

The Book was authored by Ghulam Ahmed Parwez (d. 1985) and Muhammad Aslam Jairajpuri (d. 1955) (collectively referred to as "authors"), both of whom were distinguished Islamic scholars of the 20th century. Parwez was a bureaucrat in the Indian subcontinent. After his retirement, he served as a member of the Law Commission formed under the Constitution of Pakistan of 1956. Notably, he was the founder of the *Tolu-e-Islam* movement, chairperson of the Quranic Education Society, and the director of the Quranic Research Centre, Lahore. His scholarly contribution is considerable, including *Ma'arif-ul-Quran* in eight volumes, *Lughat-ul-Quran* in four volumes, *Mafhoom-ul-Quran* in three volumes, and *Tabweeb-ul-Quran* in three volumes. Similarly, Jairajpuri was an

* Izhar Ahmed Khan is an LL.B graduate from the Pakistan College of Law (University of London International Program).
[1] Ghulam Ahmed Parwez and Muhammad Aslam Jairajpuri, *The Status of Hadeeth in Islam* (Ejaz Rasool ed tr, Tolu-e-Islam Trust 2016).
[2] *Ahadith* is the plural of *Hadith*.

eminent professor of Arabic and Persian at the Aligarh Muslim University and Jamia Millia Islamia. He was one of Parwez's teachers and mentors. His scholarly contribution includes *Sareekh-al-Ummat* and *Novadraat*.

The Book comprises 12 chapters. Chapters 1–3 deal with the status, science, and development of *Hadith*. Chapter 4 discusses the interpretation of the Quran in light of the *Hadith*. Chapter 5 sheds light on "temporary marriage" (*Mut'ah*) and its legitimacy in light of the *Hadith*. Chapter 6 discusses some examples from the Books of *Hadith* about the hereafter, particularly reaching paradise. Chapters 7 and 8 lay out the views of some renowned Islamic scholars on the status of *Hadith*. Chapters 9 and 10 cover aspects of *Hadith* relating to the Quran and Prophet Muhammad. Chapter 11 discusses everyday problems in the light of some *Ahadith* from *Sahih Al-Bukhari*. Finally, Chapter 12 reproduces a letter by a reader of the Book to Parwez and his response to it. The Book is intended for all Muslims, irrespective of their sects, to read and ponder upon. It heavily draws on the Quran and wide-ranging Islamic literature, quoting the views of the Prophet Muhammad and his Companions, various renowned Islamic scholars, academics, and philosophers. These views are presented as answers to thought-provoking questions to keep the reader involved, and each argument is substantiated with evidence and examples to make the authors' case easy to understand.

An Overview of the Book: Discussion and Analysis

Addressing the complications with the traditional understanding of *Sunnah* and *Hadith* and providing an alternative theory to untie the knot, the authors of the Book put forward a dissenting view on the authoritative status of the *Sunnah* as a source of Islamic law and the authenticity of *Hadith*. To understand the essence of the Book, it is necessary, at the outset, to appreciate the traditional understanding of the concept of *Sunnah* in Islamic jurisprudence and the challenges it has faced. To the traditional scholars of Islamic jurisprudence, the *Sunnah* is: "All that has been related from the Prophet Muhammad ... in terms of his speech, action, or approval."[3] This understanding of the concept of *Sunnah* has received significant criticism from modern scholars, particularly Western orientalists like Ignaz Goldziher, D.S Margoliouth, and Joseph Schacht, who are highly celebrated for

[3] Dr. Mustafa as-Sibaee, *The Sunnah and its Role in Islamic Legislation* (Faisal Ibn Muhammad Shafeeq tr, International Islamic Publication House 2008) 73.

their critical analyses of the meaning, historical authenticity, and authority of the *Sunnah*. Goldziher argues that "the Islamic concept of [*Sunnah*] is a revised statement of ancient Arab views."[4] He says that before the emergence of Islam, *Sunnah* was a prevalent concept in Arab societies. For them, *Sunnah* denoted the traditions of Arabs and the customs and habits of their ancestors. When Islam emerged, the content of the old concept and the meaning of the word changed. To the followers of Prophet Muhammad, *Sunnah* meant all that could be shown to have been the practices of the Prophet. He claims that *Ahadith* were falsely developed by the Umayyads and Abbasids after the demise of the Prophet for their personal political gains, and therefore, they are, on the whole, untrustworthy.[5] Advancing the work of Goldziher, Margoliouth asserts that *Sunnah*, as a principle of law, initially only denoted the normative usage of the Muslim community, and it was only later that it acquired the restricted meaning of the precedents set by the Prophet.[6] Schacht, influenced by the work of Goldziher and Margoliouth, confirms Margoliouth's conclusion and contends that the *Sunnah* is nothing more than a "precedent" or a "way of life."[7] He uses the term "living traditions" for the concept of *Sunnah* to show that it bridges the ancient meaning of the *Sunnah* to the generally agreed practices of the later communities, arguing that they are all inter-related and interchangeable to the extent that they could not be isolated from one another.[8] Although the Book is divided into various thematic chapters, the following three ideas can be regarded as its central ideas.

