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FOREWORD

Over the past few years, international law has faced significant challenges across multiple fronts, from international armed conflicts to increasingly multipolar global governance. It is imperative to continue generating and engaging in critical discourse on various areas of international law to reinforce its ability to cope with contemporary challenges and to lay the foundation for a consolidated framework capable of responding to future challenges as well.

The importance of the intersection of international law and domestic law is becoming increasingly apparent. International legal standards represent a consensus on standards of law across different sectors, including human rights, environmental law, criminal justice, and much more. It is also pertinent to explore comparative approaches to law to understand how legal systems of States around the world are foundationally similar, working towards the greater respect of the rule of law in their respective jurisdictions.

Volume 8 of the RSIL Law Review hosts a variety of articles across different disciplines of international law and their intersection with law in Pakistan, as well as comparative law. The debates explored across these articles highlight the shortcomings of international and domestic legal frameworks, and how they can be improved through innovative and structured solutions.

As Pakistan's leading private sector legal think tank, RSIL is committed to encouraging such international law discourse from the perspectives of Pakistan and the Global South. This year's Law Review is a testament to our dedication to exploring these pressing issues. We hope this volume sparks your interest in international law, its intersection with domestic law, and its contemporary challenges. We welcome your feedback and look forward to your contributions in shaping future dialogues and debates.

Jamal Aziz
Editor-in-Chief
RSIL Law Review 2024

ABOUT THE RSIL LAW REVIEW

The RSIL Law Review is a journal of international law academia published by the Research Society of International Law (RSIL). It endeavours to be one of the leading law journals in Pakistan. The Review is committed to publishing unique, cutting edge and high-impact pieces from new scholars likely to advance public debate in international, domestic, and comparative law. It reinforces RSIL's desire to sustain and strengthen critical learning, capacity building and legal expertise in Pakistan.

Submissions: The Editorial Team of the RSIL Law Review invites the submission of articles. All submissions must be previously unpublished. The mission of the Review is to publish work that displays written excellence and the highest standard of legal academic analysis. Articles utilising a creative, interdisciplinary approach or addressing comparative law issues as they relate to international and domestic law are also encouraged. RSIL accepts articles (3000 – 8000 words), book reviews and case comments (3000 words each). All those interested should submit a manuscript for review through the submission form available on our website, https://rsillaw.review.

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ABOUT RSIL

The Research Society of International Law (RSIL) is a private sector research and policy institution based in Pakistan. Founded in 1993 by Mr. Ahmer Bilal Soofi, RSIL's mission is to conduct research on the intersection between international law and the Pakistani legal context. Today, it is the largest legal think-tank in Pakistan with a highly qualified research staff, possessing a broad spectrum of specialisations in both international and domestic law. RSIL engages in academic research, policy analysis, and capacity building in order to inform the discourse on issues of national and international importance from a legal perspective and to bring out a positive effect in the domestic legal space.

Our organisational philosophy is based on the view that greater awareness of international law improves the development of a State's domestic and foreign policies and helps Pakistan remain compliant with its international commitments, solidifying its reputation as a responsible member of the international community. As RSIL is a non-partisan, apolitical institution, our mandate is restricted to providing legal analysis on the challenges facing Pakistan without engaging in partisanship or expressing any political biases.

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investment arbitrations and has advised on investment issues in cross-border transactions. She is also serving on the 8-member committee constituted by Pakistan for advising on international law and the 12-member committee constituted to advise on the investor-State arbitration regime in Pakistan. She is a Fulbright scholar, a Weinstein JAMS International Fellow for 2018, and the first lawyer from Pakistan to become a Fellow of the Chartered Institute of Arbitrators, UK (FCIArb). She is the first woman in Pakistan to have qualified as an S.J.D. She is an alumna of the London School of Economics and Political Science.

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MANAGING EDITOR'S NOTE

The Research Society of International Law is pleased to present Volume 7 of the RSIL Law Review. The RSIL Law Review was founded in 2017 as the successor publication to the Pakistan Journal of International Law (2012). It was established upon the vision of Mr. Ahmer Bilal Soofi and Mr. Jamal Aziz, who wanted a publication that highlighted the breadth of research into international law and domestic law in Pakistan. Since 2017, the RSIL Law Review has published a diverse range of articles on policy, social issues, economics, national security and international relations.

The articles in this volume cover a range of issues across the breadth of legal and political disciplines that are of pressing importance in 2024. The first article, by Momina Khurshid, examines the effectiveness of introducing CCTV cameras in police stations to curb custodial torture in line with Pakistan's obligations under the UN Convention Against Torture.

In the second article, Hammad Saleem compares the development of medical negligence jurisprudence in Pakistan with its development in England and Wales and in India, discussing the similarities and differences between the courts' approaches to the subject.

The third article, written by Freiha Jabeen, analyses the inheritance rights framework for transgender persons in Pakistan under Islamic law, drawing a comparative approach with the systems in Iran and India.

In the fourth article, Breshna Rani proposes the development of a domestic ecocide law to enhance Pakistan's environmental protection framework. She contextualises this debate in light of the growing international discourse on recognising ecocide as an international crime.

The fifth article, co-authored by Khadija Zafar and Jhanzaib Ahmad Khan, analyses Pakistan's mental health legislative framework in light of its commitments under international law by comparing the approaches to mental health law adopted by the different provinces.

In the final article, Haniya Rehman and Haniyyah Ahmad highlight the lack of legal and constitutional recognition of ethnic and linguistic minorities in Pakistan and consider how this lacuna can be addressed through multiple avenues.

This volume also includes two book reviews. The first book review, written by Sara Naseer, explores approaches to environmental protection through international trade law in *Freer Trade, Protected Environment: Balancing Trade Liberalization and Environmental Interests* by Carlisle Ford Runge with François Ortalo-Magne and Philip Vande Kamp. The second book review, written by Sufiyan bin Muneer, explores approaches to law, obligations and governance through the perspective of the Qur'anic covenant in *Qur'anic Covenants: An Introduction* by Ahmer Bilal Soofi.

This year's case comment, written by Arooba Mansoor, analyses the 2024 Advisory Opinion of the International Tribunal of the Law of the Sea on Climate Change and International Law and its significance for States Parties to the UN Convention on the Law of the Sea.

The articles in this volume underwent a rigorous peer-review process, with each article being blind-reviewed by two peer reviewers. On behalf of the RSIL Law Review, I would like to thank our peer reviewers for their time, effort and expertise. I would also like to thank Ms. Maha Husain who contributed extensively to the editing and reviewing process of this year's volume.

I hope you enjoy this volume of the RSIL Law Review and welcome your feedback, engagement and continued support in our future work.

Raas Nabeel
Managing Editor
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THE USE OF CCTV CAMERAS TO CURB CUSTODIAL TORTURE UNDER PAKISTANI LAW

MOMINA KHURSHID

Momina Khurshid is a lawyer with experience in both corporate and criminal law. She graduated from the Lahore University of Management Sciences in 2022 and began her career in corporate law at Axis Law Chambers before transitioning to criminal defence work at Bhutta and Saeed Barristers and Legal Consultants. Momina is studying for a Master's degree in Public History at the Central European University and the Tokyo University of Foreign Studies through the Erasmus Mundus scholarship.

ABSTRACT

In 2010, Pakistan ratified the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishments 1984 (CAT), which provides a blanket prohibition on torture under international law. Since then, Pakistan has passed the Torture and Custodial Death (Prevention and Punishment) Act 2022 in fulfilment of its obligations under the treaty. However, there is still much to be done to reduce the high rates of custodial torture suffered by civilians at the hands of the police in Pakistan. This article critically assesses the legal framework related to police conduct and torture in Pakistan and proposes the installation of CCTV cameras as a safeguard against custodial torture. Drawing from international best practices proposed by the UN Committee Against Torture, NGOs working in collaboration with the UN in the prevention of and accountability for custodial torture, and case law from India and Pakistan, the article also provides a policy framework for, administering and monitoring CCTV Camera systems in Pakistani police stations.

KEYWORDS: Custodial Torture, International Law, CCTV Cameras, Convention Against Torture, Pakistan, Monitoring, Police Stations.

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1. INTRODUCTION

Reports of custodial torture by the police in Pakistan are very common.[1] A report by the Justice Project Pakistan found that 1424 out of 1867 medico-legal certificates from Faisalabad between 2006 and 2012 showed conclusive

[1] Amnesty International, *Pakistan: Reports of Torture and Death in Police Custody* (AI Index: ASA 33/05/91, June 1991) 1-41 https://www.amnesty.org/en/documents/asa33/005/1991/en/ accessed 23 November 2024. ('Amnesty International')

signs of abuse.[2] While confessional statements made to the police against the accused cannot be proven in a court of law,[3] the police often use torture to extract information or confessions from suspects.[4] However, Article 40 of the Qanun-e-Shahadat Order 1984 (QSO) provides a puzzling exception to this rule, wherein confessions (or statements otherwise) made during police custody can be proven to be true if supported by a discovery of fact.[5] This provision potentially incentivises police brutality in custody as information disclosed by the accused during the interrogation can be proven in court if subsequently supported by a discovery of fact.

Section 167(1) of the Code of Criminal Procedure 1898 (CrPC) dictates that within 24 hours of an arrest suspects must be produced before a magistrate; however, it is common for suspects to be kept in detention for several days.[6] During this time, detainees are often abused through intimidation, and various forms of torture.[7] Moreover, it is common practice to deny detainees access to relatives or lawyers.[8]

Since the passing of the Torture and Custodial Death (Prevention and Punishment) Act 2022 (TCDA), there have been some improvements in the last few years; however, there is still much room for improvement in terms of policy and standards of practices. This article critically assesses the legal framework related to police conduct and torture in Pakistan and proposes the installation of closed-circuit television (CCTV) cameras as a safeguard against custodial torture – a practice that has proven to be effective in other jurisdictions. Drawing from international best practices proposed by the UN Committee Against Torture, NGOs working in collaboration with the UN in the prevention of and accountability for custodial torture, and case law from India and Pakistan, the article provides a policy framework for administering and monitoring CCTV camera systems in Pakistani police stations.

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[2] World Organisation Against Torture and Justice Project Pakistan, *Pakistan: Universal Periodic Review* (July 2022) https://www.omct.org/en/resources/reports/upr-submission accessed 23 November 2024.
[3] Qanun-e-Shahadat Order 1984, art 38.
[4] Amnesty International (n 1) 3-37.
[5] Qanun-e-Shahadat Order 1984, art 40.
[6] Amnesty International (n 1) 3.
[7] ibid.
[8] ibid.

2. LEGAL HISTORY AND FRAMEWORK

Pakistani law against custodial torture underwent major developments in 2010 and 2022. On 23 June 2010, Pakistan ratified the United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment 1984 (CAT),[9] which provides a blanket prohibition on torture under international law.[10] For the next 12 years, the Government failed to enact anti-torture legislation in express contravention of Pakistan's international legal obligations.[11] Finally, in 2022, the Government passed the TCDA.[12]

Prior to the TCDA, one had to look at the Constitution of the Islamic Republic of Pakistan 1973 (Constitution), the CrPC, the Police Order 2002 (Police Order), the 'Police Code of Conduct (Code of Conduct), and provincial Police Rules to ascertain the legal position on custodial torture. Article 14 of the Constitution explicitly protects the inviolability of the dignity of man. It provides that no person shall be tortured for the purpose of extracting evidence.[13] Meanwhile, the CrPC is silent on the subject of custodial torture. However, Section 156(d) of the Police Order does provide that a police officer shall be punished with imprisonment for a term of up to five years with a fine if he tortures any person in his custody.

As per Rule 14.4 of the Punjab Police Rules 1934 (Police Rules), police officers are obliged to keep their temper under control, act courteously, and maintain their composure. Furthermore, police officers must act calmly, using as little violence as possible when defending themselves or lawfully enforcing

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[9] UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 ('UNCAT').

[10] Amnesty International and International Commission of Jurists, *Pakistan's Reservations: A Challenge to the Integrity of the United Nations Human Rights Treaty System* (AI Index: ASA 33/006/2011, 23 June 2011) 1. https://www.amnesty.org/en/documents/asa33/006/2011/en/ accessed 23 November 2024 ('Pakistan's Reservations').

[11] Justice Project Pakistan and World Organisation Against Torture (OMCT), *Criminalising Torture in Pakistan: The Need for an Effective Legal Framework* (Justice Project Pakistan and OMCT, 11 March 2021) 13-14 https://www.ecoi.net/en/document/2047236.html accessed 23 November 2024 ('JPP').

[12] Torture and Custodial Death (Prevention and Punishment) Act 2022 ('TCDA').

[13] Constitution of Pakistan 1973 ('Constitution'), art 14(2).

their authority. However, there is no explicit prohibition on torture under the Police Rules.

On the other hand, the Code of Conduct provides that a police officer can use minimum force when defending themselves or enforcing their lawful authority.[14] An officer is not permitted to use firearms against any person unless such act is justified by self-defence, 'the defence of others against the imminent threat of death, to prevent a particularly serious crime, or to arrest a criminal'.[15] Moreover, officers are prohibited from using more force than is reasonable, or abusing their authority.[16] The Code of Conduct also provides that police officers may not 'inflict, instigate or tolerate any act of torture or other cruel, inhuman, or degrading treatment or punishment.'[17] Additionally, police officers are prohibited from invoking superior orders, on specific pretexts,[18] to justify torture or inhuman treatment.[19] Violations of the Code of Conduct are grounds for punishment under the Punjab Employees Efficiency, Discipline and Accountability Act 2006.[20]

The aforementioned laws have been deemed insufficient by organisations such as Human Rights Watch[21] because no domestic law actually made torture a criminal offense prior to 2022. This meant that there was no definition of torture or an explicit criminalisation of torture as required under Pakistan's international legal obligations. Therefore, passing an anti-torture bill was a crucial first step towards ending custodial abuse and mistreatment.[22]

Having ratified CAT in 2010, Pakistan was legally obligated to meet requirements set by the Convention. As per Article 2 of the CAT, States Parties are obligated to take effective measures to prevent acts of torture in

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[14] Punjab Police, 'Code of Conduct for Punjab Police Officers' (Lahore, 2011) Section E https://punjabpolice.gov.pk/system/files/Code-of-Conduct-for-Punjab-Police-Officers.pdf accessed 23 November 2024.
[15] ibid.
[16] ibid.
[17] ibid Section F.
[18] ibid.
[19] ibid.
[20] ibid [3].
[21] Human Rights Watch, *Pakistan: Pass Anti-Torture Bill: Creating a Criminal Offense Essential to Police Reform* (Human Rights Watch, 14 July 2021) https://www.hrw.org/news/2021/07/14/pakistan-pass-anti-torture-bill accessed 23 November 2024. ('Human Rights Watch')
[22] ibid.

their jurisdiction. This includes legislative, administrative, judicial or other measures. Article 4 obligates States to ensure that all acts of torture are made criminal offences and prescribed appropriately grave penalties given their nature. As per Article 12, where there is reasonable ground to believe that an act of torture has been committed, States must ensure a prompt and impartial investigation. In particular, Article 13 provides that States Parties ensure that victims of torture have a right to have their complaints heard and impartially examined by competent authorities.

