

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

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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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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 172⁶ 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, Article 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 146²⁵ 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

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; *Muhammad 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 24²⁸ 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

²⁸ The Constitution of Pakistan 1973, Article 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 Balochistan³⁹ 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 comprising 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

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

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.

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.