The Sunnah of Prophet Muhammad does not Constitute a Source of Islamic Law

Challenging the authoritative status of the *Sunnah* of Prophet Muhammad, the Book puts forth the idea that holding the *Sunnah* of the Prophet as a source of Islamic law is based on misinterpretations of Quranic verses. Parwez argues that the Quranic saying, "Obey Allah and Obey the Messenger,"[9] does not mean two

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[4] Ignaz Goldziher, *Muslim Studies (Muhammedanische Studien)* (S. M. Stern ed, C. R. Barber and S.M. Stern tr, State University of New York Press 1890 vol 2) 26.
[5] Ibid 145–164.
[6] D. S. Margoliouth, *The Early Development of Mohammedanism: Lectures Delivered in the University of London* (Williams and Norgate 1914) 65–98.
[7] Joseph Schacht, *The Origin of Muhammadan Jurisprudence* (Oxford University Press 1979) 58.
[8] Ibid.
[9] Quran, 3:132; 5:92; 8:1; 8:20; 8:46; 47:33; 58:13.

separate submissions, i.e., the obedience of Allah through the Quran and obedience of the Prophet through following his *Sunnah*. Instead, when such a phrase appears in the Quran, it means obeying a central authority (Markaz-e-Millat) whose commands are based on and rooted in the Quran. Prophet Muhammad, according to Parwez, was the ruler and central authority of his time who established a state purely based on the Quran – implementing Quranic laws without any amendments and enacting sub-laws based on Quranic principles and according to the needs of the time through consultation with the Islamic community. Therefore, following Prophet Muhammad today would result in the establishment of a similar governance system, one based entirely on the Quran, and obedience to it will be equivalent to "obedience of Allah and His Messenger."

This doctrine of Quranic self-sufficiency, as articulated by the authors, makes an appealing case; it can limit disagreements that may arise in relation to the *Sunnah* of Prophet Muhammad. Nevertheless, questions persist: What makes Prophet Muhammad different from an ordinary person, except that he was the deliverer of Allah's message? And what remains the reason for the twenty-three years of prophetic life of Prophet Muhammad, when considering that his purpose was solely to establish a Quranic-based system and not to hold authority over Muslims? A contextual analysis of Parwez's claim of Prophet Muhammad being a mere ruler of his time in light of the Quran reveals that Parwez has failed to consider the Quranic verse: "O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger."[10] This verse clearly distinguishes the obedience to "Allah and His Messenger" from "those in authority." It also clarifies that one may disagree with the authority amongst them but cannot disagree with "Allah and His Messenger." Interestingly, if the obedience to "authority" is the "obedience of Allah and His Messenger," as the authors suggest, then there would have been no need to mention them separately.

Further, Parwez's argument involves the idea that Prophet Muhammad was only the deliverer of the Holy Quran in his prophetic capacity. All other responsibilities, i.e., the interpretation of the Quran, the sanctifying of people, and the struggle for an Islamic system by Prophet Muhammad, were in his personal

[10] Quran, 4:49.

capacity. Such a claim cannot be reconciled with the Quran. The Holy Quran mentions: "It is He who has sent amongst the unlettered an apostle from among themselves, to rehearse to them His signs, to sanctify them, and to instruct them in scripture and wisdom – although they had been, before, in manifest error."[11] This Quranic verse defines the status of Prophet Muhammad and does not reduce the Prophet to a mere deliverer of Allah's message. Instead, it enjoins Prophet Muhammad with the duty to purify the people and instruct them in the Quran and its wisdom, in addition to delivering Allah's message. Here, the word "wisdom" following "scripture" is of particular importance. Wisdom means "to put everything in its place on time."[12] It would mean such an interpretation and explanation of the scripture, which is according to the will of the scripture's giver.