In fulfilment of the aforementioned obligations, the Federal Government of Pakistan passed the TCDA. This law is applicable all over Pakistan. It defines 'custody' to include 'all situations where a person is detained or deprived of his liberty by any person'.[23] This includes custody during any proceedings pertaining to search, arrest, and seizure. Furthermore, the law defines 'cruel, inhuman, or degrading treatment' to include 'any deliberate or aggravated treatment inflicted by a public official or a person acting on his behalf against a person under their custody'.[24] Such treatment should cause 'suffering, gross humiliation or degradation' to the person in custody.[25] Finally, 'torture' means an act committed by which 'severe physical pain or physical suffering is intentionally inflicted' on a person.[26]

Section 3 of the TCDA provides that a statement extracted through torture shall be inadmissible. Importantly, Section 16 of the TCDA states that its provisions shall override any other law in force. When the two provisions are read together, it may be understood that Article 40 of the QSO, which allows for statements made in police custody to be proven by subsequent discoveries of facts, is not applicable in the case of torture. Public officials who use such information are liable for imprisonment of up to one year or with a fine of up to PKR 100,000.[27]

The TCDA designates the Federal Investigation Agency (FIA) constituted under the Federal Investigation Agency Act 1974 (FIA Act) to investigate

[23] TCDA, s 2(f)
[24] ibid s 2(g).
[25] ibid.
[26] ibid s 2(n).
[27] ibid s 3(2).

torture.[28] This FIA has the same powers and shall follow the same procedure as prescribed in the FIA Act. According to Section 8 of the TCDA, the punishment for torture shall be the same as a punishment for the type of harm provided in Chapter XVI of the Pakistan Penal Code 1860 (PPC). Under Section 9, the punishment for custodial death shall be the same as that provided for Section 302 of the PPC.[29] Finally, Section 10 provides that the punishment and procedure the punishment for custodial rape shall be the same as that provided in the law and procedure for rape.

Although the definition of torture under TCDA is fairly comprehensive, it fails to cover mental torture. While CAT does not specifically define the term mental torture, one may refer to the United States of America's Reservations, Declarations and Understandings in its ratification of CAT.[30] The United States interprets 'mental suffering' as:

> prolonged mental harm caused by the intentional infliction or threatened infliction of severe physical pain or suffering; the administration or application or threatened application or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; the threat of imminent death; and finally the threat that another person may be imminently subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.[31]

The latter type of torture is fairly common in Pakistan wherein detainees are forced to watch others being tortured to intimidate and extort them.[32] In fact, in *Saifuddin Saif v Federation of Pakistan*,[33] the Lahore High Court also held that

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[28] ibid s 5.
[29] Pakistan Penal Code 1860, s 302.
[30] The Government of the United States of America, *US reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Cong. Rec. S17486-01, daily ed., 27 October 1990) http://hrlibrary.umn.edu/usdocs/tortres.html accessed 23 November 2024.
[31] ibid Reservation II.
[32] Amnesty International (n 1), 5; Human Rights Commission of Pakistan, *Report 2022-2023* (Legislation Watch Cell, Oct-Dec 2022) https://hrcp-web.org/hrcpweb/wp-content/uploads/2020/09/2023-State-of-human-rights-in-2022.pdf accessed 23 November 2024 ('HRCP').
[33] *Saifuddin Saif v Federation of Pakistan* (PLD 1977 Lahore 1174).

'blindfolding, confinement in dark underground cells, and *incommunicado* detention' amounted to mental torture, which is violative of Article 14(2) of the Constitution.[34]

Notably, the entire investigative process has been entrusted to the FIA.[35] Thus, public officials shall be responsible for holding their fellow public officials accountable instead of an objective, independent and impartial body carrying out the process. Similarly, another concern is that the law does not establish any standalone punishments.[36] This means that the punishment for causing custodial death is the same as that prescribed under Section 302 of the PPC, which includes the death penalty. The Human Rights Commission of Pakistan (HRCP) has criticised this, highlighting that Pakistan's use of capital punishment is arbitrary and that the death penalty has not been reserved as punishment for the most serious of crimes alone.[37] In fact, the HRCP has pointed out that the death penalty is actually incompatible with Pakistan's obligations to prohibit torture and inhuman punishment.[38] Thus, despite the developments in Pakistan's law on custodial torture in the past few decades, significant room for improvement still exists.

It is also important to note that the TCDA limits custodial violence to instances where the accused is tortured for the purposes of investigation, such as to extract evidence for the prosecution. For example, Section 3 of the law deems evidence obtained through torture as inadmissible in a court of law. However, many cases of custodial torture in Pakistan take place for various other motivations. For example, in one case, police officers arrested a man without warrants, tortured him, and demanded a hefty bribe for his release.[39] While Section 8 does provide punishments for public officials who commit, abet or conspire to commit torture, there are no other provisions that directly address the different motivations that lead to custodial torture in Pakistan.

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[34] ibid.
[35] TCDA, s 5.
[36] HRCP (n 31) 7.
[37] ibid.
[38] ibid.
[39] Asian Human Rights Commission, *Pakistan: Police torture and extort huge bribe from father, two sons for complaining to higher authorities including courts* (15 April 2016) http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-034-2016/ accessed 10 December 2024.

As of December 2024, no case law is publicly available under the TCDA. Although the law was passed in 2022, cases related to custodial torture continue to be filed under other provisions of criminal laws. For example, in *Government of Sindh v Muhammad Sarwar*,[40] the victim's family filed a suit for compensation under Section 1 of the 'Fatal Accidents Act 1855', claiming that their son was tortured to death at the CIA Centre while in police custody.[41]

However, a cursory look at newspaper headlines from the end of 2024 suggests that this trend may be changing. The Tribune reported on 28 September 2024 that several police officers were booked under Section 8 and 9 of the TCDA for the killing of Dr. Shahnawaz Kumbhar after he was accused of blasphemy in Hyderabad.[42] Another newspaper reported that the Lahore High Court held a complaint with the FIA to be competent in a case of custodial torture even if the police had already registered the FIR.[43] The Court directed the police to refer any future complaints related to custodial torture to the FIA as per Section 6 of the TCDA. Despite this progress, it is imperative that further stringent measures are taken to curb custodial violence.

3. CCTV CAMERAS TO CURB CUSTODIAL VIOLENCE

The recording of police interrogation has been widely recognised as an useful safeguard against torture and inhuman treatment.[44] There have been many cases globally in which custodial abuse has been caught through video footage, resulting in the prosecution of the perpetrators.[45] A report by the European Committee for the Prevention of Torture to Ireland reported in 2006 that the amount of ill-treatment of detainees had reduced greatly partly

[40] *Government of Sindh v Muhammad Sarwar* (2023 PLD 154 Karachi).
[41] ibid [2].
[42] Z Ali, 'Senior Cops, Others Booked in Dr Shahnawaz's Custodial Death' (The Express Tribune, 28 September 2024) https://tribune.com.pk/story/2499215/senior-cops-others-booked-in-dr-shahnawazs-custodial-death accessed 23 November 2024.
[43] Hamid Nawaz, 'Custodial Death, Rape Cases: 'Registration of FIR Does Not Trump Proceedings' LHC' (The Business Recorder, 15 August 2024) https://www.brecorder.com/news/40317556/custodial-death-rape-cases-registration-of-fir-does-not-trump-proceedings-lhc accessed 23 November 2024.
[44] HRCP (n 31) 7.
[45] ibid.

due to audio-video recordings of interrogation rooms.[46] Additionally, a report by Amnesty International in 2010 revealed that CCTV cameras successfully reduced misbehaviour by the police in Spain by 40%.[47]

Penal Reform International (PRI), an NGO with consultative status at the United Nations Economic and Social Council (ECOSOC) and the Council of Europe, has pointed out three main purposes of recording police interrogations.[48] Firstly, it helps in preventing torture and provides protection against ill-treatment. Secondly, it helps to deter and protect police officials against false allegations. Finally, it creates accountability by securing evidence for legal proceedings. Thus, CCTV footage can also be used to successfully prosecute police officers for misbehaviour.

Interestingly, in its General Comment No. 2 on Article 2 of CAT, the UN Committee against Torture stated the following:

> [a]s new methods of prevention (e.g. videotaping all interrogations […]) are discovered, tested and found effective, Article 2 provides authority to build upon the remaining articles and to expand the scope of measures required to prevent torture.[49]

Thus, the UN Committee against Torture has recognised that videotaping interrogations falls under the scope of Article 2, which mandates States Parties to take effective measures for preventing acts of torture in their jurisdictions.

In the 12th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the

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[46] Penal Reform International, 'Video Recording in Police Custody: Addressing Risk Factors to Prevent Torture and Ill-Treatment' (2006) https://cdn.penalreform.org/wp-content/uploads/2013/11/Factsheet-2-cctv-v6_final.pdf accessed 23 November 2024 ('PRI').
[47] Nishant Nagori, 'CCTV Cameras in Police Stations: A Comprehensive Step to Deter Custodial Violence?' (2021); Amnesty International, *Amnesty International Report 2010 - Spain* (Amnesty International, 28 May 2010).
[48] PRI (n 45) 1.
[49] UN Committee Against Torture, 'General Comment No. 2 on Article 2 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' [2017] UN Doc CAT/C/GC/2 https://www.ohchr.org/en/documents/general-comments-and-recommendations/catcgc2-general-comment-no-2-2007-implementation accessed 23 November 2024.

Committee addressed the developments concerning its standards in respect of police custody.[50] The introduction of electronic recording of police interviews was welcomed as an crucial additional safeguard against the ill-treatment of detainees.[51] According to CPT, this facility can provide 'a complete and authentic record of the interview process', which is in the interest of both victims of custodial ill-treatment and police officers who are faced with unfounded allegations of ill-treatment.[52]

Article 164 of the QSO provides that the Court may allow evidence or witnesses recorded by the Court through modern devices or techniques.[53] In fact, in *Ishtiaq Ahmed Mirza v Federation of Pakistan*,[54] the Supreme Court summarised the requirements for proving an audio or video recording before a court of law.[55] According to the judgment, recordings must be proven to be genuine and not tampered with for the court to rely on them. Forensic reports in respect of audio or video tapes are admissible under the Punjab Forensic Science Agency Act 2017. It is up to the discretion of the court whether it allows any audio or video recording to be produced as evidence. Where the court does allow such submission, the same must be proven according to the law of evidence.

Furthermore, the recording's accuracy needs to be proven, and direct evidence must be produced which rules out the possibility of any tampering of the recording. The person who makes the recording must be produced before the court and the recording itself must be played in the court. The audio or video recording must be clearly audible or viewable. The person in the recording or voice of the person in the audio recording must be identified by any person who recognises said person. Any other person who was present at the time of the event that was recorded may also testify in support of the

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[50] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), '12th General Report of the CPT's activities covering the period 1 January to 31 December 2001' *Council of Europe* (Strasbourg, 3 September 2002) https://www.coe.int/en/web/cpt/police-2 accessed 23 November 2024 ('CPT').
[51] ibid [36].
[52] ibid.
[53] Qanun-e-Shahadat Order 1984, art 64.
[54] *Ishtiaque Ahmed Mirza v Federation of Pakistan* (PLD 2019 SC 675).
[55] ibid [11].

events recorded. The evidence sought to be produced through this recording must be both admissible and relevant.

Additionally, safe custody of the recording tape must be proved, and the transcript of the recording must be prepared independently. The person who makes the recording must have done it as part of their routine duties and not to lay a trap to procure evidence, and the recording's source has to be disclosed. An application must be filed before the court by the person desirous of producing the recording as evidence. Finally, a recording produced at a later stage of the judicial proceeding may be treated with suspicion.[56]

From the aforesaid, it may be understood that video and audio recordings are admissible in courts, albeit at the court's discretion. Other rules that govern the admissibility and presentation of the recording have also been outlined by the Supreme Court.

Moreover, courts in Pakistan have also recognised that CCTV in police stations should be installed so that police conduct can be better controlled and supervised. In *Dr. Yasin Zia v Government of Punjab,*[57] the Lahore High Court ordered the installation of CCTVs in each police station as its monitoring had become essential to improve the working of police and for minimising illegal detention, and custodial abuse.[58] The Court directed the Government of Punjab to complete the installation of CCTV cameras in the police stations of the province within six months.[59] The directions specified that the entrance, corridors, lockups, and main reception halls of police stations must be covered with 24-hour surveillance with both audio and visual recordings.[60] The recordings need to be stored at the police station itself, the district police headquarters, as well as in an archive to preserve the data at the police headquarters.[61] The Station House Officer and either the Deputy Inspector General of Police or Deputy Police Officer are responsible for

[56] ibid.
[57] *Dr. Yasin Zia v Government of Punjab* (PLD 2016 Lahore 94).
[58] ibid [3].
[59] ibid [4].
[60] ibid [3]-[4]
[61] ibid [3].

storing and preserving this data at their respective jurisdictional levels.[62] The Inspector General of the Police was directed to ensure that cameras at each police station are working and a record is maintained for at least three years at both the police station and the district headquarters.[63]

Through this judgment, the Lahore High Court laid down the foundation for the installation of CCTV cameras and their use for keeping a check on custodial torture. This judgment was passed by a provincial High Court, and is thus not binding on other provinces. Moreover, it does not provide detailed instructions, such as the manner of storage, or accountability for misplacing or failing to record footage. For proper installation and usage of CCTV cameras in police stations, a law should be passed along with rules of procedure for its effectiveness.

In a surprising development, the Inspector General of Sindh issued a press release in 2022 that a decision to install CCTV cameras in all police stations across Sindh had been taken.[64] According to him, four cameras were being installed at each police station – one at the entrance, the duty officer's room, the detention area, and the corridor.[65] He also added that shoulder cameras had been ordered, which would be provided to traffic police on duty. If the officer fails to record footage when issuing the notice of offence (*challan*), departmental action would be taken against him.[66]

From the assessment of laws in the second section of this article, it is clear that Pakistani legislators had not envisioned the installation of CCTV cameras in police stations as a means of curbing custodial torture. However, the Lahore High Court has directed the installation of CCTV cameras across police stations in Punjab. Since this judgment was passed by a High Court, its scope of applicability across the country is limited. The judgment also does

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[62] ibid.
[63] ibid.
[64] Raheel Salman, 'CCTV Cameras to Be Installed at All Police Stations: IGP' *The Express Tribune* (Karachi , 13 June 2022) https://tribune.com.pk/story/2361290/cctv-cameras-to-be-installed-at-all-police-stations-igp accessed 23 November 2024.
[65] ibid.
[66] ibid.

not lay down a detailed framework of the implementation and use of such an initiative.

On the other hand, Pakistan's obligations under Article 2 of the CAT would suggest that new technological measures such as the use of CCTV cameras are included in the scope of required measures for the prevention of torture. Thus, a direction to install CCTV cameras in police stations would be in line with the country's international legal obligations.

While the Sindh government has taken the initiative to install CCTV cameras in police stations, the same cannot be said for the remaining provinces. Instead, no statutory law or related rules require CCTV camera installation in police stations. For the effective application of such a policy, it is important that clear instructions are laid out for installing CCTV cameras, and the recording and storage of footage. Importantly, an accountability framework for tampering with footage, failure to record footage or negligent loss of footage must also be set in place for this initiative to be effective.

