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Aims and Scope

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 amongst 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 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 rigour 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 widely recognised as a distinguished platform for academic legal scholarship across a broad range of subjects. The editors are privileged to serve a publication that consistently upholds a high standard of quality. In recent years, submissions and publications have increasingly reflected themes of interest to a more diverse readership, enabling the LLJ to enhance its relevance within the international legal community. Alongside this, the LLJ has begun its own endeavours to bring accessible and thought-provoking legal academia to its readers. Over the past year, an incredibly driven and committed team has been working to make this Volume a reality, while ensuring that its quality remains unimpeachable. Thus, it is with great pride that we now present the eleventh Volume of the LLJ.

First and foremost, we extend our sincere gratitude to the authors of the brilliant articles published in this volume for their valuable insights, attention to detail, and wholehearted co-operation with the LLJ team in polishing and publishing their pieces. We deeply appreciate the commitment and patience of all contributors to this Volume, and are immensely grateful to the contributors for trusting us with their work. Additionally, we are sincerely grateful to our Chief Editor, Dr. Sadaf Aziz, and Co-Editor, Marva Khan, for their continued guidance and support for the LLJ this year. Without these brilliant academics and their valuable insights, the publication of this Volume would have been practically impossible. We are also highly grateful to the LLJ Fellows and Sub-Editors—Alina Arif, Bilquees Bano Vardag, Muhammad Mohsin Masood, Muhammad Hammad Amin, Muhammad Usman Mumtaz, Aizaz Arif, Aleezay Saeed, Fatima Farooq Chishti, Musa Saeed, and Zainab Farhan—alongside their team members, for their tireless efforts in ensuring and maintaining the academic quality of the LLJ.

As the new academic year approaches, the LLJ and its team remain committed to producing rigorous, well-researched, and critical legal scholarship that is thought-provoking and capable of challenging conventional ideas. We welcome all feedback, suggestions, and recommendations for how to further improve the quality and standard of our publications. In this regard, please write to us at submissions.llj@lums.edu.pk.

Student Editors
Syed Qasim Abbas, Shehryar Atif Malik

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Child Marriages: Determination of the Age of Marriage Under the Law of Pakistan

Fadil Syed Hashmey*

Abstract

Despite global progress, Pakistan struggles with the challenge of child marriages, owing to anachronistic laws and ineffective enforcement. Girls Not Brides, an international non-governmental organisation, reports that 18% of Pakistani girls are married before their eighteenth birthday. The Child Marriage Restraint Act, 1929 ('CMRA' or the 'Act') is almost a hundred years old, enacted to restrict marriages amongst underaged children in the Indian subcontinent. While many countries have developed and adopted effective legislation tackling child marriages, Pakistan still subscribes to this archaic Act. The state has taken few legislative steps to outlaw child marriages, and these efforts have largely been unsuccessful in domesticating international treaty requirements or curbing child marriages. This paper examines the factors contributing to child marriages in Pakistan and the relevant jurisprudence, and recommends that significant legislative changes be introduced by the Parliament. This paper suggests that underaged marriages should be invalidated, greater punishments should be imposed on *Nikah* (marriage contract) registrars for solemnising child marriages, and medical boards should be constituted in cases of 'disputed ages'. In sum, a comprehensive overhaul of the law on child marriages is needed to completely do away with this practice.

Introduction

Article 35 of the Constitution of the Islamic Republic of Pakistan, 1973 (the 'Constitution') provides for the protection of the family, the mother, and the child, while Article 37 of the Constitution specifically prescribes the promotion of social justice and eradication of social evils.[1] Whereas the Constitution has guaranteed these rights, domestic legislation, in the form of the CMRA—which is nearly a

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* Fadil Syed Hashmey is an Advocate of the High Courts of Pakistan and is pursuing his LL.M. at The University of Law (London).

[1] *Alisha Bibi v. State* PLD 2020 IHC 28 [20], wherein child marriages were expressly referred to as a social 'evil'.

hundred years old—has been unable to restrain child marriages adequately. By continuing with the archaic provisions of the CMRA, the state has been unable to cater to the morphing social conditions of the modern day and has also failed to comply with its international commitments.

Furthermore, the Parliament's reluctance to amend the law has contributed to some perturbing contradictions in the jurisprudence. As suggested by numerous recent decisions of the Pakistani courts, only an all-encompassing reform effort can put the issue of child marriages to rest once and for all and bring the domestic legislation in line with country's international obligations and commitments.

Background

I. Prevalence and Impact of Child Marriages

As per the United Nations International Children's Emergency Fund ('UNICEF'), a child marriage 'refers to any formal marriage or informal union between a child under the age of 18 and an adult or another child.'[2] According to an Islamabad-based non-governmental organisation, there were 119 cases of child marriages reported in Pakistan in 2020, of which 95% and 5% involved girls and boys, respectively.[3] Girls Not Brides further reports that '18% of girls in Pakistan are married before their 18th birthday, and 4% are married before the age of 15.'[4] UNICEF notes that in 2018, 4.6 million girls in Pakistan had been married before the age of fifteen, and 18.9 million had been married before the age of eighteen.[5]

Child marriage has many adverse effects, especially for girls who, as a result of such marriages, lose their rights to personal development, education, and health. According to the National Library of Medicine, child marriages prevent girls from

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[2] UNICEF, 'Child marriage' (*unicef*) <https://www.unicef.org/protection/child-marriage> accessed 23 July 2022.

[3] Sahil, 'Cruel Numbers 2020' (*Sahil*) <https://sahil.org/cruel-numbers/> accessed 5 September 2022.

[4] 'Pakistan' (*GirlsNotBrides*) <https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/regions-and-countries/pakistan/> accessed 29 July 2024.

[5] UNICEF Pakistan, 'Child Marriage Country Profile' <https://www.unicef.org/pakistan/media/4151/file/Child%20Marriage%20Country%20Profile.pdf> accessed 21 July 2024.

'obtaining an education, enjoying optimal health, bonding with others their age, maturing, and ultimately choosing their life partners.'[6] The United Nations Population Fund Pakistan (the 'UNFPA') reports how girls who are subject to child marriages fall victim to domestic abuse and violence and experience significant health issues.[7]

II. Legislation and Jurisprudence

One of the main flaws in the CMRA is the distinction it creates between the definition of a female and male child. The CMRA defines a child as 'a person who, if a male, is under eighteen years of age, and if a female, is under sixteen years of age.'[8] By way of comparison, other Muslim-majority countries have prescribed the minimum age of marriage for girls as eighteen years or higher. For example, the minimum age of marriage for boys and girls in Egypt, Oman, Qatar, Morocco, and Turkey is eighteen years.[9] In Algeria, the minimum age for marriage is nineteen years for boys and girls, whereas in Bangladesh, the age limit is set at eighteen years for girls and twenty-one for boys. Similarly, Indonesia has fixed the minimum marriage age for boys and girls at nineteen years.[10]

Although some of the aforementioned countries do not strictly follow the same schools of *Shariah* law,[11] the examples are noteworthy because they show that the problem transcends any single school of Sunni Islamic jurisprudence. For instance, Turkey is predominantly Hanafi, while Egypt follows the Shafi School, with Morocco and Qatar adhering to the Maliki and Hanbali schools, respectively.

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[6] Nawal M. Nour, 'Health consequences of child marriage in Africa' (2006) 12(11) NLM 1644 <http://dx.doi.org/10.3201/eid1211.060510> accessed 29 July 2024.
[7] UNFPA Pakistan, 'Child Marriage in Punjab: A Political Economy Analysis and Policy Options' (2022) 17 <https://pakistan.unfpa.org/en/publications/child-marriage-punjab-political-economy-analysis-and-policy-options> accessed 29 July 2024.
[8] Child Marriages Act 1929, s 2(a).
[9] Mega Puspita and Nindya Octariza, 'The Rule Minimum Age of Marriage in Islamic Family Law in the Muslim World' (2022) IJSSR 196 <https://www.researchgate.net/publication/361846686_The_Rule_Minimum_Age_of_Marriage_in_Islamic_Family_Law_in_the_Muslim_World> accessed 21 July 2024.
[10] Ibid.
[11] The Constitution of the Arab Republic of Egypt 2014, art 2 which declares Islamic *Shariah* to be the principal source of legislation; Basic Statute of the State (Oman) 1996, art 2 which declares that *Shariah* law shall be the basis of legislation; and the Permanent Constitution of the State of Qatar 2004, art 1 which states that *Shariah* shall be the main source of legislation.

All of the aforementioned countries are signatories to treaties such as the Convention on the Rights of the Child[12] ('CRC'), the Convention on the Elimination of All Forms of Discrimination Against Women[13] ('CEDAW'), and the Universal Declaration of Human Rights[14] ('UDHR'). This shows that despite varying forms and levels of enforcement of *Shariah*, these countries have abided by their treaty obligations to balance human rights laws with Islamic standards. This further implies that the countries deem the potential harms associated with child marriages to outweigh religious factors.[15] In comparison, the Pakistani Parliament has, on multiple counts, refused to update the minimum age of marriage for girls in the CMRA citing 'religious reasons.'[16]

The Parliament, by enacting the CMRA, did acknowledge the need for imposing sanctions on child marriages. However, despite the existence of the Act, child marriages are still prevalent in Pakistan. This suggests two main points of contention. First, the implementation of the Act, in its current form, has been inefficient. Second, the Parliament was not convinced to move for a change to the CMRA despite the developing social norms of the country, newly discovered medical impacts, and legal loopholes, thereby resulting in an ineffective and outdated law. Similarly, the courts also reached conclusions that were at odds with the core purpose of the CMRA, which is to restrict child marriages. For instance, in *Bakshi v. Bashir Ahmed*, the Supreme Court of Pakistan ('Court') held the marriage of a girl under the age of sixteen to be contractually valid.[17] This clearly undermined the very purpose of the Act.

[12] Pakistan ratified the Convention on the Rights of the Child on 12 November 1990, making a reservation on interpreting its provisions following the principles of Islamic laws and values. In 1997, Pakistan decided to withdraw its reservation.
[13] Pakistan ratified CEDAW on 3 December 1996.
[14] Pakistan became a signatory to the UDHR in 1948.
[15] Religious factors refer to the belief that one may enter into a contract of marriage on the onset of puberty.
[16] Ikram Junaidi, 'Senate body rejects amendment to child marriage act as "un-Islamic"' *Dawn* (Islamabad, 12 October 2017) <https://www.dawn.com/news/1363275/senate-body-rejects-amendment-to-child-marriage-act-as-un-islamic> accessed 29 July 2024.
[17] *Mst. Bakshi v. Bashir Ahmed* PLD 1970 SC 323.

The Lahore High Court has, however, delved into the devastating medical implications of child marriages in *Tahira Bibi v. SHO*.[18] The case law that followed highlights the gaps in the CMRA more clearly.[19] In *Tahira Bibi*, Justice Anwaar ul Haq Pannun used empirical evidence as support for the notion that a lower age of marriage for girls would 'not only restrict women from socio-economic opportunities but also affect their reproductive health status such as forced sexual relations, early and complicated pregnancies, higher fertility rate and large family size formation.'[20] Justice Pannun expanded the ambit of his argument, citing how the issue of child marriages 'hampers the development process of a region or a country' as a 'substantial part of the human population, the women, remain uneducated or less educated, unemployed and underprivileged with poor health measures and no decision-making power.'[21]

The *Tahira Bibi* decision is notable in how it supports the idea that changing social mores have made girls more vulnerable to the after-effects of child marriages—no prior judicial decision had acknowledged the egregious implications of child marriages. While the judgement does not comment on whether the minimum age of marriage for girls should be enhanced,[22] it nonetheless reiterates that *Nikah* registrars are under a legal duty to verify whether the contracting parties to a marriage are of legal age. The judgement offers support for the idea that there is an ever-present need to update the CMRA, as the law in its current form is virtually toothless:

> It is a matter of great concern that despite ninety years of the promulgation of the Act, 1929, its objectives could not have been achieved satisfactorily due to certain lapses or loopholes in the mechanism for its enforcement. The children are still being lured by unscrupulous elements through deceitful means to abuse their innocent souls.[23]

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[18] *Tahira Bibi v. SHO* PLD 2020 LHC 811 [9]: 'Physically, the child bride has a small pelvis and is not prepared for childbearing. It results in deliveries that are too early or late. This exposes them to different complications.'
[19] *Abdul Razaq v. State* PCrLJ 2022 IHC 953 [7]: '…the law is vague and not clear about the age of a person to contract *Nikah*.'
[20] *Tahira* (n 18) [9].
[21] Ibid.
[22] Ibid [8]: 'It is quite vivid that the act does not hold the minor responsible for violation of the provision of the Act 1929. It also does not invalidate the marriage itself…'
[23] Ibid.

The Legal Landscape and Contributors to Child Marriages

I. Incompatibilities in the Domestic Law

In Pakistan, the various statutes on marriage rights are sparse in their wording and do not prescribe a single, unanimous minimum age for marriage. The Muslim Family Law Ordinance 1961 ('MFLO') does not incorporate a minimum age requirement for constituting a valid marriage, while the Dissolution of Muslim Marriages Act, 1939 ('DMMA') only provides for the possibility of dissolution when a girl under the age of sixteen had been married off by her guardian.[24] The assumption under the DMMA is that sixteen is the age of majority—the age after which an individual is no longer classified as a 'child'.

Similarly, while the CMRA defines a girl as being above 'sixteen years' for the purposes of entering into a contract of marriage, Section 3 of the Majority Act, 1875 ('Majority Act') defines a minor as an individual who is below the age of 'eighteen'. This highlights the inherent inconsistency between the two Acts. However, some commentators have pointed out that the Majority Act itself resolves this contradiction. Section 2(a) states that 'nothing herein contained shall affect the capacity of any person to act in the following matters (namely), marriage, dower, divorce and adoption.' This ostensibly means that these matters shall be governed by the statutes that respectively apply to them.

Moreover, as mentioned previously, Pakistan is a signatory to the CRC, CEDAW, and the UDHR, all of which have fixed the threshold for the minimum age of marriage at eighteen years for all children.[25] By signing these treaties, Pakistan is under a duty to legislate in a way that is consistent with the manner and form of these treaties. However, to date, only the province of Sindh has increased the minimum age of marriage to eighteen years for girls through the Sindh Restraint

[24] Dissolution of Muslim Marriages Act 1939, s 2(vii).

[25] Angela Melchiorre, 'A minimum common denominator? Minimum ages for marriage reported under the Convention on the Rights of the Child' (2011) OCHR <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/ForcedMarriage/NGO/AngelaMelchiorre.pdf> accessed 29 July 2024.

of Marriage Act, 2013—the implementation of which has also been rather ineffective.[26]

II. Cultural Practices

In the rural areas of Pakistan, the practice of *Swara*[27] (also known as *Wani* or arranged or forced marriage) is often used to solve familial disputes. This practice employs the *Jirga* (tribal council) system which consists of councils of senior and religious members of the society who act as an informal judicial body.[28] *Jirgas* often give away female offspring or women to solve conflicts between disputing parties. For instance, if a member of one family kills a member of another, the *Jirga* may urge the former family to marry off their female child to a member of the wronged family. The wronged family, in turn, accepts that female child as compensation for the crime.[29]

The statistics on marriages conducted under the *Swara* system in Pakistan are concerning, particularly in the provinces of Sindh, Khyber Pakhtunkhwa, and Balochistan. According to a 2013 household survey of five thousand women conducted by the Rutgers World Population Foundation in Naseerabad, Muzaffargh, Jaffarabad, Dera Ghazi Khan, Kashmore, and Jacobabad, more than 77% of marriages were arranged under *Swara*.[30] As per government statistics from the same year, merely nine instances of *Swara* marriages were reported, while

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[26] Hafeez Tunio, 'Law Fails to Thwart Child Marriages' *The Express Tribune* (Islamabad, 7 October 2022) <https://tribune.com.pk/story/2380506/law-fails-to-thwart-child-marriage> accessed 29 July 2024.

[27] Dr Mudasra Sabreen, 'Swara Marriages and Related Legal Issues' (2015) IIU 40 <http://dx.doi.org/10.2139/ssrn.3641315> accessed 5 July 2022.

[28] Farooq Yousaf, 'Jirga, Its Role and Evolution in Pakistan's Pashtun "Tribal" Society' (2021) *Clan and Tribal Perspectives on Social, Economic and Environmental Sustainability, Emerald Publishing Limited* 105–117 < https://www.researchgate.net/publication/349696680_Jirga_Its_Role_and_Evolution_in_Pakistan's_Pashtun_Tribal_Society> accessed 13 July 2024.

[29] National Commission on the Status of Women, 'Women, Violence and Jirga' (2017) 17 <https://ncsw.gov.pk/SiteImage/Downloads/Women,%20Violence%20and%20Jirgas%20Consensus%20and%20Impunity%20in%20Pakistan.pdf> accessed 29 July 2024.

[30] Sehrish Wasafi, 'Survey finds 77% of marriages made in traditional exchanges' *The Express Tribune* (Islamabad, 12 February 2013) <https://tribune.com.pk/story/506066/survey-finds-77-of-marriages-made-in-traditional-exchanges> accessed 22 July 2024.

human rights advocates posit that the actual number of *Swara* cases was significantly greater.[31]

Section 310-A of the Pakistan Penal Code, 1860 ('PPC') explicitly bars the practice of *Swara* and prescribes a punishment 'which may extend to seven years but shall not be less than three years' for engaging in the act. In addition to the precise language used by the legislature, the Court in the case of *Samar Minallah*[32] specifically abolished the custom of *Swara*, ruling that weddings consummated under such a custom had no legal standing. As a result, all women whom the *Swara* custom had constrained into arranged marriages were to be set free. Though the Court did not specifically refer to an international human rights standard as justification for the decision, it nonetheless unambiguously declared that women have fundamental rights that were unalienable under the law.

The court's declaration that *Swara* weddings are blatant defilements of women's freedom with no legal validity[33] is particularly interesting given how the scope of this argument was not extended to forced child marriages conducted outside the *Swara* context. In comparison, it appears strange that an underaged child who is forced into a marriage by a *Wali* (guardian) cannot have the marriage contract repudiated while an identical marriage in the context of *Swara* stands null and void in the eyes of law.

III. Religious Beliefs & Inconsistencies in Interpretation

Another major contributor to the ineffective implementation of the minimum age requirement for marriage in Pakistan stems from certain interpretations of religious injunctions by different courts, which have given rise to inconsistencies in the law.

[31] Ibid.
[32] *Samar Minallah v. Federation of Pakistan* Constitutional Petition No. 16 of 2004.
[33] *Mst. Sakeena Bibi v. Secretary Law, Government of Pakistan* PLD 2022 FSC 57 [13]; see also *Gul Sher v. Additional and Sessions Judge* PLD 2023 LHC 171 [3]–[12]. The judgement alluded to the UDHR, ICCPR, and CEDAW as well as Articles 25, 36, and 37 of the Constitution of Islamic Republic of Pakistan, 1973 to conclude that 'the custom of vani or swara is un-Islamic.'

One must keep in mind that Pakistan is an Islamic country with a large Hanafi sect.[34] As per the Hanafi school of thought, the age for marriage is contingent upon the onset of puberty. In this regard, it must be stated that 'the Hanafis consider eighteen years for a boy and seventeen years for a girl as the age of maturity.'[35] However, that is the maximum age for maturity, whereas 'the minimum age limit according to them is twelve years and nine years for a boy and a girl respectively.'[36] An introductory survey of the other sects of Sunni Islamic jurisprudence, namely the Maliki, Shafi'i, and Hanbali sects, reveals that they also 'do not adhere to the concept of the minimum age of marriage.'[37]

In determining the minimum age for marriage, scholars and practitioners place great reliance on legal commentaries such as D.F. Mullah's *Mohammadan Law*. The judgement in the case of *Muhammad Khalid v. Magistrate 1st Class*[38] dealt with the issue of whether a 14-year-old girl could enter a contract of marriage without the consent of a guardian. The Lahore High Court, in delivering the verdict, relied heavily on the decision in *Muhammad Iqbal v. State*[39] for ruling that 'a girl who has attained puberty may contract marriage with a man of her own choice.'[40] The judgement in *Muhammad Khalid* also refers to *Mohammadan Law* to rationalise the notion that the onset of puberty sanctions entry into a contract of marriage, and this was held not to violate the CMRA. The judgement, in placing reliance on a legal commentary for ruling that the onset of puberty is the determinant for obtaining the status of 'adult', as opposed to heeding the legal requirement under the CMRA itself, sets up a dangerous precedent. The inconsistency stems from the fact that the age of puberty varies from individual to individual, and hence, there can be no consistent determinant for marriage therein.

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34 John L. Esposita 'Islam in Pakistan' (*Oxford Islamic Studies Online*, 2012) <https://web.archive.org/web/20130618023219/http://www.oxfordislamicstudies.com/article/opr/t125/e1809?_hi=1&_pos=1> accessed 29 July 2024.
35 Muhammad Jawad Mughniyya, 'Marriage According to the Five Schools of Islamic Law' (*Al-Islam.org*, 1997) 8 <https://www.al-islam.org/printpdf/book/export/html/43417> accessed 29 July 2024.
36 Ibid.
37 Afrizal Maisarah, Zulfahmi, F. Mauliza, and F. Murni, 'Minimum Marriage Age: Study of Fiqh of Four Madhabs' (2019) 150 BIoHS <http://biarjournal.com/index.php/biohs/article/view/46> accessed 29 July 2024.
38 *Muhammad Khalid v. Magistrate 1st Class* PLD 2021 LHC 21.
39 *Muhammad Iqbal v. State* PLD 1983 FSC 9.
40 *Muhammad Khalid* (n 38) [7].

Moreover, by relying on *Mohammadan Law*, the judgement undercuts the importance of the CMRA itself which is binding legislation.

If principles of *Mohammadan Law* have to be relied upon (as has been done in *Muhammad Khalid* and *Muhammad Iqbal*) to reach decisions, then it is important to also rely on the Islamic legal principle known as *la dharar*,[41] which translates to 'no harm' or 'avoiding harm'. This describes a situation where, if the benefit accrued from an act exceeds the harm, only then can the harmful act be condoned. Since medical science has indisputably proven that the harm inflicted upon girls through child marriages outweighs any potential benefits, it follows that an application of the principle of *la dharar* results in a ban on child marriages.

Interestingly, this aspect was dealt with in the recent Federal Shariat Court ('FSC') decision in *Farooq Omar Bhoja v. Federation of Pakistan.*[42] This case involved a dispute regarding the minimum age of a child for *Nikah*. Assessing the facts of the case, Justice Dr. Syed Muhammad Anwer emphasised that a minimum age for marriage is desirable, as it is in line with Islamic values and is beneficial to the society. In reaching this conclusion, Justice Anwer referred to the 'settled principle of *Shariah*' wherein if 'any *Mobah* (permitted) act appears to be harmful to the society collectively or to a particular segment of a society, the State has the power to make that act prohibited so that the society can be protected from a larger [*sic*] damage.'[43] Besides, Justice Anwer alludes to the principle of *Sad-uz-Zaraey* under which it is the 'duty of the State to control, curtail or curb any act in a society, which may lead to harmful consequences to society at large or to any of its segments, no matter how minor it is.'[44]

Thus, the courts, in *Muhammad Iqbal* and *Farooq Omar Bhoja*, have taken differing approaches and utilised contrasting interpretations in relation to child marriages. While the Court in *Muhammad Iqbal* was of the view that the onset of puberty is sufficient for contracting a marriage, the FSC in *Farooq Omar Bhoja*

[41] Musawah, 'Report to be written pursuant to HRC Resolution A/HRC/RES/24/23 on child, early and forced marriage' (*musawah*, 13 December 2013) <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/ForcedMarriage/NGO/Musawah.pdf> accessed 29 July 2024.
[42] *Farooq Omar Bhoja v. Federation of Pakistan* PLD 2022 FSC 1.
[43] Ibid [6].
[44] Ibid. [7].

defended the minimum age of marriage as enshrined in the CMRA. The author of this paper argues that the decision in *Farooq Omar Bhoja* portrays the FSC's progressive stance in enforcing the minimum age bracket for a valid marriage and that the proposition of a minimum age is backed by sound religious reasoning and logic. Nonetheless, it must be noted that the FSC, in *Farooq Omar Bhoja*, did not go into detail about whether the minimum age should be increased to eighteen years. Instead, the FSC defended the currently existing minimum age of sixteen years as prescribed by the Parliament 'in the impugned law.'[45] This suggests that the FSC is willing to enforce decisions imposing a higher minimum age bracket for child marriages if Parliament amends the CMRA accordingly.

Recent Developments in Jurisprudence

Despite the Parliament's reluctance to update the law, the judiciary has recently become open to highlighting the issues in the CMRA.[46] In the recent case of *Abdul Razaq v. State*,[47] Islamabad High Court acknowledged the existence of 'anomalies in law with respect to the age of a person to contract *Nikah*.'[48] The Islamabad High Court also accepted the idea that 'it is not only puberty which is the criteria for granting consent but there is also requirement of being 'Rushd', i.e., a person being able to decide for himself and exercise good judgement.'[49]

In referring to the *Dictionary of Modern Written Arabic* by Hans Wehr, Justice Aamer Farooq remarked that 'Rushd has been explained/defined as the integrity of (one's) actions, proper, sensible conduct; reason, good sense, senses; consciousness; maturity (of the mind).'[50] Therefore, a person can only contract for a *Nikah* when they have reached puberty and 'can form good decisions and have a maturity of mind.'[51] In this regard, the Court's decision in *Hafiz Abdul Waheed v. Mrs. Asma Jehangir*[52] was also referred to wherein it was stated that where a

[45] Ibid [3].
[46] *Tahira* (n 18) [8].
[47] *Abdul Razaq* (n 19).
[48] Ibid [7].
[49] Ibid [7] and [12].
[50] Ibid [12].
[51] Ibid.
[52] *Hafiz Abdul Waheed v. Mrs. Asma Jehangir* PLD 2004 SC 219.

woman is of the appropriate age, the 'consent of Wali'[53] is not required, and a *sui juris* (possessing full social and civil rights[54]) Muslim women can enter into a valid *Nikah*/marriage of her own free will.[55]

In light of this reasoning, Justice Farooq referred to how the minimum age for marriage in the Hanafi school of thought, 'as per Imam Abu Hanifa (R.A), for male is 18 years and for female 17-years'[56] whereas 'D.F. Mullah in *Mohammadan Law* has mentioned the age for Hanafi women as 15 years.'[57] In *Abdul Razaq*, although Justice Farooq rendered his decision in light of the parties' respective schools of thought, which prescribed the minimum age of marriage as being '17 years', this was not in line with the express wording of the CMRA. The issue here is not with courts' deviation to ensure a just application of the law but with the legislature's failure to update the archaic provisions of the CMRA which have, to an extent, lent themselves to varying interpretations and therefore bred gaping judicial inconsistencies.

The case of *Abdul Razaq* not only grapples with the inherent contradictions within the law on child marriages but also exposes them: although 'other Islamic countries have passed laws fixing age for both a male and female person to contract marriage,'[58] Pakistan's reluctance to update the CMRA in accordance with today's currents has exacerbated the problem. In concluding his judgement, Justice Farooq expressly remarked how 'in the above backdrop, it is appropriate that the Federal Government should intervene and legislate upon the matter to remove all the anomalies as such.'[59]

More recently, the Lahore High Court dealt with this issue in *Azka Wahid v. Province of Punjab*[60] wherein the definition of 'child' as prescribed under Sections 2(a) and 2(b) of the CMRA was struck down. In reaching his conclusion, Justice Shahid Karim drew inspiration from the Sindh Child Marriages Restraint

[53] Legal guardian.
[54] *Black's Law Dictionary* (5th edn, 1979).
[55] *Hafiz Abdul Waheed* (n 52) [29]; *Abdul Razaq* (n 19) [13].
[56] *Abdul Razaq* (n 19) [12].
[57] Ibid.
[58] Ibid [9].
[59] Ibid [15].
[60] *Azka Wahid v. Province of Punjab & Others* LHC 2024 1392.

Act, 2013 and the constitutional protections provided in Articles 25 and 35 of the Constitution. The primary focus of the judgement pivoted on the noticeable gap between the law and religious beliefs, and Justice Karim reasoned that 'the purpose of law is anchored primarily in social, economic, and educational factors rather than religious.'[61]

In assessing the true intent of the Parliament, the Justice Karim cast aside the argument that child marriages could be justified given the early attainment of puberty for females. The essential purpose of the CMRA, the Justice Karim held, is to 'restrain the solemnisation of child marriage'—a purpose that has 'been muddled by providing different ages for males and females for which there is no intelligible criteria.'[62] In concluding his judgement, Justice Karim ruled that the provincial government is empowered to enforce a minimum age for marriage, and had the Parliament intended to make the minimum age of marriage contingent on the onset of puberty, it would have expressly said so.

The Lahore High Court directed the government to amend the CMRA accordingly. This judgement is a welcome development as it takes an important step in ironing out the ambiguities plaguing incredibly inconsistent laws. However, the legislature has not, till date, brought any amendments to the Act.

The Validity and Aftermath of Child Marriages

Once a child marriage has been solemnised, the law is eerily silent as to whether it stands as a legally valid contract or is null and void. In *Bakshi v. Bashir Ahmed*,[63] the Court held that if a girl under the age of sixteen entered a contract of marriage in contravention of the CMRA, the marriage would not become void, though the individuals who contracted the marriage may attract criminal culpability.

Ghulam Qadir v. the Judge Family Court, Murree[64] also dealt with the issue of the validity of a minor entering a contract of marriage. Although the Lahore High Court acknowledged that minors were not competent to enter a contract of

[61] Ibid [6].
[62] Ibid [5].
[63] *Mst. Bakshi* (n 17).
[64] *Ghulam Qadir v. the Judge Family Court, Murree* CLC 1988 113.

marriage, it found that minors may still be married off by their guardians. Most notably, however, the Court opined that the marriage of a child is tantamount to a voidable contract, and it could be repudiated.

The abovementioned decision of the Lahore High Court is atypical in how it postulates that child marriages may be declared void, mainly owing to the fact that no specific *pari materia* legal provision in the CMRA or any other statute exists. Despite this, the view of the majority of courts on the matter is that child marriages cannot be annulled. In this regard, the Islamabad High Court took a different approach through its judgement delivered in *Mumtaz Bibi v. Qasim*:

> As will be discussed later in this opinion there are clear statutory provisions proscribing acts that no one can engage in when they involve a child under the age of 18. In the presence of such clear and unequivocal statutory provisions criminalizing certain acts and behaviour, there is no room to engage in any further interpretive exercise to determine whether or not a child marriage falls within the domain of prohibited conduct in Pakistan.[65]

The *ratio decidendi* in *Mumtaz Bibi* is notable for several reasons. First, it analyses the concept of child marriage vis-à-vis the law of contract while also incorporating a discussion on the penal provisions triggered by an underage marriage. Second, it uproots the idea that legal commentaries such as *Mohammadan Law* by D.F. Mullah are to be treated as law, distinguishing such commentaries from legislation passed by a democratically elected Parliament.[66] Third, it adopts a purposive approach to interpretation and attempts to decipher the true intent of the Parliament in enacting the CMRA to reduce child marriages. Fourth, it considers international commitments and treaties to which Pakistan is a signatory and stresses the need to interpret domestic jurisprudence in a way that is consistent with the form and manner of such treaties.

The underlying logic in the judgement is noteworthy—Justice Babar Sattar refers to cases such as *Shahab Saqib v. Sadaf Rasheed*[67] and *Malik Mumtaz Qadri*

[65] *Mumtaz Bibi v. Qasim* PLD 2022 IHC 228 [18].
[66] Ibid [13]: 'Dinshaw Mulla's commentary can therefore not be treated as a source of law itself but like any other treatise commenting on a subject of law can be used as a reference and a commentary.'
[67] *Shahab Saqib v. Sadaf Rasheed* Writ Petition No. 2355/2015.

v. State[68] to support the idea that the state has a legitimate interest in governing relationships under Muslim Personal Law and that preferences for certain schools of Islamic jurisprudence should not alter the trajectory of decisions that ought to be based on express statutory provisions:

> …this Court's opinion rendered in *Shahab Saqib*: It can thus It can thus not be permissible for a judge to assume the role of the legislature and determine what the Muslim Personal Law ought to be (which determination is then binding in terms of Articles 189 and 201 of the Constitution) on the basis of his preference for a certain school of Islamic thought or his personal understanding of *Usool-al-fiqh* and *Shariah*. The Constitution has thus addressed this issue as also elucidated by the august Supreme Court in *Malik Muhammad Mumtaz Qadri*. A provision of law that is considered to fall foul of the commands of *Shariah* can be challenged only before the Federal Shariat Court in terms of Article 203D of the Constitution and the jurisdiction of the High Courts is ousted for such purpose under Article 203G…[69]

Justice Sattar equates a contract of marriage to a contract to enter into sexual relations, and then points out the inherent contradiction in the situation as envisioned under the CMRA. The current state of law is such that it categorises as rape (under Section 375 of the PPC) instances where sexual intercourse is carried out with a woman under the age of sixteen, with or without her consent. Moreover, the offence of sexual abuse, as introduced by the Criminal Law Amendment Act, 2016 through the insertion of Sections 377A and 377B in the PPC, covers instances where the victim is less than eighteen years of age, irrespective of whether the act is performed with the consent of the victim. As such, Justice Sattar reasons that to hold that contract law would condone such a contract while the corresponding penal provisions envision criminal culpability would be greatly illogical and wholly unsustainable.[70]

The foregoing, in conjunction with Sections 11 and 23 of the Contract Act, 1872 and Pakistan's international commitments under the CRC and the UDHR, led

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[68] *Malik Mumtaz Qadri v. State* PLD 2016 SC 17.
[69] *Mumtaz Bibi* (n 65) [16].
[70] Ibid [25].

Justice Sattar to conclude that the marriage of a girl below the age of eighteen constitutes an illegal contract and is *void ab initio*.[71] The applicability of the judgement in *Mumtaz Bibi*, in invalidating marriages of children aged below eighteen, remains restricted to Islamabad. Nonetheless, it has a persuasive effect on the rest of the provinces. Apart from accounting for Pakistan's international obligations, the judgement is progressive in nature and sound in reasoning.

I. Disputed Age Cases

The validity of a marriage is often called into question where there is an issue of 'disputed ages'. The typical dilemma in such situations is that a minor elopes against the wishes of her legal guardians, but later contends that she is *sui juris* and has attained puberty. A recent case that dealt with such a matter is *Alisha Bibi v. State*[72] wherein the Islamabad High Court held that the accurate determination of age is a question of evidence which is to be decided by the trial court. Moreover, the High Court issued directions to 'curb the evil of child marriages'[73] by: (i) revoking the licences of and criminally prosecuting *Nikah* registrars for conducting child marriages; and (ii) directing that National Database and Registration Authority ('NADRA') link marriage registration certificates to birth certificates to avoid inconsistencies as to one's age.

The progressive nature and rationale of the *Alisha Bibi* judgement does not appear to have influenced the jurisprudence in other provinces. The problem of disputed ages was again brought to the spotlight through the Dua Zehra case. Dua Zehra, a fourteen-year-old resident of Karachi, was reported missing from Korangi on the 16th of April 2022.[74] On the 25th of April, Zehra was found, but she stated that she was eighteen years old and had eloped to marry, while her parents vehemently contested the marriage, claiming that she was underage.[75] On the 19th of May, a magistrate refused to accept the police's plea seeking a medical examination to determine Zehra's age. After several attempts, a medical board was finally constituted on 25th June by the Sindh High Court. Zehra's test results were

[71] Ibid [28].
[72] *Alisha* (n 1) [20].
[73] Ibid.
[74] Editorial, 'Timeline of the Dua Zahra case' *AAJ News* (Karachi, 9 January 2023) <https://www.aajenglish.tv/news/30293228> accessed 29 July 2024.
[75] Ibid.

then returned on 4th July, declaring her to be fourteen years of age.[76] Zehra's custody was given to her parents, through whom she then filed a petition for annulment of marriage. However, on 8th March 2025, a judicial magistrate in Karachi dismissed the petition, declaring the marriage to be lawful.[77]

The Dua Zehra case presents a fine example of how the laws concerning child marriages are riddled with insurmountable inconsistencies. Nonetheless, till date, no amendments have been brought in the law requiring mandatory medical examinations where there is uncertainty about the betrothed parties' ages. The reluctance to reform the law on child marriages has resulted in an almost identical situation in the case of a fourteen-year-old girl, Nimra Kazmi.[78] It is argued that concrete changes, along the lines of the directions contained in the *Alisha Bibi* judgement—which mandate strict punishments for *Nikah* registrars, promote government-maintained online portals for verifying ages, and require medical examinations for determining disputed ages—ought to be brought.

II. The Potential for Reforms in the Child Marriages Act

The reluctance of the Pakistani Parliament to legislate on this issue has become apparent on multiple occasions. At the provincial level, a proposed Child Marriage Amendment Bill in 2014 failed to gain approval from the Khyber Pakhtunkhwa Assembly. Similar bills were also mooted in both 2019[79] and 2021[80]; however, nothing came to fruition. On the other hand, Punjab introduced the Punjab Marriage Restraint Act in 2015, which did not alter the legal age for marriage but instead

[76] Rana Bilal, 'Dua Zehra moved back to Karachi from Lahore, placed in child protection centre' *Dawn* (Islamabad, 24 July 2022) <https://www.dawn.com/news/1701330> accessed 27 July 2024.
[77] News Desk, 'Court declares Dua Zehra, Zaheer Ahmed's marriage valid' *The Express Tribune* (Islamabad, 8 March 2025) <https://tribune.com.pk/story/2533092/court-declares-dua-zehra-zaheer-ahmeds-marriage-valid> accessed 19 March 2025.
[78] Tariq Ismail, 'Missing Nimra Kazmi emerges happily married in DG Khan' *The Express Tribune* (Islamabad, 26 April 2022) <https://tribune.com.pk/story/2354255/missing-nimra-kazmi-emerges-happily-married-in-dg-khan> accessed 27 July 2024.
[79] UNFPA, 'Child Marriages in Khyber Pakhtunkhwa: A Political Economy Analysis and Policy Options' (2020) 32 <https://pakistan.unfpa.org/sites/default/files/pub-pdf/child_marriage_kpk_book_1_0.pdf> accessed 29 July 2024.
[80] Editorial, 'Bill to restrain underage marriage submitted in KP Assembly' *Associated Press of Pakistan* (Islamabad, 14 June 2021) <https://dailytimes.com.pk/772871/bill-to-restrain-child-marriage-submitted-in-kp-assembly/> accessed 29 July 2024.

increased prison sentences and fines for child marriages.[81] These parliamentary efforts highlight the ongoing struggle to address and reform child marriage laws in Pakistan.

At the national level, the Child Marriage Restraint (Amendment) Bill, 2017, was swiftly rejected by the Senate Standing Committee, which reasoned that 'increasing the minimum age for girls to marry from 16 to 18, was contrary to Islamic injunctions.'[82] Senator Kamran voiced the frustration of many citizens stating, 'Girls as young as ten are being married off in Pakistan even though the legal minimum age for getting married is 16…If the government thinks 16-year-old girls are adults, they should also be issued driving licences and allowed to cast votes.'[83] Another attempt to amend the law came with the Child Marriage Restraint (Amendment) Bill, 2019, which sought to expand the definition of a child to include individuals under eighteen. However, despite being passed in the Senate,[84] it was ultimately rejected by the National Assembly.[85]

Apart from the *Azka Wahid* judgement, the closest glimmer of reform from the Lahore High Court appears in the *Tahira Bibi v. SHO* judgement, which has suggested that rigorous measures ought to be enforced to curb child marriages. In his judgement, Justice Pannun highlighted numerous flaws observed in the *Nikah* registration process. He observes that *Nikah* registrars often fail to demand proof of the betrothed parties' ages in the form of their authentic NADRA-issued National 'Identity Card, B-Form, or school leaving certificate(s). Instead, they rely on self-estimates as to their age during registration of the marriage.'[86] To address this issue, Justice Pannun recommended making it mandatory to provide authentic proof of identity, specifically birth certificates issued by the concerned Union Council and

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[81] Punjab Marriage Restraint (Amendment) Bill 2015, s 4–6.
[82] Junaidi (n 16).
[83] Ibid.
[84] Mumtaz Alvi, 'Bill against marriage under 18 sails through Senate' *The News International* (Islamabad, 30 April 2019) <https://www.thenews.com.pk/print/465072-bill-against-marriage-under-18-sails-through-senate> accessed 29 July 2024.
[85] Muhammad Anis, 'NA body on Law rejects Child Marriage Restraint Bill' *The News International* (Islamabad, 22 August 2019) <https://www.thenews.com.pk/print/515514-na-body-on-law-rejects-child-marriage-restraint-bill> accessed 29 July 2024.
[86] *Tahira* (n 18) [4].