Hence, one of the main duties of Prophet Muhammad was to make it evident to the people what Allah meant in His Book, indicating His general and specific commands. This is why Al-Shafi'i regarded "wisdom," as used here, to be synonymous with the model behaviour of Prophet Muhammad, which makes it evident to the people what Allah meant in His Book.[13] In this regard, the work of Sayed Abul Ala Maududi in his Book *Sunnat Ki Aini Haisiyat*[14] is of particular importance in further investigating the issue of the authority of the *Sunnah* of Prophet Muhammad. In the said work, Maududi not only invalidates the argument that Prophet Muhammad was just the deliverer of Allah's message in his prophetic capacity but also demonstrates, in light of a large number of Quranic verses, that Prophet Muhammad was given a multidimensional role as a prophet, and his *Sunnah* was meant to be followed by Muslims.

Hadith Literature is the Historical Record of the Life of Prophet Muhammad

The authors consider *Hadith* literature to be the historical record of the life of Prophet Muhammad. According to traditionalist Islamic scholars, *Hadith* literature contains narrations of Prophet Muhammad and describes the Sunnah of the Prophet. Any Hadith that satisfies the authenticity tests and reveals any Sunnah of

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[11] Quran, 62:2.
[12] Maḥmud b. Abdullah al-Alusi, *Ruh al-Mani fi Tafsir al-Quran* (Dar Ihia al-Turath al-Arabi 2010) Verse 2:129.
[13] Imam Muhammad ibn Idris al-Shafi'i, *Al-Risala fi usul al-fiqh* (Majid Khadduri tr, 2nd edn, Islamic Text Society 1961) 109–112.
[14] Abul A'la Maududi, *Sunnat ki Aini Haisiyyat* (Islamic Publication Ltd. 2005).

the Prophet is considered authoritative for Muslims. However, the authors, as mentioned previously, question the very concept of *Sunnah*. They argue that it is only the Quran that was given to humanity in its pure and authentic form, and the same is not true for *Ahadith* because the Prophet Muhammad never made any arrangements for their preservation as opposed to the Quran, which was sought to be meticulously recorded in the Prophet's lifetime. Instead, the authors construct a proposition that the penning down of *Ahadith* was done against the express will of Prophet Muhammad and his companions to compromise the meaning of the Quran. After investigating the development and compilation of *Hadith*, Parwez concludes as follows: most of the compilation work of *Ahadith* was done by Iranians; all this work was done approximately two hundred years after the death of Prophet Muhammad; the scholars of *Hadith* found millions of *Ahadith* but declared only a few thousand authentic; and all these *Ahadith* were communicated to them orally. Based on these findings, Parwez argues that all the *Ahadith* are probable, and probable narrations may be regarded as a historical record of the life of Prophet Muhammad but cannot be considered a source of religion.

Although the authors have attempted to substantiate their findings with evidence from the early Islamic literature, in most instances, interestingly, they support their assertions with the same *Hadith* literature which they regard as probable and untrustworthy. Also, the authors have, in certain instances, partially quoted different *Ahadith* and views of other academics, only to the extent that supports their narrative. For example, to prove that Prophet Muhammad was against the recording of *Ahadith*, Parwez quotes a *Hadith*: "Do not write anything from me other than the Quran. Whoever has written anything other than the Quran, should erase it." But interestingly, this is half the *Hadith*, and the full text of the Hadith is as follows: "Do not write down what I say, and whoever has written anything from me other than the Quran, let him erase it. Narrate from me, and there is nothing wrong with that, but whoever tells a lie about me, let him take his place in the fire."[15]

Amongst the recent scholarship, Jonathan Brown gives a very important account of the authenticity of Hadith in his work "Authenticating of *Hadith* and the

[15] Imam Abul Hussain Muslim bin al-Hajjaj, *Sahih Muslim: The Book of Zuhd and Softening of Heart* (Huda Khattab ed, Nasiruddin al-Khattab tr, Darussalam Publishers 2007 vol 7) Hadith no. 7510.

History of *Hadith* Criticism."[16] Brown gives a detailed explanation of the causes of forgery in the *isnad* and *matn* of *Hadith* and describes how the scholars of *Hadith* developed a sophisticated and effective science of *Hadith* criticism to separate authentic *Ahadith* from false ones.