4. FRAMEWORK FOR USE OF CCTV CAMERAS AGAINST CUSTODIAL TORTURE

Under this section, a prospective framework for the use of CCTV cameras to curb custodial torture shall be laid down. For this purpose, international guidelines by organisations such as PRI and case law in India have been relied on as blueprints.

4.1. International Guidelines

4.1.1. Location and type of equipment

For the effective use of CCTV cameras against custodial torture in police stations, one important consideration is the location and type of equipment being used. Poorly placed equipment or poor-quality cameras are unlikely to be effective.[67] Furthermore, regular cleaning and maintenance of this

[67] PRI (n 45) 2.

equipment is necessary to ensure its effectiveness in producing evidence and acting as a deterrent.[68]

Moreover, footage must be clearly labelled and stored in an accessible location so that it can be used when needed.[69] In case the monitoring bodies are informed that the footage is unavailable or the equipment is broken, the issue must be raised immediately with the authorities and resolved.[70] Detailed rules and guidelines must be laid down for the smooth and efficient processing and resolution of such issues. For example, a time period after which regular inspection of the equipment must be set. In case of any irregularities, the relevant authorities must be readily notified so that the same may be resolved. Importantly, signs of willful tampering must be investigated and penalised accordingly.

While there are no clear-cut standards set by monitoring and standard-setting bodies pertaining to the placement of CCTVs in a police station, certain locations do require deliberation.[71] For example, the detainees' right to privacy must be weighed against risk of abuse when it comes to installing CCTV cameras in toilets.[72] Some monitoring bodies are of the view that removing blind spots is crucial and thus toilets cannot be left uncovered. Similarly, the detainees' right to privileged communication would require that their meetings with their lawyers are not video recorded. Therefore, there is a difficult weighing of the detainees' rights to privacy and dignity with their own safety to be made.

It is important that visitors or occupants of the premises understand they are being recorded. As discussed below, the Indian Supreme Court directed large posters in English and native languages informing the reader of ongoing CCTV recordings, to be hung at visible locations in and outside the police stations for public awareness.[73]

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[68] ibid.
[69] ibid.
[70] ibid.
[71] ibid 3.
[72] ibid.
[73] *Paramvir Singh Saini v Baljit Singh & others*, Special Leave Petition (Criminal) No.3543 of 2020 [17].

In terms of location of the cameras, it is important that there are no blind spots.[74] For example, if there is only one camera in a room, it should be capable of rotating or zooming out (to increase the viewing field).[75] This is to ensure that there is no risk of unnoticed threatening gestures towards the detainee. The quality of the footage must also be clear enough to identify those being filmed.[76]

Another concern is the possibility of the prosecution relying on CCTV footage from a police station as evidence against the accused. For example, the accused, unaware of themselves being recorded, may have made incriminating statements outside of the investigation. However, many countries which employ the use of CCTV cameras inside police stations have protective laws which prevent such a possibility. For example, Article 6 of the European Union General Data Protection Regulation (GDPR) provides that data collection (such as CCTV recordings) must only be used for what is necessary. Thus, the use of CCTV recording is meant to protect the accused from custodial abuse, for the prosecution of the same individual could be a violation of their privacy.

Similarly, safeguards should be incorporated in the law regulating CCTV installation and recording in police stations, limiting the footage's use solely to curbing custodial violence. Additionally, it may be argued that the use of such recordings against the accused violates the principle of voluntariness embodied by Article 37 of the QSO, which only allows confessions to be made voluntarily before a magistrate.

4.1.2. Recording, Storage and Accountability

In order to prevent unlawful deprivation of liberty, it is important for the CCTV footage in police stations to have a recording function.[77] The PRI also stresses the importance of the personnel in charge of reviewing and analysing the footage of being sensitised.[78] In addition, they must be well aware of the

[74] PRI (n 45) 3.
[75] ibid.
[76] ibid.
[77] ibid 4.
[78] ibid.

relevant laws which protect against torture and ill-treatment.[79] However, at the same time, the duty of monitoring the footage must not be the responsibility of a single officer for the entire day or shift to avoid oversight caused by diminished alertness.[80] Therefore, a schedule which includes a variety of tasks must be created to ensure that the footage is watched dutifully so that instances of custodial abuse are readily noted, and police officers, aware of the constant and vigilant surveillance, have an incentive to behave appropriately and legally.

The PRI further advises that the storage of CCTV footage must be closely regulated and supervised.[81] A detailed framework must be laid down to ensure that this footage is used to meet the set objectives and is being used professionally. For example, in one case, it was found that police officers resorted to storing footage in USB drives when faced with equipment that had limited storage capacity.[82] Furthermore, the time period for which data must be recorded and stored before it is destroyed should be stipulated.[83] In order to remove any arbitrariness, the same metric must be set for all police stations (or if distinctions are made they must not be arbitrary).[84] This way, it may be ensured that the staff is well aware of how long they must store the footage and when to destroy it.

Another important aspect is the sensitivity of the images and right to privacy. It is crucial that the information is used and managed according to protocol and that the footage is traceable from its recording till its destruction.[85] To ensure this, police officers must undergo training in the professional use of CCTV cameras, their management, storage and destruction. Correct methods of labelling and other safeguards related to privacy must be dutifully incorporated into this training programme.[86]

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[79] ibid.
[80] ibid.
[81] ibid.
[82] ibid.
[83] ibid.
[84] ibid.
[85] ibid.
[86] ibid.

Wherever audio recording is being used during interrogations, the equipment or programme must not allow it to stop the recording randomly during questioning.[87] If such interruptions are allowed, the risk of torture and abuse going unrecorded increases. Therefore, there must be safety mechanisms built into the equipment to ensure that the questioning is taped in its entirety. This footage can also be useful in training police officers on issues related to human rights.[88] However, this educational use must not compromise the right of privacy of those being recorded. Thus, officers in charge must blur out the faces of those recorded before using the footage.[89]

Monitoring bodies must maintain a checklist when inspecting the surveillance systems installed at police stations.[90] This checklist can include whether the system records footage or simply transmits it without recording, if the system has both sound and image, and who is authorised to view the footage. Other important matters include whether the monitoring is organised within the police station, what the storage medium is and how it is maintained, where the footage is kept before it is destroyed, if law enforcement personnel are instructed in the handling of data, and whether detainees and their legal counsels can access the data as well.

4.1.3. Laws and Regulations Governing CCTV Recording

CCTV monitoring systems are relatively new additions to the criminal justice system. Therefore, the blueprint for regulations is still being molded. Normally, laws regulating CCTV footage and its use in public areas do include some protection of the right of privacy of persons being recorded.[91] Such rights include the possibility of accessing the footage or asking that it be destroyed. In some countries, CCTV footage is only recorded if the detainee has been apprehended under a specific offence, such as drug trafficking.[92]

The PRI recommends that any law regulating the use of CCTV in police stations should have clear provisions covering the duty to inform the persons

[87] ibid.
[88] ibid.
[89] ibid.
[90] ibid.
[91] ibid 5.
[92] ibid.

being recorded, the responsibility and chain of command in place regarding viewing, storage and destruction of data, and the access to data by detainees and their lawyers.[93] Furthermore, a balance must be struck between the benefits of recording and the detainees' right to privacy. The protection afforded through CCTV footage must be given to detainees indiscriminately.[94] Such laws must always specify the persons who are allowed access to the footage.[95] For example, if the footage includes any nudity, only persons of the same gender should have access to it.

4.1.4. Comparative Analysis: Indian Case Law

The Indian Supreme Court has issued detailed instructions for the surveillance and monitoring of police stations in India that can serve as a blueprint for similar initiatives in Pakistan. The Court considered various issues, such as a complaints mechanism, the usage of footage, storage capacity, budgetary concerns and the imposition of responsibility. In *Paramvir Singh Saini Baljit Singh & others,*[96] the Supreme Court noted the need for an oversight mechanism in each State to be created whereby an independent committee can study the CCTV camera footage and periodically publish a report of its observations. The same Court had previously issued directions to set up a Central Oversight Board in *Shafhi Mohammad v State of Himachal Pradesh.*[97]

The directions given by the Court were fairly detailed. According to the Court, CCTV systems must be equipped with night vision, and both audio and video footage.[98] Where there is no electricity and/or internet, the State or Union Territories are obliged to provide the same expeditiously.[99] The Court also set requirements for Internet systems, image resolution, and audio quality. It also gave some suggestions for the storage of footage in different mediums.[100] The preservation period for recorded data is directed to be 18

[93] ibid.
[94] ibid.
[95] ibid.
[96] *Paramvir Singh Saini v Baljit Singh & others* (n 72).
[97] *Shafhi Mohammad v State of Himachal Pradesh* (2018 8 SCC 311).
[98] *Paramvir Singh Saini v Baljit Singh & others* (n 72) [17].
[99] ibid.
[100] ibid.

months long. In case the storage capacity of available equipment in the market was for less than 18 months, the State, Union Territories and Central Government must purchase equipment with storage capacity up to at least 1 year.[101] As soon as equipment with higher storage capacity (18 months) becomes available, States are directed to purchase the same.[102]

The Court's rationale for the installation of CCTV cameras was to ensure that persons were free to complain against force being used in a police station which resulted in serious injury or custodial deaths.[103] Such complaints could be made to the State Human Rights Commission which would use its powers under Sections 17 and 18 of the Protection of Human Rights Act 1993 for redressal. The Commission could then summon the CCTV camera footage of the incident. The same could subsequently be provided to an investigation agency to hear the complaints it receives.

In light of the above, the Court gave further instructions to States to direct all police stations, other law enforcement and investigation agencies to make prominent displays at the entrance and insides of their respective premises that CCTV footage was being recorded therein.[104] The informational posters must be in English, Hindi as well as local vernacular languages. These posters shall also inform readers of a person's right to complain about any human rights violations to the National or State Human Rights Commission, Human Rights Court, Superintendent of Police or any other authority empowered to take cognisance of an offence. Finally, the storage period of the CCTV footage must also be mentioned, as well as the victim's right to access this footage.

The insights drawn from Indian case law and the guidance provided by PRI lend valuable perspectives that can be adapted and contextualised to suit Pakistan's unique circumstances. These guidelines not only underscore the importance of technical aspects like camera placement, maintenance, and storage but also emphasise the necessity of ethical considerations, such as safeguarding privacy rights and ensuring the admissibility and reliability of

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[101] ibid.
[102] ibid.
[103] ibid [18].
[104] *Paramvir Singh Saini v Baljit Singh & others* (n 72) [20].

CCTV evidence in legal proceedings. By drawing inspiration from such sources, Pakistan can bolster its efforts in eradicating custodial violence. Including clear protocols for the retention and access to footage, coupled with mechanisms for independent oversight, enhances transparency and builds public confidence in the justice system's integrity.

4.2. Other Measures

Custodial violence is a problem that can only be tackled if holistic measures are taken that cater to all socio-political dimensions of the issue. The installation of CCTV cameras is only one such mechanism for keeping a check on custodial violence. Pakistan has not ratified the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 2002 (OP-CAT).[105] Therefore, it is not legally bound by the legal provisions contained therein. However, as the country faces increasing pressure from the international community to take stronger steps against the rampant problem of custodial violence,[106] it is in the Government's best interests to take further steps in strengthening its preventative mechanisms against the issue. Pakistan could ratify OP-CAT to offer substantive means of implementing change at the domestic level. The OP-CAT complements CAT's preventative framework by providing a solid legal framework for combating custodial ill-treatment.[107] For example, the Subcommittee Against Torture established under OP-CAT can visit places of detention in States Parties, offer them assistance such as training and advice, and even tackle root causes of custodial ill-treatment.[108]

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[105] UN, *Tables for UN Compilation on Pakistan* (Universal Periodic Review Project, 2023) https://upr-info.org/sites/default/files/country-document/2023-02/UN_Compilation_42_PK_E_Annex.pdf accessed 23 November 2024.

[106]Amnesty International, *Pakistan: Human Rights Safeguards: Memorandum Submitted to the Government Following a Visit in July – August 1989* (Index Number: ASA 33/003/1990, 30 April 1990) https://www.amnesty.org/en/documents/asa33/003/1990/en/ accessed 23 November 2024; Human Rights Watch, 'Pakistan: Make Torture a Crime: Senate Should Promptly Pass Law to Hold Security Forces to Account' *Human Rights Watch* (New York, 23 August 2022) https://www.hrw.org/news/2022/08/23/pakistan-make-torture-crime accessed 23 November 2024.

[107]Association for the Prevention of Torture (APT) and Inter-American Institute for Human Rights (IIHR), *Optional Protocol to the UN Convention Against Torture Implementation Manual* (revised edn, APT and IIHR, 2010) 11 https://www.apt.ch/sites/default/files/publications/opcat-manual-english-revised2010.pdf accessed 23 November 2024.

[108] UNCAT, arts 11, 20.

Article 17 provides that States Parties must maintain independent National Preventative Mechanisms (NPMs). As per Article 19, these NPMs shall have the power to regularly examine the treatment of detainees at their places of custody. They may also protect such persons against torture or inhuman treatment if necessary. Article 20 also directs States Parties to grant these NPMs access to information regarding detainees, and their treatment and conditions of detention. They must also provide such institutions access to all places of detention and their facilities. NPMs shall also be able to visit detainees and interview them privately. Thus, the OP-CAT envisions an additional mechanism for preventing custodial torture in States Parties. Pakistan should consider ratifiying the OP-CAT, or at least, establishing a similar NPM structure voluntarily if ratification is not opted for.

The Office of the United Nations High Commissioner for Human Rights (OHCHR), the Association for the Prevention of Torture (APT) and the Asia Pacific Forum of National Human Rights Institutions (APF) have jointly published a set of anti-torture guidelines in 'Preventing Torture: An Operational Guide for National Human Rights Institutions'.[109] This Guide set outs lays down standards of practices in monitoring places of detention for national human rights institutions.[110] According to this Guide, simply setting up internal administrative control mechanisms, such as police inspection services, is not enough as they lack independence and largely perform administrative monitoring functions.[111] Instead, independent mechanisms must be set up for visiting places of detention as these are proven to have a strong deterrent effect.[112] The primary aim of such visits does not need to be the documentation of cases of torture or condemnation of the authorities.[113] These bodies should operate with the goal of analysing the overall operation of the places of detention and providing constructive and practical recommendations to improve their treatment of the detained

[109] Office of the High Commissioner of Human Rights (OHCHR), APT and APF, *Preventing Torture: An Operational Guide for National Human Rights Institutions* (HR/PUB/10/1, OHCHR, APT and APF, May 2010) https://www.ohchr.org/Documents/Publications/PreventingTorture.pdf accessed 23 November 2024.
[110] ibid.
[111] ibid 81.
[112] ibid.
[113] ibid.

persons.[114] The basic principles of monitoring are provided in the Guide which include doing no harm, respecting the authorities and detainees, respecting confidentiality and security, being objective and credible, and being consistent and persistent.[115] Practical steps to take before the visit, during the visit, and after the visit are discussed in detail.[116] This guide can serve as a useful blueprint for the establishment and operation of independent monitoring mechanisms against custodial violence in Pakistan.