'medical certificate(s) based on ossification test(s) issued by the competent authority.'[87]

In concluding his judgement, Justice Pannun strongly urged that *Nikah* registrars and Union Councils assume greater responsibility in preventing child marriages, suggesting stricter checks and balances such as revoking the registration licences of those found illegally facilitating such marriages.

Nonetheless, the common thread running throughout the *Tahira Bibi* judgement is that much more could be done to curb child marriages, such as the Parliament legislating to render child marriages *void ab initio*, as suggested by the Islamabad High Court in *Mumtaz Bibi*. Moreover, medical tests to determine age should be mandated in cases where the individual's age is contested or unclear. Ultimately, the judiciary can only demand a strict application of the existing law. However, where the situation demands that the law be amended, as in the case of child marriages, the judiciary's hands remain shackled pending further legislation by the concerned legislatures.[88]

III. International Obligations

From an international perspective, it appears that Pakistan has not taken its commitments seriously. When a nation ratifies a particular international treaty, it is obligated to enact domestic legislation that complies with the terms of the agreement and should effectively integrate the latter's provisions within the local legal framework.[89] International bodies can hold Pakistan accountable for keeping the marriageable age of girls at sixteen, for failing to exercise due diligence, and for the continued prevalence of customary child marriages within its society, as documented by statistical evidence.

In 1990, Pakistan became a signatory to the CRC, committing to set the minimum age of marriage at eighteen years. In 1996, Pakistan signed CEDAW,

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[87] Ibid.
[88] Sara Raza, 'Child Marriages: A Commentary on Tahira Bibi v. SHO and Others' (*Lahore Education and Research Network*, 2020) <http://learnpak.com.pk/wp-content/uploads/2020/08/TBSOCC.pdf> accessed 20 July 2024.
[89] Vienna Convention on the Law of Treaties 1969, art 26–27; ICCPR, art 2(2); CEDAW, art 2(a).

which obligates states to ensure free and consensual marriages amongst its citizens. Moreover, Article 16(2) of CEDAW expressly requires states to set a specific minimum age for marriage and further states that the 'betrothal and the marriage of any child' below the prescribed minimum age should have 'no legal effect'—a provision that still has not found a place in Pakistan's domestic legal framework. It is nonetheless apparent from the foregoing that Pakistan has failed to comply with its international obligations.

Pakistan has also not ratified the Optional Protocol to CEDAW. The Optional Protocol provides a mechanism through which citizens can submit complaints to the CEDAW Committee and directly hold the state parties accountable for violations of rights. Pakistan's refusal to ratify the Optional Protocol demonstrates a lack of legislative ambition, as avoiding the Protocol prevents it from being held liable under the international agreement. Without an individual complaint and inquiry procedure, CEDAW loses its ability to impose sanctions on the nation.

In addition to these treaties, Pakistan has also subscribed to the South Asian Initiative to End Violence Against Children ('SAIEVAC'), which is committed to ending child marriages by 2018.[90] Moreover, Pakistan committed to ending child marriages on the South Asian Association for Regional Co-operation's ('SAARC') platform, the Kathmandu Call to Action to End Child Marriage, too.[91] These international commitments amount to little more than hollow promises, as the Parliament has repeatedly failed to enact effective restraints on child marriages despite numerous opportunities. By reviewing judicial precedents on child marriages, it appears as though *Mumtaz Bibi* is one of the very few judgements that recognised Pakistan's international commitments vis-à-vis child marriages and employed them as a tool of statutory interpretation.

[90] SAIEVAC 'Regional Action Plan to End Child Marriage in South Asia' <https://www.girlsnotbrides.org/documents/719/RAP_Child_Marriage.pdf> accessed 29 July 2024.

[91] European External Action Service, 'South Asian Association for Regional Cooperation (SAARC)' (*European Union External Action*) <https://www.eeas.europa.eu/eeas/south-asian-association-regional-cooperation-saarc_en> accessed 29 July 2024.

Conclusion and Recommendations

In conclusion, the CMRA is outdated and fails to provide adequate protection against child marriages. This paper has demonstrated that Pakistan's legislative framework on child marriages is internally inconsistent, creating significant social and legal challenges. Pakistan has made several international commitments on the matter and is therefore obligated to align its domestic laws and practices with the treaties and conventions to which it is a signatory.

Additionally, merely passing an amendment is insufficient to discharge Pakistan's obligation of due diligence under international agreements. Thorough investigations, criminal prosecution, and payment of just compensation to the victims are additional measures that must be introduced as part of the obligation of due diligence; failing to do so may result in a breach of international treaties. It is further suggested that in order to demonstrate its resolve to end child marriages before the international community, Pakistan should ratify the CEDAW Optional Protocol and routinely report to the CRC and CEDAW Committees regarding its implementation. The Parliament cannot ignore the issue of child marriages for much longer as it continues to affect millions of children in the country.

However, simply bringing about legislative changes may not be enough. The key issue is that of implementation of the law. The courts can only do so much if their rulings are not executed on the ground. At the same time, legislative changes themselves are subject to conflicting views of modern scientific research and religious beliefs. As has been discussed earlier in this paper, legislative apathy can largely be attributed to legislators' reluctance to challenge orthodox interpretations of Islamic teachings. Here, the role of institutions like the Council of Islamic Ideology and the FSC is especially significant in reconciling religious beliefs with scientific evidence and affirming that child protection legislation is not un-Islamic.

The judiciary has, in the past few years, delivered commendable decisions that eloquently address the menace of child marriages. This paper recommends that the concerned legislatures undertake a comprehensive overhaul of the CMRA in all of the provinces in light of such progressive judgements to establish a robust and watertight legal framework. The cases of *Farooq Omar Bhoja* and *Azka Wahid* suggest that the Parliament should impose a single, uniform minimum age of marriage for girls, and international obligations mandate that this should be eighteen years. *Mumtaz Bibi* indicates that reliance on reductionist theories and commentaries that equate the onset of puberty as an entry point for matrimonial proceedings should be abandoned entirely. The judgement also recommends that all marriage contracts undertaken between underage parties should be declared invalid and *void ab initio*. *Alisha Bibi* and *Tahira Bibi* highlight the need for *Nikah* registrars to verify the parties' ages through documents such as NADRA-issued identification cards and birth certificates. Moreover, *Nikah* registrars should be punished with harsh penalties and fines for solemnising and registering child marriages. Their licences should be revoked to deter them and others from engaging in such practices. A central committee of registrars should also be established to review the marriage documents of Union Councils in specific areas to ensure the effective implementation of the law. Lastly, it is recommended that in cases where the age of the betrothed is disputed, the constitution of a medical board and the provision of medical tests should be made mandatory.

Only through holistic reform and strict implementation of the foregoing recommendations can the plague of child marriages be effectively eradicated.

Discretionary Review in the Common Law: A Montesquieuan Headache

Muhammad Jalal Yousaf Tarar*

Abstract

Discretionary review complicates Montesquieu's theory of judicial restraint by allowing courts to control their own dockets, selectively shaping legal and constitutional development with minimal external oversight. While traditionally framed as a tool for judicial efficiency, discretionary review expands judicial autonomy in ways that blur the boundaries between adjudication and policymaking. This paper examines its evolution across six common law jurisdictions—the United States, the United Kingdom, Australia, Canada, India, and Pakistan—and demonstrates how courts have adapted this power within their distinct constitutional, political, and institutional environments. Although discretionary review enables courts to manage caseloads and resolve legally significant disputes, it also functions as a mechanism of judicial gatekeeping, allowing courts to avoid politically sensitive cases or strategically revisit established precedents. In systems where judicial discretion is expansive, such as Pakistan and India, discretionary review has facilitated judicial interventions in political affairs, often shaping governance beyond the judiciary's conventional mandate. In the United States, the opaque nature of certiorari denials has entrenched judicial agenda-setting, allowing ideological factions within the Court to dictate which constitutional questions receive national adjudication. Conversely, jurisdictions like Australia and Canada impose structured constraints on discretionary review, mitigating judicial overreach while maintaining institutional autonomy. This paper argues that discretionary review, while indispensable for judicial independence, requires procedural safeguards to prevent its use as an instrument of unchecked power. By comparing discretionary frameworks across jurisdictions, it identifies systemic vulnerabilities and proposes reforms to enhance accountability, including mandatory reasoning for case denials, broader selection panels, and codified review criteria. Without such measures, discretionary review risks entrenching judicial supremacy at the expense

* Muhammad Jalal Yousaf Tarar is a fourth-year law student at the Shaikh Ahmad Hassan School of Law, Lahore University of Management Sciences. Tarar's interests include judicial politics, legal history, and critical readings of postcolonial institutions.

of democratic oversight, fundamentally altering the balance of powers in ways Montesquieu never envisioned.

Introduction

While the idea of separation of powers predates Montesquieu, his articulation of the doctrine remains one of the most influential in shaping modern legal systems. Writing during the Era of Absolutism, Montesquieu was particularly concerned with unchecked state power and criticised instruments such as *Lettres de Cachet*, which allowed imprisonment without trial at the king's discretion. He observed that a well-functioning system of government required three distinct branches—the legislature (which made laws), the executive (which implemented laws), and the judiciary (which interpreted laws). However, unlike the other two branches, Montesquieu viewed the judiciary as the least dangerous and the most restrained, believing it should operate with minimal discretion to prevent arbitrary rulings.[1] This assumption that the judiciary would remain a passive interpreter rather than an active policymaker is central to the debate over discretionary review. While Montesquieu advocated for judicial independence, he also feared judicial overreach, warning against judges assuming legislative functions:

> The judges ought to be of the same rank as the accused person, or his peers, that his condition may not render him subject to oppression. If they were to be a body that continued for ever, they might be tempted to perpetuate their own power; and judges should be, as it were, invisible and pass unnoticed.[2]

Modern discretionary review—where courts choose which cases they hear—complicates this vision by granting the judiciary significant control over its docket, effectively allowing it to shape legal and constitutional developments through selective intervention. The expansion of judicial power through discretionary review shifts the balance within the separation of powers, giving courts a decisive role in legal and political outcomes. The implications of this tension are particularly evident in common law jurisdictions, where courts possess broad discretion in case selection, enabling them to influence the development of legal precedent beyond Montesquieu's envisioned role for the judiciary.

[1] Maurice Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Liberty Fund 1998) 97.
[2] Montesquieu, *The Spirit of the Laws* (Cambridge University Press 1989), ch 5.

Judicial independence, within this framework, was not merely a safeguard but a sentinel, standing watch over the ambitions of the executive and the legislative. Montesquieu, however, did not rigidly espouse the actual form that judicial independence should take, which would explain the differences in how various societies have manifested the abstract notion of judicial independence, while still appealing to a common origin in Montesquieuan thought. In the United States, for example, judges of the Supreme Court ('SCOTUS') hold life tenure to insulate their decisions from political pressure.[3] This form of judicial independence allows judges to rule without fear of political retaliation or the need to seek reappointment, reducing the influence of transient political majorities. However, this model has also led to criticisms, particularly concerning the lack of direct democratic accountability and the potential for ideological entrenchment over decades-long tenures. For instance, Bickel famously described this as the 'countermajoritarian difficulty'.[4] Unlike parliamentary systems, where judicial appointments usually involve legislative confirmation and periodic review, SCOTUS judges wield significant discretionary power over case selection, granting them influence over which constitutional questions are adjudicated at the highest level. Coupled with life tenure, discretionary review fortifies judicial autonomy, yet it also casts a long shadow of unease: does it foster a judiciary insulated from democratic accountability, an untouchable elite steering the law at will?

Discretionary review is a defining feature of judicial authority in common law systems, granting courts the power to select which cases they will hear. While mandatory jurisdiction compels courts to hear all properly filed cases, discretionary review lets higher courts choose cases with major legal, constitutional, or policy consequences. Appellate courts like SCOTUS use discretionary review through certiorari, while the United Kingdom's Supreme Court ('UKSC') requires permission to appeal in most cases. Discretionary review is justified on the grounds of judicial efficiency—preventing courts from being overwhelmed with frivolous or redundant cases, that is, the so-called 'floodgates' principle—but it also raises fundamental questions about accountability and the separation of powers. By

[3] Staff, 'The Court as an Institution' (*Supreme Court of the United States*) <https://www.supremecourt.gov/about/institution.aspx> accessed 12 August 2024.
[4] Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press 1986).

selecting cases, courts shape legal precedent and steer constitutional interpretation. This power may be necessary for judicial autonomy but can also insulate courts from public scrutiny, allowing judges to sidestep politically sensitive or inconvenient cases—or continually seek opportunities to overturn established precedent for ideological reasons. As such, discretionary review stands at the intersection of judicial independence and institutional oversight, exposing the broader tensions within Montesquieu's framework of the separation of powers.

Montesquieu's model of separation of powers has often been interpreted as a rigid tripartite structure, but his writings also suggest a more pragmatic adaptation to political realities. While he believed that the judiciary should be the 'least dangerous' branch, functioning purely as the mouthpiece of the law,[5] he did not anticipate the judiciary exercising discretionary control over case selection. The judiciary, in his model, was meant to be reactive, not proactive. By granting courts the authority to dictate which legal questions demand engagement, discretionary review does more than complicate Montesquieu's vision—it subtly edges the judiciary into the realm of quasi-legislation, endowing it with a hand in sculpting constitutional destiny. This raises the question: is discretionary review a necessary adaptation to modern governance, or does it undermine the balance of powers Montesquieu envisioned?

While Montesquieu's model of separation of powers has profoundly influenced constitutional thought, it is not the only way judicial independence and institutional balance are maintained in common law systems. Parliamentary democracies such as the United Kingdom, Canada, and Australia depart from the strict tripartite structure he envisioned, operating instead on a model where the executive is drawn from the legislature rather than existing as a distinct branch. Despite this fusion, judicial independence is upheld through conventions, procedural safeguards, and entrenched legal principles rather than rigid institutional separation. Similarly, discretionary review itself has taken different forms—ranging from the highly structured leave-to-appeal system in the United Kingdom to the more expansive discretionary docket of the SCOTUS—demonstrating that separation of powers in the common law world is neither uniform nor static.

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[5] Montesquieu (n 2) ch 6.

However, the existence of alternative frameworks does not diminish Montesquieu's relevance in assessing discretionary review. His concern was not merely with the formal separation of institutions but with the concentration of unchecked authority in any one branch of government. Whether or not a system adheres strictly to his tripartite model, the power of courts to control their own dockets raises the very concerns he warned against: a judiciary that extends beyond mere interpretation into the realm of policy and governance. Even in jurisdictions that deviate from his precise formulation, discretionary review challenges the balance of power by allowing courts to shape legal and constitutional development selectively. The fact that separation of powers has evolved in different ways across common law systems does not weaken this critique—it underscores its urgency. If discretionary review permits courts to operate with minimal external restraint, the risk of judicial supremacy persists, regardless of whether the system in question adheres to Montesquieu's structural model in its purest form.

This paper argues that the idea of discretionary review complicates Montesquieu's theory of the separation of powers by allowing courts to control their own dockets with minimal external oversight. This power may be necessary to make the judiciary more efficient, but it undermines judicial accountability, particularly in jurisdictions where judicial discretion is highly expansive. Through a comparative analysis of discretionary review in six common law jurisdictions—the United States, the United Kingdom, Australia, Canada, India, and Pakistan—this study explores how courts maintain autonomy while facing institutional limits.

While Montesquieu emphasised the institutional separation of powers, Dicey refined this argument by grounding it in the rule of law, which he defined as a system where 'no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.'[6] This principle points to two critical concerns about discretionary review: (i) the unpredictability of case selection; and (ii) the absence of legal certainty in how judicial discretion is exercised.

Dicey warned that excessive discretion enables arbitrary governance, arguing that law should be based on fixed, established principles rather than judicial

[6] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan and Company 1915) 188.

prerogative. Modern discretionary review mechanisms—where courts have near-total control over which cases to hear—depart from Dicey's model by allowing judges to shape constitutional law without predefined legal standards.

Although the United States, Pakistan, the United Kingdom, and the rest of the jurisdictions discussed in this paper are each the product of distinct historical, cultural, and political trajectories, they are united by a foundational common law heritage that shapes their judicial review mechanisms. Of course, it is true that the distinct political challenges and democratic experiences in these countries differ significantly—for example, the United States has maintained a stable constitutional order without military coups or severe constitutional crises that have affected Pakistan. The United Kingdom's appellate courts, constrained by parliamentary sovereignty, apply a limited form of discretionary review through the leave-to-appeal system. In contrast, Pakistan's judiciary, despite inheriting British common law traditions, has developed an expansive interpretation of discretionary powers, particularly through its *suo motu* jurisdiction, which used to enable the Supreme Court of Pakistan ('Court') to take up cases of 'public importance' without a formal petition, before this power was scrapped through the Constitution (Twenty-sixth Amendment) Act, 2024 ('26th Constitutional Amendment'). Therefore, this comparison does not suggest that these jurisdictions face identical legal issues. Rather, by examining how each system adapts the common law tradition to manage discretionary review and safeguard judicial independence, the analysis highlights both universal principles and context-specific modifications.

Pakistan's judiciary has historically exercised broad discretionary review powers, particularly through the *suo motu* jurisdiction, allowing it to take up politically sensitive cases without requiring a formal petition. This power, before it was scrapped, often positioned the judiciary as an active player in political disputes, as seen in the disqualification of Prime Ministers Yousaf Raza Gillani (2012) and Nawaz Sharif (2017).[7] Unlike the United States, where discretionary review is primarily used to manage judicial workload, the Court has leveraged it to assert direct influence over governance. At the same time, judicial appointments have been a focal point of power struggles between the judiciary and the Parliament. The

[7] The disqualification of both former prime ministers did not originate through *suo motu* notices, but the emboldened stance of the activist judiciary in the 2010s had much to do with *suo motu* powers.

Constitution (Eighteenth Amendment) Act, 2010 (‘18th Constitutional Amendment’) introduced a Parliamentary Committee for judicial appointments, mirroring elements of the United States confirmation system. However, Chief Justice Iftikhar Chaudhry, emboldened by the Lawyers’ Movement and his role in President Musharraf’s ousting, challenged the 18th Constitutional Amendment, arguing that it compromised judicial independence. In response, the Constitution (Nineteenth Amendment) Act, 2010 (‘19th Constitutional Amendment’) reasserted the judiciary’s dominance in appointments, reinforcing the Court’s autonomy.[8] This consolidation of power coincided with an increase in *suo motu* cases in the post-Chaudhry era, where discretionary review became a tool for judicial intervention in executive and legislative affairs. These developments show how discretionary review in Pakistan has expanded beyond case selection. Instead, it has functioned as an instrument of judicial activism, enabling the Court to shape political outcomes in a way that diverges significantly from other common law jurisdictions.

The 26th Constitutional Amendment has fundamentally altered how discretionary review operates in Pakistan by abolishing the Court’s unilateral *suo motu* powers and introducing designated Constitutional Benches to handle constitutional cases. Previously, any bench of the Court—often formed at the discretion of the Chief Justice—could take up constitutional matters, giving the judiciary significant flexibility in selecting politically or legally sensitive cases. With the removal of the *suo motu* jurisdiction, the Chief Justice and individual judges now have far less discretion in initiating cases, as constitutional issues must be funnelled through pre-designated panels rather than being taken up at will.

This change represents a structural shift in Pakistan’s approach to judicial discretion. By centralising constitutional adjudication within specific benches, the amendment imposes a procedural constraint on judicial intervention, reducing the likelihood of politically motivated case selection. However, this newfound rigidity also limits the Court’s responsiveness to urgent constitutional crises. In jurisdictions such as the United States and the United Kingdom, discretionary review allows apex courts to take up cases of significant national importance, shaping constitutional law incrementally. Similarly, Pakistan’s 26th Constitutional

[8] Saroop Ijaz, ‘Judicial Appointments in Pakistan: Coming Full Circle’ (2018) 1 LLJ 86, 89.

Amendment, in eliminating *suo motu* powers, moves discretionary review towards a more bureaucratic framework, limiting judicial agility while potentially increasing institutional accountability.

The removal of *suo motu* powers is particularly consequential because historically, the Court's discretionary review powers have played a decisive role in shaping political outcomes. *Suo motu* cases have led to the dismissal of elected leaders, investigations into government corruption, and even interventions in electoral matters—functions rarely exercised by apex courts in other common law jurisdictions. With the 26th Constitutional Amendment, discretionary review in Pakistan is now more in line with the system in the United States, where SCOTUS retains full control over its docket through the writ of certiorari but cannot initiate cases on its volition, and even the United Kingdom, where the permission-to-appeal system still allows the courts to filter cases strategically but not initiate new ones. Whether the 26th Constitutional Amendment corrects a history of judicial overreach or merely shifts discretionary power to a smaller, more centralised judicial body remains a contested issue.

The 26th Constitutional Amendment is unusually controversial, with legal and political challenges well underway and unlikely to be resolved soon. Following the passage of the 18th and 19th Constitutional Amendments, some commentators suggested that the question of judicial independence had finally been settled. However, following years of media and political pressure, the federal government, led by the Pakistan Democratic Movement coalition, introduced legislation[9] aimed at reducing the discretionary review powers of the Chief Justice, particularly the *suo motu* powers, which was immediately challenged in the Court on grounds of undermining the independence of the judiciary. Some judges, like Justice Qazi Faez Isa, complained of the almost dictatorial nature of *suo motu* powers because they grant the Chief Justice absolute and unaccountable authority to issue *suo motu* notices, regardless of the views of the other members of the now 25-member Court. Thus, discretionary review must achieve a delicate balance: while expansive powers to choose opportunities for adjudication can protect the judiciary from undue political influence, they also risk compromising accountability if not checked by appropriate safeguards. Pakistan's legal framework, however, is

[9] Supreme Court (Practice and Procedure) Act 2023.

marked by episodes of military intervention and constitutional upheaval—factors that have fundamentally altered its judicial landscape compared to the relatively stable political evolution of countries like the United States or the United Kingdom. This divergence necessitates a careful contextualisation of common law principles within each nation's unique environment.

Discretionary review and judicial independence are interrelated concepts that lie at the heart of this analysis. For clarity, it is reiterated that discretionary review refers to the power of appellate courts to decide which cases to hear, serving as a filtering mechanism against an overwhelming caseload. This power allows judges to select cases that have significant legal or constitutional implications, thereby supporting judicial independence by enabling them to deliberate without direct external pressures. However, the inherent subjectivity of discretionary review opens it to criticisms of arbitrariness and a lack of accountability. Judicial independence is the cornerstone of any constitutional system, ensuring that judges can render decisions based solely on legal principles rather than political expediency. It is essential to distinguish procedural discretionary review, which determines case selection, from substantive judicial review, which assesses the validity of executive or legislative actions on the touchstone of the Constitution of the Islamic Republic of Pakistan, 1973 ('Constitution'). While procedural discretion governs docket management, substantive review wields broader political influence by shaping legal precedents. Many critiques of discretionary review conflate these two forms, yet they serve distinct purposes in maintaining judicial independence. A nuanced understanding of both is crucial to assessing whether discretionary power genuinely threatens the separation of powers. This autonomy is vital for maintaining public confidence in the legal system and for preserving a balanced separation of powers. When the criteria for case selection are vague or inconsistently applied, the discretion exercised may inadvertently undermine public trust and the system of checks and balances. In essence, while discretionary review can bolster judicial independence by insulating the judiciary from political interference, it can simultaneously threaten that independence if it leads to perceived or actual judicial overreach. This paper explores whether, and under what circumstances, discretionary review ultimately reinforces or complicates the principle of judicial independence within common law systems.

This paper also examines whether discretionary review enhances or disrupts the separation of powers by granting courts unchecked authority over case selection. Discretionary review strengthens judicial efficiency and independence, but its use across jurisdictions exposes tensions between judicial power and democratic accountability. In some systems, it operates as a neutral case-management mechanism whereas in others, it has been leveraged as a vehicle for judicial intervention in political affairs.

To explore these dynamics, the paper proceeds as follows. The first section examines the development of discretionary review in the United States, focusing on the evolution of the writ of certiorari and how it has allowed SCOTUS to exercise selective constitutional interpretation while maintaining judicial legitimacy. The subsequent section turns to the United Kingdom, where the permission-to-appeal system demonstrates how discretionary review operates within the constraints of parliamentary sovereignty. Australia and Canada provide additional perspectives on how discretionary review can function as a judicial efficiency tool while still maintaining public trust. The paper then shifts to India and Pakistan, where discretionary review has been instrumental in shaping political and constitutional developments, often blurring the boundaries between legal adjudication and governance. The discussion also considers potential reforms that could introduce greater transparency and institutional checks on judicial discretion, particularly in jurisdictions where courts have historically exercised this power expansively. Finally, the conclusion synthesises these findings, assessing whether discretionary review reinforces the balance of powers envisioned by Montesquieu or whether it allows courts to assume an outsized role in shaping national policy.

The United States of America

Although most commonly associated with the American justice system, the term ‘certiorari’ originates from Latin, meaning ‘to be made certain’. In its earliest form, certiorari was used in English common law as a writ directing lower courts to send records to higher ones for review. By the medieval period, English royal courts employed certiorari to supervise local tribunals, ensuring uniformity in legal decisions. Over time, it became a mechanism for judicial oversight, guaranteeing consistency and fairness in appellate decisions. This was the culmination of a unique trend.

In the United States, certiorari has taken on a distinct role as the primary tool for discretionary review by SCOTUS. However, the Court did not always have this power. Prior to the Judiciary Act of 1925, SCOTUS was obligated to hear all properly filed cases, placing immense strain on its appellate jurisdiction.[10] Although the United States Constitution has long provided for judicial review, *Marbury v. Madison*[11] is seminal not only because it expanded SCOTUS's formal jurisdiction but because it redefined SCOTUS's role as an active arbiter of constitutional issues. By affirming judicial review as a fundamental principle, the decision set the stage for SCOTUS to rigorously examine legislative and executive actions. But on its own, accepting William Marbury's lawsuit for hearing was an act of discretionary review. Over time, as SCOTUS embraced this power of determining the limits of its power, the number of cases challenging governmental conduct increased significantly. This surge did not result from an expansion of constitutional jurisdiction per se but from SCOTUS's evolving role in addressing a growing array of constitutional questions. Consequently, without an effective filtering mechanism—namely, discretionary review—the Court would face an unsustainable caseload, thereby risking delays and a decline in the quality of its judgements.

This is the essence of the floodgate argument: that unchecked judicial review can lead to an inundation of cases, overwhelming even a well-established judiciary. To deal with this new issue, judges started pressing for a mechanism to reduce the cases they would have to hear without compromising judicial independence. However, not all solutions were acceptable to SCOTUS. For instance, congressional determination of a fixed number or range of cases was not acceptable on grounds of judicial independence. The result was the writ of certiorari, whereby SCOTUS itself was given the discretionary review powers to decide which cases to hear. This had been first instituted in limited circumstances under the Judiciary Act of 1891, but now it expanded to become the rule rather than the exception. This owed to the fact that by the late nineteenth century, SCOTUS's docket had become unsustainable, with judges struggling to manage the growing number of appeals, despite the creation of circuit courts and the institution of minimal certiorari powers in 1891. Justice Willis Van Devanter, amongst others,

[10] J. Warren Madden 'One Supreme Court and the Writ of Certiorari' (1963) 15 HLJ 153.
[11] *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803).

warned that without a mechanism to filter cases, SCOTUS would be unable to function effectively as a constitutional court.[12] Legislative attempts in 1916 did not succeed in reducing the caseload because they only allowed SCOTUS to refuse adjudication on frivolous claims.[13]

To solve this problem, the Judiciary Act of 1925 granted SCOTUS broad discretionary review powers,[14] allowing it to decline cases at will through the writ of certiorari. This marked a fundamental shift in judicial authority, as SCOTUS gained near-total control over its docket. Unlike lower courts, which must hear all cases within their jurisdiction, SCOTUS was now free to selectively determine which legal questions warranted national adjudication. This shift gave courts greater discretion, letting them define constitutional law by choosing which cases to hear and which to ignore. The Judiciary Act of 1925 remains one of the few statutes where the judiciary played an active role in drafting legislation. Justices Van Devanter, McReynolds, and Sutherland were central in this regard while Chief Justice Taft undertook a trip to the United Kingdom to observe appellate court procedure there. This is why the draft was commonly referred to as the Judges Bill.[15] The result was an incredible reduction in the number of cases being heard by SCOTUS. This was a far cry from the views of Chief Justice Marshall on the subject:

> (The Supreme Court has) no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgement, and conscientiously to perform our duty.[16]

Nevertheless, the floodgates argument can be seen in action here because the writ of certiorari was aimed to reduce the number of cases SCOTUS had to decide.

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[12] Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (The Macmillan Company 1928) 16.
[13] Ibid 255.
[14] Judiciary Act of 1925 [1925] 43 Stat. 936.
[15] Frankfurter and Landis (n 12) 260.
[16] Sternberg J, 'Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court' (2008) 33 JSCH 1.

SCOTUS judges have taken the notion of 'discretion' very seriously, such that the only way academics have been able to understand the procedure for certiorari writs is through the volitions of the judges themselves. A party seeking review must file a petition for certiorari, but the vast majority of these requests are denied. The 'Rule of Four', a procedural safeguard, requires that at least four judges agree to hear a case, blocking ideological factionalism on the docket.[17] Yet, the low grant rate—typically between 1% and 2% of petitions per term—shows the extent of judicial discretion in determining which issues are deemed worthy of review.[18]

Another significant innovation is the 'cert pool'. Originally, judges' clerks would go through every petition, drafting brief memoranda which the judges would then use to decide whether to vote for the granting of certiorari for each individual petition. This meant that every petition would, in theory, have at least nine memoranda. Unsurprisingly, the cumbersome nature of this process became increasingly intolerable. Therefore, in 1973, Chief Justice Burger, heeding the suggestion made by Justice Powell,[19] created the cert pool. In this system, all the petitions are consolidated in one place before being randomly allocated to judges' clerks. The clerks draft memoranda of only the petitions they are assigned.

The Supreme Court Case Selections Act of 1988 further streamlined the selection process.[20] Section 1 of this Act repealed Section 1262 of Title 28 of the United States Code, meaning that appeals that previously had to be reviewed by SCOTUS as a matter of right were now subject to discretionary certiorari review. Section 2 repealed Section 1254, removing the right of direct appeal from federal appellate courts to SCOTUS. Section 3 did the same for Section 1257 and state courts. There were other provisions as well, but the aim was to consolidate the reforms in SCOTUS's administrative machinery.

[17] Peter Linzer, 'The Meaning of Certiorari Denials' (1979) 79 CLR 1227–1305.
[18] 'The Supreme Court at Work' (*Supreme Court of the United States*) <https://www.supremecourt.gov/about/courtatwork.aspx> accessed 25 February 2025.
[19] Adam Liptak, 'Gorsuch, in Sign of Independence, Is out of Supreme Court's Clerical Pool' *The New York Times* (New York City, 1 May 2017) <https://www.nytimes.com/2017/05/01/us/politics/gorsuch-supreme-court-labor-pool-clerks.html> accessed 24 February 2025.
[20] Supreme Court Case Selections Act of 1988, 102 Stat. 662.

While certiorari is framed as an efficiency mechanism, its impact extends far beyond mere docket management. SCOTUS's discretionary review power allows it to shape constitutional law by controlling which legal questions reach the national stage. This is particularly evident in cases involving circuit splits, where federal appellate courts have issued conflicting rulings on similar legal issues. By selectively resolving these disputes, SCOTUS ensures doctrinal consistency across jurisdictions. However, certiorari also enables judicial gatekeeping, allowing judges to strategically advance or sideline contentious legal debates based on their interpretive priorities.

Importantly, a denial of certiorari does not constitute an endorsement of a lower court's ruling. SCOTUS has repeatedly clarified that refusals to hear a case should not be interpreted as implicit approval of the decision below. In *Missouri v. Jenkins*,[21] SCOTUS reaffirmed that a certiorari denial carries no precedential weight, meaning it neither validates nor invalidates the legal reasoning of lower courts. It simply means that SCOTUS chose to remain silent on the matter or that it did not involve a justiciable question of law.

Despite its institutional safeguards, discretionary review is not entirely neutral. Studies have shown that SCOTUS's paid certiorari docket disproportionately favours litigants with extensive legal resources, while petitions from *in forma pauperis* applicants—often involving indigent or incarcerated individuals—face significantly lower grant rates, possibly because such petitions are read almost exclusively by clerks rather than the judges.[22] This structural disparity suggests that access to SCOTUS review is not determined solely by the legal merits of a case but is also shaped by SCOTUS's internal priorities and resource allocation. There have been criticisms of the disproportionate importance accorded to clerks in discretionary review. Kenneth Starr, former clerk to Chief Justice Burger, has described the cert pool as having achieved 'efficiency…at the expense of informed judgement.'[23] Clerks are also not as well trained as appellate judges in separating their values from the job, meaning the decision to grant

[21] *Missouri v. Jenkins* 495 U.S. 33 (1990).
[22] R.C. Black and C.L. Boyd, 'US Supreme Court Agenda Setting and the Role of Litigant Status' (2010) 28 JoLEO 286.
[23] Kenneth W. Starr, 'The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft' (2006) 90 MLR 1363.

certiorari depends, at least partially, on the value judgements of liberal or conservative clerks. Furthermore, even when certiorari is granted, SCOTUS sometimes limits its review to specific legal questions, strategically narrowing its role in shaping judicial precedent.[24]

While the power to grant certiorari allows SCOTUS to set the national legal agenda, the equally powerful ability to deny review enables it to avoid politically volatile issues. By declining cases without explanation, SCOTUS exercises judicial restraint not through rulings, but through silence. This discretion to engage—or disengage—from major constitutional debates is a defining feature of discretionary review, allowing judges to strategically delay, deflect, or completely evade contentious legal questions. SCOTUS has historically avoided cases that might force it to rule on deeply divisive political issues. One prominent example is gerrymandering. In *Gill v. Whitford*,[25] SCOTUS had the opportunity to establish a constitutional limit on partisan redistricting, but instead ruled on procedural standing grounds, avoiding the central issue. SCOTUS later declined to intervene in *Rucho v. Common Cause*,[26] effectively leaving gerrymandering as a non-justiciable political question, despite mounting concerns about electoral fairness. Similarly, SCOTUS has, on multiple occasions, refused to reconsider qualified immunity for law enforcement officers despite widespread bipartisan criticism of the doctrine. After the killing of George Floyd in 2020, SCOTUS received several petitions challenging the legal protections that shield police officers from civil liability, yet it denied certiorari in all of them, leaving the doctrine intact. By avoiding these cases, SCOTUS ensured that lower courts would continue to apply qualified immunity without SCOTUS clarification, reinforcing the legal status quo without issuing an explicit ruling.

Avoidance is not limited to politically sensitive issues—it can also perpetuate legal uncertainty in areas where SCOTUS's guidance is needed to resolve inconsistent lower court rulings. SCOTUS is often expected to intervene when federal appellate courts issue conflicting decisions on the same legal issue, creating circuit splits that lead to geographically inconsistent applications of federal

[24] Margaret Meriwether Cordray and Richard Cordray, 'The Supreme Court's Plenary Docket' (2001) 58 WLLR 737.
[25] *Gill v. Whitford* 585 U.S. 48 (2018).
[26] *Rucho v. Common Cause* 588 U.S. 684 (2019).

law. However, SCOTUS frequently declines to resolve such disputes, effectively leaving key constitutional questions unanswered. For example, SCOTUS refused to hear several cases on whether religious exemptions apply to COVID-19 vaccine mandates, leaving lower courts divided on the extent to which religious freedom claims override public health policies.

This strategic silence has significant legal consequences. By choosing not to hear certain cases, SCOTUS allows lower court rulings to stand without national precedent, and therefore constitutional rights and federal laws can be interpreted differently depending on jurisdiction. This creates a fragmented legal landscape, where rights and obligations vary across the country based on where a case is decided. In effect, discretionary review allows SCOTUS to pick and choose when and where constitutional change happens, a power that is often overlooked in discussions of judicial discretion.

Another major consequence of avoidance is its impact on public trust in the judiciary. When SCOTUS refuses to hear cases on controversial or socially significant issues, it risks being perceived as shirking responsibility rather than acting as a neutral arbiter of justice. The selective nature of discretionary review can lead to accusations that judges prioritise cases that align with their ideological leanings while ignoring those that might challenge their views. This criticism has been particularly strong in areas such as campaign finance law, where SCOTUS has aggressively entertained cases that expand corporate political spending (*Citizens United v. FEC*[27]), while avoiding cases that challenge existing financial regulations on elections.

The lack of transparency in certiorari denials further compounds these concerns. Unlike lower courts, which must provide written opinions explaining their decisions, SCOTUS can reject thousands of cases without any justification. While the judges may have legitimate institutional reasons for avoiding certain cases—such as waiting for more developed legal arguments or clearer factual records—this absence of explanation leaves the public, legal scholars, and policymakers in the dark. Thus, discretionary review is not only a tool of judicial engagement but also one of judicial inaction. By choosing which cases to hear and

[27] *Citizens United v. Federal Election Commission* 2010 U.S. LEXIS 766.

which to ignore, SCOTUS exerts influence not only through its rulings but through its silence. This ability to shape the legal landscape without issuing decisions is a powerful but often underexamined aspect of discretionary review—one that raises fundamental questions about judicial accountability, transparency, and the role of SCOTUS in the democratic process.

Moreover, SCOTUS has jealously guarded these processes and powers. It has consistently refused to allow the Congress to intervene in settling a fixed standard for the granting of certiorari. For some, this standard is deliberately vague to free SCOTUS from rigid rules and congressional intervention.[28] For instance, if SCOTUS limits its granting of certiorari to cases involving the Fifth Amendment only, it would eventually be bound by its own convention, and/or Congress may codify it.[29] However, several broad trends may be identified from an analysis of the past certiorari writs granted by SCOTUS. The first is that SCOTUS is always cognisant of what is happening in the American society, and its actions result from and respond to those events. For instance, in *Brown v. Board of Education of Topeka*,[30] SCOTUS did not just overturn old precedent but responded to broader issues of race in the United States, veterans' rights, and rhetorical defence of the West from onslaughts by the Third World.[31] Secondly, SCOTUS keeps itself up to date on legislative developments. A good example would be *Dickerson v. United States*.[32] In this case, SCOTUS responded to Congress's assertion that it could overrule Miranda rights, as enumerated in *Miranda v. Arizona*,[33] by allowing the *Dickerson* case in the docket and then using it to disagree with the Congress.

Lastly, the personal views of judges could also be seen as important in this regard. While SCOTUS, like other supreme courts, presents itself as an apolitical institution, its discretionary review powers allow judges to selectively engage with legal and constitutional issues that align with their ideological preferences. Because SCOTUS is not obligated to hear most cases, its judges can control the pace of legal change by choosing which issues to address and which to ignore. This gatekeeping

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[28] Tejas N. Narechania, 'Certiorari in Important Cases' (2022) 122 CLR 923–1018.
[29] Ibid.
[30] *Brown v. Board of Education of Topeka* [1954] 347 U.S. 483.
[31] Mary L. Dudziak, 'Brown as a Cold War Case' (*USC Gould School of Law*, 2004) <https://ssrn.com/abstract=550443> accessed 25 February 2025.
[32] *Dickerson v. United States* [2000] 530 U.S. 428.
[33] *Miranda v. Arizona* [1966] 384 U.S. 436.

function is particularly powerful because denying certiorari can delay or prevent legal shifts, ensuring that certain precedents remain intact while others are more aggressively challenged.