Revelation is Confined to the Quran

Another notable point in the Book is the authors' view on the concept of revelation (*Wahi*). The authors believe that revelation from Allah is confined to the Quran. According to traditionalist Islamic scholars, the revelation that Prophet Muhammad received from Allah was of two kinds. One was the "recited revelation" (*Al-Wahy-Al-Matluww*), i.e., the revelation that can be recited, which is confined to the verses of the Quran.[17] The other kind of revelation was "the unrecited revelation" (*Al-Wahy-Ghair-Al-Matluww*), i.e., the revelation received by Prophet Muhammad which is not conveyed to people verbally but has been demonstrated through the sayings and acts of the Prophet.[18] Parwez strongly disagrees with this differentiation in revelation and asserts that Prophet Muhammad received only one kind of revelation: what we have in the form of the Quran. He claims that neither the Quran nor any early Islamic literature suggests any differentiation or categorization as regards revelation. He furthers his case through a very critical question: if the *Sunnah* or the *Hadith* is also a revelation from Allah similar to the Quran, and He has taken on the responsibility for the protection of revelation, then why is the *Sunnah* not protected in the same manner as the Quran?

When the author's narrative about the revelation is examined in light of the Quran, it does not hold. The Quran says: "*It is not fitting for a man that God should speak to him except by inspiration, or from behind a veil, or by the sending of a messenger to reveal, with God's permission, what God wills: for He is most high, most wise*."[19] This verse suggests that sending a messenger (the angel *Jibreel* in the case of the Quran) to reveal Allah's message is not the only mode of communication between Allah and humankind. Further, the Quran refers to several

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[16] Jonathan Brown, 'Authenticating Hadith and the History of Hadith Criticism' (2021) <https://yaqeeninstitute.org/read/paper/authenticating-hadith-and-the-history-of-hadith-criticism> accessed 6 Sep 2022.
[17] Ibid 23.
[18] Ibid.
[19] Quran, 42:51.

events that are not part of the Quran but regards them to be from Allah – showing that revelation from Allah is not confined to the Quran; instead, there is another kind of revelation that does not form part of the Quran, yet it is a revelation from Allah. For instance, the Quran mentions: "*We made the Qiblah (prayer direction towards Jerusalem) which you used to face, only to test those who followed the Messenger (Muhammad) from those who would turn on their heels (i.e., disobey the Messenger).*"[20] After Prophet Muhammad migrated to Madinah, Muslims were ordered to direct their faces in prayers towards *Bayt al-Muqaddas* (Jerusalem). After seventeen months, the Quran abrogated its earlier order, and Muslims were ordered to regard the mosque in Makkah as their *Qiblah:* "*So turn your face in the direction of Al-Masjid-al-Haram (at Makkah).*"[21] This new order was objected to and criticised by some disbelievers who questioned the change in *Qiblah*. This objection was answered through the verse quoted above, which stated that the appointment of the earlier *Qiblah*, attributed to the command of Allah, was to test the believers on whether they would follow Prophet Muhammad. But interestingly, this order, to which retrospective indication has been made, is nowhere in the Quran. This direction was given to Muslims by Prophet Muhammad with no reference to any verse of the Quran. Yet, this order was mentioned by the Quran as the order of Allah. Hence, this example indicates that the revelation is not confined to the Quran, and the acts and words of Prophet Muhammad were also divinely inspired, which traditionalists refer to as "unrecited revelation."

Conclusion

The *Sunnah*, which is understood as the model behaviour of Prophet Muhammad and held as the second source of Islamic law, is regarded by the authors as a fabricated concept that has emerged from the development of *Hadith* approximately two centuries after the death of Prophet Muhammad. The authors also find the *Hadith* literature probable and say that a probable element cannot be regarded as a source of religion. Further, they are of the view that Prophet Muhammad only followed the Quran and preserved it for his followers. Thus, the only source of Islamic law is the Quran, and anything other than it has no authoritative status.

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[20] Quran, 2:143.
[21] Quran, 2:144.

Accordingly, this book provides a thought-provoking critique of the traditional understanding of the concept of *Sunnah* and the authoritative status of *Hadith* in Islamic jurisprudence. It invites the reader to challenge long-held beliefs about the impeachable status of *Sunnah* and authentic *Ahadith*. Although the findings of the authors appear quite untenable, there is no gainsaying their hard work in terms of opening a new avenue of inquiry for students and scholars of Islamic jurisprudence.