5. CONCLUSION

Custodial violence remains a deeply embedded problem in the Pakistani law enforcement system. While the passage of TCDA provides a legal framework for holding officials accountable, the law itself has some glaring issues that need to be addressed. In addition, legislative change alone is insufficient to successfully tackle the problem. It needs to be complemented with the establishment of independent monitoring mechanisms that visit places of detention frequently, provide constructive feedback, and work collaboratively with authorities for the prevention custodial violence. Furthermore, a robust investigative system is required to hold violators accountable regardless of position and authority.

This article proposes the installation of CCTV cameras in police stations as a means of prevention of and accountability for custodial violence. Pakistan's obligations under Article 2 of the CAT and its commentary would suggest that new technological measures such as the use of CCTV cameras are included in the scope of necessary measures for the prevention of torture. Thus, a direction to install CCTV cameras in police stations would be in line with the country's international legal obligations. Moreover, the Punjab and Sindh Governments have already taken steps for the installation of such systems in police stations. However, as statutory law is still silent on the subject, it is important that clear legal rules are laid out for the installation of CCTV cameras, and the recording and storage of footage, along with an

[114] ibid.
[115] ibid.
[116] ibid 84-91.

accountability framework for tampering with footage, failure to record footage or negligent loss of footage.

EXPLORING THE LEGAL LANDSCAPE OF MEDICAL NEGLIGENCE IN PAKISTAN: CHALLENGES AND PERSPECTIVES

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ABSTRACT

The law of medical negligence remains largely underdeveloped. However, recently, judges have pro-actively considered tort law jurisprudence from the United Kingdom and India in an attempt to replicate those legal principles in the Pakistani legal framework. This article will medical negligence jurisprudence under tort law as developed over the years in England and Wales and in India. It will then critically analyse how Pakistani courts have applied these principles. This article aims to illustrate that an exact replication of principles developed elsewhere is not the most suitable course of action, and that it is the responsibility of State institutions legislate and adjudicate cases in a manner that is in touch with the ground realities of a country.

KEYWORDS: Medical Negligence, Tort Law, Pakistan, India, England and Wales, Duty of Care, Breach of Duty of Care, Remedies.

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1. INTRODUCTION

The word 'tort' is a Norman-French word meaning 'harm' or wrong'. The law of torts is best understood as the law of civil wrongs, i.e., wrongful conduct that entitles an aggrieved person to a remedy, primarily in the form of compensation.[1] Tort law covers the law of nuisance, libel, slander, trespass,

[1] Paula Giliker, *Tort* (7th edition, Sweet & Maxwell 2020) 1.

assault, battery, and negligence.[2] The tort of negligence is the most well-known branch of tort law and is the subject of this article.

Negligence is 'the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate human affairs, would do, or doing something which a prudent and reasonable man would not do.'[3] It must be noted that negligence can be of different types, including gross negligence, vicarious negligence, contributory negligence, professional negligence, and medical negligence. This article considers medical negligence and its development in England and Wales, India, and Pakistan.

This area of the law was developed through common law and eventually became a consolidated area of law on its own. Today, this area of the law continues to develop in order to adopt with changing societal needs.[4] This article examines the development of this concept within the legal system of England and Wales. In doing so, this article will identify the key requirements for establishing a tort of medical negligence and then highlight the remedies available to victims of medical negligence in England and Wales. After this, a comparative analysis will be provided of the development of the jurisprudence on medical negligence in India and Pakistan.

2. ENGLAND AND WALES

The tort of negligence has been most convincingly defined by W.H.V Rogers as: '… a breach of a legal duty to take care which results in damage to the claimant.'[5] From this definition, three crucial ingredients of negligence can be identified: firstly, the defendant owes a duty of care to the claimant; secondly, there is a breach of the duty of care; and thirdly, the claimant suffers a damage that is reasonably foreseeable (i.e., not too remote) a result of the breach of duty of care, It is important to examine the concepts of duty of care and breach of duty of care. The concepts of remoteness and causation is beyond the scope and purport of this article because causation as a concept of law has been developed and tested in other areas of the law, primarily criminal

[2] ibid.
[3] *Blythe v Birmingham Waterworks* [1856] 11 Exch 781, 784.
[4] Giliker (n 1) 28.
[5] W.H.V. Rogers, *Winfield and Jolowicz on Tort* (18th edition, Sweet & Maxwell 2010) 150.

law, and hence is the least controversial requirement for the purposes of negligence.

2.1. Duty of care

The concept of duty of care, as it is understood today, developed primarily on the basis of Lord Atkin's judgment in the landmark case of *Donoghue v Stevenson*.[6] He stated that under English law, there is a general conception of relationship between two individuals which gives rise to a duty of care, framing it as the 'neighbour principle'. This illustrates that a degree of proximity between two individuals is one of the primary characteristics that leads to the imposition of a duty of care towards one another, which includes the duty not to cause reasonably foreseeable harm or injury. In the medical field, a patient is in a proximate enough relationship with a medical practitioner such that the actions or omissions of the practitioner, if they fall below a particular standard, can result in harm to the patient. Thus, the patient-medical practitioner relationship is deemed to be proximate enough to establish a duty of care under the law of negligence.

There are three elements to establishing a duty of care as per *Caparo v Dickman*.[7] Firstly, there must be reasonably foreseeable damage. Secondly, there must be a sufficiently proximate relationship between the individuals. Thirdly, it must be 'just, fair, and reasonable' for the courts to impose a duty of care in light of the policy considerations at play.[8] Thus, a medical practitioner indeed owes a duty of care to all of his/her patients: as risk is invariably foreseeable during the administration of medical treatment, there is a proximate relationship between the parties and it being 'just, fair, and reasonable' to impose a duty of care in such cases. The courts in England and Wales have gone to the extent of establishing a duty of care not just with respect to a medical practitioner but also with respect to hospital staff when it comes to the provision of accurate information to the patient.[9]

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[6] *Donoghue v Stevenson* [1932] 1 A.C. 562, 580 (HL Sc).
[7] *Caparo Industries plc v Dickman* [1990] 2 A.C. 605 (HL).
[8] ibid 617-618 (Lord Bridge of Harwich).
[9] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50 [24] (Lloyd-Jones J).

2.2. Breach of duty of care

The breach of a duty of care has been defined as 'the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do.'[10] This concept has been interpreted and applied liberally.

The standard for a breach of duty of care by a professional, such as a medical practitioner, was established in *Bolam v Friern Hospital Management Committee*.[11] where it was held that when adjudging a breach of duty of care on part of a professional, the courts must first examine the conduct of the defendant against the conduct expected from a reasonable individual having the skills that the defendant possesses.[12] Thus, courts must examine the conduct of a medical practitioner in light of the conduct expected of a reasonable medical practitioner having similar skills or areas of expertise. This does not mean that a medical practitioner is to be judged against the conduct expected from the most competent of medical practitioners, but rather against the conduct of a reasonable medical practitioner whose practice involves similar challenges as those of the defendant.

Secondly, where there are multiple treatment options for a particular ailment, a medical practitioner will not be deemed to have acted negligently if he/she chooses one of the options, and if a body of professionals prefers the treatment option chosen by the defendant over other available options.[13] For example, there are multiple views regarding what the correct treatment is for 'thoracic outlet syndrome'. One body of professionals may prefer a surgical approach while another body of professionals may consider physiotherapy as the most suitable form of treatment.[14] Hence, if a medical practitioner

[10] *Blythe v Birmingham Waterworks* (n 3) 784 (Alderson B).
[11] *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582.
[12] ibid 587 (McNair J).
[13] ibid 588 (McNair J).
[14] Bo Povlsen, Thomas Hansson and Sebastian D Povlsen, 'Treatment for thoracic outlet syndrome' (2014) 11(CD007218) Cochrane Database of Systematic Reviews 1

chooses either one of the above-mentioned modes of treatment, he/she is not automatically in breach of the duty of care that is owed to the patient as that choice is backed up by the opinion of other professionals as well.

The drawback of this approach is that it leaves a profession self-regulated. The courts will not be able determine whether a breach of a duty of care has occurred without referring to the opinion of a body of professionals. However, as held in *Bolitho v City and Hackney Health Authority*, the fact that the conduct of the defendant is a preferred mode of treatment by a body of professionals does not automatically provide blanket immunity to the defendant.[15] There will indeed be some cases where the courts will be entitled to reject the opinion of expert professionals if the opinion is considered to have no logical basis. Nevertheless, this is an exception to the general rule. The Court of Appeal has reiterated that, generally, it will not be appropriate for the courts to intervene and label the opinion of expert professionals as having no logical basis.[16] Hence, the principle laid down in *Bolitho* does not overrule the test for breach of duty of care for professionals; rather, it acts as a qualification on the existing test, allowing the courts to intervene in cases involving exceptional circumstances.

2.3. Remedies under English law

Having consolidated the concepts of duty of care and breach of duty of care of professionals, it is important to highlight the remedies available to a victim of medical negligence under the legal framework of England and Wales. In most cases, negligence is simply a result of carelessness. The remedies available to a victim of medical negligence differ in light of the magnitude of carelessness involved in each case.

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https://pmc.ncbi.nlm.nih.gov/articles/PMC11245746/pdf/CD007218.pdf accessed 13 December 2024.

[15] *Bolitho v City and Hackney Health Authority* [1998] A.C. 232; R. Mulheron 'Trumping Bolam: a critical analysis of Bolitho's 'gloss' (2010) 69(3) Cambridge Law Journal 609 https://www.cambridge.org/core/journals/cambridge-law-journal/article/abs/trumping-bolam-a-critical-legal-analysis-of-bolithos-gloss/12E1A801046FFA958F745BC5E83776DC accessed 13 December 2024.

[16] *Williams v Cwm Taf Local Health Board* [2018] EWCA Civ 1745 [14].

2.3.1. Criminal negligence

Where the negligence amounts to such a magnitude that it can reasonably be termed 'gross negligence', a victim has the right to pursue a case of criminal negligence against a medical practitioner.[17] In such cases, it must be proven that the conduct of the medical practitioner could not have been expected from a reasonable medical practitioner in any circumstances. Given that this becomes a criminal case, the case against the defendant must be proven beyond reasonable doubt rather than on a balance of probabilities; the penalties imposed in cases of gross negligence are considerably higher and may include prison sentences for the medical practitioners found guilty.[18] In addition to this, a doctor found criminally negligent is also likely to be made subject to fitness procedures by the General Medical Council and may have his medical licence revoked.[19]

In cases of criminal negligence, the fundamental question put before a jury is whether the conduct of the medical practitioner amounts to criminal conduct. In *R v Adomako*,[20] an anaesthetist failed to notice that the patient was disconnected from a ventilator during an eye operation.[21] As a result of this ignorance, the patient suffered a cardiac arrest and, unfortunately, passed away. The House of Lords, while upholding the conviction of the anesthetist for manslaughter, held that in such cases, the courts must consider whether 'the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death of the patient, was such that it should be judged criminal.'[22] In light of this ruling, the defendant's appeal was dismissed.[23]

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[17] *R v Adomako* [1995] AC 171 [187] (Lord Mackay); Graham Virgo 'Reconstructing Manslaughter on Defective Foundations' (1995) 54(1) Cambridge Law Journal 14 https://www.cambridge.org/core/journals/cambridge-law-journal/article/abs/reconstructing-manslaughter-on-defective-foundations/002B3EF4D2CE5FCBD07CA3A2751EB9BA accessed 13 December 2024.

[18] Daniele Bryden and Ian Storey, 'Duty of care and medical negligence' (2011) 11(4) Continuing Education in Anaesthesia Critical Care & Pain 124 https://academic.oup.com/bjaed/article/11/4/124/266921 accessed 13 December 2024.

[19] The General Medical Council (Licence to Practise) Regulations Order of Council 2009, s 3.

[20] *R. v Adomako* (n 17).

[21] ibid [181] (Lord Mackay).

[22] ibid [187] (Lord Mackay).

[23] ibid [189] (Lord Mackay).

2.3.2. Negligence not amounting to criminal negligence

Where the negligent conduct does not amount to criminal negligence, remedies are provided for under civil law. In England and Wales, under the Limitation Act 1980, a victim of medical negligence can bring a claim against a medical practitioner up to three years after the cause of action accrues or the date of knowledge of the person injured.[24] This phrasing is of importance because 'knowledge of person injured' as a result of medical negligence occurs after one attains the age of majority i.e., 18-years old. Hence, for victims of medical negligence who were minors at the time of the negligent conduct, the three-year period for filing a claim against the medical practitioner begins after they attain the age of majority. This is significant because it takes account of the fact that minors may not be able to pursue a claim for negligence until they attain the age of majority and can have adequate knowledge of the practitioner's negligence and the injuries and loss that they suffered as a result.

The biggest deterrent when filing a civil claim for medical negligence is the time that it takes for a case of medical negligence to reach its conclusion and the victims being provided with the requisite damages. In 2001, according to the National Audit Office, an average case of clinical negligence took five and a half years to be concluded and 22% of outstanding cases concerned events that took place 10 years previously.[25] However, once a victim of medical negligence successfully goes through the entire court process and gets a favourable decision, the victim is likely to be compensated for a number of losses suffered during the process.

The compensation a victim is entitled to is calculated considering the pain and suffering caused by the medically negligent conduct and the victim's loss of amenity i.e., the impact the injuries had on the victim's enjoyment of their daily life.[26] In addition to this, the victim is also compensated for any foreseeable loss of earnings that might have resulted from them being put in

[24] Limitation Act 1980 (UK), s 11.
[25] UK Comptroller and Auditor General, *Handling Clinical Negligence Claims in England'* (London: National Audit Office, 3 May 2001) 7 https://webarchive.nationalarchives.gov.uk/ukgwa/20170207052351/https://www.nao.org.uk/wp-content/uploads/2001/05/0001403.pdf accessed 13 December 2024.
[26] *Attorney General of St Helena v. AB and others* [2020] UKPC 1; *Hassam and another v. Rabot and another* [2024] UKSC 11.

a difficult situation owing to the medically negligent conduct. Moreover, where the medically negligent conduct has left a victim in a state where he/she requires special care, the victim is also compensated with respect to this special care and support.[27] The damages also contain miscellaneous expenses incurred by the victim in relation to the injury suffered, including travelling expenses, treatment costs, and prescription charges. The victim can also claim an interest on all past losses.

All of this suggests that after a claim of medical negligence has been concluded in favour of a victim, the compensation afforded to the victim is significant and covers all quantifiable losses incurred. The courts in England and Wales have comprehensively defined the concept of medical negligence along with its requirements, and outlined various types of pain and damage that can be compensated for if attributable to the negligent conduct. However, the time that it takes for a victim to finally get compensated for the pain and damage caused is significant.

3. INDIA

The legal framework of the tort of negligence in India was essentially inherited from the British colonial framework, and is therefore very similar. In *Poonam Verma v. Ashwin Patel and others*,[28] the Supreme Court of India affirmed the definition of negligence *per se* found in Black's Law Dictionary:

> Conduct, whether of action of omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of a statute or valid municipal ordinance, or because it is so palpably opposed to the dictates of common prudence, that it can be said without hesitation or doubt that no careful person would have been guilty of it." As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes.[29]

[27] ibid.
[28] *Poonam Verma v. Ashwin Patel and others* (SCC 1996 322).
[29] ibid [40] (Saghir Ahmad J).