Historically, ideological factions within SCOTUS have strategically used discretionary review to shape the legal landscape.[34] During the 1930s, the conservative bloc known as the 'Four Horsemen' consistently voted against hearing cases that might validate President Franklin D. Roosevelt's New Deal policies, while the liberal 'Three Musketeers' sought to bring such cases before SCOTUS. This resulted in a period of judicial resistance to economic regulations, which ended only after President Roosevelt's court-packing threat altered SCOTUS's stance. More recently, SCOTUS's discretionary docket has reflected the ideological composition of its judges. The conservative supermajority has granted certiorari in cases involving gun rights (*New York State Rifle & Pistol Association v. Bruen*[35]), religious freedoms (*Kennedy v. Bremerton School District*[36]), and abortion restrictions (*Dobbs v. Jackson Women's Health Organization*[37]). Conversely, SCOTUS has been more hesitant to grant review in cases that might expand voting rights protections or enhance federal regulatory power.

The decision to hear *Dobbs* illustrates how discretionary review serves as a mechanism for judicial agenda-setting. SCOTUS had repeatedly declined to hear earlier challenges to *Roe*, including in *Whole Woman's Health v. Hellerstedt*,[38] when a more liberal majority was in place. However, following the appointments of Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, SCOTUS's ideological shift made it more likely to grant certiorari in cases that directly challenged *Roe*. The eventual ruling in *Dobbs* was not just a decision on abortion rights—it was the culmination of a deliberate effort to bring the issue before a more favourable SCOTUS. President Biden also acknowledged the role played by President Trump in getting *Roe v. Wade* overturned.[39] Conversely, SCOTUS can

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[34] C. Jeddy LeVar, 'The Nixon Court: A Study of Leadership' (1977) 30 WPQ 484–492.
[35] *New York State Rifle & Pistol Association, Inc. v. Bruen* 2022 U.S. LEXIS 3055.
[36] *Kennedy v. Bremerton School District* 2022 U.S. LEXIS 3218.
[37] *Dobbs v. Jackson Women's Health Organization* 597 U.S. 215.
[38] *Whole Woman's Health v. Hellerstedt* 579 U.S. 582 (2016).
[39] Lawrence Hurley, 'Analysis: Trump's Justices Decisive in Long Campaign to Overturn Roe v. Wade' *Reuters* (Washington, 24 June 2022) <https://www.reuters.com/legal/government/trumps-justices-decisive-long-campaign-overturn-roe-v-wade-2022-06-24/> accessed 12 August 2024.

also use discretionary review to avoid politically volatile cases. Despite repeated petitions, SCOTUS has declined to hear cases challenging partisan gerrymandering, presidential powers, and certain police immunity doctrines, allowing lower court rulings to stand without intervention.

This section has demonstrated that certiorari, as a form of discretionary review, is a double-edged sword. On one hand, it is a practical necessity, allowing courts to manage overwhelming caseloads and prioritise legally significant cases. On the other hand, however, it grants the judiciary extraordinary control over constitutional interpretation, public policy, and legal precedent, enabling judges to shape the trajectory of the law through selective case selection. This power, though essential for judicial efficiency, can obstruct transparency and accountability while also institutionalising ideological bias. The ability of courts—particularly SCOTUS—to deny review without explanation means that judicial discretion extends beyond deciding cases; it also includes deciding which cases are never heard at all. This form of judicial gatekeeping allows courts to sidestep politically sensitive issues, delay legal questions they wish to avoid, and consolidate ideological influence over time. The discretionary docket is not a neutral filter; it is shaped by internal judicial priorities, the interests of institutional litigants, and structural imbalances that favour corporate and government actors over individual petitioners.

The United Kingdom

The political and legal system of the United Kingdom operates under a distinct framework of parliamentary supremacy, which differs significantly from the constitutional supremacy of the United States. Unlike the United States, where Montesquieu's model of separated powers is central to the constitutional structure, the United Kingdom follows a system where Parliament remains the supreme legal authority, and the executive derives its legitimacy from the legislature. The Prime Minister is not independently elected but emerges from the House of Commons, reinforcing the fusion of legislative and executive powers. Before the Constitutional Reform Act of 2005,[40] the House of Lords functioned as the United

[40] The Constitutional Reform Act 2005, s 4.

Kingdom's highest appellate court, blurring the boundary between the judiciary and the legislature.

However, while the United Kingdom does not adhere strictly to Montesquieu's separation of powers, judicial independence has strengthened over time. The Constitutional Reform Act transformed the judicial landscape by removing the Law Lords from the legislative branch and establishing the Supreme Court of the United Kingdom ('UKSC') as an entirely separate entity. This body plays an active role in reviewing executive decisions, particularly in cases concerning human rights, administrative law, and judicial review of governmental action. Cases such as *R (Miller) v. Prime Minister*,[41] where the UKSC ruled that Prime Minister Boris Johnson's prorogation of the Parliament was unlawful, illustrating that the superior judiciary now exercises significant oversight over the executive.

Therefore, while discretionary review in the United Kingdom operates within the constraints of parliamentary supremacy, the judiciary is not entirely subordinate to the Parliament. The flourishing of judicial review, the influence of the Human Rights Act of 1998, and the UKSC's willingness to intervene in governmental matters demonstrate that judicial independence remains a key concern, even within a system that prioritises legislative authority.

Discretionary review in the UKSC operates through a permission-to-appeal system, which serves a function similar to the writ of certiorari in SCOTUS. Unlike lower courts, the UKSC is not obligated to hear all cases appealed to it—instead, appellants must apply for permission (also called 'leave') to appeal, and the UKSC exercises discretion in determining which cases warrant full review. The decision to grant permission to appeal is made by an Appeals Committee composed of three judges, who assess whether a case meets the threshold for the UKSC's intervention. Unlike SCOTUS, where four judges out of nine must vote in favour of certiorari, the UKSC's permission-to-appeal system relies on a smaller judicial panel,

[41] *R (on the application of Miller) v. The Prime Minister Cherry and others v. Advocate General for Scotland* [2019] EWHC 2381 (QB).

ensuring a tightly controlled case selection process.[42] The UKSC grants permission to appeal only in cases that: (i) raise an arguable point of law of public importance; (ii) concern legal principles that require further clarification by the highest court; and (iii) have significant implications for statutory or common law interpretation.

Here, too, the floodgates argument reigns supreme. The Julian Assange extradition case exemplifies how this gatekeeping function operates in practice. Assange sought permission to appeal his extradition to the United States, arguing that his case raised fundamental questions about press freedom and diplomatic assurances. However, the UKSC denied his application, ruling that it did not raise an arguable point of law,[43] effectively closing the door to further appeals. This illustrates how discretionary review enables courts to filter out politically or legally contentious cases that do not meet the strict threshold for review. By limiting access to only the most legally significant cases, the UKSC's discretionary review process shapes the trajectory of legal precedent, much like SCOTUS. This selective case curation ensures that the UKSC functions not just as a final appellate body, but as a strategic arbiter of key constitutional and statutory questions. However, unlike SCOTUS, which does not respond to petitions not granted certiorari, the Registrar of the UKSC writes to appellants about the lack of jurisdiction of the UKSC.[44]

The origins of discretionary appellate review in the United Kingdom can be traced to the medieval writs of certiorari and recordari, which were developed as mechanisms for transferring cases from inferior local courts to the King's central courts.[45] These writs were crucial in shaping the modern understanding of judicial discretion in case selection, as they allowed the central administration to intervene only in cases deemed significant or requiring royal adjudication. The Norman

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[42] 'Court of Appeal & Supreme Court' (*Richard Buxton Solicitors*) <https://www.richardbuxton.co.uk/legal-process/court-of-appeal-supreme-court/> accessed 12 August 2024.

[43] Haroon Siddique & Ben Quinn 'Julian Assange Denied Permission to Appeal against US Extradition' *The Guardian* (London, 14 March 2022) <https://www.theguardian.com/media/2022/mar/14/julian-assange-denied-permission-to-appeal-against-us-extradition> accessed 12 August 2024.

[44] Supreme Court of the United Kingdom, 'A Guide to Bringing a Case to The Supreme Court' (*UKSC*) 5-6 <https://supremecourt.uk/uploads/A_guide_to_bringing_a_case_to_The_Supreme_Court_The_Supreme_Court_fe900010bd.pdf> accessed 25 February 2025.

[45] Jerome J. Hanus, 'Certiorari and Policy-Making in English History' (1968) 12 AJLH 63–94.

conquest of England in 1066 significantly altered the legal system by strengthening feudal structures and establishing the principle that all land was held from the King. Under this system, local feudal lords had jurisdiction over disputes concerning their lands, but their rulings could be challenged before the King's courts.[46] This led to the development of writs—royal orders that facilitated legal appeals from local to higher authorities.

Certiorari ('to be made certain') was used to transfer cases from lower courts to royal courts, ensuring that the Crown could review disputes of greater significance. Recordari ('to be recorded') allowed a higher court to demand a full record of proceedings from a lower court, often used when questions of legal procedure were at stake. The early use of these writs was an exercise of the discretionary power of the monarch, who acted as the ultimate legal authority in cases where justice was perceived to be inadequately served at the local level. Initially, only the King could decide which cases warranted review because appellate review was a privilege rather than a right. Over time, however, this power was delegated to centralised royal courts, such as the Court of King's Bench and the Court of Common Pleas, where judges exercised their own discretion in granting or denying appeals.

One of the primary justifications for these early discretionary writs was judicial efficiency—much like modern discretionary review, they prevented frivolous or routine cases from overwhelming royal courts. Additionally, as local feudal courts were often corrupt or incompetent, the availability of certiorari and recordari allowed the central judiciary to correct injustices.[47] The writ of habeas corpus—which ensured that individuals could not be unlawfully detained—also emerged from this tradition of centralised judicial intervention.

The transition from monarchical discretion to institutionalised judicial discretion was not immediate. Throughout the medieval and early modern periods, royal prerogative courts, such as the Star Chamber, exercised unchecked discretionary power, often in ways that undermined the rule of law. The struggle between the monarchy and the Parliament, culminating in the English Civil War (1642-1651) and the Glorious Revolution (1688-1689), gradually shifted legal

[46] Ibid.
[47] Edward Jenks, 'The Prerogative Writs in English Law' (1923) 32 YLJ 523–534.

authority away from the Crown and towards the judiciary and the Parliament.[48] By the nineteenth century, the discretionary use of certiorari and recordari had become embedded in common law appellate procedure, laying the groundwork for modern permission-to-appeal systems.

Today, all branches of government in the United Kingdom act in the name of the monarch, even though the monarch no longer has the authority to grant certiorari or recordari writs.[49] The process, which was the product of violent and bloody revolutions in continental Europe and the Americas, took place gradually as the Parliament went about dismantling the centuries-old powers of the monarch and co-opting them for itself.[50] This evolution directly shaped the modern case selection system in the House of Lords, and later the UKSC. By virtue of the Appellate Jurisdiction Act of 1876,[51] leave to appeal was necessary for a case to enter the House of Lords. The UKSC now requires permission to appeal, a discretionary mechanism that mirrors historical certiorari principles while operating within a modern constitutional framework. The criteria for granting permission—to address points of law of general public importance—reflects the same selective approach that defined judicial review under earlier common law traditions.

Australia

The Commonwealth of Australia is a unique golden mean between the rigid American separation of powers and the British concentration of powers. To understand this, it is essential to go over the political history of Australia briefly. As an Anglo-Saxon territory owned by Britain, it was reorganised into six colonies, with a Supreme Court in New South Wales.[52] Gradually, political power was devolved to the colonies, which joined a common federation in 1901.[53] Subsequent

[48] Hanus (n 45).
[49] Polly Botsford 'Relationship between UK Crown and Law in Focus as Carolean Era Begins' *International Bar Association* (London, 22 September 2022) <https://www.ibanet.org/Relationship-between-UK-Crown-and-law-in-focus-as-Carolean-era-begins> accessed 12 August 2024.
[50] Frank J. Goodnow, 'The Writ of Certiorari' (1891) 6 PSQ 493–536.
[51] The Appellate Jurisdiction Act 1876, 39 & 40 Vict. c. 59.
[52] David Kemp, *The Land of Dreams: How Australians Won Their Freedom, 1788–1860* (Melbourne University Press 2018).
[53] The Constitution of Australia.

moves towards independence took place in 1931[54] and 1986,[55] when Australia achieved self-governing dominion status and independence, respectively. However, Australia is still a monarchy, and King Charles III of the United Kingdom also heads Australia. Formally, that is the only legal link existing between the United Kingdom and Australia.

On the surface, the Australian constitutional framework and its judiciary's structure seem to resemble that of the United States and the United Kingdom. While the executive may be handed over some legislative functions under the United Kingdom's system of concentration of powers, the judiciary is an exception, as is seen in the United States. Judicial independence echoes loudly when the state allows only judicial functions to the judiciary; allowing judges power over non-judicial functions obstructs judicial independence as greater authority leads to greater accountability.[56] The Commonwealth of Australia represents a unique hybrid between the discretionary review traditions of the United Kingdom and the United States. While the High Court of Australia ('HCA') serves as the apex judicial body, its approach to discretionary review is structured by clear legal criteria, making it less discretionary than its American counterpart but more flexible than the British model.

Unlike the UKSC, where appeals must pass the permission-to-appeal threshold, or SCOTUS, where judges vote under the Rule of Four, HCA's discretionary review is guided by statutory and constitutional standards. Appeals to the HCA require special leave, meaning that the HCA has discretion to deny review unless a case meets specific legal criteria. The HCA grants special leave based on criteria enumerated in Section 35A of the Judiciary Act of 1903 (Cth): (i) the case presents a question of law of public importance; (ii) there are conflicting interpretations of law between lower courts that require resolution; (iii) a lower court has made a jurisdictional error—that is, exceeded its lawful authority in deciding a matter; and (iv) the case involves significant constitutional questions affecting federal-state relations. This system mirrors aspects of both the United States and the British models—it allows for judicial selectivity but does so within

[54] Statute of Westminster 1931, 22 & 23 Geo. 5, s 4.
[55] Australia Act 1986, s 2.
[56] S.A. de. Smith, 'Separation of Powers in Australia' (1957) 20 MLR 391–394.

a more structured framework that ensures case selection remains legally and procedurally constrained.

One of the most significant limits on judicial discretion in Australia is the concept of jurisdictional error.[57] The HCA generally does not grant leave to appeal unless it determines that a lower court has committed such an error. A jurisdictional error occurs when a lower court or tribunal exceeds its lawful authority, such as: (i) misinterpreting statutory provisions in a way that removes or expands its jurisdiction; (ii) deciding matters that were beyond its legal authority; and (iii) failing to comply with essential procedural requirements that affect the fairness of the decision.

This contrasts with the United States, where certiorari is often granted based on policy or ideological considerations rather than strictly legal error. By prioritising jurisdictional error, the HCA's discretionary review process remains focused on correcting fundamental legal mistakes rather than engaging in judicial policymaking.

Another limitation on discretionary review in Australia is the requirement that alternative remedies be exhausted before seeking review before the HCA.[58] The HCA will typically deny leave to appeal if a legal dispute can be resolved through: (i) an injunction or declaration in a lower court; (ii) a statutory appeal process in a federal or state tribunal; or (iii) an administrative review mechanism. This preserves judicial efficiency and limits the role of discretionary review.

A major distinction between Australia and other common law jurisdictions is the existence of the Administrative Decisions (Judicial Review) Act of 1977.[59] This Act provides a statutory basis for judicial review of administrative decisions and allows for judicial intervention even when no common law basis for review exists. Additionally, it is meant to ensure that government decisions meet standards of legality, rationality, and procedural fairness.

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[57] Downes Garry, 'Judicial Review' (*Administrative Appeals Tribunal*, 24 March 2011) <https://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pres/judicial-review> accessed 12 August 2024.
[58] *Minister for Labour and Industry (NSW) v. M.L.C. Assurance Co. Ltd* (1931) 46 CLR 422.
[59] Administrative Decisions (Judicial Review) Act 1977 (Cth).

Unlike the United States, where discretionary review by SCOTUS is almost exclusively constitutional, and the United Kingdom, where review is based on common law and parliamentary sovereignty, the HCA has a dual framework of discretionary review—one rooted in the common law tradition and another in statutory administrative oversight. Therefore, the HCA's discretionary review system represents a hybrid approach, combining elements of judicial independence, statutory regulation, and procedural selectivity. While it retains the power to choose its cases, it does so within a structured legal framework that limits ideological and policy-driven interventions. The dual influence of common law precedent and statutory review mechanisms ensures that discretionary review in Australia remains both selective and accountable, positioning it as a middle ground between the broad discretionary powers exercised in the United States and the restrained appellate mechanism employed in the United Kingdom.

Canada

The case of the Great White North is similar to that of the kangaroos: both were marred by settler colonialism (which almost entirely eradicated the native population), were British colonies, and were primarily populated by Anglo-Saxons.

Yet, Canada is unique in that when the Confederation of Canada was formed in 1867,[60] the notion of judicial review did not exist there, at least not in the form it assumed in subsequent decades. The roots of judicial review in Canada can thus be traced to British colonists who took it upon themselves to ensure that laws passed by local legislatures did not violate British law. This they did through the Judicial Committee of the Privy Council,[61] which meant that the latter became the apex court in the Canadian Confederation.

The same tradition continued in a qualitatively different form after 1867 when the Supreme Court and the Exchequer Court were formed—the latter was replaced by the Federal Court in 1971 and became responsible for judicial review. In 1970, the scope for this review was expanded.[62] The key word here, as discussed

[60] British North America Act 1867, 30 & 31 Vict., s 3.
[61] Jennifer Smith, 'The Origins of Judicial Review in Canada' (1983) 16 CJPS 115–134.
[62] Federal Court Act, S.C. 1970, c.l.

previously, is discretion. Certain broad criteria do exist, such as the requirement for the issue to be of public importance,[63] but since 1867, the demarcation between private and public spheres has changed to such an extent that judges, seemingly bound by the British North America Act of 1867,[64] can exercise tremendous discretion in deciding whether to hear an appeal.

Of course, there are other requirements concerning standing and jurisdiction. But those minuscule and basic conditions exist in the United States as well—no court can carry on with the proceedings if the plaintiff does not have standing or if the matter is beyond the jurisdiction of the court. So, a similar practice exists across the Canadian border.

Another similarity between the two North American jurisdictions is the emphasis on federalism. The British North America Act of 1867 Act explicitly delineated the powers of the federal and provincial governments.[65] The Canadian Supreme Court ('SCC') emerged as the *Marbury*-styled protector of such constitutional guarantees. Likewise, following the adoption of the Canadian Bill of Rights,[66] the SCC's ambit for judicial review broadened to include fundamental rights.

The SCC exercises significant discretionary review powers, similar to SCOTUS and the UKSC, but with distinct procedural and constitutional features. Since its establishment, the SCC has gradually transitioned from a body interpreting British imperial law to an independent constitutional authority governing Canadian legal dispute. While judicial review in Canada originated through colonial oversight mechanisms, modern discretionary review is tightly controlled through a structured leave-to-appeal system, balancing case selectivity with constitutional oversight.

Unlike SCOTUS, where discretionary review is exercised through certiorari, and the UKSC, where permission to appeal is required, the SCC grants

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[63] David Elliot, *Judicial Control of Administrative Action* (Captus Press 2011).
[64] British North America Act 1867, 30 & 31 Vict. s 3.
[65] Richard Benwell and Oonagh Gay, 'Separation of Powers: The Canadian Experience' (2009) 47 DLR 731.
[66] Canadian Bill of Rights, S.C. 1960, s 44.

leave to appeal based on clearly defined legal standards. Each year, the SCC receives approximately 600 applications for leave to appeal, of which only about 70 are accepted—a selection rate of roughly 10-12%.[67] Under Section 40(1) of the Supreme Court Act of 1985,[68] the SCC grants leave to appeal in cases that meet at least one of the following criteria: (i) public importance—the case presents a legal question of broad significance, such as issues related to the Charter of Rights and Freedoms; (ii) national significance—the case has implications beyond a single province or region, impacting federal law or the division of powers between provincial and federal governments; or (iii) important points of law—the case clarifies unsettled legal principles or resolves inconsistencies in provincial appellate court decisions.

Unlike the United States, where judicial philosophy and ideological considerations often influence certiorari decisions, the SCC follows a more structured framework in determining whether a case deserves discretionary review. The three-judge panel reviews each petition for leave to appeal before deciding whether it should proceed to a full hearing. This mirrors the United Kingdom's Appeals Committee but operates within a federal constitutional structure that resembles the United States model. The only exception to this discretionary system is criminal appeals, where leave to appeal is automatically granted if the case involves an issue of law. This creates a key distinction between discretionary review in Canada and other jurisdictions—the SCC has less control over its docket in criminal matters than the UKSC or SCOTUS.

Like other apex courts, the SCC applies discretionary review as a safeguard against excessive caseloads.[69] Without this filtering mechanism, the SCC would be overwhelmed with appeals from provincial courts, preventing it from focusing on cases of national importance. The floodgates argument is central to discretionary review in Canada, as it ensures that the SCC's limited resources are dedicated to legally significant disputes rather than routine appeals.

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[67] Department of Justice Canada, 'Canada's Court System' (*Government of Canada*) <https://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/> accessed 12 August 2024.
[68] Supreme Court Act, RSC 1985, s 40(1).
[69] William H. Angus, 'Judicial Review in Canada: Do We Need It?' (1974) 26 ALR.

One of the most distinctive and controversial aspects of Canadian discretionary review is the reference jurisdiction, which allows the federal government to directly refer legal questions to the SCC.[70] Unlike typical appeals, which arise from lower courts, references bypass normal judicial processes, enabling the government to seek advisory opinions on constitutional matters. The SCC's jurisdiction over references is outlined in Section 53 of the Supreme Court Act, which allows the Governor-General (on advice from the government) to submit legal questions directly to the SCC. There are also past references which include landmark cases, such as the *Reference Re Secession of Quebec*,[71] where the SCC ruled on whether Quebec could legally secede from Canada under both domestic and international law.

While references serve a functional purpose—helping the government clarify constitutional uncertainties—they also risk politicising the judiciary, as governments may strategically refer cases to the SCC to validate political agendas. In Pakistan, the Court has the jurisdiction to hear references too, which has led to many instances of politicising the judiciary and encroaching on the separation of powers.[72] The risk of judicial politicisation in Canada's reference jurisdiction resembles the use of *suo motu* powers in Pakistan, where the Court has been accused of judicial overreach by taking up politically charged cases at its discretion.

While Canada's leave-to-appeal system is more structured than SCOTUS's certiorari model, it remains more flexible than the United Kingdom's permission-to-appeal process. This hybrid approach ensures that the SCC retains significant discretionary authority while maintaining judicial accountability, positioning Canada as a model of judicial discretion that balances efficiency, selectivity, and constitutional oversight.

[70] Department of Justice Canada (n 67).
[71] *Reference Re Secession of Quebec* [1998] 2 SCR 217.
[72] Yasser Kureshi, 'Politics at the bench: The Pakistani Judiciary's Ambitions and Interventions' (*Carnegie Endowment for International Peace*, 23 June 2022) <https://carnegieendowment.org/2022/06/23/politics-at-bench-pakistani-judiciary-s-ambitions-and-interventions-pub-87371> accessed 12 August 2024.

India & Pakistan

India and Pakistan inherited a common law framework from the British. However, unlike settler colonies such as Australia and Canada, British India was governed through an extractive colonial administration.[73] This shaped the development of discretionary review in both countries, as colonial courts were designed to adjudicate disputes while maintaining centralised state control. Judicial discretion was often exercised to uphold colonial interests, and this legacy persisted in the post-independence judicial structures of India and Pakistan.

While the common law heritage binds India and Pakistan to discretionary judicial review, other Global South jurisdictions provide alternative approaches. South Africa's Constitutional Court, for example, employs a structured 'leave to appeal' process but allows direct access to litigants in human rights cases, ensuring equitable access without overburdening the judiciary.[74] Similarly, Singapore's 'judicial filtering system' limits discretionary power through explicit legislative criteria.[75] These models present possible avenues for reform in South Asia, where discretionary review faces accusations of selective judicial activism.

Since India and Pakistan have written constitutions, judicial review in their legal frameworks closely follows the American model. Whereas the United States has the Bill of Rights, India and Pakistan have scheduled lists of fundamental rights, which serve as a basis for judicial review of executive and legislative actions. However, the extent to which these cases reach the respective Supreme Courts depends on the discretionary review exercised under Articles 136 (India) and 184(3) and 199 (Pakistan) of their respective Constitutions, which allow selective case admission.

The procedures for the two countries are strikingly similar. Both require a writ petition, which must concern fundamental rights and issues of public importance, which the court grants or sets aside. In India, the Chief Justice is

[73] Jason Hickel, 'How Britain Stole $45 Trillion from India' *Al Jazeera* (Doha, 19 December 2018) <https://www.aljazeera.com/opinions/2018/12/19/how-britain-stole-45-trillion-from-india> accessed 12 August 2024.
[74] Constitution of the Republic of South Africa, s 167(6)(a).
[75] Rules of Court 2022, Order LIII.

responsible for formulating benches for all cases, including appeals.[76] However, in cases where petitions are 'frivolous' or 'scandalous', the Registrar rejects the petition on their own initiative.[77] In Pakistan's case, an appeal is filed in the Court through the Office of the Registrar. A preliminary hearing is conducted where the appellant is allowed to demonstrate the points of law which need to be decided by the Court. A notice is sent to the respondent, who may or may not choose to appear at the preliminary hearing.[78] The hearing is supervised by a bench of at least two judges of the Court.[79]

The procedure for leave to appeal in the Supreme Courts of India and Pakistan follows a discretionary framework but diverges in key procedural aspects. In India, leave to appeal is governed by Order XIX (Appeals on Certificate by High Court) and Order XXI (Special Leave Petitions – Civil) of the Supreme Court Rules of 2013, under which a Special Leave Petition under Article 136 must be filed within 60 days if the High Court refuses a certificate of fitness[80] and within 90 days in other cases.[81] The Registrar[82] conducts an initial screening before forwarding the case to a bench of three judges,[83] which may either summarily reject it or grant leave, converting it into an appeal. If leave is granted, notices are sent to all relevant parties, and the High Court record is transmitted to the Supreme Court. In Pakistan, the right to appeal to the Court is provided under Article 185 of the Constitution. Leave to appeal is governed by Order XIII (Civil Appeals) and Order XXIII (Criminal Appeals) of the Supreme Court Rules of 1980, whereby a petitioner must file an appeal within 60 days for civil cases[84] and 30 days for criminal cases.[85] The Chief Justice used to wield greater discretionary power over case selection and bench formation,[86] while the Registrar initially reviewed petitions.[87] In both jurisdictions, the criteria for granting leave involve determining whether the case

[76] Supreme Court of India Rules 2013, Order VI, Rules 1–5.
[77] Rules 2013 (n 76) Order XV, Rule 5.
[78] Supreme Court of Pakistan Rules 1980, Order XIII, Rule 5.
[79] Rules 1980 (n 78) Order XI.
[80] Rules 2013 (n 76) Order XIX, Rule 1.
[81] Rules 2013 (n 76) Order XXI, Rule 2.
[82] Rules 2013 (n 76) Order XV, Rule 5.
[83] Rules 2013 (n 76) Order VI, Rule 1.
[84] Rules 1980 (n 78) Order XIII, Rule 2.
[85] Rules 1980 (n 78) Order XXIII, Rule 1.
[86] Rules 1980 (n 78) Order IV, Rule 4.
[87] Rules 1980 (n 78) Order V, Rule 1.

raises significant constitutional or legal questions. However, Pakistan's system was more centralised, as the Chief Justice had the authority to decide which cases merited review. Additionally, while both systems grant discretionary review, Pakistan's process has been historically criticised for being more susceptible to judicial activism due to its Chief Justice's erstwhile dominant role in case selection, whereas India's system distributes authority across multiple judges, reducing individual discretion in the selection process.

The Court's erstwhile *suo motu* jurisdiction was one of the defining features of its discretionary review framework. *Suo motu* (Latin for 'on its own motion') refers to a court's power to take up cases without a formal petition. While both India and Pakistan inherited this principle, their applications diverged. India's Supreme Court still retains *suo motu* jurisdiction under Articles 32 and 226 of the Constitution of India, empowering both the Supreme Court and the High Courts to intervene in cases concerning fundamental rights violations. In contrast, the Court previously relied on Article 184(3) of the Constitution to take up cases of 'public importance'. However, the 26th Constitutional Amendment has abolished these *suo motu* powers entirely, doing away with the judiciary's unilateral ability to intervene without a petition. Common law jurisdictions outside the subcontinent do not have such powers, and SCOTUS explicitly rejected it for lacking any constitutional basis in *Carlisle v. United States*.[88]

Former Chief Justices like Iftikhar Chaudhry, Saqib Nisar, and Umar Ata Bandial are well-known for having issued a significant number of *suo motu* notices, a considerable proportion of which dealt with political matters. The idea that one strongman, political or otherwise, can challenge everyone else delights some people who relish the thought of a Messiah but discourages others who find no legal or constitutional basis for such an extraordinary power. The frequent use of discretionary review for political cases raises concerns about judicial overreach. While judicial activism has been celebrated for addressing human rights violations, it has also enabled judicial intervention in political disputes. For instance, the Court's decision in *PPPP v. Federation of Pakistan* exemplifies how discretionary review has been wielded to shape national politics.[89] When Qasim Khan Suri, the

[88] *Carlisle v. United States* [1996] 517 U.S. 416.
[89] *Pakistan Peoples Party Parliamentarians (PPPP) and others v. Federation of Pakistan and others* PLD 2022 SC 290.

Deputy Speaker of the National Assembly, set aside the motion for Vote-of-No-Confidence against Prime Minister Imran Khan, the Court, led by Chief Justice Bandial, reviewed Suri's actions[90] and subsequently invalidated them. This trend, seen in both India and Pakistan, blurs the distinction between judicial independence and judicial supremacy, undermining the separation of powers.

The use of discretionary review in times of crisis reflects its dual role as both a safeguard and a political tool. The Court has intervened in constitutional emergencies, such as the aforementioned attempt to dissolve the National Assembly in 2022, to prevent executive overreach. However, such interventions have also been criticised for selectively targeting political opponents, raising concerns about the judiciary's role in stabilizing—or destabilizing—democratic institutions. Defenders of such a system point to its successes in protecting the fundamental rights of the marginalized. For example, in 2017, Chief Justice Saqib Nisar issued a *suo motu* notices over a minor's rape[91] and a year later over the rape and murder of another young girl in Kasur.[92] Besides his role during the attempt to dissolve the National Assembly in 2022, Chief Justice Bandial also issued a *suo motu* notice over the delay in the subsequent general elections.[93] Defenders have argued that the *suo motu* method is the only way the Court can ensure implementation of its orders. Without the *suo motu* weapon, marginalized groups in society would have no recourse or protections in law. However, that does not explain why other judges cannot be allowed into this decision-making. Justice Qazi Faez Isa, the former Chief Justice, was unusually vocal about this problem,

[90] Shivani Kumar, 'Pak Chief Justice Says SC Will Issue "reasonable Order" on Crisis, Imran Calls PTI Meet Tomorrow' *Hindustan Times* (New Delhi, 4 April 2022) <https://www.hindustantimes.com/world-news/pakistan-supreme-court-resumes-hearing-on-political-crisis-imran-calls-pti-meet-tomorrow-101649065662800.html> accessed 12 August 2024.

[91] PTI, 'Pak Chief Justice Takes Suo Motu Notice of Teenage Girl's Rape' *The Indian Express* (Noida, 27 July 2017) <https://indianexpress.com/article/pakistan/pak-chief-justice-takes-suo-motu-notice-of-teenage-girls-rape-4769652/> accessed 12 August 2024.

[92] Web Desk, 'Chief Justice Takes Suo Moto Notice of Zainab Rape, Murder in Kasur' *The News International* (Islamabad, 10 January 2018) <https://www.thenews.com.pk/latest/266861-chief-justice-takes-Suo-Moto-notice-of-zainab-rape-murder> accessed 12 August 2024.

[93] Hasnaat Malik 'CJP Takes Suo Motu Notice over Polls Delay' *The Express Tribune* (Islamabad, 22 February 2023) <https://tribune.com.pk/story/2402654/Chief Justicep-takes-suo-motu-notice-over-polls-delay> accessed 12 August 2024.

particularly before his retirement.[94] He believed that the power to issue *suo motu* notices lied, like the case in India, with the Court in general, not the Chief Justice alone.[95]

Regardless of what happens behind closed doors, the fact remains that one of the motives behind the Supreme Court (Practice and Procedure) Act, 2023 ('Practice and Procedure Act') was to do away with the dictatorial nature of the *suo motu* powers.[96] The Practice and Procedure Act, prior to its amendment in 2024, effectively mandated that *suo motu* notices be issued through a majority decision of the Chief Justice and the next two senior-most judges of the Court. Ironically, this same legislation was obstructed by the wielding of the very *suo motu* powers it sought to reform. However, the question of *suo motu* is now moot owing to the 26th Constitutional Amendment, which has constitutionally mandated the removal of these powers.

The Supreme Courts of Pakistan and India face an unsustainable backlog—over 57,000[97] and 79,000[98] pending cases, respectively—necessitating a recalibration of discretionary review. Unlike the United States, where certiorari restrictions have concentrated judicial power, the problem in South Asia is excessive case admission, which dilutes Supreme Courts' function as courts of law rather than fact. Given the existence of Sessions Courts and High Courts as appellate bodies, appeal to the Supreme Courts should not be a matter of right. Unrestricted access to apex courts burdens judicial resources and incentivises litigants to bypass lower court finality. Expanding discretionary review would correct this inefficiency by ensuring that only cases involving unsettled or conflicting points of law are admitted. This would align Pakistan and India with

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[94] PTI, 'Pak President Alvi Appoints Justice Qazi Faez Isa as Next Chief Justice' *The Indian Express* (Islamabad, 21 June 2023) <https://indianexpress.com/article/pakistan/pak-president-alvi-appoints-justice-qazi-faez-isa-next-chief-justice-8678087/> accessed 12 August 2024.
[95] News Reporter, 'Suo Motu Powers Lie with SC, Not Just CJP: Justice Qazi Faez Isa' *Dawn* (Islamabad, 19 April 2023) <https://www.dawn.com/news/1748501> accessed 12 August 2024.
[96] Practice and Procedure (n 9).
[97] Hasnaat Malik, 'SC Grapples with Unprecedented Caseload' *The Express Tribune* (Islamabad, 23 April 2024) <https://tribune.com.pk/story/2463605/sc-grapples-with-unprecedented-caseload> accessed 26 February 2025.
[98] Gauri Kashyap, '80,221 Cases Pending in the Supreme Court in January 2024' (*Supreme Court Observer*, 23 May 2024) <https://www.scobserver.in/journal/80221-cases-pending-in-the-supreme-court-in-january-2024> accessed 26 February 2025.

jurisdictions like the United Kingdom and Canada, where permission-to-appeal mechanisms filter cases to preserve judicial economy. Without such a shift, the Supreme Courts will remain overwhelmed by routine appeals, undermining their capacity to develop coherent legal doctrine.

The above discussion shows how Pakistan's separation of powers has been undermined by the judiciary's historical entanglement in political conflicts, inconsistent application of constitutional principles, and a lack of institutional checks on judicial discretion. The Court's use of Article 184(3) of the Constitution for politically sensitive cases, combined with executive and military interventions, has contributed to an unstable balance of power between state institutions. While discretionary review and judicial independence are contested issues in many common law jurisdictions, the extent of judicial entanglement in political conflicts varies. In the United States, judicial review has historically been insulated from direct political interference whereas in Pakistan, the judiciary's role in disqualifying elected leaders and engaging in judicial populism has led to more overt power struggles with the executive and the legislature. While SCOTUS in the United States exercises strong judicial review, its authority is subject to checks through mechanisms such as congressional amendments, legislative overrides of statutory interpretations, and judicial ethics scrutiny. However, the absence of a formal accountability mechanism for discretionary review decisions, such as case selection under the writ of certiorari, has raised concerns about the judiciary's unchecked power over its docket. Considering the resistance of Chief Justice Roberts to congressional accountability,[99] with the tacit support of Justice Thomas,[100] it seems like the separation of powers is about to get messier still, and discretionary review may be one of the casualties.

Reforming discretionary review could have divergent effects depending on the jurisdiction. In some cases, greater judicial accountability might enhance the separation of powers by ensuring courts do not overstep their constitutional role. However, excessive constraints on judicial discretion could weaken the judiciary's

[99] Muhammad U. Faridi, 'Congress Can and Must Enact a Supreme Court Ethics Code' (*New York City Bar Association*, 19 October 2024) <https://www.nycbar.org/blogs/congress-can-and-must-enact-a-supreme-court-ethics-code> accessed 25 February 2025.

[100] Devin Dwyer, 'All 9 Supreme Court Justices Push Back on Oversight: "raises More Questions," Senate Chair Says' (*ABC*, 28 April 2023) <https://abc7.com/supreme-court-justices-scotus-ethics-code-clarence-thomas/13192491> accessed 25 February 2025.

ability to check executive overreach and uphold fundamental rights. A manner of reconciling these opposing consequences must be sought, primarily through reform of the discretionary review system, renewing the trust other branches have for the judiciary.

Reforming Discretionary Review in Common Law Jurisdictions

I. Mandatory Written Explanations for Granting or Denying Review

The problems with discretionary review in the United States, United Kingdom, Australia, Canada, India, and Pakistan stem primarily from a lack of transparency in case selection, excessive judicial discretion concentrated in small groups of judges, the absence of clear criteria for review, and the politicisation of judicial interventions. The following reforms address these issues directly.

A fundamental flaw in discretionary review is that courts refuse to explain why they accept or reject cases, leaving case selection opaque and vulnerable to ideological biases. In the United States, SCOTUS denies more than 98% of certiorari petitions without explanation, creating uncertainty over why some cases are deemed worthy of review while others are not. A requirement that at least one judge must provide a written statement when a certiorari petition is denied in a constitutional case would introduce some transparency. In the United Kingdom, UKSC's refusal to grant permission to appeal is also not accompanied by detailed reasoning, leaving parties uncertain about how 'arguable points of law' are determined. Requiring a one-paragraph explanation for refusals would reduce ambiguity. Pakistan and India's Supreme Courts, which exercise broad discretionary powers over writ petitions, should be required to justify denials of constitutional petitions in cases where fundamental rights are at stake.

It is suggested that all discretionary review refusals, at least in constitutional cases, must include a short, written explanation detailing why the case was rejected. This prevents arbitrary denials and ensures that discretionary review does not shield courts from accountability.

II. Expanding Case Selection Panels to Prevent Concentration of Power

A major issue in Pakistan, India, and the United States is that a small group of judges—often led by the Chief Justice—dominates case selection decisions. In Pakistan, the Chief Justice has historically had unilateral control over bench formation and discretionary review, allowing case selection to be shaped by individual judicial preferences. In India, the Chief Justice plays a major role in deciding discretionary petitions and forming benches, which has led to accusations of bench fixing in politically sensitive cases. The case selection process should be entrusted to a randomly selected panel of five judges rather than being determined by the Chief Justice or the Registrar's Office alone.

In the United States, the Rule of Four, which allows four judges to grant certiorari, means that a minority of SCOPUS can control case selection. Expanding this rule to require five judges (a majority) for case selection in constitutional matters would prevent cases from being selected purely on ideological preferences. However, considering the settled conservative supermajority in SCOTUS, this suggestion may not be entirely effective.

It is suggested that all Supreme Courts should require a minimum of five judges to approve case selection in constitutional matters to prevent discretionary review from being monopolised by judicial factions or the Chief Justice.

III. Codifying Case Selection Criteria to Reduce Subjectivity

Courts often claim to use broad principles like 'public importance' (Canada, United Kingdom, India, Pakistan, etc.) or 'substantial federal question' (United States) to determine case selection. However, these principles are vague and inconsistently applied, allowing judges excessive discretion in choosing politically or ideologically significant cases while ignoring others.