This illustrates that judges have not shied away from defining negligence as broadly as possible to include all forms of careless conduct within its parameters.[30] It is important to further examine the requirements that must be satisfied to establish a case for medical negligence within the Indian legal system.

3.1. Requirements for the tort of medical negligence

The requirements for the tort of medical negligence in the Indian legal system were laid down in the cases of *Dr. Laxman Balakrishna Joshi v. Dr. Trimbak Bapu Godbole and another*[31] and *A.S Mittal v. State of U.P*[32] wherein the Supreme Court of India held that a doctor owes three distinct kinds of duties to a patient.[33]

Firstly, a duty of care is owed by the medical practitioner to the patient in deciding whether the case of the patient should be undertaken by the concerned medical practitioner.[34] This means the doctor must decide if he/she considers himself/herself to have the professional competence to successfully relieve the patient of the medical issue that he/she may be suffering from. This was further explained in *State Of Haryana & Ors vs Smt. Santra*,[35] wherein the Supreme Court of India held a fertility doctor liable for medical negligence for making a representation that he was competent enough to attend to the medical needs of the patient.[36] Subsequently, when the doctor failed to demonstrate due care and caution on his part, causing the patient loss and injury, the doctor fell short of the standard expected from a reasonably competent doctor in similar circumstances by failing to discharge his duty of care in deciding whether he should have taken the patient's case.

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[30] ibid.
[31] *Dr. Laxman Balakrishna Joshi v. Dr. Trimbak Bapu Godbole and another* (AIR 1969 Supreme Court 128).
[32] A.S. Mittal v. State of U.P (AIR 1989 Supreme Court 1570).
[33] ibid [9]; *Dr. Laxman Balakrishna Joshi v. Dr. Trimbak Bapu Godbole and another* (n 31) [11].
[34] *Poonam Verma v. Ashwin Patel and others* (n 37) [19].
[35] *State Of Haryana & Ors vs Smt. Santra* (AIR 2000 Supreme Court 1888)
[36] ibid [2].

Secondly, where multiple acceptable methods of treating the patient's condition exist, the doctor owes a duty of care to the patient in choosing the most suitable mode of treatment.[37] Hence, this second duty of care is similar to the principle laid down in *Bolam v Friern Hospital Management Committee*, i.e., that a doctor's choice of one out of multiple courses of treatment does not automatically render the doctor liable for medical negligence as long as there is sufficient professional backing for the mode of treatment chosen by the doctor.[38] Similarly, the Indian courts do not expect the doctor's conduct to be in line with the highest degree of competency expected from a medical practitioner, but rather conduct that is reasonable in light of the facts of every case.[39]

Thirdly, a doctor also has a duty of care in the administration of the chosen treatment.[40] A doctor does not discharge his/her duty of care by the mere selection of the appropriate treatment; he/she must also ensure its proper administration. The Supreme Court of India held that a patient could recover damages where it can be established that the doctor breached any of the three duties owed to the patient. The Court also clarified that this should not be taken to mean that the courts are trying to diminish doctors' discretion in choosing and administrating distinct modes of treatments with respect to the patient's needs. Rather, the discretion that a doctor must exercise in treating a patient is heightened in cases of emergency, which suggests that the more critical a patient's condition, the greater the discretion that a doctor will have. This makes it more difficult to establish that the doctor acted negligently because the question of negligence in such situations will be determined while keeping in mind the tense situation in which the doctor acted.

3.1.1. Remedies for medical negligence in the Indian legal system

A victim of medical negligence in India has four distinct routes to attain a suitable remedy for the injury and losses incurred. Firstly, the victim can file a case for compensation through consumer dispute resolution channels, the High Courts, or the Civil Court under the Consumer Protection Act 2019,

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[37] *Poonam Verma v. Ashwin Patel and others* (n 37) [19].
[38] *Bolam v Friern Hospital Management Committee* (n 11).
[39] *Dr. Laxman Balakrishna Joshi v. Dr. Trimbak Bapu Godbole and another* (n 31).
[40] *Poonam Verma v. Ashwin Patel and others* (n 37) [19].

the Constitution of India 1950 or the law of torts respectively. Secondly, the victim can file a criminal complaint against the doctor under the Bharatiya Nyaya Sanhita 2023 (the official criminal code in India), which will result in punitive action being taken against the doctor but does not offer compensatory damages. Thirdly, the victim can initiate disciplinary action against the doctor before the Indian Medical Council or the requisite State Medical Council, potentially leading to the suspension or revocation of the doctor's medical license.[41] Lastly, the victim can file a recommendatory action before the National Human Rights Commission or a state's Human Rights Commission to seek compensation. This section will focus on remedies under constitutional law and consumer protection law as these are the remedies that are sought in the majority of cases that arise in this area in the Indian legal system.[42]

3.1.2. Remedies under Constitutional Law

The courts have interpreted the right to life as enshrined under Article 21 of the Constitution of India to encapsulate the right to health and proper medical treatment.[43] Furthermore, one can argue that all constitutional rights can only be enjoyed if a citizen is in good health and is not injured or impaired (particularly as a result of negligent medical treatment). Hence, medical negligence can be interpreted as a breach of an Indian citizen's constitutional rights. Considering this, a victim of medical negligence can file a petition to the Supreme Court under Article 32 and to the High Court under Article 226 of the Constitution, respectively. The courts are constitutionally responsible for upholding the fundamental rights of all citizens and ensuring that these rights are enforced. In medical negligence cases brought before the Apex Courts under the Constitution, the High Court and the Supreme Court have the power to issue writs i.e., *habeas corpus*, *mandamus*, prohibition, *quo-warranto*, and *certiorari* – whichever may be appropriate in a particular case. However, it must be noted that a writ petition can only be filed against public hospitals

[41] Indian Medical Council Rules 1957, Rule 15.
[42] Shyamkrishna Balganesh, 'The Constitutionalization of Indian Private Law' (2016) All Faculty Scholarship 1557, 1564.
[43] Abhishek R Bhardwaj and Kuljit Singh, 'Medical negligence in India: A study with special reference to liability in tort' (2018) 3(2) International Journal of Academic Research and Development 1415, 1421; Sharma MK 'Right to Health and Medical Care as a Fundamental Right' (2005) All India Reporter 255.

and not against private hospitals, as the Articles 32 and 226 only allow petitions against State officials or functionaries and not against private actors.[44]

3.1.3. Remedies under Consumer Protection Law

Where a consumer suffers loss resulting from the provision of deficient services, the consumer can file a claim for damages under the Consumer Protection Act 2019. The Act establishes Consumer Dispute Resolution Commissions at the district, state and national levels. For a patient to bring a claim, the patient must qualify as a 'consumer' under the Act. In *Indian Medical Association v. V.P. Shantha and others*,[45] the Supreme Court of India held that a consumer under Section 2(1)(d) of the Act only includes those individuals who have been rendered medical services in exchange for consideration.[46] In addition to this, in *Consumer Unity & Trust Society, Jaipur v. State of Rajasthan*, the National Consumer Disputes Resolution Commission (NCDRC) held that individuals who avail medical services in government hospitals cannot be regarded as consumers as these services cannot be regarded as being hired in exchange for consideration.[47] Thus, one can only avail remedies through the Consumer Protection Act where medical services were availed in a private hospital or healthcare facility in exchange for consideration.

However, confusion arises within the Indian legal system due to the multiplicity of forums available to a victim of medical negligence. The most suitable route to take is to file a constitutional claim and establish a breach of fundamental rights as a result of medical negligence.[48] This will allow a victim to seek compensation irrespective of the fact whether the medical services were available in a private facility or a government facility as the victim will not be assessed as a consumer as opposed to claims under the Consumer Protection Act, which are only an option for victims of medical negligence who availed medical services in private healthcare facilities. Hence, it is important that this area of the law be streamlined, and victims of medical

[44] *AK Gopalan v. State of Madras* (AIR 1950 SC 27).
[45] *Indian Medical Association vs. V.P. Shantha & others* (1996 AIR 550)
[46] ibid [11].
[47] *Consumer Unity & Trust Society, Jaipur v. State of Rajasthan* 1 CPR 241 (NC).
[48] Balganesh (n 42) 1564.

negligence be provided with a singular legal option to pursue which is broad to enough to encompass all possible cases.

4. PAKISTAN

In Pakistan, there appears to be a lack of tort law jurisprudence; however, Pakistani courts have started to develop this area in line with the courts of England and Wales and the Indian courts in this regard. Much of the tort jurisprudence has been a result of a liberal interpretation of the Constitution of the Islamic Republic of Pakistan 1973 (Constitution) and a reliance on settled principles of law as applied in England and Wales and in India.

4.1. The application of the *Bolam* test in Pakistan

In *Punjab Road Transport Corporation vs. Zahida Afzal & Others*,[49] the Supreme Court of Pakistan highlighted the importance of promoting the development of tort law jurisprudence in Pakistan.[50] The Court held that Articles 4 and 5(2) of the Constitution impose a duty on all organs of the State and citizens of Pakistan to act within the limits prescribed by law, and where any State organ or individual violates these boundaries, they shall be subject to legal action.[51] As per Article 4 of the Constitution, no action detrimental to the life, liberty, body, reputation, or property of any person shall be taken except in accordance with the law. One can argue that where a medical practitioner causes damage to a patient as a result of negligent conduct, the patient's right to be treated and protected in accordance with the law is violated.

In *Mrs. Alia Tareen v. Amanullah Khan*,[52] the Supreme Court of Pakistan reiterated the test for professional negligence as was enunciated in *Bolam v Friern Hospital Management Committee*. The Supreme Court of Pakistan held that the test for a breach of duty in cases of medical negligence is whether the conduct of the medical practitioner acted according to what can be reasonably expected from a medical practitioner faced with the circumstances under which the concerned medical practitioner was working.[53] In addition to this,

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[49] *Punjab Road Transport Corporation vs. Zahida Afzal & Others* (2006 SCMR 207)
[50] ibid.
[51] Constitution of the Islamic Republic of Pakistan 1973 ('Constitution') arts 4, 5(2).
[52] *Mrs Alia Tareen v. Amanullah Khan* (PLD 2005 Supreme Court 99) [32].
[53] ibid.

it was also held that a medical practitioner's conduct is not automatically considered to be negligent where a body of professionals disagrees with the mode of treatment adopted by the concerned medical practitioner as long as the mode of treatment adopted by the medical practitioner is preferred by another body of professionals.[54]

In addition to this, in *Dr. Atta Muhammad Khanzada v. Muhammad Sherin*,[55] a suit for damages was decreed in favor of a victim of medical negligence who suffered damage as a result of the negligent conduct of an eye doctor.[56] It was held that even where medical treatment is consented to, the medical practitioner is not absolved of the duty of care that the medical practitioner owes to the patient.[57] Thus, the courts have begun liberally considering claims for damages against medically negligent conduct and have not allowed medical practitioners to shield themselves by claiming consent to treatment as a defence.

In the seminal case of *Mariam Sajjad v. Dr. Prof. Rasool Ahmed Chaudhry*,[58] a 22-year-old woman went to a government hospital as she was suffering from mild pain in her arm.[59] The patient was attended to by the Head of the Orthopedics Department at the concerned facility, who advised a surgical treatment to the woman's condition. After her surgery, the patient suffered paralysis of the lower limb. Upon further examination, it was revealed that this impairment was caused by the the negligent surgery.

Thereafter, the victim filed a claim before the concerned Punjab Healthcare Commission which suspended the surgeon's license and fined the government hospital a sum of PKR 500,000. The victim also filed a suit for damages against the surgeon before the Civil Court, which decreed damages of PKR 5 million. She then appealed to the Lahore High Court. The matter was taken up as a Regular First Appeal and the sum of damages was increased from PKR 5 million to PKR 10 million.

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[54] ibid [37].
[55] *Dr. Atta Muhammad Khanzada v. Muhammad Sherin* (1996 CLC 1440)
[56] ibid [2], [13].
[57] ibid [11].
[58] *Mariam Sajjad v. Prof. Dr. Rasool Ahmed Chaudhry* (RFA. No. 70634/2023)
[59] ibid.

In the judgment that followed, the Court not only failed to cite previously decided cases in Pakistan but also examined the tort law jurisprudence from England and Wales and India.[60] However, the judgment falls short in resolving the controversy on the application of immunity afforded to medical practitioners against medical negligence claims.[61] This will be discussed further below.

4.2. The impact of the Punjab Healthcare Commission Act

Each province in Pakistan has its own statutorily established Healthcare Commission responsible for regulating medical professionals and medical facilities in the province. In Punjab, the Punjab Healthcare Commission Act 2010 (PHCA) governs the administration of the Punjab Healthcare Commission. Under section 2(xvii) of the of the PHCA, a 'healthcare service provider' is defined as 'an owner, manager or in-charge of a healthcare establishment and includes a person registered by the Medical and Dental Council, Council for Tibb, Council for Homeopathy or Nursing Council.'[62] Hence, a doctor who is also the Head of Department in a healthcare establishment falls within the ambit of section 2(xvii) and is considered as a healthcare service provider. Medical negligence is defined under Section 19 of the PHCA as:

> **19. Medical negligence**. (1) Subject to sub-section (2), a healthcare service provider may be held guilty of medical negligent on one of the following two findings:-
> (a) the healthcare establishment does not have the requisite human resource and equipments which it professes to have possessed; or
> (b) he or any of his employee[s] did not, in the given case, exercise with reasonable competence the skill which he or his employee did possess. [63]

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[60] *Mrs Alia Tareen v. Amanullah Khan* (n 52); *Sikandar Shah & Others v. Dr. Nargis Shamsi & Others* (2014 MLD 149); *Abdul Basit and another v. Dr. Saeeda Anwar* (PLD 2011 Karachi 117); *Dr. Atta Muhammad Khanzada v. Muhammad Sherin* (n 55).
[61] *Mariam Sajjad v. Prof. Dr. Rasool Ahmed Chaudhry* (n 58); Punjab Healthcare Commission Act 2010, s 29.
[62] Punjab Healthcare Commission Act 2010, s 2(xvii).
[63] ibid, s 19.

In addition to this, Section 29 of the PHCA lays down immunity for healthcare service providers in the following terms: 'No suit, prosecution or other legal proceedings related to [the] provision of healthcare services shall lie against a healthcare service provider except under this Act.'

On a plain reading of this particular provision, it bars all kinds of suits and other legal proceedings except under the PHCA. Under the PHCA, there appears to be no concept of monetary compensation; while medical negligence is included as an offence under Section 28 of the PHCA, the Punjab Healthcare Commission only has the jurisdiction to impose a fine not exceeding Rs. 500,000 and – either additionally or alternatively – revoking the medical license of the healthcare service provider.[64] Consequently, allowing a suit for damages against a medical practitioner would be a clear contravention of Section 29 of the PHCA as the language of this particular provision categorically grants healthcare service providers immunity against such legal proceedings.