In Australia, the HCA's 'jurisdictional error' framework restricts discretionary review to cases where lower courts have acted outside their authority. This clear legal threshold reduces the possibility of politically motivated case selection. In Canada, the 'public importance' criterion for leave to appeal is flexible but ensures that cases involve broad legal implications rather than purely individual grievances. Pakistan and India lack structured criteria for discretionary review, allowing judges to take up cases on vague public interest justifications.

Courts should adopt a structured, multi-factor test for discretionary review case selection, requiring at least two of the following criteria to be met: (i) conflict amongst lower courts on a major constitutional question; (ii) demonstrable national legal significance; (iii) jurisdictional error by a lower court; or (iv) violation of fundamental rights requiring apex court intervention. This would prevent judges from selectively choosing cases that align with personal or political priorities while still allowing courts to manage their dockets efficiently.

IV. Restricting the Use of Discretionary Review for Political Disqualifications

A major problem in Pakistan and India has been the use of discretionary review to remove elected officials from office, raising concerns about judicial overreach into democratic processes. For instance, the Court disqualified Nawaz Sharif in 2017 through discretionary review, leading to accusations that the judiciary was weaponised against political opponents.[101] India's Supreme Court has intervened in election disputes, sometimes barring candidates from running under unclear discretionary justifications. Rahul Gandhi, leader of the Indian National Congress, was disqualified on charges of defaming Prime Minister Narendra Modi.[102] Dicey argued that the rule of law cannot function if legal decisions appear arbitrary or politically motivated. He warned against judicial power being 'exercised in an irregular and unaccountable manner, which subjects individuals to the risk of punishment without established rules.'[103]

Constitutional disqualifications of elected officials should be explicitly removed from discretionary review jurisdiction and should require: (i) a full

[101] Shuja Nawaz, 'The Disqualification of Nawaz Sharif: Will Pakistan's Courts Drain the Swamp?' (*Atlantic Council*, 28 July 2017) <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-disqualification-of-nawaz-sharif-will-pakistan-s-courts-drain-the-swamp> accessed 25 February 2025.
[102] The Associated Press, 'India Opposition Leader Loses His Parliament Seat after Being Convicted of Defamation' (*NPR*, 24 March 2023) <https://www.npr.org/2023/03/24/1165822683/india-rahul-gandhi-parliament-seat-defamation-modi> accessed 25 February 2025.
[103] Dicey (n 6) 204.

Supreme Court bench (not a discretionary panel); (ii) mandatory appeal rights; and (iii) legislative review before judicial disqualification. This prevents courts from unilaterally removing political leaders based on vague constitutional provisions, ensuring that judicial review does not become a political tool.

V. Limiting the Use of Discretionary Review to Overturn Established Precedents

Discretionary review is sometimes exploited to overturn long-standing legal precedents, leading to legal instability. In the United States, SCOTUS used discretionary review to overturn *Roe* in *Dobbs* after decades of precedent. In Pakistan, judicial doctrine has been reversed multiple times under different Chief Justices, particularly in cases involving constitutional interpretation.

Courts should require a supermajority vote (two-thirds of judges) to accept a case for discretionary review if the stated purpose is to overturn a precedent that has existed for decades. This prevents sudden ideological shifts from erasing long-established legal protections.

VI. Strengthening Parliamentary Oversight Without Undermining Judicial Independence

While judicial independence is a core principle of common law systems, the lack of external accountability in discretionary review enables judges to operate without democratic checks. In the United Kingdom, parliamentary scrutiny of judicial decisions provides a minimal check on judicial power. In Pakistan, judicial decisions have historically been immune from parliamentary review, leading to power struggles between branches of government.

Discretionary review case selection trends should be subject to annual review by an independent legal commission which would: (i) publish reports on discretionary case selection patterns; (ii) identify ideological biases in case selection; and (iii) provide recommendations for procedural improvements. This would preserve judicial independence while ensuring discretionary review is not abused for political or ideological purposes.

Discretionary review is an essential function of common law courts, but its unchecked nature has created legitimacy crises in multiple jurisdictions. By implementing the six reforms outlined above—mandatory reasoning for denials, expanded case selection panels, codified selection criteria, restrictions on political disqualifications, limits on precedent reversals, and independent oversight—courts can maintain their autonomy while ensuring greater institutional accountability. These reforms will protect the credibility of discretionary review and prevent judicial discretion from being exploited for political purposes.

Conclusion

Discretionary review occupies a paradoxical space within the legal frameworks of common law jurisdictions. It is simultaneously a safeguard against judicial overload and a mechanism that grants courts the power to shape legal and constitutional discourse with little oversight. This paper has examined how discretionary review functions across six common law jurisdictions—the United States, the United Kingdom, Australia, Canada, India, and Pakistan—demonstrating that while the principle remains consistent, its application varies widely depending on historical, institutional, and political contexts.

The evolution of discretionary review across common law jurisdictions presents a departure from Montesquieu's model, where the judiciary was meant to exercise minimal discretion. However, Montesquieu also emphasised the spirit of the laws, which suggests that legal structures should adapt to the specific political and institutional needs of a society. In this sense, discretionary review can be seen as both a pragmatic necessity—preventing courts from being overwhelmed—and a constitutional anomaly, granting the judiciary an agenda-setting function that Montesquieu never envisioned. The challenge, therefore, is not just about limiting judicial discretion but ensuring that it operates within principled constraints that maintain institutional balance without compromising judicial efficiency.

The core tension underlying discretionary review is its dual role as both a protector of judicial independence and a potential threat to the separation of powers. On the one hand, discretionary review ensures that courts are not overwhelmed with frivolous or redundant cases, allowing them to focus on legal questions of significant constitutional or public importance. On the other hand, the absence of clear criteria, the concentration of power within small judicial panels, and the lack of transparency in case selection raise concerns about judicial accountability. The ability of courts to choose which cases they hear inherently means that certain issues—especially politically sensitive ones—can be either prioritised or ignored based on judicial preferences rather than purely legal considerations.

This analysis has revealed that while some jurisdictions, such as Australia and Canada, have introduced structured frameworks for discretionary review, others, particularly the United States, India, and Pakistan, continue to rely on opaque, highly discretionary mechanisms that grant courts broad authority without adequate oversight. The problem is most acute in Pakistan and India, where discretionary review has been wielded as a political tool, influencing electoral processes, executive decisions, and legislative actions. The United States, while often held as a model of judicial independence, has similarly struggled with the unilateral nature of certiorari decisions, which lack any requirement for explanation and allow ideological biases to shape constitutional adjudication.

The need for reform is evident. The lack of transparency in discretionary review decisions must be addressed through mandatory reasoning for denials, ensuring that courts provide at least minimal explanations for case selection in constitutional matters. The concentration of power in small judicial panels should be mitigated by requiring larger case selection committees, preventing ideological factions from monopolizing judicial agendas. Furthermore, the absence of clear selection criteria should be resolved by codifying structured, multi-factor tests to guide discretionary decisions, ensuring consistency and fairness.

Most crucially, discretionary review must not become a mechanism for judicial interference in democratic processes. The history of judicial disqualifications in Pakistan, politicised rulings in India, and precedent reversals in the United States illustrate the dangers of an unchecked judiciary acting as an unaccountable constitutional arbiter. While courts must retain independence from political influence, this does not mean they should be beyond institutional checks. Introducing independent oversight commissions, performance evaluations, and procedural safeguards can ensure that discretionary review serves its intended purpose—strengthening the judiciary as an impartial constitutional guardian rather than an unchecked political actor.

Ultimately, discretionary review is not inherently flawed, but its unchecked nature creates systemic vulnerabilities. Without reforms that introduce greater transparency, clearer criteria, and structural accountability, discretionary review risks undermining the very judicial independence it seeks to protect. Courts must not only interpret the law but also demonstrate institutional integrity and public accountability. A judiciary that remains immune to scrutiny loses credibility, and discretionary review, if left unregulated, risks eroding public trust in the courts as impartial arbiters of justice. Reforming discretionary review is not about limiting judicial power—it is about ensuring that such power is exercised with legitimacy, fairness, and responsibility.

If the judiciary is to remain the guardian of constitutional order, then discretionary review must be a scalpel, not a sledgehammer—precise, principled, and wielded with restraint, lest it carve away the very balance it was meant to preserve.

The Legal Admissibility of Online Family Dispute Resolution in Pakistan

Zeeshan Ashraf Qureshi, Mohammad Azam Bin Hussain, Ain Husna Mohammad Arshad, Mohamad Fateh Labanieh*

Abstract

This paper evaluates the legal admissibility and practical application of Online Family Dispute Resolution ('OFDR') in the Pakistani context with a particular focus on Islamic jurisprudence. The advent of technology has made Online Dispute Resolution ('ODR') extremely relevant in the world as a cost-effective and efficient alternative to traditional legal dispute mechanisms, which bridges barriers between disputing parties. OFDR, as a subset of ODR, offers an efficient alternative to traditional family dispute resolution in courts by incorporating Islamic principles such as the idea of *Sulh* (reconciliation) and *Tahkim* (arbitration) in the legal system with the help of technology. In doing so, it reduces the propensity for long, drawn-out family disputes for speedy resolution. Thus, this paper makes a case for the adoption of OFDR in Pakistan while evaluating Islamic principles of mediation, arbitration, and negotiation as well as global practices in other jurisdictions such as Australia, the United Kingdom, Bangladesh, and others.

Introduction

The family is universally defined as a social institution composed of individuals directly linked by kinship, where adult members assume responsibility of raising children.[1] Family serves as the centre of society and functions as the primary institution for the socialization of norms, values, and beliefs.[2] The lack of speedy and peaceful resolution of family disputes can foster resentment and ill will within

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* Zeeshan Ashraf is a Ph.D. Scholar at the School of Law, Universiti Utara Malaysia. Previously, he served as the Head of Department at the School of Law, IVY College of Management Sciences, Lahore; Mohammad Azam Bin Hussain is an Associate Professor at the School of Law, Universiti Utara Malaysia; 'Ain Husna Mohd Arshad serves as a Senior Lecturer at the School of Law, Universiti Utara Malaysia; Mohamad Fateh Labanieh is an International Lecturer at the School of Law, Universiti Utara Malaysia.

[1] Admin, 'Problems in Families, Sample of Essays' (*EduCheer!*, 7 February 2013) <https://educheer.com/essays/problems-in-families/> accessed 11 August 2024.

[2] Akhmedov B.T. 'The Family As The Basic Unit of Society' (2021) 8(12) IJMMU 201.

this foundational institution.[3] For this reason, effective mechanisms for resolving family disputes are essential to social stability.

Modern law and Islamic legal theory offer a range of mechanisms to resolve disputes. One such method is the use of informal dispute resolution of family conflicts which includes analysing the problems between the parties amicably. During such informal dispute resolution, the disputing parties aim to resolve the conflict rather than win the argument.[4] This approach in resolving family disputes often keeps the door open for reconciliation between both parties. If the dispute is not resolved through informal modes of dispute resolution, the parties still have formal options for the resolution of conflict such as litigation.[5]

Informal dispute resolution finds support in numerous Islamic traditions including the *Ahadith* (sayings) of Prophet Muhammad (P.B.U.H.). One such saying narrated by Ibn Abbas is as follows: 'He who makes peace (*Sulh*) between the people by inventing good information or saying good things is not a liar.'[6] Another saying, as narrated by Anas Ibn Malik, is '[a]ll types of compromise and conciliation amongst Muslims are permissible, except those which may harm anything *halal* and a *halal* as *haram*.'[7] Thus, Prophetic sayings indicate that Islam stresses the importance of informal dispute resolution mechanisms to facilitate reconciliation between conflicting parties. The teachings of Islam appreciate love, affection, and harmony within family relationships and across the social system to avoid quarrels and conflicts.[8] Islam commands Muslims to resolve family disputes through the involvement of family members.[9] Therefore, the primary purpose of Islamic law is to resolve disputes of all kinds harmoniously and cordially.[10]

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[3] Thomas Killian, Harvey C. Peters, and Lainey J Brottem, 'Religious and Spiritual Values Conflicts in Queer Partnerships: Implications for Couples and Family Counselors' (2019) 27 FJ 250.
[4] Arshad Muradin, 'Religious Authority and Family Dispute Resolution among Moroccan Muslims in the Netherlands' (2022) JME 1.
[5] George E. Irani, 'Islamic Mediation Techniques for Middle East Conflicts' (*ciaotest.cc.columbia.edu*, June 1999) <https://ciaotest.cc.columbia.edu/olj/meria/meria99_irg01.html> accessed 11 August 2024.
[6] Muhammad Al-Bukhari, *Sahih Bukhari*, Book. 73, Hadith No. 83.
[7] Ibn Majah, *Sunan Ibn Mājah*, Book 20, Hadith No. 2535.
[8] Hamad al-Humaidhi, 'Ṣulḥ: Arbitration in the Arab–Islamic World' (2015) 29 ALQ 92.
[9] Md Zahidul Islam, 'Provision of Alternative Dispute Resolution Process in Islam' (2012) 6 IOSR-JBM 31.
[10] Aida Othman, '"And Amicable Settlement Is Best": Sulh and Dispute Resolution in Islamic Law' (2007) 21 ALQ 64.

Additionally, Alternative Dispute Resolution ('ADR') is the more efficient method of dispute resolution globally in contrast to the judicial system due to its streamlined procedure and shorter timelines. The applications of ADR, mediation, and arbitration engage an independent third party to resolve the dispute.[11] Nowadays, ADR has been transformed into ODR. This involves using virtual techniques by third parties to reach an amicable solution instead of face-to-face interaction. The participants of ODR are free to choose any appropriate tool for virtual interaction, including popular virtual meeting platforms like Zoom, Webex, or Google Meet.[12]

The concept of invoking internet-based mediation and arbitration for equitable dispute resolution between the spouses for an eventual cordial agreement is known as OFDR.[13] For now, the global breakthrough in dispute resolution applications is through technological advancement. The prevailing system avoids face-to-face interaction between the disputants, mediators, or arbitrators while resolving family disputes. Many countries, such as Australia, New Zealand, and Morocco, are equipped with various technological tools for resolving disputes virtually due to the constraints of long distances.[14]

As a result, in the current context, OFDR is an appropriate, flexible, and convenient method of family dispute resolution.[15] This paper outlines the role of OFDR and its online forms in other jurisdictions, its relevance to Islam, and its possible application to Pakistan.

Definition of ADR

ADR serves as a new alternate mode of dispute resolution outside the formal judicial system involving mediation, arbitration, conciliation, or negotiation. While there are some ADR mechanisms that are attached to court proceedings such as

[11] Ibid 93.
[12] Ibid 93.
[13] James C. Melamed, 'Establishing Ethical Standards for Online Family Mediation' (2021) 59 FCR 244.
[14] Ibid 245.
[15] Margaret M. Huck, 'The Value of Online Dispute Resolution in Family Law' (2020) 6 IJODR 52.

court-annexed arbitration, others are independent from the government and formal oversight.[16] Since its inception, ADR has gained much popular support as a less expensive and less time-consuming endeavour that leads to amicable solutions amongst disputing parties.

According to the International Chamber of Commerce, arbitration, one form of ADR, has increased in a number of different countries including Central and Eastern Europe, North America, and Middle East.[17] While these arbitral awards concern disputes in commercial transactions especially in international contracts, they point to a larger move towards out-of-court judicial mechanisms globally. The success of ADR mechanisms worldwide depicts the ease of accessibility and efficiency that they create.

Introduction to Family Dispute Resolution

Family Dispute Resolution ('FDR') is a procedure for resolving disputes between the parties belonging to a family institution. A neutral person/mediator can facilitate the parties towards an amicable dispute settlement.[18] FDR aims to provide cheap, quick, and amicable settlements to the disputed partners in an informal and pleasant environment.[19]

Section 10(3) of the Family Courts Act, 1964 ('1964 Act') requires conflicting parties to undergo FDR proceedings before initiating court proceedings.[20] To simplify, parties who wish to approach the court to resolve their

[16] Harry T. Edwards, 'Alternative Dispute Resolution: Panacea or Anathema?' (1986) 99 (3) HLR 668–84.
[17] 'ICC Releases Preliminary 2023 Arbitration and ADR Statistics - ICC - International Chamber of Commerce' (*ICC*, 26 June 2024) <https://iccwbo.org/news-publications/news/icc-releases-preliminary-2023-arbitration-and-adr-statistics/?utm_source=chatgpt.com> accessed 6 February 2025.
[18] Susan M. Armstrong, 'Encouraging Conversations about Culture: Supporting Culturally Responsive Family Dispute Resolution' (2011) 17 JFS 233.
[19] Family Relationships Online, 'Family Mediation and Dispute Resolution | Family Relationships Online' (*Familyrelationships.gov.au*, 2019) <https://www.familyrelationships.gov.au/separation/family-mediation-dispute-resolution> accessed 11 August 2024.
[20] Aamir Latif Bhatti, 'Role of Arbitration Councils and Mediation in Family Disputes' (*Courting The Law*, 31 July 2023) <https://courtingthelaw.com/2022/12/19/faqs/role-of-arbitration-councils-and-mediation-in-family-disputes/> accessed 23 May 2025.

family disputes must attend family dispute resolution/mediation sessions. During those sessions, the mediator sincerely tries to resolve their conflicts and restrains them from approaching the judicial system.[21] Notably, the matters related to domestic violence and child abuse do not fall under the domain of FDR and mediation centres.[22] FDR is facilitated by a neutral and independent third party, a mediator/arbitrator, who resolves the dispute between the conflicting parties.[23] The person appointed as the neutral arbitrator should qualify as an arbitrator as per ADR Laws, which, in Pakistan, include the qualification of a neutral arbitrator, as defined under Section 4 of the 2017 Act.[24] In the event of arbitration, the agreement made after the proceedings of FDR is legally binding, and its violation constitutes a breach of contract.[25]

Online arbitration is the transformation of traditional arbitration into virtual reality. During online arbitration and mediation, communication, interactions, and documentary evidence are based on electronic means.[26] The service provider, who hosts and runs the ODR forum, must cope with sophisticated infrastructure efficiently to offer online mediation and arbitration processes in the true spirit. In developed countries, OFDR centres and family mediators are available with the equipped infrastructure of Web, WhatsApp, Skype, Zoom, or WebEx video and audio conferencing to assist the parties to a dispute. Therefore, family disputes are no longer confined to courts involving face-to-face interactions only.[27] These are of greater significance when it is difficult or impossible to get the parties together into face-to-face interaction or when both parties are residing in different jurisdictions.[28] Family arbitrators can also provide the disputants with an online pre-negotiation session to collect the required information and to ascertain the issues that require redressal. This exercise will help to inform and prepare

[21] Ibid 123.
[22] Helen Rhoades, 'Mandatory Mediation of Family Disputes: Reflections from Australia' (2010) 32 JSWFL 183.
[23] Ibid.
[24] Ibid.
[25] Carlo Vittorio Giabardo, 'American Legal Realism in Dispute Resolution: Alternative Dispute Resolution as a "Realist" Project' (2020) SSRN-EJ 63.
[26] Ibid.
[27] Michael J. Dennis, 'APEC Online Dispute Resolution Framework' (2019) 6(2) IJODR 138–43.
[28] Ibid.

disputants for their first joint session with the mediator. It can save time and help disputants engender reasonable expectations related to the process and outcome.[29]

In conclusion, whether pursued online or in person, FDR provides a suitable platform for the resolution of disputes between two conflicting parties. The advent of technology provides ease in the way in which FDR is administered. The next section explores the importance of OFDR, keeping in mind the outlined statutory framework and procedural mechanism.

Significance of OFDR

OFDR has three distinguished models. It is facilitative, evaluative, and transformative since it involves settlement through mediation.[30] These models can be further divided into two tools: facilitative and advisory mediative.[31] Notwithstanding the notable acceptance and expansion of OFDR, its growth in developing countries is challenging. OFDR is based on the amicable principle of settlement through Information and Communication Technology ('ICT'). Modern tools of ODR can resolve arguments and issues efficiently and positively because it is wrapped up in a quick, cheap, and expedient online process. When it comes to the actual process of family dispute resolution, in the offline FDR, participants may only end up dealing with the symptoms of the problem because emotional issues may make the parties avoid face-to-face interaction.[32] Therefore, in this era of ICT, OFDR is the best mode of resolving family disputes amicably, and it is also essential for dispute resolution in the long-term efficacy of relationships.[33]

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[29] Giselle Beran Medella D'Almeida, '"Digital Family Justice - from Alternative Dispute Resolution to Online Dispute Resolution?"' (2021) 43(2) JSWFL 231–33.
[30] Zena Zumeta, 'Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation' (*Mediate.com*, 27 February 2018) <https://mediate.com/styles-of-mediation-facilitative-evaluative-and-transformative-mediation/>.
[31] Ibid.
[32] Melamed (n 13).
[33] Melamed (n 13).

Application of Family Dispute Resolution in Other Jurisdictions

I. Australia

ADR gained traction in Australian Family Law post-1970s as a means of conflict mediation for family disputes. The subsequent reforms in the 2006 Australian Family Law Act introduced mediation as a prerequisite for parenting orders. This mandatory requirement ensured mediation was part of the FDR process to facilitate reconciliation between the parties. Additionally, the establishment of 65 Family Relationship Centres ('FRCs') across Australia provided subsidized mediation services, information, and advice to help families transition to alternative family arrangements.[34] The significance of FDR, coupled with the increased access to technology, has assisted in the use of OFDR in Australia to help solve geographical constraints and increased costs of physical dispute resolution arrangements. Recently, the use of Artificial Intelligence ('AI') in OFDR has also been evaluated to help inculcate AI in negotiation processes and research for the speedy resolution of complex family disputes.[35]

Additionally, the COVID-19 pandemic further facilitated the transition towards OFDR as a legitimate medium of dispute resolution. The growth of video conferencing and the increased use of Online Applications/Programs provided a web-based/mobile-based solution to legal disputes. The free-flow of communication led to streamlined resolution of conflicts.[36] Cumulatively, the increased role of tech-based solutions for legal problems in Australia has, in turn, increased the role of OFDR as a legitimate medium of resolving family disputes.

II. United Kingdom

FDR is legally mandated under Section 10 of the Children and Families Act, 2014 in the United Kingdom. This Act mandates a Mediation Information and Assessment Meeting ('MIAM') before the initiation of a formal suit to provide

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[34] Elisabeth Wilson-Evered and John Zeleznikow, 'The Evolution of Family Dispute Resolution and the Need for Online Family Dispute Resolution in Australia' (2021) 45 OFDR 1–16.
[35] Melissa Conley Tyler and Mark McPherson, 'Covid-19, Technology and Family Dispute Resolution' (2020) ADRJ.
[36] Ibid.

information about mediation as an alternative to the court for dispute resolution. Additionally, it forces disputing parties to contemplate key issues, including arrangements for the children, sharing finances, and dealing with debts. This is a mandatory requirement before approaching the court, except in special circumstances such as domestic abuse.

The Family Mediation Council ('FMC') provides access to trained mediators to facilitate the MIAM procedure. The advanced search engine enables conflicting parties to search for mediators closest to them based on their postal codes. The website accounts for online mediation options as well to improve accessibility to parties. This MIAM signals the start of a confidential and comprehensive mediation process.[37] Cumulatively, ODR and OFDR mechanisms play a substantial role in increasing access to justice for litigants.

III. India

Lok Adalats (People's Courts) under the Legal Services Authorities Act, 1987 are an efficient mechanism for ADR in India. These People's Courts serve as mediation forums, settling disputes pending in courts or at the pre-litigation stage through conciliation and compromise. They address matrimonial disputes, property issues, land acquisitions, motor vehicle claims, and compoundable criminal cases. These courts have facilitated the growing relevance of ADR in India.[38]

More so, the eCourts Mission Mode Project of 2007 in India served to inculcate online dispute resolution tools in mediating legal disputes. This project introduced video conferencing, e-filing, e-payment gateways and mobile applications to increase accessibility to litigants and lawyers. Apart from the large-scale effort to digitise records and introduce new tech-based solutions in the Indian legal system, such a project further strengthens the use of alternative legal dispute resolution mechanisms such as OFDR. While there are no specific OFDR mechanisms in India, the growing influence of different platforms for ADR and

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[37] 'What Is a Miam?' (*Family Mediation Council*, 17 January 2021) <https://www.familymediationcouncil.org.uk/family-mediation/assessment-meeting-miam/> accessed 25 May 2025.

[38] Smartaz Majumder, 'A Critical Analysis on Lok-Adalat in Indian Legal System' (2024) 5 IJRPR 1913.

subsequently ODR depict a renewed commitment to the inclusion of online mediation to resolve civil disputes.

Applicability in Pakistan

The continued advancement in technology has only increased the relevance of OFDR. While the success of OFDR in different jurisdictions is laudable, its integration in Pakistan requires careful consideration of its admissibility with Islamic family law. The effectiveness of OFDR is contingent on its alignment with cultural and religious values cohesively. For this reason, it is important to evaluate the permissibility of OFDR in Islam and its applicability in Pakistan.

I. Sources of Islam

Islam means ‘peace’, i.e., the inverse of hostility. Thus, peaceful resolution of disputes lies at the heart of Islamic ideology. Under Islamic legal tradition, *qadi* and Arbitrators can play a crucial role in dispute resolution because Islam promotes justice and encourages reconciliation amongst the disputants.[39]

Within the larger theoretical framework of dispute resolution in Islamic Law, the sources of Islamic law are derived from the teachings of the Holy Quran and practices of Prophet Muhammad (P.B.U.H.).[40] These sources are primarily divided into two classifications: primary (commands obtained from the Holy Quran and *Sunnah*) and secondary sources, including juristic commands derived from the injunctions of Islam, which provide a base for the achievement of objectives of *Shariʿah* (*Maqasid ul Shariʿah*).[41]As per the divine commands in the verse of the Holy Quran.

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَٱبْعَثُوا۟ حَكَمًا مِّنْ أَهْلِهِۦ وَحَكَمًا مِّنْ أَهْلِهَآ إِن يُرِيدَآ إِصْلَـٰحًا يُوَفِّقِ ٱللَّهُ بَيْنَهُمَآ ۗ
إِنَّ ٱللَّهَ كَانَ عَلِيمًا خَبِيرًا. ٣٥

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[39] Amyn B Sajoo, ‘Islam, the Shari’a and Alternative Dispute Resolution: Mechanisms for Legal Redress in the Muslim Community by Mohamed M Keshavjee’ (2014) 69 IJ-CJGPA 264.
[40] Imran Ahsan Khan Nyazee, *Outlines of Islamic Jurisprudence* (Advanced Legal Studies Institute 2005) 263.
[41] Munir Ahmad Mughal, *Islamic Legal Maxims* (Createspace Independent Publishing Platform 2017).

> If you anticipate a split between them, appoint a mediator from his family and another from hers. If they desire reconciliation, Allah will restore harmony between them. Surely Allah is All-Knowing, All-Aware.[42]

The aforementioned divine command of the Holy Quran is similar to one of the sayings of Prophet Muhammad (P.B.U.H.): '[w]hoever judges between two disputing parties and both of them agree with (the arbitrator) whereas he does not do justice between them, Allah will curse him.'[43] It declares that the believers are tied through a string of brotherhood and guides them to peace and prosperity through principles of fairness and justice.[44] The Holy Quran and *Sunnah* depict that Islamic injunctions aim to resolve disputes amicably.

Apart from the Holy Quran and *Sunnah*, other sources of Islamic Law also allow amicable dispute resolution. The third source of Islam is *Ijma.* The divine authority of this source of Islamic Law is illustrated through Prophet Muhammad's (P.B.U.H.) saying, narrated by Ibn Masud: '[t]he Muslim community would never agree upon an error.'[45] This *Hadith* is the reasoning for consensus on *Ijma* as the third source of Islamic law because it will create cohesion between the Muslim community and moral determination of conduct.[46]

The fourth source of Islamic law is *Qias,* wherein the primary sources, the Holy Quran and *Sunnah*, are relied upon to find answers through a juristic approach. This endeavour attempts to fill the gaps in understanding divine law. In addition to these four sources, the fifth source is customs/social norms known as *Urf* in Islamic Law, and the last source is individual legal reasoning or *Ijtihad* (*Mufti* or *Mujtahid*), which must comply with or be based on the other four sources of Islamic Law.[47]

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[42] *Qur'an* 4:35.
[43] Ibn Majah (n 7) Hadith No. 2251.
[44] M. Ali Sadiqi, 'Bismillah Ar-Rahman Ar-Rahim Islamic Dispute Resolution in the Shade of the American Court House' (*amjaonline.org*, October 2010) <https://www.amjaonline.org/wp-content/uploads/2019/04/2010-7-dispute.pdf> accessed 11 August 2024.
[45] Ibn Majah, *Sunan Ibn Mājah*, Book 36, Hadith No. 3950.
[46] Hisham Hanapi, Mohd Amsyar, and Mohd Arif, 'Alternative Dispute Resolution in Islamic Law: Analysis on the Practice of Sulh' (2018) 6 IJSSHR 326.
[47] Vandana Singh, 'Alternative Dispute Resolution in Islam: An Analysis' (2017) 1 ILI-LR 137–146.

Cumulatively, these different sources of law provide a myriad of analytical tools with which to approach modern problems in light of divine commandments. The result is an ever-evolving and dynamic application of Islamic law in keeping with the recent global technological developments. The different sources maintain the hierarchy within Islamic Law by relegating the Holy Quran and *Sunnah* as the primary source of Islamic teachings; however, they leave room for the application of *Ijtihad* (individual legal reasoning) and *Ijma* (consensus) in the community.

II. Dispute Resolution in Islam

The family institution is significant in a Muslim society and emerges from a marriage contract. Therefore, the teachings of Islam encourage amicable settlement between the disputants. A husband and wife should resolve their disputes with the help of their family members and relatives. Islam appreciates the involvement of representatives from both sides of disputed spouses to protect their rights and safeguard matrimonial ties.

Islamic approaches to family dispute resolution are based on fundamental principles of social justice derived from religious values. Islamic religious texts offer a significant wealth of constructive solutions to disputes. To understand the Islamic theory of FDR, we need to understand some essential terms of Islamic Jurisprudence. The term *Sulh*[48] means peace-making or reconciliation and dates to the time before Islam, when Arabs used them to resolve tribal disputes. Prophet Muhammad (P.B.U.H.) adopted and employed the *Sulh* technique in dispute resolution in the Treaty of *Hudaybiya* indicating his preference for reconciliation over adjudication.[49]

The foremost concept in the dispute resolution mechanism in Islam is the idea of *Qada*, which has received much attention in Islamic scholarship who use both *Sulh* and *Tahkim* in court. This aligns with the extensive literature written over centuries by Muslim jurists regarding the characteristics and duties of the *qadi* and

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[48] Saidilyos Khakimov, 'Arbitration (*Tahkim*) And Reconciliation (*Sulh*) in Islam as Alternative Dispute Resolution Mechanisms' (2020) 6 TLI 31, 33. *Sulh*, or conciliation and peacemaking, is a practice that predates Islam.

[49] Siraj Islam Mufti, 'Peacebuilding and Conflict Resolution in Islam - IslamiCity' (*Islamicity.org*, 16 November 2014) <https://www.islamicity.org/6351/peacebuilding-and-conflict-resolution-in-islam/> accessed 11 August 2024.

his court in the Islamic legal system.[50] A *qadi*'s position carried considerable political and social prestige, and he was given a legal education appropriate to the role of the final arbiter of disputes and interpreter of divine will. This is a more significant means of resolving disputes in Islamic Law, but the focus on the judge and adjudication has obscured it.[51] *Sulh* is a peaceful resolution, and it is considered by some jurists to be the most morally and religiously appropriate course of action for parties involved in family disputes.[52]

III. The Concept of *Sulh* in Islam

The teachings of Islam and its permitted methods for family dispute resolution introduced the practice of *Sulh* (mediation) in Islamic law.[53] A verse of the Quran elaborates:

إِنَّمَا ٱلْمُؤْمِنُونَ إِخْوَةٌ فَأَصْلِحُوا۟ بَيْنَ أَخَوَيْكُمْ ۚ وَٱتَّقُوا۟ ٱللَّهَ لَعَلَّكُمْ تُرْحَمُونَ ١٠

> All believers are but brothers; therefore, seek reconciliation between your two brothers and fear Allah so that you may be blessed with mercy.[54]

Sulh is a settlement grounded upon compromise where the conflicting parties negotiate themselves or through the help of a third party.[55] Quranic verses praise the role of the mediator, assumed during conflict resolution proceedings. *Sulh* is the best and most accurate of all illustrations of conflict resolution, even for the disputes generated out of heinous offences.[56] Prophet Muhammad's (P.B.U.H.) statement on this subject is essential to be understood:

> Should I inform you of something higher in virtue than fasting, praying, and charity?' They said, 'Yes, O Messenger of Allah Almighty.' Then the Holy

[50] Steven Judd, 'The Jurisdictional Limits of Qāḍī Courts during the Umayyad Period' (2015) 63 Bulletin d'études orientales 43–56.
[51] Ibid.
[52] Justin Jones, 'Muslim Alternative Dispute Resolution: Tracing the Pathways of Islamic Legal Practice between South Asia and Contemporary Britain' (2020) 40 JMMA 48.
[53] Mohammad Nor Anwar Mohd Sabri and Nor 'Adha Ab Hamid, 'Sulh and Peace: Its Application according to Islamic Perspective' (2021) 6 IJLGC 76.
[54] *Qur'an* (n 42) 49:10.
[55] Othman (n 10).
[56] Ibid.

Prophet (S.A.W.) said to make reconciliation between people that conflict: 'enmity and malice tear up heavenly rewards by the roots.'[57]

Sulh tends to resolve family disputes in the same way as mediation, which is about property, civil, criminal, and other social disputes. Significantly, *Sulh* is applicable when the conflict arises during the continuance of marriage or even after its dissolution.[58] The concept of *Sulh* (reconciliation) and justice has been further elaborated in the *Hadith* of Prophet Muhammad (P.B.U.H.), whose life is a complete code for the guidance of humanity. In a *Hadith* narrated by Kathir bin Abd Allah bin Amru bin Auf al Muazni, it is stated that Prophet Muhammad (P.B.U.H.) said: '*Sulh* is permissible amongst the Muslims except for the one which makes the unlawful as lawful and which makes the lawful as unlawful. Their promises bind Muslims except for promises that permit the unlawful as lawful.'[59] On another occasion, Prophet Muhammad (P.B.U.H.) said, 'He who makes peace between the people by inventing good information or saying good things is not a liar.'[60]

The following verse of the Quran highlights the amicable settlement of disputes on equitable terms and conditions:

لَّا خَيْرَ فِى كَثِيرٍ مِّن نَّجْوَىٰهُمْ إِلَّا مَنْ أَمَرَ بِصَدَقَةٍ أَوْ مَعْرُوفٍ أَوْ إِصْلَٰحٍ بَيْنَ ٱلنَّاسِ ۚ وَمَن يَفْعَلْ ذَٰلِكَ ٱبْتِغَآءَ مَرْضَاتِ ٱللَّهِ فَسَوْفَ نُؤْتِيهِ أَجْرًا عَظِيمًا

There is no good in most of their whisperings unless one bid charity or appropriate action or reconciliation between people. The one who does this, to seek Allah's pleasure, we shall give him a great reward.[61]

The companions of Prophet Muhammad (P.B.U.H.) preferred *Sulh* in dispensing justice. A letter was written by Umar bin Khattab to Abu Musa al-Asharion, putting forth the principles of *Sulh* to be considered during judicial

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[57] Muḥammad Ibn ʻīsá Tirmidhī, *Sunan al-Tirmidhī*, محمد بن عيسى ،ترمذيترمذي., *English Translation of Jāmi' At-Tirmidhī = Jāmi' Al-Tirmidhī* (Riyadh: Darussalam 2007) Hadith No. 2509.
[58] Ibid 32.
[59] Ibn Mājah (n 7) Hadith No. 2353.
[60] Al-Bukhari (n 6) 870.
[61] *Qur'an* (n 42) 4:128.

proceedings: '[a]ll types of compromise and conciliation are permissible except those which makes *haram* anything *halal* and *halal* as *haram*.'[62]

The fact is that *Sulh* is a legal tool meant for private conciliation between spouses, whereas litigation is rarely acknowledged in private matters of Islamic Law.[77] Moreover, a *qadi* may also use it as a procedural tool in his courtroom because judges can send parties in dispute to *Sulh* (mediation) before or at any point during the trial process.[63]

IV. The Concept of *Tahkim* in Islam

The practice of *Tahkim* (Arbitration) in Islamic law is based on the teachings of Islam and its permitted methods for family dispute resolution.[64]

> **وَإِن طَآئِفَتَانِ مِنَ ٱلْمُؤْمِنِينَ ٱقْتَتَلُوا۟ فَأَصْلِحُوا۟ بَيْنَهُمَا ۖ فَإِنۢ بَغَتْ إِحْدَىٰهُمَا عَلَى ٱلْأُخْرَىٰ فَقَـٰتِلُوا۟ ٱلَّتِى**
> **تَبْغِى حَتَّىٰ تَفِىٓءَ إِلَىٰٓ أَمْرِ ٱللَّهِ ۚ فَإِن فَآءَتْ فَأَصْلِحُوا۟ بَيْنَهُمَا بِٱلْعَدْلِ وَأَقْسِطُوٓا۟ ۖ إِنَّ ٱللَّهَ يُحِبُّ ٱلْمُقْسِطِينَ**
>
> If two groups of believers fight each other, seek reconciliation between them. And if one of them commits aggression, it comes back to Allah's command. So, if it comes back, seek reconciliation between them with fairness and maintain justice. Surely, Allah loves those who maintain justice.[65]

In the verses mentioned above of the Quran, for *Sulh* and *Tahkim*, the most significant aspect is that in *Sulh,* an amicable settlement may be reached between the parties with or without the involvement of a third party, unlike *Tahkim*, where the engagement of a third party is indispensable.[66]

As mentioned before, Quranic verses emphasise the amicable settlement of family disputes between the spouses on equitable terms and conditions:

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[62] Al-Bukhari (n 6) 874.
[63] Othman (n 10).
[64] Muhammad Babagana and Bello Tukur, 'Peace and Conflict Resolution in Islam an Instrument for Sustainable Peaceful Coexistence in Nigeria' (2020) 4(9) IJRISS 454–458.
[65] *Qur'an* (n 42) 49:9.
[66] Md. Shahadat Hossain, 'Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An Analytical Overview' (2013) 1 JPCR 1.

وَإِنِ ٱمْرَأَةٌ خَافَتْ مِنۢ بَعْلِهَا نُشُوزًا أَوْ إِعْرَاضًا فَلَا جُنَاحَ عَلَيْهِمَآ أَن يُصْلِحَا بَيْنَهُمَا صُلْحًا ۚ وَٱلصُّلْحُ
خَيْرٌ ۗ وَأُحْضِرَتِ ٱلْأَنفُسُ ٱلشُّحَّ ۚ وَإِن تُحْسِنُوا۟ وَتَتَّقُوا۟ فَإِنَّ ٱللَّهَ كَانَ بِمَا تَعْمَلُونَ خَبِيرًا

> If a woman fears ill-treatment or aversion from her husband, then there is no sin on them in entering a compromise between them. Compromise is better. Avarice is made to be present in human souls. If you do good and fear Allah, Allah is All-Aware of what you do.[67]

This verse clarifies that if a disagreement arises between spouses, *Tahkim* (arbitration) may preferably be applied for amicable settlement of disputes based on the injunctions of Islam. It is recognised that dispute resolution based on *Tahkim* establishes a productive relationship for the future and creates a sense of respect for each other, even in the case of dissolution of marriage, where the spouses discontinue to live together.[68]

V. Validity of ODR in Islam

The teachings of Islam require us to negotiate our conflicts and encourage amicable settlements to preserve human relationships. However, it is also acknowledged that family dispute resolution establishes long-term relationships for spouses through *Sulh* and *Tahkim*. In the case of the dissolution of marriage, an amicable settlement lets the separating parties end their ties with kind words and consideration.[69]

Muslims use religious principles, customary reconciliation rituals, and intercommunal behaviours to resolve family disputes. In resolving conflicts, it is crucial to consider contextual factors like culture, ethnicity, and history that influence sources, parties, attitudes, and behaviours in different Islamic societies.[70] Islamic legal approaches to resolving disputes may differ from culture to culture. However, adhering to the Holy Quran and the teachings of Prophet Muhammad (P.B.U.H.) is a fundamental component of Islamic legal discourse. To reach a peaceful and mutually agreeable resolution in family disputes, arbitrators must be

[67] *Qur'an* (n 42) 4:128.
[68] Islam (n 9).
[69] Ibid 44.
[70] Hanapi (n 46).

appointed to represent both the husband and the wife.[71] The theory of family dispute resolution is based on verse 35 of Surah Al-Nisa of the Holy Quran.

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَٱبْعَثُوا۟ حَكَمًا مِّنْ أَهْلِهِۦ وَحَكَمًا مِّنْ أَهْلِهَآ إِن يُرِيدَآ إِصْلَـٰحًا يُوَفِّقِ ٱللَّهُ بَيْنَهُمَآ ۗ
إِنَّ ٱللَّهَ كَانَ عَلِيمًا خَبِيرًا. ٣٥

> If you anticipate a split between them, appoint a mediator from his family and another from hers. If they desire reconciliation, Allah will restore harmony between them. Surely Allah is All-Knowing, All-Aware.[72]

The Islamic perspective emphasizes human effort and divine purpose in the approach to family dispute resolution, which is based on human self-determination.[73] In this sense, researchers contend that morality serves as the foundation for *Shariah* law, but ultimately, the goal of Islamic Law is to find the truth and administer justice.[74]

To discuss it juristically in the theoretical framework of FDR, the *Hanafi* School of Law (named after the founder, Imam Abu Hanifah al-Nu'man b. Thabit, 80-148 A.H.) and *Ash-Shafi'i* School of Law (named after the founder, Imam Muhammad bin Idris al Shafi'i, 150-206 A.H.) maintain that arbitrators lack the authority to render a binding decision, and the above-cited verse 35 of *Sura Al-Nisa* of the Quran also does not specify the arbitrators' verdict's binding nature. Their only option is to suggest a solution to the disputant spouses, who can accept or reject it.[75] However, in the event of a divorce, the decision will be legally binding if both the husband and the wife have designated the arbitrators to act on their behalf. However, some academics contend that arbitrators have complete authority over marriage and reconciliation.[76]

Islamic family dispute resolution also makes use of the communication skills that have long been valued in Islamic Law, such as *Tahkim* (arbitration), *Sulh*

[71] Ibid.
[72] *Qur'an* (n 42) 4:35.
[73] Mufti (n 49).
[74] Ibid.
[75] Ibid.
[76] Ibid.

(mediation), and *Musalaha* (reconciliation).[77] This indicates that there are a lot of disagreements amongst Muslims in informal family conciliation, where older family members or relatives mediate disputes. To facilitate communication and restore harmony within the family, the idea of mediation and third-party intervention to resolve conflicts using fairness and justice as the primary values of intervention has been put forth.[78] Thus, it can be said that the process of resolving family conflicts in Islam starts, in general, with the analysis of the conflict, the choice of the intervention strategy, and the agreement reached at the end, where all parties agree on essential matters, such as how to guarantee the agreement's implementation.

In this context, we propose that an Islamic model of intervention should be based on three principles: bringing Islam's teachings of justice, freedom, and equality back to the forefront; involving the family members and relatives in the intervention and resolution processes; and modifying intervention tactics based on the nature and phases of the conflict.[79] Therefore, Islamic Law appreciates the principles of *Sulh* and *Tahkim* that have remained enshrined in the methods of ADR in family matters for the last 1400 years. This form of Islamic ADR is endorsed and approved by many sources of Islamic Law; however, if *Sulh* and *Tahkim* remain ineffective, then the parties may approach the traditional court of a *qadi*.

OFDR in Islamic Jurisdictions: A Case Study of Bangladesh

ADR as a method has been a common tool for resolving family disputes in other Muslim-majority jurisdictions, including Bangladesh, primarily through informal dispute settlement processes such as a *Panchayat*.[80] Over time, formal ADR mechanisms were incorporated, beginning with the Muslim Family Laws Ordinance ('MFLO') of 1961 and later with the Family Courts Ordinance ('FCO') of 1985 (recently repealed by the Family Courts Act, 2023), which emphasizes pre-

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[77] Mohamed M. Keshavjee, *Islam, Sharia and Alternative Dispute Resolution* (Bloomsbury Publishing 2013).
[78] Ibid.
[79] Othman (n 10).
[80] Jamila Ahmed Chowdhury, 'Legitimacy of Mediator's Powers and Techniques of Intervention in Family Mediation: An analysis on Riskin's Grid on Mediation' (2010) The Dhaka University Studies 77–100.

trial, pre-judgement, and post-judgement conciliation.[81] ADR processes such as mediation and arbitration offer faster, less expensive, and less adversarial alternatives to court trials, particularly for sensitive family matters like marriage dissolution, dower claims, and child custody.

The suitability of ADR in family matters is supported by its ability to address the unique and sensitive nature of such disputes, which often require specialized processes beyond formal litigation. ADR is particularly beneficial in Bangladesh's conservative context, where it allows women to participate directly in resolving disputes while avoiding the stigma and public exposure associated with court proceedings. This approach promotes their involvement in settling matters without fear of societal judgement.

However, critics have observed that despite its potential, ADR in family courts faces significant obstacles. Judges and lawyers often lack the necessary training and commitment to facilitate ADR effectively. Political interference, lack of public awareness, and inadequate resources further impede its success. Women, who are the primary beneficiaries of ADR in family disputes, frequently face social and economic disadvantages that undermine their ability to approach the mediation councils.[82]

Therefore, the online equivalent of ADR, i.e., ODR, is suggested as a method that can help overcome the limitations associated with traditional ADR, as it delivers solutions in a swift, efficient, and cost-effective manner. While the usage of ODR for family matters in Bangladesh is still fairly limited, and there is no firm legislative foothold as yet, a number of positive indicators suggest that Bangladesh is paving the way for ODR, and other countries can follow.[83]

[81] Family Courts Act 2023, s 11, 14, and 15.
[82] Md. Sefat Ullah, 'Application of ADR in Family Courts: A Critical Analysis under Legal Framework and Practice in Bangladesh' (2018) 4(1) GURSS.
[83] Md Nayem Alimul Hyder and Jenath Chowdhury, 'Scope of Online Dispute Resolution in Bangladesh' (2018) 6(4) IJBSSR 103–110.

Application in Pakistan

A case is undoubtedly made for the application of ODR in Pakistan due to several pressing issues facing the country's judicial system. A significant challenge is the backlog of pending cases across various levels of the judiciary, from lower courts to superior courts, which has reached an alarming 2.26 million cases. There is an overwhelming load on the district courts, where 1.86 million cases are pending, making it harder for citizens to access expeditions and inexpensive justice.[84] ADR, and particularly ODR, for its cost- and time-efficiency, is certainly necessary to address these systemic issues by providing a more efficient and accessible means of resolving disputes outside of the traditional court process. ODR platforms can efficiently handle small claims and family disputes, which tend to be more straightforward, reducing the need for physical hearings and long waiting periods.

To effectively implement ODR for family matters in Pakistan, it is crucial to build upon the existing legal framework, which includes the ADR Act of 2017 ('2017 Act') and the 1964 Act, as well as the Muslim Family Law Ordinance 1961 ('1961 Ordinance'). The 2017 Act provides provisions for methods like mediation, arbitration, and reconciliation, all of which are suitable for resolving family-related disputes, including child custody, alimony, property division, and inheritance. The key challenge lies in transitioning these processes from traditional in-person settings to an online environment. The 1964 Act lays down the reconciliation attempts to be undertaken by the court after the filing of a written statement under Section 10(3), and the 1961 Ordinance sets out the procedure for husband-initiated *talaq* (divorce). Under Section 7 of the 1961 Ordinance, an Arbitration Council is to be formed in the case of *talaq* to attempt reconciliation between the disputing parties.

The current scheme of law pertaining to family law disputes recognises the need for amicable out-of-court settlement as a precursor to formal court adjudication for family law disputes. However, this arbitration or mediation is court-mandated and does not include the use of technological alternatives to effect compromise. Though there is recognition for mediation in family disputes, there is

[84] Staff Reporter, 'July-Dec 2023 statistics show 2.26 million cases pending in courts: report' *Dawn* (Islamabad, 16 February 2024) <https://www.dawn.com/news/1814586/july-dec-2023-statistics-show-226-million-cases-pending-in-courts-report> accessed 11 August 2024.

a need to formally incorporate technologically advanced ODR methods in Pakistan. Additionally, there is a need to ensure that the mediation is inclusive for all parties instead of a mere procedural step before litigation.[85]

The first step in implementing ODR would be to ensure that the technological infrastructure is in place to support digital interactions between all parties involved in family disputes. As seen with initiatives like the online case management systems in the Supreme Court, Islamabad High Court, Lahore High Court, and even district courts in Punjab, Pakistan has already taken measures towards digitizing judicial processes. The websites for the higher courts, as well as certain tribunals in Pakistan, include features like e-filing of documents, video conferencing for hearings, and secure online portals for case and queue management. These tools could very well be implemented for family matters, providing a streamlined and easily accessible process for filing disputes, scheduling hearings, and facilitating virtual mediation and arbitration sessions. Effective implementation of ODR could require the development of clear regulations outlining the specific requirements for family dispute mediators, the procedural steps for online mediation, and the rules for safeguarding sensitive information. Given that family matters involve private and sensitive information, protecting the confidentiality of the parties involved and ensuring data storage and communication will be a priority.

One promising example for Pakistan to follow is the United Kingdom's Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations, 2015, which contain provisions for ODR,[86] offering a framework for adapting traditional dispute resolution methods to the digital world. Pakistan could also develop a similar structure tailored specifically to family matters, ensuring it adheres to local cultural norms and legal requirements. Furthermore, training programs for online mediators would be necessary to equip them with the skills to facilitate virtual hearings and handle family disputes effectively.

[85] Bhatti (n 20).
[86] The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, s 8A and 19A.

While ODR presents a promising solution for resolving family disputes, several challenges and limitations need to be addressed to ensure its effectiveness. Pakistan faces a digital divide, and digital literacy may be limited, especially in rural areas (where traditional ADR systems like the *Panchayat* are preferred). Many people living in underserved or remote areas may struggle to access the necessary technology to participate in ODR processes. These digital barriers could result in unequal access to justice. On the positive side, recent studies show an increase in the usage of the internet in Pakistan: there were about 3.718 million internet users in Pakistan in the year 2002,[87] 34.3 million in 2016, and this number has increased to 82.90 million in 2022 and currently stands at 111 million.[88] However, this still makes up for less than 50% of the population, thus initiatives to improve digital literacy that would help bridge the gap between different socio-economic groups and ensure that everyone has an opportunity to engage with the ODR system are extremely necessary.

Family disputes often involve highly sensitive personal information, such as financial details, custody arrangements, and personal history. A breach of privacy or unauthorized access to the personal data of parties involved could have serious consequences, including harm to the reputations of the parties and could cause further emotional distress or even escalate disputes. Therefore, before ODR is introduced, it is crucial to establish comprehensive data protection regulations and to implement robust security measures within the ODR system. This includes encryption of sensitive data, secure communication channels, and safeguards to prevent unauthorized access. Legal protections should also be in place to ensure that the confidentiality of the mediation process is upheld.

It must be noted that ADR may not be appropriate for every type of family dispute. Cases that involve divorce or *khula* due to domestic violence or significant power imbalances may require in-person mediation or legal intervention. Online platforms might not provide the necessary support for individuals in vulnerable situations who may need additional legal protection or counselling. For instance, the victim and suspected accused could be present in the same house, compromising

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[87] 'Pakistan Internet Users' (*internet live stats*) <https://www.internetlivestats.com/internet-users/pakistan/> accessed 11 August 2024.

[88] Danyal Khan, Serkan Kaya, and Rao Imran Habib, 'Global Trends of Online Dispute Resolution (ODR) with reference to Online Trade in Pakistan' (2022) 4(2) REDS 303–311.

the victim's ability to properly represent themselves,[89] and hindering the mediator's ability to effectively intervene in the event of intimidation by a party.[90] Furthermore, there is limited scope for ODR in complex cases that involve a greater degree of legal intricacy or emotional depth. For example, issues such as contested inheritance or complex divorce cases that involve multiple parties may require more in-depth exploration and face-to-face interactions. In these cases, ODR might only serve as a preliminary step, and parties might need to be referred to traditional court proceedings for a full resolution. In such cases, mediators themselves have noted that having the parties physically present before them is more effective.[91] Therefore, it is essential to have a screening process to determine which cases are suitable for ODR and which require in-person intervention or court proceedings.

Conclusion

The advent of OFDR marks a significant shift in the resolution of family disputes, blending traditional principles of mediation and arbitration with modern technological advancements. This study underscores the compatibility of OFDR with Islamic legal principles, particularly *Sulh* (reconciliation) and *Tahkim* (arbitration), which have long been foundational to dispute resolution in Islam. Rooted in Quranic injunctions, the sayings of Prophet Muhammad (P.B.U.H.), and the practices of classical jurists, Islamic teachings consistently emphasise the peaceful settlement of disputes to protect familial harmony. OFDR, by offering a flexible, efficient, and non-confrontational platform, upholds these values while addressing the practical challenges of face-to-face interactions.

OFDR serves as an innovative mechanism that mirrors the objectives of Islamic law, particularly the protection and sanctity of the family institution. By minimizing emotional confrontations, reducing costs, and providing accessibility across jurisdictions, OFDR caters to the evolving needs of modern society. It also aligns with the constitutional provisions in Pakistan, such as Article 35, which

[89] MLive, 'Domestic violence suspect arrested at accuser's apartment during virtual court hearing' (*YouTube*, 11 March 2021) 1:53–1:58 <https://www.youtube.com/watch?v=-8DApY7OE90&t=138s> accessed 11 August 2024.
[90] Haley Benson, 'Abuse Just Out of Frame: The Impact of Online Dispute Resolution on Domestic Violence' (2022) 1 JDR 83–95.
[91] 'Online Dispute Resolution and Domestic Violence' (*bwjp.org*, 3 September 2020) <https://www.bwjp.org/news/online-dispute-mediation-tipsheet.html> accessed 11 August 2024.

ensures the protection of family and marriage, and Article 37(d), which calls for affordable and expeditious justice.

This paper highlights how the incorporation of OFDR within Pakistan's legal framework could alleviate the judicial backlog, enhance access to justice, and foster amicable settlements. Drawing from successful international examples in countries like Australia, it is evident that OFDR offers a scalable model for the digital transformation of family dispute resolution. Additionally, the adaptability of Islamic jurisprudence through *Qiyas* (analogy) and *Ijma* (consensus) supports the legitimacy of employing technological tools for this purpose, as long as they align with Islamic principles.

From Survivor to Suspect: The Perils of Judicial Backsliding in Sexual Offence Cases

Muhammad Imran v. The State
2024 SCP 226

Angbeen Atif Mirza*

Introduction

This case concerned an appeal against the decision of the Lahore High Court that affirmed the conviction of the accused under Section 376 of the Pakistan Penal Code ('PPC') for the offence of rape. The Supreme Court ('Court') set a unique precedent as it altered the initial charge framed by the trial judge to one under Section 496-B of the PPC (fornication), something which never came under consideration before the lower fora. Contrary to established precedent on the unassailable credibility of victims of sexual offences, the majority judgement marks a regressive shift by expecting rape victims to behave in a certain manner. The dissenting opinion correctly identifies the loopholes in the majority's reasoning, and lays a strong challenge to the majority's decision of converting the rape charge into that of fornication.

Facts

The complainant, Mumtaz Bibi, had been living with her brother, Muhammad Zaman, for one month prior to the occurrence of the alleged incident. During this time, the accused, Muhammad Imran, would visit her brother. On 11 July 2016, at around 8 pm in the evening, the complainant was alone at home when the accused entered the house, bolted the outer gate from the inside, and forcibly dragged the complainant into a room. Once inside, he removed her shalwar and raped her, after which he fled the scene of the crime.

* Angbeen Atif Mirza holds an LL.M from the University of Michigan Law School, and is an Assistant Professor at the Shaikh Ahmad Hassan School of Law, Lahore University of Management Sciences.

After the incident, the complainant's cries brought her brother to the place of the incident, along with another one of his friends. A First Information Report ('FIR') was filed almost two days later.

Procedural Posture

The case was filed following the FIR; the prosecution produced nine witnesses, and the statement of the accused under Section 342 of the Code of Criminal Procedure ('CrPC') was recorded. The accused's case before the trial Court was that the rape allegation was false, brought by the complainant as revenge for his refusal to marry her. Upon completion of the trial, the accused was convicted under Sections 376 and 449 of the PPC for rape and house trespass, respectively. He was collectively sentenced to ten years of rigorous imprisonment along with PKR 120,000/- in fine.

The accused's appeal against this sentence was dismissed by the Lahore High Court, after which a Criminal Petition for Leave to Appeal ('CrPLA') was filed before the Court alleging that the matter at hand was not that of rape, but of *zina* under Section 496-B of the PPC.

As the Court was hearing the CrPLA, the accused also filed an application for grant of permission to compound the offence because the complainant, who was also the sole eyewitness to the crime, had resiled from her statement. While dismissing the application on grounds that rape was a non-compoundable offence, the Court noted that the complainant had named the accused as the culprit in her statement before the trial Court.

There was no representation for the complainant since she had resiled from her accusation. The prosecutor general opposed the appeal, while the Court heard and delivered its judgement on the basis of arguments by the accused.

Arguments and Decision

A three-member bench of the Court heard the CrPLA, and the decision was split 2-1 in favour of the accused's claim of fornication. Justice Ayesha Malik recorded a strong dissent.

The majority judgement began by determining the establishment of 'illicit intercourse' having taken place between the parties. The primary issue framed by the Court was whether the case at hand was one of rape punishable under Section 376 of the PPC or of fornication punishable under Section 496-B of the PPC. The framing of this issue will be studied in greater detail below.

The findings of both sets of judgements (majority and dissent) of the Court have been discussed in seriatim.

I. Delay in Filing the FIR

The majority judges found that a delay of approximately two days had not been plausibly explained by the complainant, which brought into question the veracity of the FIR since the complainant party could have used this time to exaggerate their narrative 'to make the offence graver'.[1] While noting that delay is not always fatal, the Court found that it 'may'[2] be relevant in light of other particular facts of the case.

In her dissent, Justice Malik recorded a more detailed version of the facts, noting that the complainant had in fact reported the matter to the police soon after the incident, and was taken by the police for a medical examination later the same night at around 2:25 am. There, the complainant was examined physically. DNA swabs were taken for forensic testing, reports of which were positive for the defendant's DNA. This narration indicates that the filing of the FIR was initiated quite soon after the incident, which was alleged to have taken place at 8 pm. This means that the majority judges considered a delay of perhaps two hours to be destructive of the complainant's case, and deemed this to be enough time for the complainant to exaggerate her case.

There is ample case law on the point of delay in filing of FIR in rape cases. Courts have consistently held that delay, if properly explained and accounted for,

[1] *Muhammad Imran v. The State* 2024 SCP 226 [6].
[2] Ibid.

does not defeat a rape allegation. In *Zahid v. the State*[3], a two-member bench of the Court reiterated this long-standing principle by pointing out the nature of a rape allegation, its impact on a survivor's reputation and honour, and the survivor's natural reluctance in reporting such a crime. In addition, the *Zahid* Court noted that the reason behind the delay in that case was the initiation of medical treatment, making the *Zahid* judgement a precedent that applies squarely upon these facts. It is a dangerous step away from established precedent to raise a concern about delay without clearly elaborating upon the facts of the case. Such a trend only reinforces the apprehension of stigma on the part of rape survivors and their families; surely, one cannot hasten the process of filing an FIR more than approaching the police station within hours of the incident. If courts begin to look at this as delay, it effectively translates into a rape victim being required to behave like an automaton, brushing herself (or himself) off before going straight to the police station without even pausing to take a calming breath.

II. Marks of Violence and Solitary Statement of a Rape Survivor

The majority judgement notes that despite a claim of being forcibly dragged by the defendant to an inner room and forcibly removing her shalwar in order to commit rape, there is no sign of dragging mentioned on the site plan, and no bruise, or laceration due to this dragging. It goes on to mention that the FIR did not allege the presence of any kind of weapon, such as a *churri, danda*, or a firearm, which would have frightened the victim into compliance. The Court finds that the allegation of having her clothes forcibly removed is not corroborated since her clothes were not torn. It uses the lack of torn clothes and the absence of signs of being dragged to conclude that the rape survivor was, in fact, a consenting party, since a female who does not wish to be raped would, the judges held, offer very strong resistance to the rape attempt. The majority judges thus found the complainant guilty of fornication under Section 496-B of the PPC. However, since she was not even present before the Court, she was not penalized for the offence.

It is noteworthy that the defendant's case before the lower Courts was that he was not present at the scene of the crime. It appears that the allegation of

[3] *Zahid v. The State* 2020 SCMR 590. Other recent judgements include *Nasreen Bibi v. Farrukh Shahzad* 2015 SCMR 825, where the Court held that a delay in filing an FIR is immaterial as people naturally avoid rushing to the police because of family honour.

fornication had been made for the first time before the Court. It is unclear from the judgement of the Court how a new defence may legally be raised at the appellate stage of the proceedings. As a judgement of the country's apex Court, this decision forms binding precedent for all lower courts. It has established that unless a rape victim is able to show signs of being dragged on the floor, and unless her clothes are torn and she is beaten up such that she has marks of violence on her body, her allegation of rape may be used to *find her guilty of a crime*. The impact of this judgement for survivors of rape is that during the commission of a crime, a victim must respond such that her person and clothing bear some brunt of physical trauma, lest her case be overturned in second appeal (despite the double presumption in her favour) and she transformed from a complainant for rape to a defendant with a conviction for fornication.

In her powerful dissent, Justice Ayesha Malik relied on domestic case law, principles of international law and common sense to note that the presence of DNA evidence is deemed the 'gold standard' to establish the identity of an accused in a rape case. Having established the identity, which was not under contest in this case (especially since the defendant was now claiming fornication), the question became one of determining the commission of rape. Justice Malik noted that the sole testimony of a survivor is commonly accepted as sufficient to award a conviction. This is backed up by multiple precedents, as recent as 2023, where the Court held that 'it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to solely rely on the testimony of the victim of a sexual assault to convict the accused.'[4] It is when the sole testimony suffers from contradictions or otherwise does not inspire the confidence of the Court that the Court seeks to corroborate the victim's testimony with other evidence.[5]

Justice Malik noted that the complainant's statement was without any discrepancy. For the majority Court, however, the absence of marks of violence raised a question regarding the veracity of the complainant's account. Justice Malik addressed this concern by pointing out that physical resistance need not be established in a rape case as different people react differently when confronted with

[4] *Atta Ul Mustafa v. The State* 2023 SCMR 1698 [7].
[5] Ibid [10].

trauma and it is counterintuitive to subject all women to a stereotypical presumption that they must resist in a particular form to prove the occurrence of rape.[6] She goes on to list the various reactions that a victim may exhibit to a situation of trauma, including the fight, flight, or freeze responses. Referencing research in the field, Justice Malik noted the patriarchal understanding of rape that only accepts a single state of affairs, and any other sequence of events is rejected as not constituting rape at all. She concludes by expressing strong disagreement with the majority judges' expectation of a woman offering a particular type of resistance to assault for the purposes of rape.

Analysis

Despite the male-centric definition of rape that has historically occupied our statute books, courts have recognised that there is no correct way to respond to the threat of rape. Women have been raped at gunpoint, where no physical violence has been recorded.[7] The absence of a weapon or physical marks of violence does not preclude the possibility of rape, and that a hue and cry was not raised does not hamper a complainant's case.[8]

The psychological impacts of sexual assault are academically recognised by various research studies in the field of medicine. In an article by Carolyn Crist, published in the global news agency Reuters, data from the Stockholm Rape Clinic trial indicates that about 70% of women report a state of 'paralysis' and an involuntary inability to resist, shout, or even move during assault. Dr Anna Moller, a Research Professor at the Stockholm South General Hospital, states that this inability to resist the aggressor is known as 'tonic immobility', which continues long after the incident and culminates into long term Post Traumatic Stress Disorder. The immediate impact of tonic immobility on victims of sexual assault includes inability to talk and feeling paralysed and disassociated with the surroundings. Based on her research, Dr Moller concludes that rape victims should

[6] *Imran* (n 1) [7], Ayesha Malik J., dissenting.
[7] *Mst. Yasmin Butt v. Majid Baig alias Bobby Pehlwan* 2008 SCMR 1602.
[8] *Aijaz Hussain v. State* 2018 MLD Kar 1164.

not be blamed for not resisting, and that their inability to react is rather a normal biological reaction when exposed to an extreme threat.[9]

In 2014, the Federal Shariat Court clarified this point by referring to an earlier Court judgement holding that 'mere absence of marks of injury or violence on a victim's body would not imply non-commission of rape.'[10] The Federal Shariat Court went on to say that even if no weapon is shown to have been used to threaten the victim into compliance, it is not fatal to the case of the prosecution:

> the recovery of weapon of offence is a corroborative piece of evidence, which is not essential in a case of 'zina-bil-jabr'. In such-like cases, the most important witness is the victim, and if her statement is trustworthy and reliable, then conviction can safely be recorded on her evidence.[11]

It is noteworthy that the trial Court and the High Court both found the victim's testimony to be trustworthy and reliable enough to convict the accused. In addition to being confidence inspiring and supported by medical evidence, Justice Malik noted that the complainant successfully refuted the accused's claim of her having filed a false case against him as revenge for refusing her hand in marriage.

Finally, it is worth noting that the lack of marks of violence seems to have played a major role in the majority Court's decision to convert a rape case into one of fornication under Section 496-B of the PPC. This was despite the complainant having won the case at trial, where the evidence was scrutinized and witnesses examined in detail, and the High Court having added a double presumption of truth to the matter by rejecting the appeal filed by the defendant. This line of thought disregards the principle reiterated by the Court in the case of *Atif Zareef v. The State*, where it reiterated the principle that courts do not insist on corroboration of the victim's testimony if it is found to inspire confidence.

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[9] Christ Carolyn, 'Many rape victims experience "paralysis" during assault' *Reuters* (Washington, 15 June 2017) <https://www.reuters.com/article/business/healthcare-pharmaceuticals/many-rape-victims-experience-paralysis-during-assault-idUSKBN19626V/> accessed 18 November 2024.

[10] *Mst. Lal Khatoon v. The State* 2014 YLR 1717 FSC [14].

[11] Ibid.

> A rape victim stands on a higher pedestal than an injured witness…the rape victim suffers psychologically and emotionally.[12]

I. Conversion of Charge

On a reading of the judgement, it appears that the line of argument presented by the accused before the High Court was that he was not present at the scene of the crime, that the complainant wished to marry him, and spurned by his refusal, had orchestrated this false case against him as revenge. In his appeal to the Court, the accused had instead argued that the case was not of rape but of fornication, thereby acknowledging his presence at the scene of the crime and the commission of sexual activity. This claim has been granted by the Court.

What the majority Court has essentially established is that a woman who complained of rape could instead be convicted of fornication without a case being filed or without being given a chance to proffer her defence on the charge of fornication. This kind of jurisprudential backsliding sets us decades back to the time of the Hudood Ordinances, which did not preclude the possibility of conversion of a *zina bil jabr* charge into that of consensual *zina*. Courts at that time used instances of pregnancy or the absence of medical evidence of resistance as proof of commission of *zina*.[13] Even during the time of the Hudood Ordinances, the Federal Shariat Court clarified that a woman who files a case of *zina bil jabar* could not be convicted for zina on the basis of proof sexual activity. In the infamous case of *Safia Bibi v. The State*, for instance, the trial Court had relied on the fact of the complainant's pregnancy to convert her claim of *zina bil jabr* into a conviction for *zina*. While setting aside this conviction, the Federal Shariat Court, relying on ample religious authority, concluded that there was 'no difference on the main point between Fiqh, the Common Law of England or the Law in Pakistan, that the appellant [rape victim] also cannot be convicted [of *zina*] on the evidence on record.'[14]

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[12] *Atif Zareef v. The State* PLD 2021 SC 550 [5].
[13] Moeen Cheema and Mustafa Abdul Rahman, 'From the Hudood Ordinances to the Protection of Women Act: Islamic Critiques of the Hudood Laws of Pakistan' (2009) 2 UCLA-JNEIL 16.
[14] *Mst. Safia Bibi v. The State* PLD 1985 FSC [29].

The majority judgement noted that the complainant had applied for a compounding of the office and had resiled from her statement, declaring that she had been subject to a misunderstanding which had led her to name the accused as her rapist. However, the Court did not choose to delve deeper into why the complainant would suddenly change her mind after being steadfast before two Courts. In her chapter on The Law on Rape, Sahar Bandial notes the procedural flaws that permeate the criminal justice system in the specific context of rape. She notes that most rape cases result in an acquittal. One of the main reasons for this is that many complainants resile from their statements possibly due to intimidation and threats, pressure from families, or monetary settlements.[15] In the absence of the victim's testimony, which is often the only testimony available in a rape case, a conviction becomes difficult to sustain. Therefore, the judiciary, especially at the apex level, should be cognizant of these challenges faced by rape victims, and the victim rescinding their allegation of rape should be independently inquired into by courts.

II. Consent

In 2016, when the alleged incident occurred, rape was defined in relevant part as, *inter alia*, sexual intercourse with a woman against her will, without her consent, or with her consent when the consent was obtained by putting her in fear of death or hurt. Fornication is defined in relevant part as occurring when a man and woman who are not married to each other wilfully have sexual intercourse with one another. In *Imran v. The State*, the Sindh High Court elaborated upon the difference between 'will' and 'consent' holding that per Section 375, even if there is will but no consent, rape will have occurred. In the said judgement, 'will' is explained to be a person's ability to reason that determines whether to engage in an act or not. It is a state of mind, as opposed to consent, which the Sindh High Court found relates more to a person's actions. A wilful act is a voluntary act. The Sindh High Court held that 'an act done with consent always means the act done with free will or done voluntary [*sic*].'[16] In her dissent, Justice Malik referred to jurisprudence by the Federal Shariat Court which defined consent as being of the same mind, to agree, or to comply as a free agent with free will.

[15] Sahar Bandial, 'The Law on Rape, Conceptual Limits, Procedural Indifference and Questions of Reform' in Neelam Hussain (eds), *Disputed Legacies* (Zubaan 2019) 87–88.
[16] *Imran v. The State* 2016 PCrLJ 1888.

As noted previously, the offence of fornication requires a wilful act by both parties. A failure to prove lack of consent does not translate into a presence of consent or will. Despite two earlier Courts having established a lack of consent, even if the Court found that prosecution had been unable to prove a lack of consent, this, at best, amounts to a failure to prove rape. It does not equate to the presence of a wilful act. For fornication, the party alleging fornication must independently establish a wilful act. It is only when a crime is proven beyond reasonable doubt that a party may be convicted for it. The lack of evidence for rape cannot become the reasoning for a fornication conviction of the complainant. Justice Malik concluded her discussion on this point by noting that arriving at a finding of fornication against the complainant after two Courts had confirmed it to be rape on the basis of evidence was a denial of due process and fair trial.[17]

III. Extraneous Information about the Complainant

The majority judgement notes, not once but twice, the fact that the victim was recently divorced and had returned to her brother's home. The majority judgement also mentioned that the complainant and the accused were previously nominated in an FIR for committing obscene acts, and that both parties were later released on bail. These details bear no relation to the current charge, that of rape, but find detailed mention in the majority judgement. Justice Malik notes this in her dissent as being 'totally irrelevant' and finds that in no manner does it suggest that the parties were sexually involved.

Since none of these events are part of the rape incident, the relevance of these details is unclear at best. This is particularly so in light of the fact that in 2009, the Federal Shariat Court struck down—on the touchstone of Islamic principles—Clause 4 of Article 151 of the Qanun-e-Shahadat Order, 1984, which had allowed for the impeachment of a rape victim's character to show that she was 'of generally immoral character'.[18]

The association of rape with a woman's character is unfortunately reminiscent of darker times in Pakistan, where personal histories were allowed to be dragged through courts to establish the 'rapeability' of a woman. Two-finger testing is another historical oppression that has been used to close the door to justice

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[17] *Imran* (n 1) [15], Ayesha Malik J., dissenting.

[18] *Capt. (Retd) Mukhtar Ahmad Shaikh v. Government of Pakistan* PLD 2009 FSC 65.

to many women, including those who have been married in the past. A similar exercise appears to have been conducted by the majority judges, where the complainant's recent divorce has been noted alongside her arrest (not even conviction) in an unrelated matter.

Overall, the majority judgement marks a major deviation from the available legal corpus on rape cases wherein the sole testimony of a victim has been held in high regard, unhindered by the victim's past conduct and their physical inability to resist the offender. This places an onerous burden of proof on complainants in a society where judicial proceedings are already hostile to rape victims.

Conclusion

Based on her findings of DNA evidence, solid witness testimony, and firm precedent, Justice Ayesha Malik concludes in agreement with the concurrent findings of the earlier Courts. On a detailed reading of the majority judgement, the approach taken to the various issues identified and the jurisprudence adopted therein, a clear trend of backsliding from the hard-earned guarantees won by women over decades emerges. In a manner reminiscent of the Hudood Ordinances and the blurring of distinction between rape and fornication, the majority judgement set about, in violation of established precedent, in a search for a finding of fornication.

Perhaps the most concerning aspect of this judgement is the senior judiciary's decision to try a woman for a crime in the first instance in an appellate forum. There is no ambiguity over the fact that this appeal was against an allegation of rape. No charge for fornication was framed at trial, nor was it raised as a defence before the trial and High Courts.

Despite going directly to the police station and providing DNA evidence with a coherent account, a rape victim was prevented from establishing the occurrence of a crime against her person. In a case as grave as a rape matter, one wonders what evidence could possibly have been led to convince a court to allow a defendant to successfully switch his narrative—from one of not being present at the scene of the crime to that of fornication—at the appellate stage.

Stating her marital history and noting the absence of a particular type of resistance, it appears that the Court believes that the complainant does not fit the dimensions of a perfect 'rape victim'. This is an extremely dangerous precedent and sends a strong message to all women of an unwelcoming criminal justice system.

Judicial Overreach in Constitutional Clothing: A Critique of the Supreme Court's Reinterpretation of Article 63-A

Supreme Court Bar Association of Pakistan v. Federation of Pakistan
PLD 2023 SC 42

Muhammad Hayat Lak*

Introduction

In 2022, the Supreme Court of Pakistan ('Court') was confronted with some important constitutional questions. These matters came about when Prime Minister Imran Khan faced a looming Vote of No Confidence ('VoNC') which would have ousted him under Article 95 of the Constitution of the Islamic Republic of Pakistan, 1973 (the 'Constitution'). When Deputy Speaker Qasim Suri set aside the VoNC motion on grounds of foreign interference, PM Khan advised the President to dissolve the National Assembly under Article 58 of the Constitution. Upon this development, the Court opened its doors immediately through a *suo motu* notice, quashed the Deputy Speaker's ruling and allowed the National Assembly to resume the VoNC procedure.[1] However, the crisis did not end at this point.

In the ensuing hustle and bustle in Islamabad, the Supreme Court Bar Association ('SCBA') petitioned the Court to block political parties from holding rallies or processions in Islamabad. While this petition, alongside another one filed by Pakistan Tehreek-e-Insaf—calling for a lifetime bar on defectors to contest elections—was pending in the Court, the President of Pakistan filed Reference No. 1 of 2022, invoking the advisory jurisdiction of the Court under Article 186 of the Constitution, to seek its opinion on the interpretation of Article 63-A. All three cases were clubbed together and adjudicated by the Court.[2] However, this case note focuses primarily on the Presidential Reference, since it encompasses the main issues decided by the Court.

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* Muhammad Hayat Lak is a recent graduate of the Shaikh Ahmad Hassan School, Lahore University of Management Sciences. Lak's academic interests include constitutional and public law.
[1] *Pakistan Peoples Party Parliamentarians v. Federation of Pakistan* PLD 2022 SC 574.
[2] *Supreme Court Bar Association of Pakistan v. Federation of Pakistan* PLD 2023 SC 42.

The case note respectfully disagrees with the majority view penned by Justice Munib Akhtar and argues in favour of the dissenting note of Justice Mazhar Alam.

Background on Defections and the Insertion of Article 63-A

Before delving into the legal intricacies associated with Article 63-A, it is first necessary to discuss its origins and development. Article 63-A(1) of the Constitution provides as follows:

> If a member of a Parliamentary Party composed of a single political party in a House—
>
> (a) resigns from membership of his political party or joins another Parliamentary Party; or
>
> (b) votes or abstains from voting in the House contrary to any direction issued by the Parliamentary Party to which he belongs in relation to—
>
> (i) election of the Prime Minister or the Chief Minister; or
>
> (ii) a vote of confidence or a vote of no-confidence; or
>
> (iii) a Money Bill or a Constitution (Amendment) Bill; he may be declared in writing by the Party Head to have defected from the political party, and the Party Head may forward a copy of the declaration to the Presiding Officer and the Chief Election Commissioner and shall similarly forward a copy thereof to the member concerned: Provided that before making the declaration, the Party Head shall provide such member with an opportunity to show cause as to why such declaration may not be made against him.

Defections in the legislature have existed in Pakistan since the time of the First Constituent Assembly in 1947. Constitution-making was delayed owing to a variety of reasons that scholars have categorised as lack of consensus amongst the framers, extra-parliamentary pressure, frequent dissolutions, and the absence of a powerful guiding figure in the Assembly.[3] The Constitution of the Islamic Republic

[3] Hamid Khan, *Constitutional and Political History of Pakistan* (2nd edn, OUP 2019) 64.

of Pakistan, 1956 (the '1956 Constitution') was not allowed enough time to explore questions of defection before being abrogated two years after its promulgation. Neither the 1956 Constitution nor the Constitution of the Islamic Republic of Pakistan, 1962 (the '1962 Constitution') provided explicitly for disqualification for defecting from party line on a legislative or administrative issue. However, scholars have extensively proven that the largely rump central legislature in Ayub Khan's regime suffered from frequent defections as the regime shuffled and reshuffled the King's Party.[4]

This practice continued under the regime of General Zia-ul-Haq. The period between 1988-1999 in Pakistan was marked by weak democratic regimes, which were at odds with a strong President who enjoyed extensive constitutional powers.[5] Governments also had to keep a close eye on the number of seats filled in the Treasury benches to avoid an in-house change through a vote of no confidence. The first prominent one came in 1989 against Prime Minister Benazir Bhutto. The joint opposition led by the Islami Jamhoori Ittehad ('IJI') used the resources of the Provincial Government of Punjab to woo the government members.[6] Bhutto's government survived, but only after it physically relocated over one hundred of its Members of the National Assembly ('MNAs') to secure locations to prevent defections.[7] However, in totality, there were nine defections, six from the Opposition and three from the Treasury benches.[8]

Later, in 1993, the Nawaz Sharif government in the Centre was removed from office after the President's order to dissolve the National Assembly. This move had a trickle-down effect at the provincial level as well. The IJI Chief Minister of Punjab, Ghulam Hyder Wyne, was ousted through a successful vote of no confidence, and Mian Manzoor Wattoo was elected as the Chief Minister.[9] Massive defections marred the whole saga, as the IJI lost despite originally having

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[4] Ibid 153–58.
[5] The Constitution of the Islamic Republic of Pakistan 1973, art 58(2)(B)—which was inserted through the 8th Constitutional Amendment—allowed the President to dissolve the National Assembly. President Ghulam Ishaq Khan exercised this power in 1990 to put an end to Benazir Bhutto's first tenure; he again used this power in 1993 to end the Nawaz Sharif government. President Farooq Leghari used this power in 1996 to end the second tenure of Benazir Bhutto.
[6] Khan (n 3) 400.
[7] Ibid.
[8] Ibid 401.
[9] Ibid 421.

a majority in the House. However, the situation completely reversed once the Nawaz Sharif government was reinstated by the Court; this time, the members supporting Wattoo broke rank and started joining the IJI.[10] Even in the North West Frontier Province ('NWFP'), the Pakistan Muslim League (Nawaz) coalition government,[11] led by Sabir Shah, was reduced to a minority by the Pakistan People's Party ('PPP').[12]

To put an end to horse-trading and defection, Article 63-A was inserted into the Constitution in 1997 through the Constitution (Fourteenth Amendment) Act, 1997 ('14th Constitutional Amendment'). It defined defection from a party as a) breach of party discipline by violation of its Constitution and code of conduct; b) voting contrary to any direction given by the parliamentary party; and c) abstaining from voting in Parliament against the direction of the parliamentary party on any bill. The Party Head was empowered to decide the fate of the defector but only after issuing a show-cause notice and considering their defence. If the Party Head decided against the defector, the decision was to be relayed to the Presiding Officer of the concerned House, who was obligated to refer the matter to the Chief Election Commissioner, who, in turn, was bound to declare the defected member's seat vacant. More importantly, the jurisdiction of all courts about any action under this law was excluded.[13]

The 14th Constitutional Amendment was challenged before the Court, and by a majority judgement of 6-1, it declared Article 63-A not violative of any provision of the Constitution.[14] Chief Justice Ajmal Mian opined that Article 63-A should preserve the freedom of speech of the House's members, subject to the reasonable restrictions mentioned in Article 66, read alongside Article 19 of the Constitution. However, after the military coup of General Pervez Musharraf in 1999, the Constitution was held in abeyance; the Legal Framework Order ('LFO') of 2002 was promulgated, which amended a myriad of provisions of the Constitution. Article 63-A was drastically changed, and could only come into

[10] Ibid.
[11] This party, led by Nawaz Sharif, emerged out of the IJI.
[12] Lawrence Ziring, *Pakistan in the Twentieth Century-A Political History* (OUP 1997) 556–57.
[13] Constitution (n 5) art 63-A(6): 'Notwithstanding anything contained in the Constitution, no Court including the Supreme Court and a High Court shall entertain any legal proceedings, exercise any jurisdiction, or make any order in relation to the action under this Article.'
[14] *Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan* PLD 1998 SC 324.

operation if a member voted against the direction of the parliamentary party in the following 3 cases: 1) election of the Prime Minister or the Chief Minister, 2) a vote of confidence or a vote of no confidence, and 3) voting on a money bill. It empowered the Parliamentary Party Head to declare the member to have defected from the party; the declaration then had to be sent to the Presiding Officer of the concerned House by the Party Head. More significantly, the Election Commission of Pakistan ('ECP') was allowed to confirm or reject the declaration, and a member aggrieved by the ECP's decision had the right to appeal to the Court.