This interpretation of Section 29 read with Section 26(2) of the PHCA was upheld by the Lahore High Court in *Lady Dr. Nafeesa Saleem and another versus Justice / Additional Sessions Judge, Multan and 2 others*.[65] In this case, it was held that the purpose of Section 29 is to grant exclusive jurisdiction to the Healthcare Commission over the adjudication of matters against a healthcare service provider. Furthermore, this exclusive jurisdiction is subject to Section 26(2) of the PHCA, which grants the Commission the power to refer a particular matter to another forum for initiation of criminal or civil proceedings against a healthcare service provider.[66] Thus, a victim of medical negligence is not allowed to directly approach a forum other than the Commission itself to pursue a civil or criminal claim against the medical service provider. This was also clarified in *Dr. Riaz Qadeer Khan versus Presiding Officer, District Consumer Court, Sargodha and others*,[67] where the Lahore High Court held that a victim of medical negligence cannot pursue a remedy under

[64] ibid, s 28.
[65] *Lady Dr. Nafeesa Saleem and another versus Justice / Additional Sessions Judge, Multan and 2 others* (PLD 2022 Lahore 18).
[66] ibid [44].
[67] *Dr. Riaz Qadeer Khan versus Presiding Officer, District Consumer Court, Sargodha, and others* (PLD 2019 Lahore 429)

the consumer protection laws before the Consumer Courts as the only competent forum in this regard is the Healthcare Commission.[68]

It is unclear how the courts have continued to circumvent these provisions in cases such as *Mariam Sajjad* without any justification of this issue.[69] Furthermore, the fact that in the case of *Mariam Sajjad*, the judgments of the Lahore High Court in *Lady Dr. Nafeesa Saleem* and *Dr. Riaz Qadeer Khan* were neither cited, nor were any reasons provided to depart from the interpretation of the PHCA provided in these cases, which is a glaring question mark on the reasoning provided in the judgement.[70] There is a need to challenge the legal validity and constitutionality of Section 29 of the PHCA as it violates Article 10A of the Constitution, which confers upon all citizens a right to fair trial and due process for the determination of civil rights and obligations.[71] When a victim of medical negligence is apparently barred by a statutory provision to seek remedies against negligent conduct, the victim is left with nothing more than the imposition of a fine and possibly revocation of the medical practitioner's medical licence.

The above remedies are clearly insufficient in most cases. In *Mariam Sajjad*, the victim suffered significant impairment which requires a proper quantification of damages as is done in other jurisdictions.[72] This is not to say that the Lahore High Court has, as of now, completely failed victims of medical negligence; rather, the Court has encouraged suits for damages in cases involving medical negligence, but has not properly explained the purport of the PHCA. Hence, it has exceeded the scope of their competence without dwelling too much on the constitutionality of the aforementioned provision.

Despite this inadequacy in the approach taken by the Court, this article will now examine the mode of assessment that has been recognised by the Lahore

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[68] ibid [12].
[69] *Mariam Sajjad v. Prof. Dr. Rasool Ahmed Chaudhry* (n 58).
[70] *Lady Dr. Nafeesa Saleem and another versus Justice / Additional Sessions Judge, Multan and 2 others* (n 65); *Dr. Riaz Qadeer Khan versus Presiding Officer, District Consumer Court, Sargodha, and others* (n 67)[12].
[71] Constitution, art 10A.
[72] *Mariam Sajjad v. Prof. Dr. Rasool Ahmed Chaudhry* (n 58).

High Court with respect to compensatory damages in medical negligence cases.

4.3. Standard for assessment of damages in medical negligence cases

In *Mariam Sajjad*, the Lahore High Court declared seven kinds of damages and injuries to be compensable.[73] Firstly, the victim of medical negligence should be provided with a fair and reasonable compensation for the injury caused.[74] Secondly, a small amount of compensation should be provided under the category of pain and suffering.[75] Thirdly, the victim must also be compensated for loss of amenity, i.e., the ability of the victim to enjoy his daily jobs, recreational activities, and hobbies due to some form of impairment caused as a result of the negligent conduct of the medical practitioner.[76] The Court further noted that damages for loss of amenity can be granted even where the victim is unconscious and cannot actively realize the loss of amenity that he/she has suffered.

Fourthly, the victim must also be compensated for all medical expenses incurred in connection with the treatment that was administered negligently.[77] These expenses shall include any expenses that might result due to the change in lifestyle that could be required in order for the victim to properly adopt to his/her altered circumstances.[78] Fifthly, the court must make a determination for the loss of earning suffered by the victim and this determination shall include losses suffered till date and any future losses that the victim can be expected to suffer as a result of the injury suffered.[79] Sixthly, all pecuniary losses, i.e., losses related to the injury suffered where the costs cannot be categorised as medical in nature but are in any case related to the injury suffered.[80] Lastly, the courts are also to examine any pain and suffering that the victim can be expected to suffer in the future, which may include the

[73] ibid.
[74] ibid [13].
[75] ibid.
[76] ibid.
[77] Jonathan Herring, *Medical Law and Ethics* (9th edition, OUP 2022) 124; Michael Jones, *Medical Negligence* (6th edition, Sweet & Maxwell 2021) 1001-1002.
[78] *Mariam Sajjad v. Prof. Dr. Rasool Ahmed Chaudhry* (n 58) [13].
[79] ibid.
[80] ibid.

humiliation and emotional stress that the victim will have to go through while acclimatising in the society owing to the altered circumstances.[81]

This illustrates that the Lahore High Court has not acted conservatively in describing the losses that can be monetarily compensated by a court and have actually actively included all forms of possible losses which might be in the minds of the victims of medical negligence.[82] However, it must be noted that significant confusion exists in regard to the overall structure of the tort redressal mechanism in Pakistan. While the Lahore High Court has consistently allowed cases to proceed as regular appeals under the Civil Procedure Code 1898, this seems to be in contravention of Section 29 of the PHCA and the immunity it affords to medical practitioners.[83] Moreover, it appears that the basis of this confusion has been that the Lahore High Court has interpreted Section 19 of the PHCA as a provision which lays down the offence of medical negligence rather than a provision that merely defines the term medical negligence.[84] This raises questions about the legality of the resulting judgements. [85]

5. CONCLUSION

This article compares the different approaches to medical negligence law across England and Wales, India and Pakistan. The latter two legal systems have regularly cited cases and academic opinions from the English legal system. Most fundamentally, in the area of medical negligence, the *Bolam* case has been significant as it has been recognised in India and Pakistan as well.[86] This replication of jurisprudence in Indian and Pakistani courts is praiseworthy for a number of reasons, but is not necessarily flawless. It is to be appreciated that every jurisdiction has its own unique challenges, and it is these challenges which the judges are to keep in mind when they are in a position to set a precedent.

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[81] ibid.
[82] ibid.
[83] Code of Civil Procedure 1908, s 96; Punjab Healthcare Commission Act 2010, s 29.
[84] Punjab Healthcare Commission Act 2010, s 19.
[85] ibid, s 29.
[86] *Bolam v Friern Hospital Management Committee* (n 11).

The Indian legal system shares the issue of replicating English jurisprudence without accommodating the ground realities in the Indian medical sector. Additionally, there is confusion as to the most suitable route to take in order to gain access to monetary compensation as a result of medical negligence. An example of this is that, as discussed above, in India, a victim of medical negligence as a result of treatment administered in the absence of consideration cannot make use of the consumer protection jurisprudence if the victim cannot be classified as a consumer.

In the end, the proactive approach taken by the Indian and Pakistani courts must be appreciated; however, there is still a long way to go for the tort law jurisprudence in both countries to become more in line with the ground realities and also be less confusing for prospective litigants.

INHERITANCE LAWS FOR MUSLIM TRANSGENDERS: INSIGHTS FROM ISLAMIC JURISPRUDENCE ACROSS JURISDICTIONS

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ABSTRACT

This article delves into the complex landscape of Islamic legal perspectives on sex change for transgender individuals and their implications for inheritance rights. By examining various legal frameworks and approaches adopted by different countries, this study sheds light on the evolving discourse surrounding gender diversity within Islamic jurisprudence and the nuanced interplay between medical and legal considerations in addressing transsexuality within Islamic law. Rather than focusing on the process of *ijtihad* conducted by individual schools of Islamic jurisprudence, this article explores how legal systems navigate the plurality of jurisprudential interpretations to shape inheritance laws that accommodate the rights to inheritance of transgender individuals.

KEYWORDS: Islamic Jurisprudence, Sex Reassignment Surgery (SRS), Transgender, Inheritance.

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1. INTRODUCTION

The Islamic law of inheritance of property provides for the disinheritance of a legal heir only in certain exceptional circumstances.[1] With regards to inheritance for transgenders, the Supreme Court of Pakistan declared that an individual cannot be disinherited merely because the deceased disapproves of their gender expression.[2] The Supreme Court did not delve into the appropriate Islamic laws of inheritance applicable in cases of devolution of property to a transgender heir. Later, the Federal Government sought to

[1] Muhammad Zubair Abbasi and Shahbaz Ahmad Cheema, 'Inheritance Law' in *Family Law in Pakistan* (Oxford University Press 2019).
[2] *Dr. Muhammad Aslam Khaki and Others vs. S.S.P. (Operations) Rawalpindi and Others* (PLD 2013 SC 188)

uphold the rights and liberties of transgender individuals by promulgating the Transgender Persons (Protection of Rights) Act in 2018.[3] Section 2(n) defines a transgender person and outlines the spectrum of identities within the definition, whereas the respective succession laws are listed in Section 7 of the Act.

The terms 'transgender' and 'transsexual' represent contemporary English medio-social constructs.[4] 'Transgender' refers to a broad spectrum of gender identities and expressions that do not align with one's assigned biological sex. On the other hand, 'transsexuals' are individuals who have undergone medical procedures to align their self-perceived gender identity with their physical characteristics. However, these terms may not fully capture the indigenous gender terminologies of the Indo-Pak region, such as *hijra*, *zenana* and *khawaja-sira*.[5]

In present-day usage, *khawaja-sira* serves as an umbrella term encompassing gender non-conforming individuals. Historically, in precolonial India, the term *khawaja-sira* described castrated men who often held respectable roles, such as house servants.[6] In contrast, *hijra* referred more broadly to effeminate men, often associated with artistic performances and cultural practices. Similarly, *zenana*, in present-day usage, refers to effeminate men.[7] The marginalisation of these groups following colonial interventions led to the adoption of the term *khawaja-sira* as a unifying term for the third gender in the region. These shifts in terminology reflect the complex interplay of social, historical, and cultural factors influencing gender identities in the Indo-Pak context.

Traditional and modern Islamic jurisprudence employs distinct terminologies in the Arabic and Persian languages to describe various forms of gender

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[3] Transgender Persons (Protection of Rights) Act 2018.
[4] 'Understanding Transgender People, Gender Identity and Gender Expression' (American Psychological Association, 9 March 2023) https://www.apa.org/topics/lgbtq/transgender-people-gender-identity-gender-expression accessed 1 May 2024.
[5] Zoya Waheed, 'Legal Recognition of Gender Identity and Sexual Rights: The Voices of Khwaja Saras in Pakistan' (2019) Social Justice Perspectives (SJP) http://hdl.handle.net/2105/51401 accessed 02 May 2024
[6] Jessica Hinchy, *Governing Gender and Sexuality in Colonial India: The Hijra, c.1850-1900* (Cambridge University Press 2019).
[7] ibid 22.

expression and sexual ambiguity. Thus, it is essential to recognise and understand the linguistic variations across different regions and languages before delving into respective inheritance principles. For this article, the term 'transgenders' will be utilised to encompass all gender non-conforming individuals. However, efforts will be made to appropriately identify any variations in terminology relevant to discussions on Islamic jurisprudence or historical analysis.

2. LITERATURE REVIEW

The exploration of Islamic jurisprudence regarding sex reassignment surgery (SRS) and gender non-conformity is essential for understanding the evolution of medico-legal frameworks addressing transsexuality across different States. This research first delves into Sunni and Shiite perspectives, which diverge on the issue of sex change and its implications for inheritance laws. Drawing from the journal articles, Sunni jurisprudence generally prohibits SRS, emphasising biological sex for inheritance matters, although diverse opinions exist within Sunni scholarship.[8] Conversely, Shiite jurisprudence, as influenced by prominent jurists like Ayatollah Khomeini, supports the legal validity of SRS within Islamic frameworks, tracing the historical development and pivotal *fatwas* (legal rulings passed by qualified Islamic legal scholars) that have shaped contemporary understandings of gender variance within Islamic legal contexts.[9]

Further context will be provided by examining literature detailing the developments in Iran's medico-legal system to accommodate transgender individuals, including revisions to inheritance laws.[10] Insights into Iran's procedural processes – albeit with identified shortcomings – offer a comprehensive examination through extensive primary fieldwork, including

[8] Serena Tolino, 'Transgendrism, Transsexuality and Sex-Reassignment Surgery in Contemporary Sunni Fatwas' (2017) 17 Journal of Arabic and Islamic 223–246.
[9] M. Alipour, 'Islamic Shari'a Law, Neotraditionalist Muslim Scholars and Transgender Sex-Reassignment Surgery: A Case Study of Ayatollah Khomeini's and Sheikh al-Tantawi's Fatwas' (2017) 18 (1) International Journal of Transgenderism 91-103; Hamidreza Abdi, Abbas Ali Heidari and Mahmoud Ghayoomzadeh, 'Imam Khomeini's Innovations in Changing Sex in Spousal Sentences' (2021) 12(11) Turkish Journal of Computer and Mathematical Education 6669–6673.
[10] Outright Action International, *Human Rights Report: Being Transgender in Iran* (2016) https://outrightinternational.org/our-work/human-rights-research/human-rights-report-being-transgender-iran accessed 23 December 2024.

interviews with legal and medical officers, transgender community members, and activists. This will provide a holistic account of Iran's judiciary's consideration of fatwas and the institutionalisation of frameworks for transgender medical care.[11]

While the focus of this paper is on SRS jurisprudence in Muslim countries, it is also relevant to examine India's succession legal framework, case law, and State approaches to gender non-conformity. Pertinent case law is examined to highlight the judiciary's attempts to address inheritance within the indigenous cultural and identity framework of the transgender community. The absence of codification of Muslim personal law regarding inheritance hinders potential avenues for exploring Islamic jurisprudence concerning inheritance for Muslim transgenders.[12] Considering Pakistan's similar social setup of transgender communities, India's approach provides valuable analysis within a shared cultural realm.

Certain limitations of this paper include the inadequacy and unavailability of literature on whether the plurality in Islamic jurisprudence is considered when issuing *fatwas* on the permissibility of SRS. Although the Transgender Persons (Protection of Rights) Act of 2018 in Pakistan codified inheritance principles applicable to transgender individuals, secondary research reveals shortcomings of the Act, its dissonance with indigenous understandings of gender non-conformity,[13] and recent controversies, including a Federal Shariat Court decision declaring few aspects of the 2018 Act against the injunctions of Islam.

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[11] Zara Saeidzadeh, 'Understanding Socio-Legal Complexities of Sex Change in Postrevolutionary Iran' (2019) 6 (1) Transgender Studies Quarterly 80.

[12] Karan Gulati and Tushar Anand, 'Inheritance rights of transgender persons in India' (2023) 7(1) Indian Law Review 1–25.