The 18th Constitutional Amendment once again made changes to Article 63-A. As it currently stands, a member defects their party if they: (a) resign from the membership of the party or join another party, or (b) abstain or vote contrary to any direction given by the parliamentary party on the election of the Prime Minister or Chief Minister, a VoNC, a money bill or a constitutional amendment bill. As the 14th Constitutional Amendment had envisioned, the Party Head retained the authority to declare a member as having defected from the party. Thereupon, the Parliamentary Party Head will send the declaration to the Presiding Officer of the concerned House. The roles pertaining to the House's Presiding Officer and the Chief Election Commissioner, alongside the right to appeal, as provided by the LFO, were kept intact. This framework has retained its shape to the present day. However, considering the fact that multiple petitions were made to the Court on the matter, there is still ambiguity on several issues.

<u>The Presidential Reference and the Issues Before the Court</u>

Presidential Reference No. 1 of 2022 sought the Court's opinion on the following four issues: (i) what is the purpose of Article 63-A and what malady does it aim to cure; (ii) should the defecting member's vote be counted and given the same weightage as it would have received had the member not defected; (iii) should a person declared to have defected from his political party be declared not honest and *ameen*, under Article 62(1)(f) of the Constitution, and hence disqualified for life; and (iv) what other methods can be adopted to deal with practices such as floor-crossing and vote-buying?

The Court left the third issue for Parliament to determine and discarded the fourth issue as being ambiguous. The Court gave its judgement on the first and second issues, apart from clarifying the related question of whether it is the Party Head's or the Parliamentary Party's direction that a member is bound to follow.

The Court's Majority View

On the first issue, the Court linked Article 63-A with Article 17(2) of the Constitution, which allows any individual to form or be a political party member, subject to certain reasonable restrictions. The Court relied upon two important cases: *Benazir Bhutto v. Federation of Pakistan*[15] and *Muhamad Nawaz Sharif v. The President of Pakistan*.[16] Both cases had interpreted Article 17(2) broadly, holding that the rights embodied in it were twofold. The right to form a political party belongs to the individual. Still, once that party or organisation has been set up, the rights are transferred to that party, which collectively enjoys them. While upholding the view taken in the Nawaz Sharif case,[17] the Court ruled in the *Benazir Bhutto* case that the right under Article 17(2) is not just limited to forming a political party but also includes the right to contest elections and to form a government if it has the requisite majority available. Any move that prevents that party from forming a government violates Article 17(2).

The judgement, drawing a connection with Article 63-A, ruled that the rights under Article 17(2) are to be enjoyed equally by every party; defections obstruct and alter political parties' balance of power and violate Article 17(2) because they prevent a political party from achieving its objectives (i.e., electing a Prime or Chief Minister, passing a constitutional amendment or a money bill).

The Court then clarified the penalties for voting against party line while giving a judgement on the second issue. The majority reasoned that discarding the vote was essential to uphold the internal discipline and representative mandate of political parties under Article 17(2). They emphasised that a member's defection distorted the electorate's choice and that penalising such conduct protected constitutional democracy by maintaining political coherence. The first penalty is the removal of the defector under due process initiated through a declaration by the Party Head, reinforcing the internal healthy operation of the party. The second

[15] *Benazir Bhutto v. Federation of Pakistan* PLD 1988 SC 416.
[16] *Mian Muhamad Nawaz Sharif v. The President of Pakistan* PLD 1993 473.
[17] Ibid.

headway is that the vote of the defected member should not be counted because their vote might have changed the balance of power in the concerned house. Hence, the Court ruled that the defecting member's vote must be discarded to promote the external aspect of a political party's healthy operation.

On the direction issue, the Court opined that the Parliamentary Party and Party Head roles had been bifurcated in Article 63-A. The Parliamentary Party was to decide the party line on a parliamentary action, while the Party Head became relevant only once a member had acted contrary to the direction issued, with the ability to declare the member to have defected from the party.

In shedding light on the purpose behind Article 63-A, the Court, while adopting the living tree scheme of constitutional interpretation,[18] reasoned that the Constitution evolves with changing social needs and must not remain stagnant. It concluded that the spirit of the Constitution suggests that Article 63-A must be read with Article 17(2), as the purpose behind it was to protect the rights of political parties. However, it may be argued that the spirit of the Constitution is to be derived from the text of the Constitution, in which Article 63-A is a complete provision. The dissent rightly points out that the only purpose behind inserting Article 63-A was to regulate discipline within the party, and if a member breaches that discipline, they should face the punishment of disqualification. The dissent further argued that expanding Article 63-A to invalidate the vote amounted to judicial rewriting of the Constitution, and stressed that individual conscience and independent legislative action were part of the broader democratic structure envisioned by the framers. The Court cannot decide what the spirit of the Constitution is if that line of reasoning does not even find the minimum amount of shelter within the provision's text.

To justify the living tree scheme of constitutional interpretation, the majority view primarily relies upon the following case law:

[18] A metaphorical approach employed, mostly in Canadian jurisprudence, for constitutional interpretation. It signifies that the Constitution is a living tree that evolves and grows over time within its natural frontiers; the constitutional tree has roots in the past, but it possesses the ability to grow out branches. The term was first used by Lord Chancellor Sankey in *Edwards v. Attorney General for Canada* [1930] AC 124. See also Vicki C. Jackson, 'Constitutions as "Living Trees"? Comparative Constitutional Law and Interpretive Metaphors' (2006) 75 FLR 921.

i) *Marbury v. Madison,*[19] where Chief Justice Marshall discovered the power of judicial review from the structure of the Constitution of the United States, even though there was no explicit provision in the text that allowed that.

ii) *Roe v. Wade,*[20] where the United States Supreme Court declared that the right to privacy was inherent in the due process clause of the 14th Amendment and embodied in that right was the choice of having an abortion. It is interesting to note that neither the right to privacy nor the right to abortion was explicitly written in the text of the Constitution.

iii) *Dobbs v. Jackson Women's Health Organization,*[21] which overturned *Roe v. Wade* and ruled that the Constitution does not refer to abortion, nor do constitutional provisions implicitly protect such a right.

iv) *Edwards v. Canada,*[22] where the Privy Council, while referring to the living tree metaphor, reversed the decision of the Canadian Supreme Court, which in its advisory jurisdiction had ruled that women cannot be elected to the upper house of the Canadian legislature.

The Court reasons that the power to review a legislative or executive action was not written in the Constitution in Marbury. Still, because of the changing social conditions, the constitutional tree had to evolve, and with time, this power was derived. Then, in *Roe*, centuries after the promulgation of the United States Constitution, a new right was created out of the Constitution because the social conditions of the time demanded it. Later in *Dobbs*, the interpretation of the same provision evolved into something opposite. The majority view professes the idea that jurisprudentially, a provision is interpreted in a particular way, but over a while,

[19] *Marbury v. Madison* 5 US (1 Cranch) 137 (1803).
[20] *Roe v. Wade* 410 US 113 (1973).
[21] *Dobbs v. Jackson Women's Health Organization* 597 US 215 (2022).
[22] *Edwards v. Canada* [1930] AC 124.

a 'tipping point' is reached, and from then onwards, a new understanding arises; hence, the constitutional tree evolves and grows out into different branches.

The textualist interpretation approach has often been emphasized as a primary mode of constitutional interpretation, particularly where the constitutional text is clear.[23] If the Constitution's text is unclear or leads to an absurd result, other approaches, such as the living tree approach, may be resorted to. In the referred judgements, the courts abandoned pure textualism because they discerned that the original text could no longer adequately respond to the evolving social or political realities—such as the expansion of judicial review (*Marbury v. Madison*), the emergence of privacy rights (*Roe v. Wade*), or gender equality in political rights (*Edwards v. Canada*). In each case, it was held that societal conditions had materially shifted, warranting a broader interpretation of constitutional guarantees. While these judgements justify the adoption of the living tree approach, it is important to note that they concerned different constitutional frameworks, legal questions, and jurisdictions. Their connection lies only within the broader common law interpretive tradition.

In contrast, the Pakistani disqualification jurisprudence concerns the interpretation of the same constitutional provision—Article 63-A—within a very short time frame of less than a decade. Therefore, the reliance on the living tree approach here lacks the necessary trigger of fundamental societal transformation that justified its use in the aforementioned cases. A more appropriate comparison would have been to show, for instance, how the Canadian courts in *Edwards v. Canada* justified the expansion of constitutional meaning over nearly half a century, reflecting extensive social change regarding gender equality. No similar evolution in the socio-political context has occurred in Pakistan regarding party defections since the 18th Constitutional Amendment. Thus, the Pakistani context does not reach the threshold where a re-interpretation of Article 63-A under the living tree approach becomes justified.

Moreover, the majority view is silent on what social changes during the last years made it necessary to grow new branches from the constitutional tree. Even Canadian courts have held that one of the limitations of employing the living tree

[23] John F. Manning, 'Textualism and Legislative Intent' (2005) 91 VLR 419.

approach is that it does not allow courts to discover new obligations that were not part of the original objective of the law; the analysis must be linked with the historical context of the provision.[24] The rejection of the defector's vote is a novel judicially manufactured liability with no roots in Article 63-A; it is contrary to the living tree approach. Even if the theory of jurisprudential tipping point is accepted, the question arises: who shall decide that such a tipping point has been reached? The Parliament shall make such a determination and change the law through an amendment rather than an unelected judiciary embroiling itself in judicial gymnastics.

Critical Analysis and the Dissenting Opinion

The judgement, while complementing the living tree scheme with the moral reasoning approach,[25] discusses in depth the breach of political party rights, which seems to be premised on a false belief that the act of defection is an ailment or morally wrong. It is argued that this might not always be the case. Article 63-A is morally neutral, as there can be instances where a defecting member votes according to their conscience. The judgement rejects the idea of such a defector and states that the only honourable recourse for such a member is to resign and get a fresh mandate. Contesting a new election may be an option, but this may not be the only option, especially where the person defecting was independently elected. The majority view considers a conscious defector as a mere theoretical construct; the reason seems to be that since there has not been an instance of a conscious defector in our history, there will be no such defector in the future as well. It states that even if a conscious defector has a right, it must yield in favour of the rights of the political party.

The Constitution envisions the idea of defection, and Article 63-A was explicitly inserted to deter members from doing so; it did not close the door for an individual member to defect; a member could break away from the party line if his conscience dictated him, but he would have to pay the price, i.e., disqualification. The majority judgement has taken away that right from the individual member of

[24] *R. v. Blais* [2003] 2 S.C.R. 236, 237 (Can.).

[25] The idea that Judges should decide cases in a way that helps in understanding the moral underpinnings of the Constitution. See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (HUP 1996).

the House. The following illustration shows how this principle may be applied in the future. Suppose the House is considering a constitutional amendment bill, one that reduces the powers of the superior judiciary. Even though defectors may lose their seats for voting contrary to the party line, they have a right to vote according to their conscience. These defecting members would have lost their seats, but would at least have thwarted such an amendment. It appears that the majority view focuses on the future when considering the rights of the political parties, but is more interested in the past when it analyses the idea of conscious defection.

When dealing with the second question, the text of Article 63-A is ignored, which does not mention the vote of the dissenting member being discarded. However, when the words are read carefully, it becomes evident that the very act of casting a valid vote or abstaining (contrary to the given direction) is triggering the defection and bringing Article 63-A into operation. If there is no act on the part of the member and there is just a mere thought, or if that contrary vote is not accepted, then that member cannot be said to have defected, as they did not harm the party's functioning. If we analyse the constitutional history, it becomes clear that the idea of rejecting a contrary vote was part of the original Constitution as a proviso to Article 96[26]—concerning the vote of no confidence—but it was omitted through the Constitution (Eighth Amendment) Act, 1985 ('8th Constitutional Amendment'). It was never restored, even under the 14th Constitutional Amendment, which introduced Article 63-A and the idea of defection separately. Not accepting the vote of the dissenting member is an extra punishment for the defector and ignores the fact that Article 63-A already punishes by de-seating and disqualifying the dissenting members. It is trite law that a penal provision should be construed strictly and cannot be expanded unless allowed by the provision. In *Wukala Mahaz*,[27] the Court strictly interpreted paragraph (a) of the Explanation to clause (1) of Article 63-A—which dealt with breach of party discipline by a member as provided by the 14th Constitutional Amendment—and held that it did not apply to any alleged misconduct outside the House. Hence, it inevitably follows

[26] Constitution (n 5) art 96 (proviso): 'Provided that, for a period of ten years from the commencing day or the holding of the second general election to the National Assembly whichever occurs later, the vote of a member, elected to the National Assembly as a candidate or nominee of a political party, cast in support of a resolution for a vote of no-confidence shall be disregarded if the majority of the members of that political party in the National Assembly has cast its votes against the passing of such resolution.'

[27] *Wukala Mahaz* (n 14) [14].

that the already stipulated penalty of disqualification cannot be widely interpreted to state that it also includes rejecting the defector's vote.

On the direction issue, it is respectfully submitted that the majority view minimises the position of the Party Head, subjecting them to the will of members elected in the first place through the party ticket he issued and received votes in his name. This is contrary to previous judgements of the Court, where Party Heads were given significant power, for example, in the *Rawalpindi District Bar Association* case.[28] The leading view of Justice Azmat Saeed, supported by seven other judges, held that after the passage of the 18th Constitutional Amendment, the decision regarding how a party shall vote has to be taken by the Party Head. The judgement highlighted that the responsibility had been shifted from the Parliamentary Leader to the Party Head because of the practical realities of the country's political arena; it is the personal popularity of the political leader, who is primarily the Party Head, which translates into votes and eventually leads to the formation of the parliamentary party. Then later, in the *Zulfiqar Bhutta* case,[29] the Court extensively described the role and functions of the Party Head and even referred to them as the leader of the parliamentary party. The Court further held that the Party Head enjoys the central role within the party and directly manages and oversees the parliamentary party; all actions and decisions of the party require his approval. In the *Sardar Sher Bahadar* case,[30] the Court did not uphold the defection of a member because there had been no particular direction given by the Party Head. These precedents collectively underscore that the Party Head, and not the Parliamentary Leader, was envisioned as the ultimate authority within the party, particularly in the context of maintaining discipline and regulating defections, reflecting the constitutional scheme post-18th Constitutional Amendment.

Implications of the Majority Interpretation

It is an established principle of law that a constitutional provision shall be interpreted holistically, and no interpretation shall impute redundancy to any word of the concerned provision or any other constitutional provision (see, *District Bar*

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[28] *District Bar Association, Rawalpindi v. Federation of Pakistan* PLD 2015 SC 401.
[29] *Zulfiqar Ahmed Bhutta v. Federation of Pakistan* PLD 2018 SC 370.
[30] *Sardar Sher Bahadar Khan and others v. Election Commission of Pakistan* PLD 2018 SC 97.

Association, Rawalpindi v. Federation of Pakistan,[31] and *Benazir Bhutto v. Federation of Pakistan*[32]). As per the new interpretation, there is no purpose left for having a vote in the House; the leader of the Parliamentary Party can simply write a letter to the Presiding Officer and inform him of the decision of the Parliamentary Party. It has made Article 95 and Article 136 (which deal with the vote of no confidence in the National Assembly and Provincial Assemblies, respectively) redundant. As of now, any vote of no confidence will never succeed if the leader of the house belongs to the party enjoying the majority of the house. Any member of that party who goes against its leader will be declared a defector, even though they may have serious concerns with the leader, and their vote too will be discarded. In such a situation, as per the new interpretation, the Prime Minister only needs to have the support of the majority of the Parliament to survive a vote of no confidence; this has reduced the rest of the House's membership to the status of silent observers. This creates an absurd situation as the whole purpose behind bringing a vote of no confidence has been destroyed; it will only succeed if the Prime Minister's majority composes different parties in case of a coalition. In other words, the majority view has made the leader of the house an elected dictator.

Conclusion

The Court's interpretation of Article 63-A in *SCBA v. Federation of Pakistan* marks a pivotal moment in Pakistan's constitutional jurisprudence—one where judicial innovation, arguably untethered from constitutional text or historical practice, has redefined the contours of parliamentary democracy. By discarding the vote of a defecting legislator, the majority transformed Article 63-A from a mechanism of party discipline into a tool of legislative disqualification, thereby granting political parties near-absolute control over their members' parliamentary conduct. This not only undermines the autonomy of elected representatives but also erodes foundational democratic norms such as dissent, deliberation, and conscience-based voting.

The Court's reliance on the living tree doctrine, though rhetorically compelling, lacks grounding in either the socio-political context of Pakistan or the textual limitations of Article 63-A. As the dissenting opinion rightly cautions, such

[31] *District Bar Association* (n 28).
[32] *Benazir Bhutto* (n 15).

interpretive elasticity risks judicial overreach and raises concerns about institutional legitimacy. While party coherence is important, it cannot come at the cost of hollowing out the very institutions meant to safeguard democratic accountability.

In the final analysis, this judgement tilts the constitutional balance decisively in favour of party leaderships, dilutes the role of Parliament as a deliberative body, and invites future constitutional crises by unsettling long-standing principles. The decision is not just a commentary on defection—it is a reimagination of legislative democracy, and one that deserves critical scrutiny.

Unravelling the Judiciary: Analysing the Supreme Court's Decision as an Interpretive Exercise Rather Than a Constitutional Rewrite

Supreme Court Bar Association of Pakistan v. Federation of Pakistan
PLD 2023 SC 42

Zoha Zuberi and Hafsa Khan*

Introduction

In April 2022, a resolution for a no-confidence vote was passed against Prime Minister Imran Khan, creating political turmoil in the country. Owing to the instability of the law-and-order situation, the President invoked the Supreme Court of Pakistan's ('Court') advisory jurisdiction under Article 186 of the Constitution[1] by filing Reference No. 1 of 2022 (the 'Reference').[2] In *Supreme Court Bar Association of Pakistan v. Federation of Pakistan*[3] (the 'SCBA case'), a five-member bench of the Court, through its order dated 17 May 2022, gave its findings on questions relating to the interpretation of Article 63-A of the Constitution,[4] particularly dealing with questions relating to defection, vote counting, and disqualification of defecting members.

The ethos of this Reference was on understanding the scope and meaning of specific provisions of Article 63-A of the Constitution. The main contention pertained to the appropriate interpretive approach for Article 63-A. One view favoured a strict textual approach, interpreting the provision in isolation from the broader constitutional framework. The other approach supported an expansive reading to interpret Article 63-A, grounded in the Constitution as a whole. The latter approach would curb defections, purify the electoral process, and promote

* Zoha Zuberi is a recent graduate of the Shaikh Ahmad Hassan School of Law, Lahore University of Management Sciences. Zuberi is an LL.M candidate at the National University of Singapore, specializing in Corporate and Financial Services law; Hafsa Khan is a recent graduate of the Shaikh Ahmad Hassan School of Law, Lahore University of Management Sciences. Khan's areas of interest lie in digital rights and the regulation of emerging technologies.
[1] The Constitution of the Islamic Republic of Pakistan 1973, art 186.
[2] The Presidential Reference No. 1 of 2022.
[3] *Supreme Court Bar Association v. Federation of Pakistan* PLD 2022 SC 488.
[4] Constitution (n 1) art 63-A.

democratic accountability. Thus, the Court, by three to two, ruled in favour of the expansive approach for interpreting Article 63-A.

This decision was met with notable criticism from the Court's judges, notably Justice Mazhar Alam Khan and Justice Jamal Khan.[5] Their objections were centred on the belief that the judiciary had exceeded its constitutional authority by engaging in an interpretive process that effectively led to the rewriting of the Constitution.[6] They argued that such judicial activism blurred the separation of powers as the Court ventured beyond its judicial mandate into areas reserved for legislative action. Their critique highlights the concerns regarding the judiciary's role in altering constitutional frameworks through its rulings rather than adhering strictly to its interpretive duties. However, this paper challenges the validity of the critiquing arguments.

Although the express terms of Article 63-A appear to be clear and compelling, opting for the purposive approach does not amount to the judiciary rewriting the Constitution because the interpretive role of the judiciary relates to 'understanding(s)' of the Constitution. This essentially highlights the need to understand Article 63-A in conjunction with fundamental rights, such as Article 17 of the Constitution.[7] This shows how such an interpretation is necessitated to preserve the parliamentary form of government, which constitutes a salient feature of the Constitution.

Facts

In 2020, the opposition parties (PML-N, PPP, MMA, and ANP) started the Pakistan Democratic Movement ('PDM') against the Pakistan Tehreek-e-Insaf ('PTI') government based on allegations of poor governance, mismanaged foreign policy, political victimisation of opponent parties, and bad economic management.[8] In 2022, 142 members of the National Assembly from within the opposition party filed a notice to move a resolution for a no-confidence vote against Prime Minister

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[5] *Supreme Court Bar Association* (n 3) 496.
[6] Ibid.
[7] Constitution (n 1) art 17.
[8] Asad Rahim Khan, 'No Confidence: How Did Prime Minister Imran Khan End up Here?' *Dawn* (Islamabad, 17 March 2022) <https://www.dawn.com/news/1680285> accessed 29 September 2024.

Imran Khan. Along with this notice, the then-Speaker of the National Assembly called for an Assembly session. As a result of this motion, political turmoil increased, with the PTI and the PDM gathering their supporters to organise rallies in Islamabad.

Furthermore, coalition and ally-party members of the PTI quit the alliance and joined the opposition, while several members, including two Ministers, resigned from the cabinet. In addition, the political situation worsened when PTI protesters barged into the Sindh House in Islamabad to throw those ex-ministers and Members of the National Assembly ('MNAs') who had either resigned from the Cabinet or left the PTI alliance to join the opposition.[9] Amid the political chaos, Prime Minister Imran Khan's assertion that the no-confidence motion against his government was a part of a broader foreign-funded conspiracy to destabilise his administration gained significant attention.[10]

Owing to the situation, the Supreme Court Bar Association ('SCBA') intervened by filing a petition in the Court under Article 184(3) of the Constitution.[11] On 21 March 2022, the President moved the Reference[12] by seeking the advice of the Court in respect of the correct interpretive approach for Article 63-A. This included seeking advice regarding the treatment of a defecting political party member in terms of being disqualified for life and the right of a defecting political party member to have their vote counted or excluded from the vote count. Moreover, the President also sought advice for other measures within the constitutional framework which can be used to prevent defection, vote buying, and floor crossing. While the proceedings for this petition started, they were adjourned till 4 April 2022, before another constitutional crisis erupted.

On the day on which the no-confidence motion was to be voted on, 3 April 2022, the Deputy Speaker, without hearing any member, stated that the motion of

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[9] Shakeel Qarar and Imtiaz Ali, 'PTI supporters forcibly enter Sindh House in Islamabad after hours-long protest' *Dawn* (Islamabad, 18 March 2022) <http://dawn.com/news/1680612> accessed 29 September 2024.
[10] 'PM Imran Says "foreign-Funded Conspiracy" out to Topple His Govt, Claims to Have Evidence in Writing' *Dawn* (Islamabad, 27 March 2022) <https://www.dawn.com/news/1682104> accessed 29 September 2024.
[11] Constitution (n 1) art 184(3).
[12] Presidential Reference (n 2).

no-confidence must be in accordance with the rules of the Constitution and ruled out the no-confidence motion, declaring it to be unconstitutional. He premised dismissing the motion based on the narrative that foreign conspirators have no right to dismiss an elected government.[13] On the Prime Minister's advice, the President dissolved the Assembly and called for general elections. On the same day, the Chief Justice invoked the *suo motu* jurisdiction of the Court under Article 184(3),[14] and a Bench was convened to decide on the constitutionality of the Deputy Speaker's action and the subsequent dissolution of the Assemblies by the President. The hearing lasted for five days. On 7 April 2022, the Court set aside the ruling of the Deputy Speaker and subsequent events, with the result that the dissolution of the Assembly was unconstitutional. Thus, on 9 April 2022, the Assembly took the no-confidence motion against the Prime Minister.

For the first time in the history of Pakistan, the National Assembly endorsed a no-confidence motion against the Prime Minister. Through 174 members passing the no-confidence motion, Prime Minister Imran Khan was ousted from power. After the change of government, the Court continued with the proceedings for the Reference,[15] the SCBA case,[16] and the PTI's Constitution Petition No. 9 of 2022 under Article 184(3). PTI pleaded the Court to declare that any defection as set out in Article 63-A amounts to a lifetime ban from contesting elections in the interest of justice.

It is also essential to note that Article 63-A was initially inserted in the Constitution through the Constitution (Fourteenth Amendment) Act, 1997 ('14th Constitutional Amendment'),[17] after which it underwent several changes. Article 63-A was instituted by the Legal Framework Order, 2002,[18] which was ratified by the Constitution (Seventeenth Amendment) Act, 2003 ('17th Constitutional Amendment') in 2003.[19] Later, the 18th Constitutional Amendment of 2010

[13] Fahad Chaudhry, 'NA speaker dismisses no-trust move against PM Imran, terms it contradictory to Article 5' *Dawn* (Islamabad, 3 April 2022) <https://www.dawn.com/news/1683067> accessed 29 September 2022.
[14] Ibid.
[15] Presidential Reference (n 2).
[16] *Supreme Court Bar Association* (n 3).
[17] Constitution (Fourteenth Amendment) Act 1997.
[18] Legal Framework Order 2002.
[19] Constitution (Seventeenth Amendment) Act 2003.

replaced the Article.[20] As it stands today, specific parts of Article 63-A are reproduced below:

> If a member of a Parliamentary Party composed of a single political party in a House—
>
> (a) resigns from membership of his political party or joins another Parliamentary Party; or
>
> (b) votes or abstains from voting in the House contrary to any direction issued by the Parliamentary Party to which he belongs in relation to—
>
> (i) election of the Prime Minister or the Chief Minister; or
>
> (ii) a vote of confidence or a vote of no-confidence; or
>
> (iii) a Money Bill or a Constitution (Amendment) Bill; he may be declared in writing by the Party Head to have defected from the political party, and the Party Head may forward a copy of the declaration to the Presiding Officer and the Chief Election Commissioner and shall similarly forward a copy thereof to the member concerned: Provided that before making the declaration, the Party Head shall provide such member with an opportunity to show cause as to why such declaration may not be made against him.

Legal Analysis

I. The Interpretive role of the Judiciary relates to 'Understanding(s)' of the Constitution

It can be argued that the interpretation of the Constitution, as a primary role of the judiciary, follows the purposive approach, which does not amount to rewriting the Constitution. This means that constitutional courts should interpret the text of the Constitution in a manner that is 'expansive and expanding'. Firstly, it is important to understand that the judiciary, while interpreting the Constitution, engages in a plural exercise of the 'understanding(s)' of the Constitution. Here, 'understandings' explains the process of Constitutional interpretation, which suggests that the judiciary not only provides a binding and authoritative meaning of a Constitutional provision but also does so while understanding the underlying principles and rules

[20] Constitution (Eighteenth Amendment) Act 2010.

that formulate it. Borrowing from the *Puttaswamu* case[21] of the Indian Supreme Court, the Court relied on the statement that 'as society evolves, so must constitutional doctrine [understanding].' Thus, the goal of the interpreting exercise conducted by the majority in the SCBA case[22] was to understand the Constitution holistically.

The purposive interpretation of the Constitution in terms of its 'understandings' reflects the contemporaneous approach adopted by the judiciary. Such an approach propels the judiciary to adopt a different interpretive approach for a statute and the Constitution. While the former requires the Court to ascertain the legislative intent of a statute, the latter is about understanding the meaning and underlying principles that impact the Constitutional text. The reason for a contextual and expansive approach to the interpretation revolves around the belief that the Constitution is a 'living document' intended to survive and evolve for years to continue to serve as the cornerstone for future laws. As highlighted in the case of *McCulloch v. Maryland*,[23] the United States Supreme Court ('US Supreme Court') held that 'a constitution [is] intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs.'[24] Furthermore, the United States Supreme Court's judgement mentions Justice Cardozo's approach to interpreting a constitution to accentuate that the constitution enlists principles for the 'expanding future' and not rules for the 'passing hour'. Therefore, the Court interpreted Article 63-A purposively to ensure its intent is accounted for while understanding the text.

Furthermore, the majority in reference argued that Article 63-A could not be read and interpreted in isolation because it pertains to the fundamental right of collectivity, i.e., the political parties as a whole, which needs to be understood in light of other Constitutional provisions having a similar subject-matter (political parties). Such an interpretive approach does not amount to rewriting the Constitution; rather, it adopts an all-rounded approach to interpret Article 63-A following the spirit of the Constitution.

[21] *Justice K. S. Puttaswamy (Retd.) and another v. Union of India and others* AIR 2017 SC 4161.
[22] *Supreme Court Bar Association* (n 3).
[23] *McCulloch v. Maryland* 17 US 316 [1819].
[24] Ibid.

Moreover, courts in Pakistan have affirmed the 'living tree' metaphor laid down in *Edwards v. Canada*[25] within the reasoning of various judgements. The Court applied the living tree metaphor to interpret the Constitution in a progressive and adaptive solution-defining manner rather than adopting a narrow or pedantic interpretation method. This represented a holistic approach to interpreting the Constitution to ensure that the Constitution could be allowed to develop over time while staying within its natural limits. The Court has affirmed the metaphor in the cases of *Al-Jehad Trust*[26] and the *Civil Aviation Authority*.[27] Similarly, the minority opinion by Justice Miankhel emphasises that interpretation of the Constitution is tied to its 'avowed purpose and spirit' to avoid an 'illogical outcome' to avoid 'fundamental changes', which ensures that there is 'sufficient elasticity' underlying the interpretive exercise.[28] This is in line with the interpretation of Article 63-A by the majority to protect the basic tenets of the Constitution, as was the case in *Al Jehad Trust*.[29]

Since the emphasis on the 'living tree' metaphor warrants that the interpretive process is always linked to the spirit of the Constitution, it is not left to the whims of the individual judges. This creates space for growth according to contextual needs while keeping in mind the basic structure of the Constitution and circumventing any illogical outcome. Therefore, the Court has particularly emphasized that Constitutional interpretation must not be a restrictive exercise tied to the past; instead, the interpretation must focus on growth in line with the present needs. The majority has interpreted Article 63-A using the same approach by expanding its outlook to address the issue of defection while keeping itself restricted to the tenets of the Constitution to prevent an imbalance within the scheme of parliamentary democracy.

II. Understanding Article 63-A in Conjunction with Fundamental Rights

The true interpretation of Article 63-A would only be revealed when looked at in conjunction with other Articles of the Constitution because it is not a 'complete

[25] *Edwards v. Canada* [1930] AC 124, 1929 UKPC 86.
[26] *Al-Jehad Trust v. Fed of Pakistan* PLD 1996 SC 324.
[27] *Civil Aviation Authority and others v. Supreme Appellate Court Gilgit Baltistan and others* PLD 2019 SC 357.
[28] *Supreme Court Bar Association* (n 3).
[29] *Al-Jehad Trust* (n 26).

code' in itself, as suggested by the minority opinion. The intention of the Parliament could only be inferred when it is looked at holistically. The proper constitutional interpretation of the anti-defection clause brings the relevance of Article 17, i.e., freedom to form and be part of an association, to the forefront.[30] The intent behind the imposition of Article 63-A in relation to the protection of the political parties from unconstitutional assaults would only bear fruition when interpreted in a broad manner consistent with the fundamental rights conferred on the political parties under Article 17(2). Therefore, these provisions must be examined together to understand the implications for a defecting member violating these rights. From the discussion that follows, it will be highlighted that the majority decision did not amount to rewriting the Constitution; instead, they adopted a purposive interpretation of Article 63-A in consonance with the spirit of the Constitution.

Appreciating Article 17(2) becomes necessary to understand Article 63-A because the former vests fundamental rights in political parties in compatibility with the latter. The Court in *Benazir Bhutto*[31] held that Article 17(2) pertains explicitly to rights attached to political parties, which could not be restricted to their formation; instead, it includes the right to 'continue its activities and propagate its political opinions.' It was further held in *Benazir Bhutto*[32] that the elected political parties continue to be in the association as they are meant to implement their mandate.[33] Action that contravenes this function of the political parties would impact its 'healthy operation' in relation to both its internal and external aspects, resulting in the infringement of the fundamental rights in Article 17(2) conferred on the political party as a unit as opposed to its individual members.

The purpose of vesting the political party with the fundamental right is to promote its 'healthy operation'. This forms an essential connection with Article 63-A to understand the scope of its interpretation taken by the majority in the Reference. This connection elucidates that the majority did not rewrite the Constitution; instead, a holistic approach was taken to uphold the fundamental right envisioned in Article 17(2). The minority opinion's emphasis on the notion that a 'restriction cannot be read into the liberties which are not already mentioned in the

[30] Constitution (n 1) art 17.
[31] *Benazir Bhutto v. Federation of Pakistan and another* PLD 1988 SC 416.
[32] *Benazir Bhutto and another v. Federation of Pakistan and another* PLD 1989 SC 66.
[33] *Mian Muhammad Nawaz Sharif v. President of Pakistan* PLD 1993 SC 473.

Constitution' omits to realise that the entire Constitution has to be read as an integrated whole to preserve its harmony, as no provision must be interpreted in a manner which destroys the other. This demonstrates that Articles 63-A and 17(2) must be read together to safeguard the harmony of the Constitution, given their interconnected nature, which does not amount to a rewriting of the Constitution. Essentially, Article 63-A provides the yardstick to analyse the internal and external aspects of the 'healthy operation' of the political parties inherent in Article 17(2). Internal factors relate to matters within the political parties, while external aspects cover the competitive inter-party relationships. Therefore, the imposition of Article 63-A serves as a corrective for defection, which is antithetical to both these aspects.

Protecting the fundamental right in Article 17(2) requires Article 63-A to be interpreted purposively to hold that the defecting member be de-seated from his office and parliamentary party once the parliamentary party gives directions under Article 63-A(b). This would restore the internal operation of the political party by fulfilling one part of its objective. However, the external aspect implicit in Article 17(2) must be addressed to reinstate the fundamental right of the political party. The vote cast by the defector disturbs the external balance amongst political parties, which could only be rectified through Article 63-A. It could be remedied by discarding the votes of the defecting members regardless of whether the party takes any resolution or direction. Therefore, the proper redressal offered by Article 63-A will only come to light when read in conjunction with Article 17(2) because the fundamental rights inherent within political parties through the latter must be protected through the former. Such an interpretation is in line with the intent of the Constitution and does not amount to rewriting by the majority.

The minority opinion is premised on the assumption that such a construction is not in accordance with other Constitutional provisions, including Article 19 relating to the Freedom of Speech[34] and Article 66 referring to Privileges of Members of the Constitution.[35] It was propounded in *Wukala Mahaz Barai Tahafaz Dastoor*[36] that the freedom of speech in a parliamentary form of government must be evaluated subject to the reasonable restrictions imposed on the conduct of the parliamentary members. This emphasizes the interconnected nature of the

[34] Constitution (n 1) art 19.
[35] Constitution (n 1) art 66.
[36] *Wukala Mahaz Barai Tahafaz Dastoor and another v. Federation of Pakistan* PLD 1998 SC 1263.

Constitution to reveal that individual members of the political party are allowed to exercise their freedom under Articles 19 and 66 if they are not infringing the restrictions set down in Article 63-A. Although Article 66 protects MNAs' speaking and voting privileges, these are also subject to the Constitution. Therefore, the full extent of the restriction laid down in Article 63-A could only be operational when read with Article 17(2) concerning the political parties' internal and external operations.

Article 63-A protects the continued coherence of political parties because the system of parliamentary democracy is contingent on their healthy operation. Their presence paves the way for the maintenance of other rights guaranteed by the Constitution.[37] In *Benazir Bhutto*,[38] the system of parliamentary democracy was recognised as one of the salient features of the Constitution, with political parties as its leading players. The significance of parliamentary democracy as part of the salient features of the Constitution was further solidified in *District Bar Association*.[39]

Destabilization of the political parties would adversely affect democracy because they are a connecting link between the cabinet, Parliament, and voters. Defection causes detrimental effects on the operation of the political parties with delegitimizing implications on the political system. The purpose of Article 63-A must be robustly interpreted, considering these repercussions. Although these consequences are not expressly laid down, the touchstone of salient features in the Constitution emphasizes that Article 63-A must be interpreted through such a lens to respect the essence of the Constitution. The de-seating of the defecting member, alongside discarding his vote, offers to protect the parliamentary form of government inherent in the Constitution. This does not amount to changing the Constitution by the majority; alternatively, the interpretation harmonizes it to uphold its salient features.

One of the roles of the political parties in effecting the cause of parliamentary democracy lies in competition and rivalry amongst them, as

[37] *Abdul A'la Maudoodi v. Government of West Pakistan* PLD 1964 SC 673.
[38] *Benazir Bhutto* (n 31).
[39] *District Bar Association, Rawalpindi v. Federation of Pakistan* PLD 2015 SC 401.

envisioned in Article 17(2).[40] A defecting member disturbs this function as they go against their electoral mandate by colluding with the opposing parties using unlawful practices. This leads to negative implications for the healthy operation of political parties, which is necessary for the proper functioning of the salient features of the Constitution. The conduct of the defecting member becomes a 'mockery of the democratic Constitutional process,' signifying that they must be dealt with in a manner where they are not 'unjustly enriched'.[41] Hence, Article 63-A, when read with Article 17(2), must be interpreted in a deterring way to preserve the 'normative moorings of the Constitution'. The notion of terming individual members as 'conscientious observers' becomes irrelevant, as it does not consider the untenable implications such acts could have on the salient features of the Constitution.

It has been collectively advanced by the two minority judges' opinion that such an interpretation would make Article 55, regarding voting in the Assembly and quorum,[42] and Article 95, pertaining to vote of no-confidence against a Prime Minister,[43] redundant, leading to 'elective dictatorship'. However, they have based their argument on an assumption that ignores the difference between casting and counting the vote. While the latter is allowed individually, the former cannot be prejudicial to their party manifesto if it relates to the conditions present in Article 63-A. Therefore, Article 55 does not become redundant as their votes are subject to the restrictions stipulated in Article 63-A. An action to the contrary would lead to discarding their votes alongside a vacation of their seat on the touchstone of the salient features of the Constitution that comes at the forefront when Article 63-A is read in conjunction with Article 17(2).

Hence, Article 63-A must be read with Article 17(2) to holistically understand the implications for a defecting member violating these rights. Such an interpretation upholds the scheme laid out in other Articles relevant to the parliamentary form of democracy, which is essential for the protection of the basic structure of the Constitution.

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[40] *Nawaz Sharif* (n 33).
[41] *Kh. Ahmad Tariq Rahim v. Federation of Pakistan and others* PLD 1992 SC 646.
[42] Constitution (n 1) art 55.
[43] Constitution (n 1) art 95.

III. Preserving the Parliamentary Form of Government, A Salient Feature of the Constitution

Individual members get elected on the mandate of their political party, which they must follow for the smooth running of the executive and legislative arenas. The minority opinion fails to take into account that the mandate of the political party coincides with the interests of the constituents of the individual members, which they must work to achieve during their tenure. The assumption that individual members forward their independent mandate, instead of the party's mandate, is untenable. Floor crossing disturbs the balance that the individual member must strike with the party's mandate, on which they were elected.[44]A government based on a party basis would never be able to work if it had to constantly monitor its parliamentarians, especially given the upheavals parliamentary democracy has historically faced within Pakistan.

A cursory glance at Pakistan's constitutional history reflects the challenge of maintaining a party-based government. In particular, during the 2008 elections, the Pakistan People's Party ('PPP') struggled to unify its coalition amid internal tensions, which led to significant political instability.[45] However, this does not mean that the interpretation by the majority in reference would infringe on Article 95 of the Constitution by giving 'unbridled power to the prime minister' as proposed by the minority opinion. The majority of the parliamentary party may still bring a vote of no confidence against their Prime Minister. Through this mechanism, they can vote freely to set him aside if they refuse to issue the direction under Article 63-A. Simultaneously, individual members on their own cannot vote against their party in matters relating to Article 63-A, as that would hinder competition and create an imbalance in the functioning of parliamentary democracy, which is a salient feature of the Constitution. Such defecting members

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[44] InpaperMagazine F, 'The Law and Politics of Floor Crossing' *Dawn* (Islamabad, 13 March 2011) <https://www.dawn.com/news/612849/the-law-and-politics-of-floor-crossing> accessed 29 September 2024.

[45] Mehdi T, 'An Overview of 2008 General Elections' *Dawn* (Islamabad, 16 April 2013) <https://www.dawn.com/news/802815/an-overview-of-2008-general-elections> accessed 29 September 2024.

could voice their dissent during internal meetings or resign and get re-elected with a fresh mandate instead of defecting against the present one.

Thus, individual members must respect the mandate of the political party on which they are elected to lead to a sophisticated running of the tripartite organs of the State. Several other modes are available for the individual members to showcase their dissent, which does not render parliamentary democracy redundant.

The Political Impact of the Judgement

This Reference has turned out to be a landmark case that has had a broad impact, especially within the political realm. It has attempted to strengthen the democratic process by eliminating defection and floor crossing. Defection has caused immense instability for decades amongst political parties, which runs counter to the notion of a parliamentary form of government enshrined in the Constitution. Switching political loyalties for *mala fide* considerations defies their role of being carriers of the '*amanat'* of their constituents. It binds the elected officials on party tickets with the political party, leading to increased discipline and accountability in connection with the party manifesto, based on which they were elected. Political shaming, expulsion from the party, and de-seating were not sufficient disincentives against frequent floor-crossing because these members would first benefit from defecting, leading to the destabilisation of Parliament, and would later become part of the political party for whom they defected by gaining their party ticket to form part of the government again. The interests of the constituents were ignored in favour of individual gains. The judgement fortifies public confidence and legitimises the democratic process revered in the Constitution instead of restricting it to the whims of the defecting members.

The Court has successfully balanced its judicial role within the tripartite scheme by limiting itself to the Constitution and not disqualifying the defectors for life; rather, it has acknowledged that the legislators must develop an appropriate law to enact such penal consequences. Such exercise of judicial restraint authoritatively addressed political defections using the constitutional framework, reducing national anxiety regarding floor crossing. The Constitution becomes a mere set of rules unless it is purposively interpreted and upheld. The majority precisely endorses this by mitigating the abuse of law arising from defections and floor crossing. The Constitution protects the political parties since they, as the nucleus of parliamentary democracy, represent the aspirations of the masses. The judgement consolidates this and stabilizes democracy from the threatening vice of horse trading that materializes through defection.

The impact of this watershed judgement could be evidenced by the events surrounding the election of the Chief Minister of Punjab in 2022. Although the defecting members did not vote against Mr. Imran Khan, 25 members of the Provincial Assembly defected during the election of the Chief Minister of Punjab held on 16 April 2022, leading to the election of Hamza Shahbaz. The Reference,[46] pronounced on 17 May 2022, provided a substantial rationale for the petitioners to challenge the election of Hamza Shahbaz as Chief Minister of Punjab at the Lahore High Court. The Lahore High Court upheld the Speaker's orders and Hamza Shahbaz's subsequent election.[47] Furthermore, the Lahore High Court held that the votes of the election of the Chief Minister held on 16 April 2022 were to be recounted by excluding the votes of the defectors from the counting process, leading to a possible re-election. As a result, Pervaiz Elahi gained the majority vote.

Subsequently, another petition was filed in the Court by Pervaiz Elahi that related to whether the understanding and implementation of the short judgement of the Court dated 17 May 2022, passed in the Reference,[48] read with Article 63-A(1)(b) of the Constitution, was correct.[49] The Court held that the import of the order given by the Deputy Speaker, Provincial Assembly of Punjab, Lahore, was incorrect and void since it ran counter to the established constitutional understanding of Article 63-A. Moreover, Pervaiz Elahi was declared the duly elected Chief Minister of Punjab.

The purposive interpretation of Article 63-A enshrined in the Constitution, which was brought to the forefront in the Reference, aided in resolving this significant crisis that affected the democratic process in one of the primary provinces of Pakistan. The trichotomy of power between the state organs and

[46] Presidential Reference (n 2).
[47] *Chaudhary Parvez Elahi v. Governor Punjab and others* PLD 2023 Lahore 154.
[48] Presidential Reference (n 2).
[49] *Chaudhry Parvez Elahi v. Deputy Speaker, Provincial Assembly of Punjab, Lahore and others* PLD 2022 SC 678 [11].

parliamentary democracy, as the salient features of the Constitution, was upheld since the destabilizing effects of the votes of the defectors were effectively set aside. Therefore, the purposive approach encompassed in the judiciary's role instils them with the authority to avert such setbacks to the democratic scheme.

Conclusion

In light of the arguments discussed above, it can be proposed that the majority decision in the Reference[50] does not amount to rewriting the Constitution. The Court took a purposive approach to understand the meaning of Article 63-A holistically. It followed the progressive elements inherent in the judiciary's role while interpreting Article 63-A. This approach highlighted that the true import of Article 63-A could only be encompassed when read with Article 17(2) of the Constitution. Lastly, it has been shown that this interpretation protects the salient features of the Constitution as opposed to the alleged rewriting. Thus, the majority decision in the Reference[51] stands as a principled exercise in constitutional interpretation, ensuring the stability of Pakistan's parliamentary democracy by deterring defections, reinforcing party discipline, and preserving the integrity of the Constitution without overstepping judicial boundaries.

[50] Presidential Reference (n 2).
[51] Presidential Reference (n 2).

Unravelling RUDA: Environmental Justice and Constitutionalism in Lahore High Court

Public Interest Law Association of Pakistan v. Environmental Protection Agency, Punjab and others
2022 LHC 129

Amal Fatima and Zoha Mirza*

Introduction

The case of the *Public Interest Law Association of Pakistan v. Environmental Protection Agency, Punjab and others*[1] is a landmark judgement by the Lahore High Court concerning the Ravi Riverfront Urban Development Project (the 'Project' or 'RRUDP') led by the Ravi Urban Development Authority ('RUDA'). The case arose from a series of petitions challenging the legal and procedural aspects of the Project, which included its dubious Master Plan, disregarding local bodies' involvement, and environmental degradation. The Lahore High Court ruled the RUDA Project unlawful, striking down its master plan and various administrative actions undertaken by RUDA. This case note examines the legal issues and the Lahore High Court's reasoning and provides recommendations accordingly.

Background

The Pakistan Muslim League-Nawaz ('PML-N') government conceived this Project in 2013 with the intention of converting the river Ravi into a perennial freshwater body and developing a housing society on the adjacent riverbed. The Lahore Development Authority ('LDA') was tasked by then Prime Minister Nawaz

* Amal Fatima recently graduated with a Masters in Politics from the New York University. Fatima is passionate about the intersection of Artificial Intelligence, technology, and global development; Zoha Mirza is a Fulbright Scholar and holds a Masters in Political Economy from the New York University. Mirza is interested in the intersection of international governance, economics, and business.

[1] *Public Interest Law Association of Pakistan v. Environmental Protection Agency, Punjab and others* 2022 LHC 129.

Sharif to investigate the area, after which the Project was included in the amended Lahore Master Plan 2016 by the LDA.[2]

At the time, LDA could not finance a large-scale Ravi River rehabilitation project. LDA's Urban Unit issued a tender for a feasibility report of the Project, which was given to the consultancy firm Meinhardt. However, Meinhardt did not abide by the terms of the agreement laid down by LDA. Instead, it began planning a feasibility report for constructing a city near Ravi. As a result of deviating from the contractual terms, LDA rejected the report and blacklisted Meinhardt from all projects in Punjab. Following Meinhardt's removal, LDA issued a notification under Section 4 of the Land Acquisition Act, 1894 ('LAA'), informing the local residents of the area about the acquisition of their land for the RUDA Project.

After the acquisition of land by the last government, the project was revived by Prime Minister Imran Khan in 2018. The Punjab Government passed the Ravi Urban Development Authority Act, 2020 ('RUDA Act'), which created a specialized committee, the Ravi Urban Development Authority, under Section 4, to supervise and accelerate the execution of the Project, especially Phase 1 of Ravi Riverfront City.[3] The committee adopted the feasibility report drafted by Meinhardt because LDA had approved it, and the Amended Master Plan ('AMP') 2016 had been incorporated in it, which detailed the regional boundaries of the Riverfront Project. In light of environmental concerns, RUDA commissioned Engineering Consultancy Services Limited ('ECSL') to conduct the Environmental Impact Assessment ('EIA') in accordance with the Punjab Environmental Protection Regulations, 2017 and the Pakistan Environmental Protection Act, 1997. However, a conflict arose between the RUDA and the local residents regarding the Project's legality and its environmental impact.

[2] The Project's initial idea was such that it was described as Lahore Ring Road, Ravi River Development, which included Lake View City and was intended to expand the city of Lahore. LDA identified roughly 17,000 acres of land under the name of Lake View City in the Ravi Basin, and the territory was marked for a potential project.

[3] Phase 1 included urban development on 46 kilometres on either side of the Ravi basin. Reviving the river remained a priority, for which a barrage along with river channelization was planned for the first 14 kilometres.

Issues before the Court

The Lahore High Court examined multiple legal questions concerning the validity of RUDA's actions. First, RUDA claimed that the Project aligns with the previously approved Master Plan.[4] However, the petitioners, who mostly included lawyers and environmentalists, argued in the public interest that it is an unapproved Plan issued by a blacklisted firm and does not present a proper Master Plan for the Project.[5] Second, Section 6 of the RUDA Act requires local government involvement in the Project, specifically, forming an enforcement system in coordination with a local government. However, later the Punjab Government passed the Ravi Urban Development Authority (Amendment) Ordinance, 2021 ('Amendment Ordinance'), which removed the Section 6 requirement. The petitioners argue that this Ordinance violates Article 140-A of the Constitution, which guarantees the participation of local governments in such projects.[6] Third, RUDA claims to have prepared an EIA report in accordance with the Punjab Regulations. However, environmental experts like Rafay Alam argue that this assessment was carried out improperly without the approval of the Environmental Protection Agency.[7]

Lahore High Court's Ruling and Legal Analysis

I. Master Plan

The primary legal contention regarding the Project's construction was the absence of an independent and sound master plan licensed by RUDA. The original plan intended to restore the River Ravi basin and improve the depleting quality of Lahore's groundwater reserves. However, according to Fahad Malik, one of the petitioners in the case, when the Imran Khan government revived the project, its focus shifted towards developing residential and commercial properties. To achieve this, the government established RUDA and granted it the authority—through the RUDA Act—to alter Lahore's Master Plan, a power traditionally held by the Lahore Metropolitan Corporation.

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[4] The AMP was the Master Plan submitted by RUDA in December 2020. This plan was later found out to be the 2016 plan proposed by Meindhardt and rejected by the LDA, and therefore, not included in the 2016 Master Plan for the city of Lahore by the LDA.
[5] *Public Interest* (n 1) [57].
[6] *Public Interest* (n 1) [7].
[7] *Public Interest* (n 1) [212].

Fahad Malik argued that RUDA's reliance on the Meinhardt feasibility study for the master plan was inherently flawed. Meinhardt was only hired to assess the Project's feasibility and not to draft its new Master Plan. Moreover, Meinhardt had no relevant expertise and was later blacklisted by LDA for deviating from its Terms of Reference. Despite all these issues, RUDA accepted Meinhardt's plan with a view that it had been approved by LDA. However, LDA had never approved such a plan.

The Lahore High Court criticized RUDA's undertaking of the Project without due diligence. Justice Shahid Karim held that RUDA was under the misconception that the Meinhardt plan was lawful. He ruled that the approval of the Master Plan suffered a misdirection of facts and, therefore, could not be understood as a rational and intelligent decision.[8] The Lahore High Court's ruling highlighted three key points:[9]

i) RUDA's master plan was invalid because it lacked independence and did not meet the criteria for a project-specific Master Plan. The Lahore AMP, which RUDA claimed as its basis, was not designed to support a standalone project of this scale.

ii) LDA had never formally approved any Master Plan for the RUDA Project. RUDA's adoption of Meinhardt's plan without proper authorization was deemed a significant administrative failure.

iii) Meinhardt was found to lack the qualifications and authority to draft a legally binding Master Plan, especially after being blacklisted. As a result, any reliance on their document as the foundation for the RRUDP was ruled unlawful.

In conclusion, the Lahore High Court struck down the RUDA Master Plan, stating that any developments based on this plan were illegitimate.

[8] *Public Interest* (n 1) [16].
[9] Ibid.

II. Local Government

The petitioners' second legal contention against the RUDA Act was that it disregards the role of local government. They argued that superseding this constitutionally embedded procedure violates the Constitution itself. The issue of local government's involvement arose from Section 6 of the RUDA Act, which was amended through an Ordinance issued by the Governor of Punjab. Representing petitioners, Waqar A. Sheikh argued that removing the phrase 'with the agreement of the local government' from Section 6 of the Act is unconstitutional, as it deprives residents of the Ravi area of their right to participation in governance.

Waqar A. Sheikh pointed out two major grounds that led to the provincial government's failure to fulfil its constitutional duty of involving local government in the Project. Firstly, Section 6 of the Act instructed the Authority to develop a Master Plan in consultation with the local government. However, the Authority failed to do so within the stipulated time. Instead of addressing the lapse through proper channels, Governor Punjab issued the Amendment Ordinance, which removed the requirement of consultation with the local government. The responsibility of creating a viable Master Plan in consultation with local government cannot be circumvented by passing a saving clause through an Amendment Ordinance.[10] Since it lacks credibility, the Amendment is deemed *void ab initio*. No such justifications can retroactively legitimise the government's unlawful acts.

Secondly, the Amendment Ordinance violates Article 140-A of the Constitution, which requires that provinces must devolve political, administrative, and financial authority to the elected representatives of the local governments. No Amendment Ordinance can override this constitutional obligation of any provincial government. The Supreme Court ('Court') in the *Lahore Development Authority v. Imrana Tiwana*,[11] held that:

> …even after the insertion of Article 140A the Provincial Government would continue to have the authority to enact and amend statutes, make general or special laws with regard to Local Government and local authorities, enlarge

[10] *Public Interest* (n 1) [37].
[11] *Lahore Development Authority v. Imrana Tiwana* 2015 SCMR 1739.

> or diminish the authority of Local Government and extend or curtail municipal boundaries. This power of amendment has, however, to be informed by the fact that if the Provincial Government oversteps its legislative or executive authority to make the Local Government powerless such exercise would fall foul of Article 140A of the Constitution. An excessive or abusive exercise of such authority would not be countenanced by this Court. It would be struck down.[12]

The Petitioners contended that, while the precise quantification of devolution of power is absent, this inference most certainly does not allow the provincial government to usurp powers away from local authorities. The case signals that the devolution of powers exists to ensure the elected representatives are stakeholders in the policy. By extension, the voters who elect these representatives get to exercise their authority, which has not been done in the present matter. In the *Imrana Tiwana* case, the Court further emphasized that local governments must remain active stakeholders in policymaking. This ruling, based on Article 140-A of the Constitution, reinforced the provincial government's duty to strengthen, and not to curb the role of local governments. In short, any function RUDA performs must be in consultation with the local government. Section 6, as initially enacted, aligned with the holding of *Imrana Tiwana*, but by deleting some words from this Section, the Provincial Government exceeded its authority. Lastly, the petitioners challenged Section 4 of the Ordinance for undermining the democratic rights of the Ravi residents.

In the present case, the Lahore High Court upheld the petitioners' arguments and ruled that RUDA cannot prepare or approve Master Plans without the approval of the local government. The judgement reads, 'Any master planning and preparation of schemes by RUDA, in the absence of an agreement with the local government concerned, is illegal.'[13]

The strict ruling of the Lahore High Court shows its commitment to protecting constitutional provisions from executive overreach. Consequently, Section 6 of the original RUDA Act stood valid, while the Amendment Ordinance

[12] *Public Interest* (n 1) [57].
[13] *Public Interest* (n 1) [217(4)].

was declared unconstitutional. Therefore, now any new Master Plan authorized by RUDA must be formulated, keeping the local government as an active participant.

III. Environmental Compliance—Invalid EIA Report

Advocate Rafay Alam challenged the Project's current EIA report because it violated the Punjab Environmental Protection Regulations, 2017, and the Pakistan Environmental Protection Act, 1997, which states, 'All environmental assessments are to be prepared by registered consultants only.'[14] These Regulations envisage that registered environmental consultancies must draft all Environmental assessments. Alam argued that any project should only be permitted if these regulations are formally integrated into master plans or developmental schemes. On this issue, the Lahore High Court ordered the government to issue the regulations in its official gazette within a month and incorporate them in the EIA Report to fulfil its statutory duty. Moreover, the Lahore High Court made it mandatory that no EIA administered by a non-registered environmental consultancy or one that violated the Punjab Regulations will be authorized. Thus, RUDA's EIA report, presented by ECSL, was declared to be unlawful and without any authority. The Lahore High Court's decision to delegitimise any such documentation against the Environmental Regulations of Punjab safeguards landowning rights and citizens whose land was impacted by the acquisition, impacting their livelihood.

Moreover, the Lahore High Court identified two significant reasons why the continued development of RRUDP was environmentally unsustainable. Firstly, the development of the Project infringes the right to life for the citizens of Pakistan under Article 9 of the Constitution. Secondly, the Project worsens food insecurity concerns due to the conversion of agricultural land into commercial estates.

Socio-Environmental Hazards of the Project

Although it was declared unlawful, the EIA report itself exposed various loopholes in the project, highlighting its unsustainability. The report identified two major costs: human costs and environmental costs. The project area mainly consists of agricultural land, supporting both the livelihood of small-scale farmers and large-

[14] Pakistan Environmental Protection Act 1997, s 12.

scale agricultural operations. The acquisition of land under the LAA will lead to the dispossession of almost 634 households, inhabited by a population of around 4,271 people.[15] Two settlements that cover an area of roughly 25.11 acres will be displaced permanently. The EIA report identified this as a significant issue because the rehabilitation and resettlement efforts will be highly challenging, as monetary compensation alone will not be able to mitigate the impacts on affected communities.[16]

Although the Project promises sustainable development and strives to achieve river restoration, an important environmental preservation goal, its construction will come at the cost of 1,410.83 acres of agricultural land. Pakistan's agrarian economy will suffer the most because the construction of this project will not only compromise Punjab's food production capacity but also harm the associated ecosystem. The Project will lead to significant environmental degradation, including loss of greenery, land degradation, and increased noise and air pollution due to construction activities.

While the EIA report attempts to present a balanced assessment of the Project, the *amicus curiae* for the proceedings efficiently condensed the Project's environmental harms. In an interview, the *amicus curiae* explained that 75.78% of the planned Ravi Riverfront city is based on agricultural land. The detailed analysis of the EIA report revealed that 82% of the population residing on this land relies on agriculture for their livelihood. These areas produce essential staple crops such as wheat, rice, and corn, as well as the mass production of fruits. Kalakhatai Road, which RUDA authorities plan to acquire adjacent to this cropping region, plays an important role in producing and exporting quality Basmati rice to meet local and international needs. The Project also includes forest areas owned by the Pakistan Army and the forest department. If continued, the construction of the Project will result in the loss of approximately 4958 acres, further exacerbating environmental degradation.[17]

[15] Engineering Consultancy Services Punjab 'Environmental Impact Assessment (EIA)' (June 2021) 127 <https://ruda.gov.pk/system/files/EIA%20River%20Training.pdf> accessed 17 November 2024.
[16] Engineering Consultancy Services Punjab (n 15) 100.
[17] *Public Interest* (n 1) [130].

There is a glaring flaw in the EIA report, for it does not consider the loss of trees and green areas in assessing the harm the project will incur on the environment. The only detail regarding the loss of forest land states that out of 4958 acres of forested land, only 255 acres of forest will be lost owing to the widening of the river banks. However, the report provides no clarity about the remaining forest land that falls within the project's designated area, leaving a crucial gap in environmental impact assessment.

Developmental projects like RUDA, which were carried out without taking environmental hazards into account, have significantly contributed to desertification in the province of Punjab. As a result, problems such as bad air quality, higher temperatures in the form of heat waves, and water pollution have become prevalent. This trend raises concerns about how much environmental loss is justified in the name of economic progress.

In support of this information, the Pakistan Bureau of Statistics reveals that the food import bill has drastically risen between 2021 and 2022 by 33%, from 3 billion to 14 billion. This is an alarming trend because not only has the share of agricultural exports lessened, but Pakistan's self-sufficiency in producing food items has also dropped. This is counterintuitive because a considerable chunk of Pakistan's economy relies on agriculture.

According to a World Health Organization ('WHO') report titled Pakistan Overview of Food Security and Nutrition, Pakistan stands at 109, ranking out of 127 countries on the food security index.[18] While the world's average score on food safety is 60, Pakistan's score is alarmingly low and stands at 43.5.[19] On the other hand, India's score is well above the world average, i.e., 82.5. While there could be multiple reasons that could potentially contribute to India's higher score, it is essential to acknowledge that while India also adhered to the same Land Acquisition Act of 1894 as that of Pakistan, India revised its acquisition policy to address environmental concerns and food security issues by promulgating a new

[18] World Food Programme, 'WFP Pakistan Country Brief' (*wfp.org*, December 2024) <www.wfp.org/countries/pakistan> accessed 12 December 2024.

[19] World Food Programme, 'Pakistan Overview of Food Security and Nutrition – 2019' (*wfp.org*, 25 August 2020) <https://www.wfp.org/publications/pakistan-overview-food-security-and-nutrition-2019> accessed 6 December 2024.

Act, i.e., Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. This Act ensures that no agricultural land will be acquired by the government for public purposes. Conclusively, in the absence of such a framework, it is pertinent for Pakistan to align its developmental goals with the preservation of the environment and sustainable development. The food security issue that RRUDP's pursuit may cause is a direct threat to the lives of people and the environment of Pakistan.

Recommendations

In light of the legal and environmental implications of the RUDA Project, we propose certain recommendations that can be adopted to ensure equitable and lawful city planning. First, Pakistan must revise the LAA to prohibit the acquisition of agricultural land for commercial and real estate purposes. The current legal framework, enacted in the colonial era, does not adequately protect landowners, local communities, or environmental resources from arbitrary acquisition and urban expansion projects like RUDA. The worsening conditions, like environmental degradation and food insecurity, require the government to bring legislative changes, ensuring that no agricultural land will be acquired and converted into commercial land, even for public purposes. The Act must be amended to introduce an agricultural zoning policy, requiring the government's approval before any changes in the classification of land use.

Moreover, in cases of the acquisition of non-agricultural land, it is necessary to amend the compensation mechanism in light of the country's current realities and circumstances. The present compensation mechanism in the LAA does not enshrine definite criteria and is left at the government's discretion to decide the value of the acquired land. Lastly, as happened in the case of the RUDA Project, a lot of citizens were displaced from the Ravi area and were later not provided any means of rehabilitation and livelihood. Therefore, the compensation, along with the economic value of land, must also include the long-term livelihood impacts on displaced communities. It may be in the form of rehabilitation packages or alternative housing and employment opportunities. In 2013, India introduced the Land Acquisition, Rehabilitation, and Resettlement Act, which ensures no agricultural land is acquired and provides a detailed framework for resettlement, ensuring displaced communities receive long-term support. By implementing similar reforms, we can strike a balance between urban development and protecting landowners and environmental sustainability.

Second, to ensure transparency, the environmental assessment procedures need significant reforms. Independent and government-registered environmental agencies should be tasked with carrying out EIAs, rather than hiring non-registered or fake consultancies, as happened in the RUDA Project. These assessments should not give surface-level reports regarding the feasibility of the projects. For instance, before initiating large-scale projects like RUDA, the EIAs must consider factors like water resources, biodiversity loss, and food insecurity. Similarly, if there is any threat of adverse impacts of such projects, the developers must submit scientific mitigation plans explaining how they will compensate for the damages through conservatory measures. Moreover, the assessments should include rigorous public consultations and empirical evaluations of long-term environmental and ecological impacts. In public consultations, civil society organizations and environmental experts should be given ample opportunities and formal avenues to challenge EIA reports in case of major discrepancies. Lastly, for developers and other government-registered bodies that fail to comply with environmental regulations and submit fraudulent reports, strict penalties should be imposed, including hefty fines and revocation of licences.

Third, the Lahore High Court's judgement on the violation of Article 140-A of the Constitution requires the strengthening of the role of local governments in Pakistan. To ensure democratic accountability and uphold the constitutional principle of devolution of power, urban planning projects, like RUDA, should not be initiated without consultation with local bodies. Since the local residents bear the consequences of such projects, it is necessary to engage them at all stages. Moreover, Article 140-A of the Constitution requires an amendment in which the local government's legislative powers on different subjects must be clearly defined and a mechanism must be provided regarding the devolution of political, executive, and administrative powers. The local authorities should be given a legally mandated role in approving and managing large-scale local developmental projects so that provincial governments can be prevented from unilaterally overriding local government participation. Furthermore, the RUDA Act must be amended to reinstate the requirement for consultation with local bodies to ensure that major urban planning projects are done in collaboration. Besides devolving administrative powers, the local governments should be financially independent, and they must be given the authority to allocate urban development funds without any intervention from provincial governments. Similar to the 57.9% share allocated for provinces in the Constitution, provincial governments should be required to set aside a fixed percentage of their share for local governments. Lastly, the local governments should be able to levy taxes on major developmental projects within their jurisdictions to generate their own revenue and fund essential infrastructure projects in their respective domains.

Fourth, urban expansion must be planned with sustainability at its core. Pakistan must implement sustainable urban development policies that prioritise environmental protection and resource efficiency over indiscriminate land conversion. The government should prioritise the development of smart cities that integrate green spaces, water conservation measures, and renewable energy sources. Big cities like Lahore must incorporate green spaces like ecological corridors and parks to improve air quality and preserve biodiversity. Similarly, mandatory green zones must be established around urban centres to prevent environmental degradation. Moreover, to achieve sustainable development, one of the most important strategies is to revive and protect the natural water bodies like the river Ravi to ensure water security for future generations. Besides, smart city planning should designate non-arable lands for commercial and residential purposes and impose strict land-use regulations prohibiting the conversion of fertile agricultural land into real estate or housing projects. Thus, instead of converting fertile agricultural land into housing societies, alternative strategies such as vertical expansion (high-rise residential buildings) should be encouraged to accommodate growing populations without exacerbating food insecurity and environmental degradation. Lastly, tax incentives should be provided to those who integrate eco-friendly construction practices like green roofs and solar heating into their buildings.

Conclusion

In conclusion, the Lahore High Court ruled that the RUDA Project was unconstitutional due to multiple legal violations. The Lahore High Court's reasoning was strongly grounded in constitutional and statutory interpretation. By holding the Project's Master Plan unlawful, the Lahore High Court ensured that such large-scale projects cannot proceed in an arbitrary manner. The Lahore High Court's interpretation of Article 140-A of the Constitution reinforces federalism and requires devolving powers to local governments, preventing centralized control of provincial governments without any oversight. Additionally, the EIA conducted by RUDA was deemed *ultra vires* as it failed to comply with regulatory standards. In short, the Lahore High Court ruling affirmed that the Project poses threats to the environment by converting large-scale agricultural land into an urban real estate project, resulting in food insecurity, ecological damage, and the displacement of many people dependent on those lands. Therefore, in the future, Pakistan's urban planning policies must incorporate thorough environmental studies, prioritise public welfare, and maintain democratic governance systems. To achieve balanced and responsible development, it will be essential to maintain legal compliance, promote sustainable urban growth, and actively include local governments in decision-making processes. Without such measures, projects like RUDA will keep setting dangerous precedents for unchecked urbanization at the cost of environmental and social stability.

Liquidation and Reorganization: Analysing the Corporate Rehabilitation Act, 2018

Muhammad Fahad Ashfaq*

Abstract

This paper argues that an insolvency regime meeting the standards set by the World Bank is vital for economic growth and attracting foreign investment in Pakistan, aiming to provide an in-depth analysis of the Pakistani insolvency regime by using the benchmarks of corporate insolvency law set by the World Bank. The United Kingdom's legislation has been selected for this paper based on several salient features. Although the current insolvency law of Pakistan, which is the Corporate Rehabilitation Act, 2018, is based on the American Model, English law is still used as a residual law in Pakistan. Secondly, the widespread acceptance of English law in various jurisdictions like Canada and Australia makes it a suitable subject of study for rules and policies pertaining to insolvency. Lastly, a long history of bankruptcy laws in the United Kingdom, since the promulgation of the Bankruptcy Act (Statute of Henry VIII) in 1542, coupled with various amendments, reflects the importance of developing and altering the law with the advancements in time and economy. In light of such advancements, the aim is to analyse whether Pakistani insolvency law supports modern businesses and, if not, what legal reforms are required to achieve this goal while not ignoring the local realities.

Introduction

An effective insolvency regime creates a balance between two competing interests, namely, whether a company can best be saved by restructuring it or declaring it insolvent to hand it over to a liquidator. In the realm of the corporate world, the existence of financially distressed companies is not unusual. However, the absence of an effective and stringent insolvency regime which aims to avert the failure of such companies can adversely affect any country's economy. Insolvency reforms are paramount for economies in transition, such as Pakistan, where they play an

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* Muhammad Fahad Ashfaq is a recent graduate of the Shaikh Ahmad Hassan School of Law, Lahore University of Management Sciences. Ashfaq's interests lie in commercial law and public policy.

important role in addressing the problems of insolvent state-owned enterprises. Considering this importance, Pakistan promulgated the Companies Ordinance 1984, which enshrined the insolvency law within the framework of the corporate legal regime. However, the vague and ill-defined provisions of the Ordinance led to widespread dissatisfaction, particularly amongst legal practitioners and corporate stakeholders, who found the framework inadequate for effective corporate reorganization. To attempt to close the legal gap, Pakistan underwent legislative reforms and created the Corporate Rehabilitation Act, 2004 (the 'CRA 2004')

This Act was modelled after Chapter 11 of the United States Bankruptcy Code ('The US Code'). On one hand, it was strongly resisted by financial institutions and commercial banking establishments for over a decade. On the other hand, the pressure to incorporate the American Model appeared to come from industrialists.[1] Enshrining a pro-debtor regime and without adapting to local ownership patterns, judicial capacity, and enforcement limitations, the Act risked enabling abuse rather than promoting rehabilitation. Considering these shortcomings, the Securities and Exchange Commission of Pakistan ('SECP') took the initiative to propose a new rehabilitation law that did not prioritise the company over interested parties but rather maintained a balance between the debtor and creditor relationship. This law came to be known as the Corporate Rehabilitation Act, 2018 (the 'CRA 2018'). The purpose of this paper is not to reject this Act; rather, it attempts to find and analyse its weaknesses and argue for a shift towards a better regime in consonance with the standards set out by the World Bank. Therefore, although the CRA 2018 marks a shift in the direction of corporate rescue and reorganization culture in Pakistan, the same is ill-suited for the industries in Pakistan, as it does not meet the aims of the Corporate Insolvency Law as provided by the World Bank, and needs further restructuring in light of the United Kingdom's insolvency law.

Core Features of the CRA 2018 and the US Code

Resembling the procedure under the US Code, the CRA 2018 provides a court-driven model for rehabilitating financially distressed companies. Under this Act, a company with financial debts of Rs. 100 million or more can apply for its

[1] Nasir Jamal, 'Waiting For Corporate Rehabilitation Law' *Dawn* (Islamabad, 28 September 2015) <http://www.dawn.connews/1209442> accessed 23 December 2024.

rehabilitation before courts. The original jurisdiction under this Act lies with the High Courts.[2] A debtor can file a petition to commence a case once a rehabilitation plan has been formed.[3] The High Court, after hearing the petition, can appoint a panel of insolvency experts to act as mediators between the creditor and the debtor to achieve the acceptance of the rehabilitation plan.[4] The Act also provides for a moratorium or stay of proceedings against the debtor.[5] If a developed Rehabilitation Plan is accepted by two-thirds of the creditors, it is confirmed. The power to confirm the rehabilitation plan rests with the High Court.[6] This confirmed rehabilitation plan can be rescinded at the discretion of the High Court in the circumstances of fraud.[7]

Chapter 11 of the US Code also provides the voluntary reorganization process for failing companies. Reorganization allows a debtor company to obtain stays on its obligations and 'invites the intervention of Bankruptcy Courts to act as mediators as the debtor company renegotiates its liabilities while also attempting to restructure its capital to make the company financially viable again.'[8] The reorganization plan enshrined in the American Model is essentially pro-debtor, creating entitlements over the secured interests of the creditors, suspending personal guarantees, and creating the right to write off unsustainable debt.[9] Therefore, although applying for rehabilitation under Chapter 11 places the company under the supervision of the United States Trustee, Chapter 11 leaves little room for creditors to negotiate settlements in the case of big state-owned companies. In fact, the Rehabilitation Plan can be implemented by courts, even if not agreed to by the majority of the creditors.

However, this does not mean that creditors have no protection at all in the American Model. An important restriction placed by the Code on the shareholders' ability to affect the Rehabilitation Plan is that courts can intervene in shareholders'

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[2] Corporate Rehabilitation Act 2018, s 3.
[3] Ibid s 8.
[4] Ibid s 10.
[5] Ibid s 12.
[6] Ibid s 15.
[7] Ibid s 16.
[8] Lynn M. LoPucki and William C. Whitford, 'Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies' (1993) 141 UPLR 669.
[9] Salman Ijaz, 'Corporate Reorganizations: Debating the Adoption of Pakistan's Draft Corporate Rehabilitation Act 2004' LLJ 4 (2017) 209.

meetings if their actions are found to be abusive—for example, if they undermine the interests of creditors or jeopardise the company's financial recovery for personal gain.[10] The automatic stay on the proceedings and the inability of creditors to recover their debt after the application under Chapter 11 are the biggest obstacles in the interests of the creditors. To overcome this, the creditors have the right to appear before courts to lift the stay; however, the acceptance of the plan is clearly at the discretion of the Bankruptcy Court. It is important to mention that numerous institutions play a critical role in the viability of Chapter 11. One such institution are the Bankruptcy Courts, 'which possess a high level of judicial sophistication to operate successfully within the complex statutory scheme laid out by the Bankruptcy Code.'[11] Nonetheless, there are certain shortcomings in the process as well. For instance, while Chapter 11 of the US Code provides for an active role of Bankruptcy Courts in overseeing reorganization plans, excessive judicial intervention/activism may hinder timely resolutions by entangling commercial decisions in prolonged legal scrutiny. Although court oversight is essential for fairness and legality, the risk lies in courts overstepping into managerial or restructuring decisions best left to business experts, potentially delaying or distorting outcomes. Secondly and lastly, the hectic process with constant judicial intervention takes four to five years for proceedings to conclude.

Analysis of CRA 2018

The creation of the CRA 2018 is the first time that Pakistan has come up with specific legislation for the rehabilitation and reorganization of financially distressed companies. Therefore, the CRA 2018 tries to cover an inherent gap in our corporate insolvency law. Considering the American Model a great model of rehabilitation, our legislature promulgated the insolvency law along the same lines. However, before implementing any foreign regime, it is necessary to consider the socio-legal and economic conditions of the country. If both do not align, either the foreign law must be prohibited, or it should be moulded enough to take into account the local realities of the society.

[10] Mark E. Budnitz, 'Chapter 11 Business Reorganizations and Shareholder Meetings: Will the Meeting Please Come to Order, Or Should the Meeting Be Canceled Altogether?' (1990) 58 GWLR 1214.

[11] Ruth Lane Neyens, 'Principles of Corporate Restructuring and Asset Resolution' (2002) 8 LBRA 371–394.

Firstly, in assessing the viability of importing the provisions of the US Code in Pakistan, it is necessary to appraise 'whether the institutional configurations, ownership and control patterns, and the incentives of stakeholders are similar in both jurisdictions.'[12] In Pakistan, most big companies are family-owned corporations with accumulated shareholding and fusion of control and ownership.[13] Therefore, where the family members are the owners and managers of the family firms, no question of personal guarantees arises. Before extending credit in favour of the companies, the creditors demand personal guarantees from the managers of the company, but in Pakistan, since the family members are also the shareholders of the company, the demand for personal guarantees becomes redundant.

Secondly, as noted in the previous section, the proceedings under Chapter 11 are cumbersome, and Pakistan lacks state capacity and institutional complementarity to carry out such proceedings. There are specialized Bankruptcy Courts in the United States that deal with matters related to insolvency. However, under Section 3 of the CRA 2018 the responsibility is handed over to the High Courts of Pakistan. It means the judges, who might not have a comprehensive knowledge of insolvency proceedings, will adjudicate upon the matters of rehabilitation, which will ultimately delay the finality of the proceedings. In contrast to Pakistan, a country like the United States usually takes four to five years for proceedings to conclude. However, considering the delay tactics in Pakistan, it will take a lot more time here.

Thirdly, the provisions of the CRA 2018 do not extend to or take into account smaller companies. For a company to be considered financially sick under the Act, its outstanding or unpaid debts must amount to a minimum of Rs. 100 million. Otherwise, it cannot file a petition in the High Court. In the Companies Act, 2017 (the '2017 Act'), companies are divided into three categories. In the 2017 Act, a small-sized company is a company that has a paid-up capital of Rs. 10 million.[14] However, no such criterion is defined for the companies in the CRA

[12] Ijaz (n 9) 213.
[13] Ali Cheema, Faisal Bari, and Osama Siddique, 'Corporate Governance in Pakistan: Ownership, Control and the Law' in Sobhan Farooq and Wendy Werner (eds), *Comparative Analysis of Corporate Governance in South Asia* (Bangladesh Enterprise Institute 2003).
[14] The Companies Act 2017, sch III.