[13] Jessica Hinchy (n 6); Faris A. Khan, 'Institutionalising an Ambiguous Category: "Khawaja Sira" Activism, the State, and Sex/Gender Regulation in Pakistan' (2019) *92(4)* Anthropological Quarterly 1135 - 1172; Marha Fatima and Hajrah Yousaf, 'The (in)Accessibility of NADRA and Union Council Processes for Women and Gender Minorities' (2022) 3 LUMS Saida Waheed Gender Initiative (SWIG) https://swgi.lums.edu.pk/publications/gender-bi-annual/article/14189 accessed 01 May 2024.

3. ISLAMIC JURISPRUDENCE ON GENDER NON-CONFORMITY

The historical understanding of non-conformity to the gender binary, in the context of Islamic societies, varies significantly from the contemporary approach to gender ambiguity and diversity, especially when one considers the linguistic manifestations that have been employed in classical Islamic jurisprudence. Classical Islamic jurisprudence, while grounded in the gender binary, identifies three categories to illustrate gender non-conformity – *khunta* (intersex persons with ambiguous genitalia upon birth or later in puberty), *khasi/mamsuh* (eunuch) and *mukhannathun* (effeminate males).[14] This early discourse on gender non-conformity in Islamic jurisprudence cannot be reconciled with the contemporary notions of 'sex change' and medical developments in SRS; rather, gender non-conformity is explored in the context of societal functions and defining Islamic practices for them. Therefore, with the increase in medical developments, Islamic jurists have had to deduce the validity of medical interventions, such as SRS, utilised by transgender individuals. After the 1970s, when the discourse regarding SRS came to the forefront and Islamic jurists increasingly delivered *fatwas* on the subject, a variety of opinions emerged. These opinions can be categorised as either a complete prohibition, a confirmation of legitimacy or a contingent confirmation of legitimacy.[15]

3.1. Sunni Jurisprudence

All major schools of thought acknowledge that sex change is permissible in cases of necessity. However, Sunni jurists, when considering medical interventions for SRS, largely regard these procedures as alterations to God's creation, which they deem impermissible under Islamic law, except in exceptional circumstances.[16] Their position is grounded in several Quranic verses that emphasise the inviolability of the natural order. For instance, they often cite Surah Ar-Rum (30:30), which commands believers to

> direct your face toward the religion, inclining to truth. [Adhere to] the fitrah of Allah upon which He has created [all] people. No

[14] Serena Tolino (n 8); M. Alipour (n 9).
[15] Hamidreza Abdi, Abbas Ali Heidari and Mahmoud Ghayoomzadeh (n 9).
[16] Serena Tolino (n 8).

> change should there be in the creation of Allah. That is the correct religion, but most of the people do not know.[17]

This verse is interpreted as a clear mandate against altering divine creation. Additionally, regarding the gender binary, Sunni jurists refer to the following verse in Surah Ash-Shura:

> 'To Allah belongs the dominion of the heavens and the earth. He creates whatever He wills. He grants females to whomever He wills, and males to whomever He wills...[18]

From this verse, jurists deduce the existence of only two divinely ordained sexes, thereby reinforcing their stance against SRS except under dire circumstances.

3.2. Shiite Jurisprudence

However, Shiite jurisprudence categorises sex change as permissible because it addresses physical and mental illnesses, which cannot be called the 'tampering of the body' but rather necessary recourse to medicine to relieve a gender dysphoric person of psychological and physiological complications.[19] It is pertinent to mention that the Shiite jurisprudence that warrants the use of SRS is not 'progressive' in terms of expanding gender diversity but rather approaches the psychological state of transgender individuals as a mental illness or a manifestation of 'the wrong soul in the wrong body'.

Shiite jurisprudence further expands upon the variation in Islamic practices that would result following the sex change.[20] Shiite jurists assert a revised criteria for inheritance according to an individual's newly assigned gender - a male individual who has transitioned to female identity is entitled to an inheritance share equivalent to that of a biological daughter.[21] While plurality exists in Shiite jurisprudence, the *fatwa* by Ayatollah Ruhollah Khomeini is

[17] The Qur'an, Surah Ar-Rum 30:30.
[18] The Qur'an, Surah Ash-Shura 42:49.
[19] Hamidreza Abdi, Abbas Ali Heidari and Mahmoud Ghayoomzadeh (n 9).
[20] ibid.
[21] ibid.

widely used to assert the validity of SRS in Islam. The following is an excerpt from his *fatwa*:

> 'In the Name of God. Sex-reassignment surgery is not prohibited in Islamic law (shari¯ʿa) if reliable medical doctors recommend it. God-willing, you will be safe and hopefully the people whom you mentioned might take care of your situation.'22

The 1987 *fatwa* marked a significant turning point in Iran's approach to sex change procedures. It triggered a transformation in the medico-legal landscape, paving the way for the establishment of a comprehensive bureaucratic framework for individuals seeking to undergo SRS and subsequently change their official gender identity. Over the following decades, Iranian authorities meticulously structured the process, encompassing both medical procedures and legal formalities.

This development in the Islamic jurisprudence on the permissibility of SRS influenced other Muslim jurists in countries such as Egypt. Following the fatwa of Ayatollah Khomeini, Sheikh Muhammad Sayyid Tantawi, a Sunni Muslim jurist in Egypt, also issued a *fatwa* when the Egyptian Medical Syndicate (EMS) requested his opinion on the validity of sex change in Islam. In 1988, EMS received the case of Sayyid/Sally, where the applicant, Sayyid Abd Allah, a biological male, was diagnosed with 'psychological hermaphroditism'.[23] It had to be determined whether he should undergo SRS at that time. In his *fatwa*, Sheikh Tantawy stated that the applicant is not deliberately trying to resemble or take on the expression of the female sex, but rather due to his psychological state, he has the natural disposition of feminine expression (*mukhannath khalqi*), and hence, was deserving of medical intervention.[24]

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[22] Intisar A. Rabb 'Conscience Claims in Islamic Law' (2019) Harvard Public Law Working Paper No. 19-40 http://dx.doi.org/10.2139/ssrn.3427941 accessed 01 May 2024.
[23] Ahmed Ali Dabash, 'The Egyptian Constitution and Transgender Rights: Judicial Interpretation of Islamic Norms' (2023) 3(1) Journal of Law and Emerging Technologies 33–58.
[24] ibid.

3.3. Inheritance for Intersex Persons

With regards to inheritance for *khunta*, or intersex individuals, extensive early Islamic jurisprudence exists on approaching the gender ambiguity of *khunta* and appropriate inheritance share for them, although with differing opinions by various Islamic schools of thought.[25] For instance, the Hanbalis and Malikis assert that the *khunta* is entitled to half of a male's share and half of a female's share as their gender is undetermined.[26] On the other hand, Abu Hurairah stated that a *khunta* should get the lowest share in the inheritance.[27] Therefore, no consensus has been reached in the determination of inheritance for intersex individuals; however, jurisprudence validating the unique genital physiology which defies the gender binary does exist, and scholars have recognised how it can shape inheritance mechanisms under Islamic law.

The preceding discussion highlights the diversity within Islamic jurisprudence concerning the acceptance or prohibition of SRS. The discourse surrounding the validity of sex change remains dynamic within Islamic jurisprudence, with divergent opinions offered by various jurists. This evolving dialogue reflects the ongoing development of Islamic legal perspectives on gender-non-conformity and transition. Moreover, there are varying approaches to succession for individuals who do not conform to traditional gender norms, further illustrating the multifaceted nature of this discourse within Islamic law.

4. Cross-Jurisdictional Analysis

4.1. Pakistan

In the Indo-Pak subcontinent context, the term *khawaja-sira* is an all-encompassing label for individuals outside the traditional gender binary.[28] Understanding indigenous practices such as the *guru-chela* system is crucial for recommending the inheritance framework within our domestic cultural

[25] Ani Amelia Zainuddin and Zaleha Abdullah Mahdy, 'The Islamic Perspectives of Gender-Related Issues in the Management of Patients with Disorders of Sex Development' (2017) 46(2) Archives of Sexual Behaviour 353 – 360.
[26] ibid.
[27] ibid.
[28] Zoya Waheed (n 5).

setting. In this system, the *guru* assumes a paternal role, offering refuge and guidance to *chelas* (students) who may have been ostracised by their families.[29]

4.1.1. Case Law

In *Zafar alias Mumtaz & another v Mst. Sajjad Begum & Others*,[30] the Supreme Court of Azad Jammu and Kashmir deliberated on the hierarchical structure within *khawaja-sira* communities, particularly concerning inheritance.[31] The Court upheld *shariah* law principles, emphasising the precedence of bloodline and spousal relations in matters of inheritance. The ruling highlights how *shariah* law supersedes customary and cultural practices. However, while the case primarily focused on the question of whether a *guru's* inheritance should pass to their *chelas*, it did not delve into the complexities surrounding inheritance for gender non-conforming individuals. This omission highlights a gap in legal discourse regarding the inheritance rights of transgender individuals.

Nevertheless, the *khawaja-sira* community is recognised as entitled to inheritance from their blood relations, as affirmed in a 2009 constitutional petition.[32] The Supreme Court stated the importance of recognising transgender persons as the 'third sex' and directed the National Database and Registration Authority (NADRA) to initiate the official process of including the 'third sex' in the identification documents. The Court held that the *khawaja-sira* community must not be denied access to social spaces and facilities, as that would infringe their fundamental right to equality enshrined in Article 25 of the Constitution of Pakistan. This legal precedent illuminates the ongoing dialogue surrounding gender diversity and inheritance rights in Pakistan, underscoring the need for continued exploration and consideration within both legal and cultural spheres.

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[29] Sameen Azhar et al, "Having a guru is like having a licence": Analysing Financial Relationships between Khwaja Sira Gurus and Chelas in Swat, Pakistan (2022) 25(11) An International Journal for Research, Intervention and Care 1449–1464.
[30] *Zafar alias Mumtaz & another v Mst. Sajjad Begum & Others* (PLJ 2015 AJK 14).
[31] ibid.
[32] *Dr. Muhammad Aslam Khaki* (n 2).

4.1.2. Legislation

In 2018, the Federal Legislature promulgated the Transgender Persons (Protection of Rights) Act, which streamlined the citizenship directives given by the judiciary in 2009 and 2018. It also included the rights and liberties that transgender persons are entitled to, including the right to inheritance. Section 7 of the Act outlines inheritance rules for transgender persons based on their gender identity. A male transgender is entitled to the inheritance share of a male, while a female transgender is entitled to the share of a woman.[33] A person with ambiguous gender/genitalia is allowed to declare their self-perceived identity upon reaching the age of majority, and the respective inheritance share will be applicable, or if they do not identify as transgender man/woman, they are entitled to the average of a male and female's share.[34]

It is pertinent to note the definition of a 'transgender' identified by the Act. Speaking in terms of the Islamic historical classifications, it encompasses *khunta* individuals (intersex), *khasi* individuals (those who have undergone castration, i.e., eunuchs), as well as any individual who defies the gender binary, which could be to some extent categorised under *mukhannathun* (effeminate male). These classifications and the respective inheritance shares arising out of them have been a major point of controversy that resulted in the petition before the Federal Shariat Court (FSC) in 2020.[35] The FSC had an opportunity to explore the diversity within Islamic jurisprudence concerning gender non-conformity and its implications for inheritance. However, it resorted to unsubstantiated speculations that the 2018 Act can allow access to female exclusive spaces to criminals under the 'disguise of transgender women', exposing them to the risk of sexual violence.[36] The FSC asserted that inheritance can only be divided among legal heirs based on biological sex, as the concept of 'self-perceived' gender identity is contrary to the injunctions of Islam. According to this, the FSC held that Sections 2(f)

[33] Transgender Persons (Protection of Rights) Act 2018, s 7.
[34] ibid.
[35] *Hammad Hussain v Federation of Pakistan* (Shariat Petition No.5/I of 2020).
[36] ibid [93].

and 7 must be repealed as they violate Article 227 of the Constitution of Pakistan.[37]

4.1.3. NADRA Process

NADRA, in accordance with the 2009 Supreme Court judgment, established protocols for recognising transgender individuals by introducing the gender X option on their CNICs. However, to obtain this CNIC, transgender individuals are still required to provide parental biometric verification or that of their *guru*. Interestingly, if a transgender individual's CNIC bears their *guru's* name, they have to forfeit their right to claim inheritance as the inheritance process, facilitated by NADRA, revolves around the issuance of a Succession Certificate which only lists biological family members and allots inheritance shares respectively.[38]

In an interview with a NADRA representative, the procedural steps for obtaining this certificate were explained. Notably, one crucial step involves listing the deceased's children along with their genders, enabling NADRA to determine their respective inheritance shares. However, transgender individuals whose CNICs only reflect 'gender X' must additionally submit a self-perceived gender identity declaration with no prerequisite medical records or examinations. According to another interview with a representative from NADRA's Operations Department in Lahore, only two instances in Karachi (none in Lahore) have been reported, which necessitated the implementation of this declaration form process. This information underscores a pivotal aspect in this examination of the inheritance process and prompts deeper analysis into the practical implications of legal frameworks concerning transgender inheritance rights and the challenges encountered in their implementation.

4.2. Iran

By 2005, the Islamic Republic of Iran had unexpectedly become a global leader in SRS.[39] As a Muslim theocratic State with laws and regulations based

[37] ibid, [96].
[38] Marha Fatima and Hajrah Yousaf (n 13).
[39] Robert Tait, 'A Fatwa for Freedom' *The Guardian* (London, 27 July 2005).

on Jafari Shia Islam, the country's decision to legalise SRS is indeed intriguing. Iran's approach to sex change procedures can be traced back to the 1930s when the Iranian medical system started recognising 'gender identity disorder'.[40] Following the *fatwas* by Ayatollah Khomeini, sex change became a medico-judicial process through which transsexuals could undergo surgical procedures to achieve their preferred sex, also known as *amal-e-taghir-e-jinsiyat* in the Persian language.[41]

It is pertinent to note that the terms 'transgender' and 'transsexual' are currently utilised by the Iranian medical system to initiate the medical diagnosis of gender identity disorder. Previously, the Persian term of *tarajinsiyati* was utilised, which primarily means 'a status in which the person's gender identity is discordant with their biological sex and culturally defined gender roles, which results in gender discontent, cross dressing and finally the change of gender'.[42] The sex change, according to the Iranian legal system, is a process through which this state of gender discordance can be treated. It is considered a healthcare service and is recognised as a matter over which Iranian Family Courts have subject-matter jurisdiction.[43] The Family Courts are empowered to refer to *fatwas* during decision-making; Ayatollah Khomeini's *fatwas* regarding sex change in the book *Tahrir ul Wasilah* hold great importance among the Iranian judiciary for these cases.[44] Ayatollah Khomeini's approach to sex change and transsexuality over time laid the foundation for the medico-legal process of attaining the legal gender transition with a new legal name and change in applicable Islamic law, including inheritance.