2018. Therefore, if a company starts its business with only Rs. 1 million, it will not be possible for it to raise its capital to a maximum of Rs. 100 million and apply for rehabilitation. Other jurisdictions, like the United States and the United Kingdom, cater to the needs of small and medium-sized industries and have special provisions for their rehabilitation. A developing country like Pakistan must not treat businesses of different sizes in a similar way and promulgate a regime enabling small industries to thrive.

Fourthly, the CRA 2018 does not provide any provisions for an initial inquiry of the company filing a petition for rehabilitation regarding its financial condition. Since the Act requires no prior investigation, the company having enough assets may raise its loan to Rs. 100 million to file a petition in the High Court and, later on, avail a moratorium just to delay the payments of creditors, thus defrauding them. This problem can be overcome with a specific provision of initial inquiry that will be initiated once the debtor company has filed a petition for rehabilitation. With such an investigation, fraudulent cases can be sorted out at the initial stages, saving the High Court's time and protecting the creditors' interests. A feared lacuna is that there will be no effective implementation of this provision because of the lack of state capability and checks and balances, i.e., who and under whose supervision the initial inquiries will be made.

Lastly, there are many other shortcomings in the Act; there is no mechanism for the timely detection of financially sick companies, which will endanger the interest of creditors; no fixed term of a moratorium; no requirement of adequate disclosure; and no imposition of penalties. Non-imposition of penalties is not that much of an issue as any Bank, as a creditor, needs money from the debtor. Therefore, by imposing penalties, it will likely become more difficult for a bank to get its credit back. Nonetheless, all these lacunae will be discussed in detail in the upcoming sections analysing the CRA 2018 in-depth by comparing it with the standards set by the World Bank and the United Kingdom's insolvency law.

Analysis of CRA 2018 on the Basis of the World Bank Principles

The World Bank provides various principles of corporate insolvency that are important in evaluating domestic insolvency laws. These principles are mostly carved out of the practices employed in developed countries. Therefore, 'there is a wide divergence of national insolvency law systems, but there exist common and uniform aspects of best practices within these systems, and these different systems have therefore been utilized to develop a global standard of best practices to benchmark the development of effective domestic insolvency regimes.'[15] This section seeks to contrast the principles of the CRA 2018 with the international benchmarks provided by the World Bank.

I. Striking a Balance between Liquidation and Reorganization

One of the aims of any insolvency law should be to strike a balance between liquidation and reorganization. The existence of companies, being a vehicle for commercial development, is a basic need of an economy. In a society where businesses are usually funded through credit, an effective mechanism is required to support them. Therefore, adequate relevant legislation is necessary to protect the interests of companies and their creditors. In Pakistan, the CRA 2018 primarily deals with the reorganization of a company and enshrines only two provisions regarding the winding up of a company. Section 18 of the Act enshrines that an application filed by the debtor for its rehabilitation can be converted into winding-up proceedings either because of the failure to achieve the acceptance of rehabilitation in twelve months from the appointment of an administrator or because there is some sort of fraud in the petition filed by the debtor. Besides these two grounds, the CRA 2018 does not provide any other basis for the winding up of the company.

The grounds on which the rehabilitation proceedings will be converted into winding-up proceedings are very vague. Firstly, since the whole process is court-driven, the language and the use of the word 'may' in Section 18 suggest that the transition from one proceeding to another will be at the discretion of the High Court, and the same is not mandatory for it. Secondly, since it is almost impossible to prove fraud in contractual matters, it is highly unlikely that the criterion enshrined in Section 18 will be fulfilled, thus rendering the conversion of rehabilitation proceedings to winding-up impossible. Hence, it can be concluded that the CRA 2018 fails to strike a balance between liquidation and reorganization and does not allow an easy conversion of proceedings from one to another.

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[15] Terence C. Halliday and Bruce G. Carruthers, *Bankrupt: Global Law Making and Systematic Financial Crisis* (SUP 2009) 18.

Moreover, it must be noted that there can be several reasons for the company's failure and, ultimately, insolvency. It is not always the fault of the company's management, but certain circumstances, like changes in market dynamics, can arise over which the company has no control. For instance, a company can fail due to its product losing its value because of a new invention by a competitor. Therefore, 'such realities require a law that facilitates rescue when the business is viable and liquidation when it is not and transitions from one proceeding to another.'[16] However, the history of insolvency laws in Pakistan reflects that Pakistan has been unable to strike a balance between liquidation and reorganization of companies. The Companies Ordinance 1984 dealt primarily with the liquidation and winding up of companies. It contained 149 sections related to liquidation, while rehabilitation provisions amounted to only six.[17] Later on, the CRA 2004 appeared to be inconsistent with the expressed policy goals of rescuing and liquidating a company. Now, we have the CRA 2018, enshrining only two provisions of liquidation out of 49 sections related to rehabilitation. Therefore, it can be argued that our legislature has failed to strike a balance between the two competing interests.

Lastly, according to the criteria set by the CRA 2018, only companies with debt of Rs. 100 million or more are eligible to apply for rehabilitation. No such mechanism is provided for small companies, hindering their chances to thrive. In such a situation, the CRA 2018 has failed to strike a balance between liquidation and reorganization and to fulfil its primary responsibility of rehabilitation by not offering any support to small industries.

II. Maximization of Value of Assets

Another aim of the World Bank's insolvency principles is that an insolvency framework should maximise the value of a company's assets and recoveries by the creditors. To evaluate whether the CRA 2018 maximizes the value of assets for the

[16] Fancy Chepkemoi Too, 'A Comparative Analysis of Corporate Insolvency Laws: Which is the best option for Kenya?' (2015) NTUP 116–117.

[17] World Bank, 'Pakistan: Strengthening the Insolvency Regime' (June 2011) <https://documents1.worldbank.org/curated/en/362211468145473381/pdf/684690ESW0WHIT0he0Insolvency0Regime.pdf> accessed 20 December 2024.

benefit of the creditors, it is necessary to analyse certain provisions of the CRA 2018.

Firstly, under Section 12 of the CRA 2018, on application by the debtor company, the High Court can pass an order of stay (moratorium) for the preservation of the assets of the debtor, shareholders, directors, and guarantors against the recovery of claims by the creditors. The stay will be lifted on the confirmation of the rehabilitation plan under Section 14 or the dismissal of the case under Section 17 of the Act. In both Sections, no definite time limit is given for the High Court to lift the stay. The stay on the debtor's assets means the assets will not be sold, transferred, repossessed, or mortgaged for that time. Due to this, the creditors cannot recover their money for that time. This provision can be misused by the debtor to delay the proceedings to keep its assets intact so that the creditors remain devoid of their due amount. Therefore, this provision does not align with the World Bank's principle of maximizing the firm's assets and recovery by the creditors.

Similarly, rather than facilitating debt recovery, Section 4 of the CRA 2018 has made it more difficult. After confirming the Rehabilitation Plan under Section 14 of the CRA 2018, the aggrieved party can file an appeal in the High Court against the order made by the Judge in original civil jurisdiction. Therefore, this mechanism of appeal can delay the finalization of the rehabilitation. Thus, it can become an incentive for the debtor to file an appeal to further defeat the recovery proceedings by the creditors.

III. Recognise Existing Creditors' Rights

The standards set by the World Bank suggest more than the recognition and ranking of the creditors by adding a requirement of a predictable and established process. In the insolvency waterfall, the different creditors will have priority, starting from fixed charge holders to the debts owed to directors of the insolvent company. In between come liquidation expenses, preferential claims of employees, floating charges, unsecured creditors, and contractually deferred debts. Section 20 of the CRA 2018 does safeguard the interests of the creditors by appointing the administrator over the assets of the debtor company. However, the Claims and Interest Provision (Section 31) of the CRA 2018 does not categorically state all existing creditors' rights by specifically mentioning them. That being said, the insolvency waterfall is not clearly defined in the Act; therefore, the creditors do not know if they will be getting anything in return. This is one of the biggest drawbacks due to which foreign direct investors hesitate to invest in Pakistan, as there is always a risk of not getting credit back. Therefore, as far as gauging the predictability and consistent application of the CRA 2018 is concerned, the analysis of delay in proceedings in the above segments and the unclear wording of Section 31 reflect that there are no such clearly established rules for ranking priority claims of different creditors.

IV. Prevent the Improper Use of the Insolvency System

The World Bank's principles for effective insolvency emphasise preventing the improper use of the insolvency system, promoting market discipline, and ensuring the stability of financial systems. This involves establishing clear rules, incentives, and procedures to prevent misuse and ensure fair treatment of all stakeholders. The analysis of the last three principles shows that the CRA 2018 does not ensure a transparent and predictable insolvency law and prevent its improper use. Neither does it strike a balance between restructuring and liquidation of a company, maximizing its assets, or protecting the rights of the existing creditors. Although Section 26 of the CRA 2018 has mandated the creation of the Creditor and Shareholder Committee, the pro-debtor regime remains intact, especially in the case of voluntary filing under Section 6 of CRA 2018, in which the debtor has been given an exclusive right to file a reorganization plan.

Studies conducted by the World Bank have concluded that the State should have a minimal role in the resolution of corporate reorganization and asset management of the companies. The principles proposed by one of those studies include the restriction of the State's role in facilitation and coordination, creating stringent enforcement mechanisms, and giving way to informal corporate workouts. However, contrary to these principles, the whole insolvency system under CRA 2018 is dependent on the courts in Pakistan. For instance, under Section 14 of the CRA 2018, even if the creditors, with a majority of two-thirds, have accepted the rehabilitation plan, the final discretion lies with the High Court as to accept it or not.

Lastly, as already discussed, most of the big industries are family corporations with a strong fusion of control. That is why there is 'a substantially higher risk of pro-shareholder expropriation at the expense of creditors and the company through proceedings under the CRA.'[18] While courts may still maintain discretion to block the shareholder meetings in cases of abuse, there is no predictability, even in the United States, concerning the type of actions the courts will block or allow, thus giving management strongly aligned with the shareholders ample room to manoeuvre.

CRA 2018 in Comparison with the United Kingdom's Insolvency Law

After an in-depth analysis of CRA 2018 in comparison to the World Bank principles, this section analyses Pakistan's rehabilitation regime in comparison to one of the Commonwealth countries. The Commonwealth state chosen for this paper is the United Kingdom due to certain reasons. Firstly, Pakistan is a post-colonial country in which common law still prevails as a residual law. The procedure of insolvency enshrined in the 2017 Act is also based on the United Kingdom's insolvency regime. Secondly, most jurisdictions worldwide have adopted the United Kingdom's insolvency regime, including but not limited to Canada, Australia, and India. Thirdly and lastly, the United Kingdom's insolvency regime is the product of the evolution of law in various centuries, i.e., it has constantly evolved with changes in time. The latest amendment in the United Kingdom's insolvency regime was in COVID-19, which shows that the law was immediately moulded according to the changing times and the needs of society.

At this time, there are two different statutes in Pakistan that regulate the liquidation and rehabilitation of companies separately. One of them, the CRA 2018, is based on the American model, and the other, the 2017 Act, follows the United Kingdom model, while neither of them takes into account the local context. Perhaps the problem might not have arisen with the simultaneous implementation of both statutes, but certain provisions of both laws are contradictory to each other. For instance, the mediation mechanism for solving creditors' and debtors' problems is available in both statutes. Under Section 10 of the CRA 2018, the High Court appoints the mediator who will turn to it after mediation between the parties, and

[18] Ijaz (n 9) 214.

who will ultimately pronounce the decision. Moreover, there is no time limit in the CRA 2018 for the process of mediation to be completed. On the other hand, under Section 276 of the 2017 Act, the SECP or the Appellate Bench appoints a mediator and approves his mediation. The mediator must complete the process in 90 days.

The whole situation makes the implementation of statutes redundant. In such a disorganised system, it is unclear in which situation the courts will refer to which statute. To overcome this problem, the United Kingdom, by consolidating the Insolvency Act, 1985 and the Companies Act, 1985, came up with a single statute, i.e., the Insolvency Act, 1986, enshrining the provisions of liquidation and reorganization. Therefore, to avoid ambiguity, a single law should be enacted in Pakistan, discarding the provisions in contravention of each other.

There are three types of winding up under the 2017 Act: (i) winding up by the court; (ii) voluntary winding up; and (iii) winding up subject to the supervision of the court. Section 301 of the 2017 Act provides a vast list of circumstances (clauses a-m) under which the court can order the winding up of the company. Whereas, in Section 122 of the Insolvency Act, 1986, only a few circumstances are listed in which the court has the power to wind up the company. Thus, the highly court-driven process enshrined in the 2017 Act does not strike a balance between liquidation and reorganization of the company, and instead favours winding up. Moreover, the Administrator, under Section 291 of the 2017 Act, is given stringent powers of management of affairs of the company, with the directors ceasing to perform their functions. On the other hand, Section 4 of the Insolvency Act, 1986 confers the major control of the company to the Administrator but does not snatch all the powers of the company's directors, carrying out the company's daily functions. This provision strikes a balance between the interests of creditors and debtors and does not exploit one by favouring the other. The three purposes of the administration defined in the Insolvency Act, 1986 are defined as '(a) rescuing the company as a going concern, (b) achieving a better result for creditors as a whole than would be possible in an immediate liquidation, and (c) realising the property to make distributions to one or more secured or preferential creditors.'[19]

[19] Insolvency Act 1986, sch B1 [3].

Like CRA 2018, another big loophole of the 2017 Act is that it does not provide the hierarchy of the creditors' waterfall. It is left to the discretion of the courts to decide the hierarchy as to which creditor will be given preference over the other. Although it is understood that secured creditors will come first compared to unsecured ones, there is no defined structure in the Act. Due to the absence of a defined structure, the courts are unable to figure out whose claim to prefer in the list of creditors.

On the other hand, Section 175 of the Insolvency Act, 1986 provides a structured hierarchy of the creditors' repayments in the case of insolvency. Therefore, this Act prevents arbitrariness in the proceedings because the hierarchy is already defined, and the courts do not have the discretion to define their preferences on their own.

In comparison to Pakistan, India, in 2016, adopted a single statute enshrining the provisions for both the reorganization and liquidation of a company. The Indian Model is based on the United Kingdom's Insolvency Act, 1986, but it promulgated the Act while acknowledging the local limitations, complex social practices, and completely different norms of society. For instance, while imitating the English insolvency law, we also gave jurisdiction to the High Courts to adjudicate upon insolvency matters. However, if the limitation of lack of insolvency knowledge possessed by judges had been considered, a separate tribunal would have been established in which the judges would be insolvency experts. India kept this constraint in mind and established a separate 'Debts Recovery Appellate Tribunal' to entertain matters under the Indian Insolvency and Bankruptcy Code 2016.

This paper, by analysing both statutes in detail and in comparison to the World Bank principles and the United Kingdom's Insolvency Act, 1986, concludes that these Acts do not provide an effective insolvency regime catering to the modern needs of the day, thus requiring crucial amendments in light of the local realities of the country. The last section of the paper provides some recommendations that can be considered to address some of the major problems in our insolvency regime.

Recommendations

First, the CRA 2018 establishes a pro-debtor regime and enshrines a highly court-driven process. In contrast, an informal mechanism should also be available to companies and their creditors so that they can reach a mutual decision in case of insolvency. For instance, rehabilitation might not be a viable option when it comes to the rehabilitation or liquidation of a big enterprise. The reason is that a big company will have many creditors having conflicts of interest. Every creditor has to be on board for restructuring and approving schemes of arrangements. Therefore, in such a situation, liquidation will be a viable option. On the other hand, reorganization will be a feasible solution for small companies, having a few creditors who, by mutually deciding with the shareholders of the company, can go for restructuring. However, besides promoting informal resolutions, legal backing in the form of a particular statute, like the CRA 2018, is necessary because it is not only the creditors and debtor companies whose interests are at stake, but there are certain other stakeholders, such as customers, who should be protected by law in case of wrongdoing.

Second, Section 36 of the CRA 2018 provides that this Act will not operate in derogation to any other law. However, the 2017 Act exists, which also contains the procedure for the winding-up of the company. Moreover, it is important to note that the procedure for winding up, as defined in the 2017 Act, is different from that of the CRA 2018. This means that the presence of each of the statutes will become redundant because both cannot be implemented simultaneously. Therefore, it would be feasible to amalgamate the provisions of both legislations and enshrine them in a single statute. Otherwise, parallel statutes being implemented once will lead to confusion.

Third, under the CRA 2018, the High Courts have the jurisdiction to adjudicate insolvency matters. As noted earlier, in addition to the plethora of cases already pending before the High Courts, the lack of expertise and knowledge of the existing judges in the field of insolvency will not result in the effective adjudication of insolvency proceedings. Therefore, separate and independent Bankruptcy Courts should be formed under the CRA 2018 as enshrined in Chapter 11 of the US Code. Even in the United States, despite the presence of special courts, the proceedings take almost four to five years to conclude. One can imagine, considering the Pakistani justice system, how much time the High Courts will take to conclude insolvency matters.

Fourth, an amendment should be made to Section 6(c) of the CRA 2018, and companies' categories (small, medium, and large) should be protected under this statute. Currently, big companies with a debt of 100 million can file a petition for rehabilitation. The insolvency laws of developed countries like the United Kingdom and the United States support small industries' ability to thrive. Therefore, the CRA 2018 should devise a new criterion and house all the small, medium, and large-sized companies.

Lastly, the CRA 2018 should provide a fixed duration of the moratorium. Currently, since there is no fixed duration of stay on the proceedings under this Act, the same favour likely given to the debtor can be abused to gain an advantage over its creditors. Besides the two grounds provided in the Act, the High Court itself can lift the stay upon the confirmation of the plan of rehabilitation. Nonetheless, the time limit is not given in the Act, during which the High Court must confirm the plan, which can again give undue favour to the debtors. Therefore, to protect the creditors' interests and fulfil the principles of justice, a time limit must be provided in the CRA 2018 or the Limitation Act, 1908.

Conclusion

In conclusion, Pakistan's current insolvency regime is not creditor-friendly as it unduly favours the debtors. This regime suffers from inherent problems of not being well-equipped for business organizations and being unable to fulfil the aims set by the World Bank. Restructuring efforts in Pakistan should be based upon the international best practices, like those established by the United Kingdom, while being cognizant of Pakistan's local legal structures, institutional capacity, and socio-economic realities, and not by forfeiting these norms. Lastly, along with the changes in legislation, political will and commitment are necessary in implementing the reforms brought by the legislature. Being a developing country, Pakistan suffers from an inadequate rule of law, financial and political instability, and judicial corruption. Thus, all of these factors hinder the attraction of investment in the country. However, once we have an effective insolvency law in place, Pakistan will become a suitable place for both local and foreign investors that will, ultimately, boost the economy and address challenges like poverty and unemployment in the country.

Seeking Supremacy: The Pursuit of Judicial Power in Pakistan

Muhammad Jalal Yousaf Tarar*

Introduction

Pakistan's judiciary, specifically the superior judiciary (i.e., the five High Courts and the Supreme Court) forms the core and substantive part of the country's legal, political, constitutional, social, and even economic infrastructure. The judges of the superior judiciary have opined on matters as diverse as electoral laws, enforced disappearances, the environment, child marriages, and even encroachments on public spaces, amongst many other subjects. The politicisation of the judiciary (or, as some have termed, the judicialization of politics) has become a focal discussion point in mainstream media and academic circles, especially in the *suo motu* era. Some have focused primarily on the alleged differential treatment meted out to political parties, depending on who controls the roster at any point. The Constitution of the Islamic Republic of Pakistan, 1973 (the 'Constitution') is the core guiding principle of judicial review in the Pakistani context. Indeed, following the conclusion of the Second World War, global rhetoric can be said to have shifted from ideological concerns to the enforcement and upholding of universal human rights. It is, then, proper that the scope of analysis in the reviewed book in this essay starts roughly from that point in South Asian, specifically Pakistani, history.

An Audience-Based Framework

Yasser Kureshi's *Seeking Supremacy: The Pursuit of Judicial Power in Pakistan*[1] makes a tremendous contribution to the studies of judiciaries in post-colonial South Asia. Published by the Cambridge University Press in 2022, it provides a critical inquiry into how and why the judiciary evolved from being an institution that historically legitimized military rule to one that has increasingly challenged both military and civilian power. The central argument of the book is that the shift in judicial behaviour is best understood through an 'audience-based' framework,

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* Muhammad Jalal Yousaf Tarar is a fourth-year law student at the Shaikh Ahmad Hassan School of Law, Lahore University of Management Sciences. Tarar's interests include judicial politics, legal history, and critical readings of postcolonial institutions.

[1] Yasser Kureshi, *Seeking Supremacy: The Pursuit of Judicial Power in Pakistan* (CUP 2022).

which focuses on how the judiciary's institutional preferences are shaped by the political, social, and professional networks it interacts with.

Yasser Kureshi is a rising scholar in the field, associated with the University of Oxford. He completed his undergraduate programme in Philosophy, Politics, Economics, and History from the University of Pennsylvania, before pursuing a Juris Doctor certification from the Boston University School of Law. He was then appointed as a Senior Teaching Fellow with the Department of Politics and International Studies at the School of Oriental and African Studies. This was followed by his appointments as the John and Daria Barry Postdoctoral Fellow in Constitutional Theory and Law at the Trinity College and then as a departmental lecturer for the Contemporary South Asian Studies Programme in the Oxford School of Global and Area Studies at the University of Oxford. His papers have been published in the Journal of Conflict Resolution, Comparative Politics and Democratization. This book arose out of Kureshi's dissertation titled *Judging the Generals*, with a similar line of thought and thesis, completed during his years at Brandeis University, for which he was also conferred with the Edward S. Corwin Award by the American Political Science Association in 2019.

A Periodised History of Judicial Behaviour

The book begins dramatically with a description of the events surrounding the downfall of former Pakistani President Musharraf in 2007-08, which have been termed subsequently as the 'Lawyers Movement'. Emboldened by the refusal of Chief Justice of the Supreme Court ('CJP') Iftikhar Chaudhary to resign in the face of pressure from military circles following *suo motu* cases on military interests, along with pictures of the Chief Justice being manhandled by Islamabad Police as he was forced out of office, bar associations galvanised into action. The initial pretext was the restoration of the CJP, but soon the movement became gigantic as lawyers and civil society activists poured into the streets to protest Musharraf's unconstitutional grip on power. In his own words, these were formative years for author Yasser Kureshi, who has since specialised in researching and writing about judicial populism in post-colonial societies.

Kureshi uses this anecdote as the launch pad for the central question of the book, i.e., what explains judicial behaviour in terms of its acceptance or resistance to military regimes and their actions? In his introduction and literature review, he examines several competing theories that try to answer this question, but all fall short when tested against the mettle of his analysis. The strategic interest theory that judges work to preserve survival fails to explain the high-risk judicial assertiveness, e.g., in the Musharraf era, when the military was dominant, and survival lay in allying with the military. The ideological interest theory treats judicial ideology as the precursor for their action, but tends to overlook the role of external factors in shaping the ideology, and, for Kureshi, places the cart before the horse.

Kureshi sympathises with the institutional approach (appointment processes shaping norms) but combines it with the role of the external audience of the judiciary to arrive at his original 'audience-based framework'. His argument is that in Pakistan, originally, judges were primarily accountable to the military, which had a decisive role in their appointments, promotions, and professional status. However, over time, the influence of the military waned as bar associations and civil society organizations became more important. This shift in judicial audiences led to a transformation in judicial preferences, making courts more willing to challenge military rule. For the reader who is uninterested in complex academic theories about bureaucracies and institutional linkages, this section may appear monotonous and unexciting. But for academics, scholars, jurists, and senior lawyers, this deep dive into theory is a reassurance about the grounding of Kureshi's thesis.

Based on his theoretical assertions, Kureshi divides the judicial history of Pakistan into time periods, depending on the attitudes of the judiciary. Section II is titled 'The Loyal Court' and deals with the years between 1947 and 1977. These were the years of extreme constitutional and political instability in Pakistan, with military dictators Ayub Khan and Yahya Khan controlling the power apparatus of the country, two constitutions, both of which were abrogated, the secession of East Pakistan as Bangladesh, and the first general election in the country, followed by another military coup orchestrated by General Zia-ul-Haq. Kureshi argues that the superior judiciary during this time closely followed the lead of the military in the political setup of the country, eventually replacing the bureaucracy as the junior partner to the military in the repression of democracy. The author explains this by noting that during this time, the military almost completely controlled the fortunes of the superior judiciary: appointments, promotions, dismissals. They were aided, initially, by the Government of India Act, 1935, a colonial-era leftover and temporary supreme law until a constitution could be promulgated to replace it. The colonial powers had prioritised order over the rule of law, a habit that was inherited by post-colonial rulers. This was coupled with another crucial reason why the military alone remained the critical audience for the judiciary—the lack of any substantive and longstanding relationship between the judiciary and the country's bar associations.

The judges at this time were more often than not educated in elite Western universities, and did not share the sense of camaraderie with bar associations that they would come to espouse. Kureshi rightly distinguishes between the bar councils (semi-governmental organisations chaired by the Attorney- or Advocate-Generals) and the bar associations (voluntary, regulative organisations) in this analysis; bar councils had a closer relationship with the judiciary, compared to the bar associations, because the state had more stakes in it—the state being populated by the bureaucratic and military elite that had shared spaces and ideology with the bar associations and the western educated judiciary.

Section III is titled 'The Controlled Court' and deals with the years between 1977 and 1999. Here, Kureshi begins to see a fragmentation between the military and the judiciary, as the latter's critical audience begins to shift from the military to the bar associations. Kureshi very meticulously sets out to unpack the 'constrained autonomy' that the judiciary exercised under military regimes and their historical oscillation between subservience and strategic assertion of power. As the reputations of the judges became a greater concern, largely due to the detriment suffered during earlier years, younger lawyers became increasingly critical of the military-judiciary nexus in the pursuit of unlawful and undemocratic interests. Bar associations, by this time, had become more politically active as mainstream political parties were driven out of the socioeconomic and political sphere. Therefore, judges became more protective and conscious of what lawyers thought of them, as their endorsement or condemnation of judicial decisions had the power to influence the public perception about judicial legitimacy, especially during periods of military rule.

Another reason for the judiciary's attempts at diversifying its support base had to do with the fact that the Constitution had granted the superior judiciary substantial powers in the enforcement of fundamental rights and the arbitration of major disputes. When the military returned in 1977, it sought to reverse this grant of power, which the judiciary vehemently opposed. During this period, the judiciary was highly protective of its rights, duties, and powers in the face of challenges from external forces; strategically asserting its autonomy in certain cases while normalizing judicial restraint and subjugation in others, often as a pragmatic move to maintain judicial operation during periods of dictatorship or authoritarianism. As such, it continued to side with the military on other matters, not related to the privileges and powers of the judiciary, e.g., validating General Zia's coup and rule and making it difficult for popular political parties to pursue their mandates. In this sense, the judiciary continued in its dislike for popular democracy. The 'Controlled Court' was thus not only a result of the relationship between the state and the judiciary but also embedded within the politics of the legal community. This reveals a more complex reality of how the legal community alternated between selfishly sustaining itself with the very system it sought to fight against from time to time.

Finally, the last section discusses the re-emergence of the judiciary as a key stakeholder in the national power dynamics, embodying the very essence of its title—'The Confrontational Court'. It describes the blatant rejection by the judiciary of what the military believed was its prerogative in the partnership, 1999 onwards. The cracks that had appeared in the previous section widened to the point of a complete break in 2007-08, when Musharraf was forced out of power by a popularly elected Parliament and a resolute legal community, ultimately leading to the reinstatement of CJP Iftikhar Chaudhary. Initially, when General Musharraf launched a coup in 1999, the judiciary surrendered and validated it. However, this time around, it was determined to confront the military establishment head-on and adopt a no-compromise stance on fundamental rights and judicial independence.

One of the strongest demonstrations of this shift was the Supreme Court of Pakistan's ('Court') spree of *suo motu* cases against military interests and its refusal to award the death penalty to Nawaz Sharif, unlike 1979's verdict to hang Zulfiqar Ali Bhutto. Both were popularly elected prime ministers, and the judiciary's refusal to tow the military's line symbolised its break from its erstwhile senior partner. Kureshi argues that by this time, the process of judicial appointments had completely shifted into the hands of the judiciary itself (specifically through the *Al-*

Jehad Trust case[2] and the 19th Constitutional Amendment[3]), which meant that the military was no longer a critical audience capable of determining the fortunes of the judges. The judiciary became increasingly assertive as it introduced the notion of *suo motu* in the already-loaded arsenal of judicial review. Through this mechanism, the judiciary challenged the military's economic, political, and strategic privileges and crafted a table for itself in policy-making circles. The *suo motu* notices issued on the question of enforced disappearances particularly irked Musharraf and the military. As a result, bar associations became the foremost audience to which judges directed their opinions and decisions. This collaboration reached its high point in the 2007 Lawyers' Movement.

This growing alignment between the judiciary and the legal community not only reshaped judicial activism but also reflected a broader shift in the composition of the superior judiciary. The judges holding positions in the superior judiciary during this time were more likely to be educated in Pakistan rather than the West, leading to a weakening of institutional linkages with the country's elite sectors. Indeed, both CJP Iftikhar Chaudhary and Justice Saqib Nisar (who used *suo motu* much more frequently than others) were educated in Pakistan. Kureshi argues that this was important in developing a sense of unity with the bar, most of whose members were also educated in Pakistan. As elite lawyers from wealthier families were uninterested in bar politics and declined judicial appointments, the judicial playground opened up for their middle-class, Pakistani-educated counterparts.

Unpacking the Argument

For Kureshi, the distinction between Western and Pakistani legal education was crucial in shaping judicial behaviour. Western-trained judges impressed lawyers with procedural expertise, while Pakistani-educated judges, focused on outcomes, sought legitimacy through bold rulings. As the judiciary shifted towards the latter, its emphasis on dramatic justice fuelled judicial activism, culminating in the Lawyers' Movement, where judges and bar associations united to challenge

[2] *Al-Jehad Trust v. Federation of Pakistan and others* PLD 1996 SC 324; this judgement had held that Articles 177 and 193 mandate the inclusion of the Chief Justices of the Court and High Courts in the process of judicial appointment.

[3] Through the 18th Constitutional Amendment, the process of judicial appointments gained significant parliamentary oversight; the 19th Constitutional Amendment reversed most of the changes, returning the process to the plan set in the *Al-Jehad Trust* case.

military authority. The following chapter (i.e., the epilogue) of the book deals with contemporary problems faced and navigated by the judiciary, particularly the quashed presidential reference against Justice Qazi Faez Isa. Kureshi argues that a new trend seems to be emerging, one of divided benches. This, he holds, is largely because audiences have shifted again. Bar associations remain important, but so do political parties and the executive, which play an important role in legislating on judicial appointments and other matters of concern to the judiciary. Judicial alignment with this or that political faction has started playing a role in their evaluation of cases, which have increasingly started demanding adjudication on political disputes, making us witness a decisive split in benches. Also, this has cast serious doubt on the impression of judicial neutrality, and if such intervention continues, Kureshi predicts, then public faith in the judiciary will wane to the point where the judiciary is considered irrelevant.

While the book does not cover the Supreme Court (Practice and Procedure) Act, 2023, nor the Supreme Court (Practice and Procedure) Amendment Ordinance, 2024, Kureshi would undoubtedly point to conflict within the benches of the superior judiciary as a signification of this new trend. The fact of increased parliamentary intervention into judicial management has split the judiciary significantly, both formally—in judgements[4]—and informally, as there are (unverified) rumours of judges responding antagonistically to other judges' opinions in separate cases.[5]

At the same time, Kureshi holds that the judiciary has realised it cannot afford to completely alienate the military and intelligence agencies, at least not until judges are being surveyed in their personal and professional capacities. The leaked data of the family of Justice Babar Sattar of the Islamabad High Court earlier this year is an unfortunate but accurate example in this regard.[6] This attempt to keep skeletons in the closet hidden requires at least a working relationship with the

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[4] *Raja Amer Khan and another v. The Federation of Pakistan* 2023 SCP 310 and 2024 SCP 159 (majority and minority opinions, respectively).

[5] Hasnaat Malik, '"Ongoing tension" between CJP, Minallah intensifies' *The Express Tribune* (Islamabad, 26 July 2024) <https://tribune.com.pk/story/2483020/ongoing-tension-between-cjp-minallah-intensifies> accessed 30 September 2024.

[6] Correspondent, 'IHC seeks X's help in judge's data leak' *The Express Tribune* (Islamabad, 2 July 2024) <https://tribune.com.pk/story/2476036/ihc-seeks-xs-help-in-judges-data-leak> accessed 30 September 2024.

military. But this realisation has not affected significant moments of resistance. However, how far the resistance goes and whether it is replicated at all levels is questionable, especially given the arguably light and paradoxical judicial response to the letter filed by judges of the Islamabad High Court against surveillance and intelligence intrusion in their personal and professional conduct, as the matter was forwarded to the executive for inquiry.[7]

The final chapter of the book, titled 'Conclusion and Comparative Perspectives', looks at how the audience-based framework of analysis used in this book can be applied to other societies, such as India, Turkey, and Egypt. The case of India is significant because it has experienced the same colonialism that Pakistan has, allowing an interesting comparative-contrasting analysis. The latter two countries have had a significant military presence in the political sphere, so they share this experience with Pakistan.

In terms of the methodology of the author, some feedback may be provided. Yasser Kureshi relies primarily on his undoubtedly impressive and exhaustive analysis of Pakistani caselaw. This approach is called 'content analysis' and involves, to some degree, the generation of quantitative, generalisable data from qualitative heaps of information. That is precisely what Kureshi has done. Six charts of figures and ten tables have been used to support the claims made. This approach is sufficiently detailed when the question of the nature of cases is concerned; in other words, even a cursory skimming of a judgement will inform one of the parties involved and the legal questions to be adjudicated. However, where Kureshi comments on the nature of the judgements, it gets a little trickier.

For illustration, consider Table 3.5 'Supreme Court's reported judgements pertaining to military prerogatives (1990-1999).'[8] Kureshi claims that 39% of the judgements were against the military between 1990 and 1994. This figure comes from his analysis of judgements, but can a generalisable claim be made out of this kind of analysis? Moreover, there is no discussion about the degree of opposition in the judgements, nor the kind of cases that were considered. In this regard, one is forced between the rock of accepting Kureshi's (probably but not certainly

[7] See *In the matter of letter dated 25th March 2024 of the Six Judges of the Islamabad High Court* 2024 SCP 162.
[8] Kureshi (n 1) 107.

accurate) claim and the hard place of rejecting his position. However, in terms of the sheer innovation of the approach, Yasser Kureshi deserves all the accolades he gets. Trends and patterns can only be identified and theorised through some input of a quantitative nature. Hopefully, the author will continue to write about these topics, so his scholarly contributions can gain depth.

Another missing element in the book was the role of the Federal Shariat Court, an institution of immense significance since its establishment in 1980. It is all the more important since any decision passed by the Federal Shariat Court and not appealed in the Shariat Appellate Bench of the Court has binding value on High Courts and all subordinate courts.[9] To appeal a decision of the Federal Shariat Court, a special Shariat Appellate Bench of the Court was formed, where the Muslim judges of the Court barely outnumber the *ulema*.[10] While the focus of the book is on the superior judiciary vis-à-vis the political setup of the country, the Federal Shariat Court could have been an important point of discussion.

For instance, the author discusses the concept of military courts and how they have been used in the past by undemocratic rulers to dilute the powers of civilian courts, while also curbing the powers of appeal of the superior judiciary. He could have easily added the example of the Federal Shariat Court, which was originally forcibly created out of thin air by General Zia's regime in a bid for Islamisation of Pakistani law, but also to create a system parallel to the High Courts and the Court. Another way in which the Federal Shariat Court could have been introduced in the discussion was regarding petitions. Article 203-D(1) of the Constitution clearly allows the Federal Shariat Court to take up cases on petition or *suo motu* on the ambiguous criteria of conformity with Islam.[11] Judges of the Federal Shariat Court could have, therefore, challenged military rule on the basis of its non-conformity with Islam, but their unwillingness or inability to do so is neither explained nor described in the book. Unfortunately, this is a gaping hole in what is otherwise an excellent analysis of the behaviour of the superior judiciary *vis-à-vis* other state institutions.

[9] The Constitution of the Islamic Republic of Pakistan 1973, art 203GG.

[10] Constitution (n 9) art 203F.

[11] *Suo motu* powers were granted to the Federal Shariat Court by the Constitution (Second Amendment) Order 1982, art 4.

Similarly, the question of legal education seems inadequately answered by the author. This is a significant issue because the disparity between the legal education in the West and in Pakistan is one of the foundational premises utilised by the author in arguing for the 'audience-based framework'. Most of the sources claiming this disparity are interviews with judges or lawyers, who remain anonymous. Even if one accepts the views of active members in the legal community as valid sources of academic work (which should not be taken for granted, least of all on questions of legal education, since they may not have a fuller appreciation for both systems of education), it remains the case that statements or claims by judges and lawyers are taken at face value. One would find these to be increasingly unreliable when one considers the intricacies of bar politics, a concept the author acknowledges as well.

The fact that bar councils and bar associations have a stake in certifying law colleges as valid institutions makes this issue more problematic. Why would lawyers, potentially working closely with legal education committees in bar councils and bar associations, speak of local law colleges as inferior when it may be their job to maintain the academic standards of those very institutions? In the absence of information on the interviewees, one can only hope that the author took these factors into consideration when planning his research. The same problem can be said to apply to judges who were interviewed, considering most of them were former lawyers as well. In sum, the question of legal education in the West (which the author claims to be more procedural) and in Pakistan (which supposedly is more outcome-based) needs to be understood carefully before any generalisable claim is made, creating a hierarchy in legal knowledge. These are crucial practical questions that every law student and lawyer will have to deal with on a routine basis.

It is contended that such claims be limited to theoretical models, which retain the capacity for exceptions, instead of implying that Pakistan-trained judges are more concerned with the final result than with the procedure. If such a claim is to be made, it needs to be backed with clear evidence that is not at risk of being twisted and cut in a manner that it fits into generalisable, quantitative models. For example, judgements written by Western- and Pakistan-trained judges could be compared, and the author must assume the responsibility for proving that they are qualitatively different from each other. But even that kind of analysis might not be what it would purport to be; after all, can a judgement's quality be measured through its usage of the English language?

These observations do not take away from the tremendous scholarly input provided by Yasser Kureshi, a rising academic who has contributed immensely to our understanding of the roles and behaviours of the superior judiciary in Pakistan. It is an excitingly valuable manual to help us become attentive viewers to the Pakistani judiciary as it navigates perilous waters for the umpteenth time in the country's brief national history. Other literature on this topic is highly anecdotal and personal, which, though beneficial to our understanding, lacks the hardcore, data-driven, and generalisable analysis that comes to us from Yasser Kureshi. It is also often an issue with other books on the subject that they comment in isolated silos, simply unable to keep track with other books describing similar facts or updated theorisation. Kureshi's work, in increasingly sharp contrast, builds on a highly sophisticated survey analysis of theoretical models on judicial institutions such as ours. In that sense, it is much more academic but astonishingly, through its style and general subject matter, retains its readability for the lay reader. Thus, this is clearly the work of an accomplished historian and legal academic who deserves our commendations on this outstanding book.

Conclusion

Yasser Kureshi's Seeking Supremacy is a groundbreaking contribution to the study of judicial politics in Pakistan. Through a rigorous, theory-driven yet accessible narrative, Kureshi deftly charts the shifting power dynamics between the judiciary, the military, and the legal community. His 'audience-based framework' offers an original and compelling lens to interpret the evolving behaviour of Pakistan's superior judiciary—one that transcends simplistic binaries of subservience and defiance. Despite certain omissions—such as the underexplored role of the Federal Shariat Court and the need for deeper empirical grounding of claims about legal education—Kureshi's work remains a landmark intervention.

The book's combination of archival research, content analysis, and comparative insight sets it apart from more anecdotal or ideologically slanted accounts of Pakistan's legal evolution. It captures not just institutional shifts but also the professional and political anxieties underlying judicial conduct in a fragile democracy. For scholars, practitioners, and students of constitutionalism, South Asian politics, and judicial power, Seeking Supremacy is essential reading. It does not merely recount history—it gives us a vocabulary and framework to understand the judiciary's complex and contested journey towards institutional supremacy in Pakistan.