4.2.1. Medico-legal Process of Sex Change in Iran

In Iran, a court authorisation is required before undergoing SRS and the subsequent changing of the legal name.[45] This authorisation is permission by the court to facilitate the applicant's assessment by the Iranian Legal Medical

[40] Zara Saeidzadeh (n 11).
[41] ibid.
[42] Zara Saeidzadeh, 'Transsexuality in Contemporary Iran: Legal and Social Misrecognition' (2016) vol 24 Feminist Legal Studies 249 – 272.
[43] Family Protection Act 1967 (Iran), art 4(18).
[44] Zara Saeidzadeh (n 11).
[45] Outright Action International (n 10).

Organisation (ILMO). The ILMO then initiates the process of gender reconstruction surgery (GRS), which includes extensive hormonal and surgical interventions. Upon the completion of the GRS, the applicant again approaches the Family Court to direct their request for new identification documentation to the National Organisation for Civil Registration (NOCR) which reflects their new gender identity.[46] Transgender individuals who do not undergo the complete legal process of GRS are not allowed to change their gender identity in their identification documents.[47]

The revised rules of inheritance for transgender individuals can only be applicable once they attain their new gender identity from the NOCR. However, the above process of changing one's gender identity is not uniform across Iran; for instance, parental presence is mandatory in the ILMO centre in the city of Shiraz, even for those above the age of 18, but not in Tehran.[48] Moreover, in Kermanshah, the Revolutionary Courts (*dadgah-ha-yi inghilab*), established by Ayatollah Khomeini as parallel to the Iranian criminal courts, are tasked with the issuance of the certificate permitting the sex change instead of the Family Court.[49] These courts are typically presided over by a single judge with expertise in Islamic jurisprudence. The entire transition process encompasses medical, legal, and social aspects; the certificate for GRS (with no expiry date) is utilised by individuals in Iran to socially pass as transgender before they initiate the medical SRS process.[50] However, they cannot legally have their gender identity changed.

4.2.2. Sex Change and Inheritance

Article 939 of the Civil Procedure Code of the Islamic Republic of Iran provides for the shares of inheritance that intersex individuals are entitled to. Where the masculine features are dominant, the individual will get the share of a male, and if the feminine features are dominant, they will be entitled to the share of a female.[51] Moreover, hermaphrodites may undergo GRS once they attain puberty, according to their dominant gender traits, which can

[46] ibid.
[47] ibid.
[48] Zara Saeidzadeh (n 11).
[49] ibid.
[50] ibid.
[51] Civil Code of the Islamic Republic of Iran 1982.

change their legal gender identity and subsequent inheritance determination.[52] The Civil Procedure Code does not codify the nexus of sex change (undertaken by transsexuals) and inheritance, as discussed in the above section. Following the procedure of sex change and revised gender identity in the identification documents, the individual will receive the respective share of their new gender identity in their identification.[53]

Iran's approach to sex change procedures presents a unique intersection of religious principles, legal frameworks, and medical interventions. Historically rooted in Ayatollah Khomeini's *fatwas*, the medico-legal process of gender transition has evolved significantly over time, guided by both religious and medical authorities. The requirement for court authorisation and subsequent procedures overseen by the ILMO and Family Courts exemplifies the complexities involved in obtaining legal recognition for gender identity. Furthermore, the relationship between sex change and inheritance laws in Iran underscores the complex interplay between legal statutes and personal identity.

4.3. India

In 2019, India promulgated the Transgender Persons (Protection of Rights) Act. The 2019 Act provides legal recognition of the civil liberties which transgender individuals are entitled to, but unlike the Pakistani Act, it does not address the issue of inheritance.[54] In the Indian legal system, the Succession Act 1925 governs the law of inheritance but excludes the ambit of the Muslim personal laws regarding succession. The judiciary mainly relies on the Muslim Personal Law (Shariat) Application Act of 1937, which recognises Muslim personal law and other customary laws and practices to resolve inheritance disputes.[55] Therefore, Islamic jurisprudence on inheritance laws on gender non-conforming individuals is insufficiently codified in India.

[52] Zara Saeidzadeh (n 11).
[53] Outright Action International (n 10).
[54] Transgender Persons (Protection of Rights) Act 2019 (India).
[55] Karan Gulati and Tushar Anand (n 12).

Although Article 14 of the Indian Constitution mandates recognition of genders as well as in the case of *National Legal Service Authority v Union of India & Others*,[56] the Supreme Court of India recognised a transgender person's right to inheritance and stated that the completion of SRS is not a prerequisite for the recognition of their inheritance rights.[57] Furthermore, the case of *Illyas v Badshah Alias Kamla*[58] dealt with the intersection of gender non-conformity and Muslim law of inheritance. In this case, the petitioner asserted that their *guru*, Munnilal, executed a will which granted them the right to inherit their *guru's* property, which the *guru* had also inherited from their then-*guru*.[59] The Madhya Pradesh High Court decided that the deceased, being a Muslim, cannot devolve their property among their *chelas*.[60] The *gurus* can only devolve not more than one-third of their property as a gift under Islamic law, as the Islamic inheritance law only recognises blood ties when devolving the deceased's property.

While India's Transgender Persons (Protection of Rights) Act 2019 was a crucial step forward in providing legal recognition and safeguarding the rights of transgender individuals, the specific issue of inheritance rights for Muslim transgender individuals remains largely unexplored and unaddressed within the country's legal frameworks.

5. ANALYSIS

The conceptualisation of gender self-identification varies significantly across different Islamic jurisprudential traditions. In Sunni jurisprudence, an individual's ability to challenge or alter their gender identity is strictly prohibited, as it is seen as an attempt to change God's creation. This belief forms the basis for the exclusion of gender self-identification in Islamic inheritance laws under Sunni jurisprudence. Emphasising a fixed binary understanding of gender, Sunni legal frameworks do not accommodate any recognition of gender identity beyond the traditional male-female dichotomy, leaving inheritance laws unchanged by an individual's self-identified gender.

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[56] *National Legal Services Authority v Union of India* (2014) 5 SCC 438.
[57] ibid [129].
[58] *Illyas v Badshah Alias Kamla* AIR 1990 MP 334.
[59] ibid [2].
[60] ibid [10].

The medico-legal framework of Iran, regarding the process of SRS and subsequent implications in the laws of inheritance for transgenders, illustrates an intriguing example of developments in Islamic jurisprudence being intertwined with State functions. Ayatollah Khomeini's revolutionary jurisprudence on SRS, which recognised the existence of transgender, has been furthered by other Muslim jurists, including Sheikh Muhammad Sayyid Tantawy. The widespread socio-cultural recognition of such fatwas prompted the State to introduce medical administrative processes aimed at streamlining the procedure of SRS. Judicial bodies, such as the Family Courts in Iran, translated these *fatwas* into binding judicial decisions, appropriately adjudicating on matters related to gender identity. These *fatwas*, rooted in Shiite jurisprudence, should not be interpreted through the lens of the Global North's perspective on recognising gender diversity.

While Shiite jurisprudence acknowledges the complex physiological and psychological factors involved, it primarily seeks to maintain a binary understanding of gender. Its aim is to encourage gender non-conforming individuals to conform to a binary gender status, thereby aligning with the gender binary aspects of *sharia* law, particularly concerning inheritance. Gender self-identification is recognised as inherently linked to medicalisation. Under Shiite jurisprudence, gender actualisation is not seen as solely a personal or social matter but is framed as a medical necessity. The belief underpinning this view is that true integration into one's self-identified gender cannot be fully realised without undergoing medical interventions, particularly SRS. As a result, legal and social recognition of a transgender individual is contingent upon their medical transition. Inheritance laws, being a critical component of Islamic legal principles, are thus only adjusted based on the post-operative gender of the individual.

As previously discussed, Islamic jurisprudence acknowledges the unique physiological condition of *khuntas* (individuals born with ambiguous genitalia), with some Islamic schools of thought proposing specific inheritance principles for them. Nevertheless, there remains an expectation that by the onset of puberty, a *khunta's* dominant gender expression, possibly aided by medical interventions, will enable them to conform to either male or female identity, thus emphasising assimilation into the traditional gender

binary framework. The principles of inheritance will then be applicable according to their post-operation gender.

The stringent requirement for a complete medical transition, as observed in Iran, poses significant challenges for the transgender community. Conversely, in Pakistan, changing legal gender identity from male or female to 'X' does not necessitate medical documentation. However, the legislation in Pakistan remains silent on the provision of appropriate medical mechanisms for transgender individuals seeking SRS. This is further hindered by the recent FSC judgment that did not recognise the plurality of Islamic jurisprudence on SRS and rather erroneously characterised SRS as solely catering to the sexual desires of transgender individuals.

While SRS for transgender individuals remains a relatively new subject in Islamic law, Shiite jurisprudence has developed significant discourse on it, particularly in connection to the law of inheritance, as elaborated in this paper. This perspective warrants further exploration within the context of our domestic social dynamics, particularly concerning the *khawaja-sira* community, before unequivocally declaring SRS as prohibited.

Article 227 states that all laws must be in conformity with the Quran and Sunnah. Moreover, the explanation clause added by the Constitution (Third Amendment) Order 1980[61] recognises the importance of diverse interpretative mechanisms, such as *qiyas* and *ijma*, within each Muslim sect without restriction. Therefore, the FSC's failure to acknowledge Shiite jurisprudence on SRS and its respective inheritance laws and the nullification of Section 7 of the Transgender Persons (Protection of Rights) Act 2018 concerning inheritance represents a misapplication of Article 227 of the Constitution.

6. CONCLUSION

This article highlights the intricate relationship between Islamic jurisprudence and State laws regarding SRS and inheritance rights for transgender

[61] Constitution of the Islamic Republic of Pakistan 1973, art 227(1): Explanation: In the application of this clause to the personal law of any Muslim sect, the expression "Qur'an and Sunnah" shall mean the Qur'an and Sunnah as interpreted by that sect.

individuals in Iran, India, and Pakistan. While Iran has established administrative processes for SRS based on their respective Islamic jurisprudence, Pakistan's legal landscape lacks clarity and consistency, as seen in the recent FSC decision. This cross-jurisdictional comparative analysis reveals the plurality in Islamic jurisprudence on SRS, with state systematising the accessibility of SRS for transgender persons, contingent upon the dominant Islamic legal framework the State aligns with. The findings underscore the need for further exploration of SRS within Islamic law in relation to our domestic social context, particularly concerning inheritance, and emphasise the importance of upholding constitutional rights to diverse interpretations of Islamic law to ensure the equitable treatment of transgender individuals.

ECOCIDE IN PAKISTAN: COMPARING THE FEASIBILITY OF A DOMESTIC ECOCIDE LAW TO INTERNATIONAL LAW

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ABSTRACT

The international community has debated the introduction of an international environmental crime for decades. Notwithstanding the international debate, many States have assumed responsibility for protecting their environment through domestic ecocide laws. While the major focus of the global ecocide discourse has been on advocating for an international environmental crime, this paper seeks to advocate for the introduction of environmental crime in domestic jurisdictions. The limitations and challenges of introducing ecocide internationally mean that States, especially climate-vulnerable and developing States like Pakistan, should introduce a domestic legal framework to prosecute environmental crime within their jurisdiction and protect its environment without primary dependence on international legal mechanisms.

KEYWORDS: Ecocide, International Criminal Law, Environmental Law, Pakistan, Developing States, Pollution, Environmental Degradation.

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1. INTRODUCTION

At the 55th session of the UN Human Rights Council in March 2024, the UN Special Rapporteur on Human Rights and the Environment, David Boyd, shared his experiences of meeting a grandmother in Slovenia who had lost many relatives to industrial pollution, a mother in Chile who was frightened to send her children to school because of the mass poisoning caused by industrial pollution and another mother in the United Kingdom (UK) who

lost her 9-year-old daughter to air pollution.[1] The discourse on the environment often refers to figures or the broader impact of its destruction on the community, but these individual accounts around the world closely illustrate how lives are impacted, signifying the cruciality of environmental protection.

There are currently more than 2000 international treaties and conventions concerning the protection of the environment.[2] However, consistent compliance with these obligations is absent, which hampers progress in decelerating the rate of environmental degradation. The international community requires a more stringent mechanism to deal with environmental concerns beyond multilateral negotiations and treating environmental regulation through civil law. An example of such a proposition is an environmental crime or 'ecocide'.[3]

'Ecocide' refers to the extensive destruction of an area's natural environment.[4] At present, it is not recognised as an international crime but is recognised as a domestic crime in a few jurisdictions. There has been an ongoing debate for over a decade about the possibility of incorporating it as the fifth crime under the Rome Statute of the International Criminal Court (ICC).[5] In 2019, at the 18th session of the Assembly of States Parties (ASP) to the Rome Statute of the ICC, Vanuatu invited States Parties to consider criminalising acts that could constitute ecocide.[6] A few years later, Vanuatu, joined by other Pacific Islands of Fiji and Samoa, formally proposed the inclusion of ecocide as the fifth core crime of the Rome Statute to the Court's Working Group on

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[1] United Nations, '17th Meeting- 55th Regular Session of Human Rights Council' (*UN Web* Tv, 6 March 2024) http://webtv.un.org/en/asset/k1g/k1gya0r5dq accessed 30 April 2024.
[2] Université Laval, 'International Environmental Agreements Database Project' https://www.iea.ulaval.ca/en accessed 18 December 2024.
[3] Tasneem Kausar, 'International Environmental Crime: Concept, Scope and Possibility' (2001) 1 Pakistan Law Review 106.
[4] 'Ecocide' (*Cambridge Dictionary*) https://dictionary.cambridge.org/dictionary/english/ecocide accessed June 2023.
[5] Rome Statute of the International Criminal Court (adopted on 17 July 1998) 2187 UNTS 3 ('Rome Statute').
[6] John H. Licht,
'Statement by H.E. John H. Licht, Ambassador of the Republic of Vanuatu to the European Union General Debate, 18th ICC ASP' *ICC Legal Tools Database* (7 December 2019) https://www.legal-tools.org/doc/uqwj4qhw/ accessed 10 December 2024.

Amendments.[7] At the 23rd ASP in December 2024, Vanuatu also stated the law is supported by many key players, including 'national proposals in multiple jurisdictions' reinforcing the proposition of this article that many States have assumed responsibility for protecting their environment by legislating an ecocide crime.[8] Further to this, recently, the ecocide bill has passed its first reading in Azerbaijan,[9] whereas ecocide bills have been proposed in the parliaments of Italy and Peru.[10]

This article evaluates the feasibility of introducing a domestic crime of ecocide in Pakistan by drawing comparisons with the subsequent introduction and implementation of ecocide in international criminal law. It assesses the practicability and utility of a crime of ecocide in domestic jurisdictions, encouraging States to be self-sufficient in protecting their environment rather than waiting for international consensus on the matter. The first section looks at the pretext for criminalising ecocide. The second section focuses on examining ways to introduce and prosecute it at the ICC. This overview is important to identify the gaps and challenges that currently exist at the ICC, which necessitates States to consider introducing ecocide in domestic law. The third section is a case study focusing on Pakistan to illustrate that even in a developing, climate-vulnerable State, the introduction and enforcement of ecocide laws can be both feasible and beneficial at the State level.

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[7] International Criminal Court Assembly of States Parties 'Report of the Working Group on Amendments' (2024) ICC-ASP/23/26, 20 https://asp.icc-cpi.int/sites/default/files/asp_docs/ICC-ASP-23-26-ENG.pdf.

[8] Ralph Regenvanu, 'Statement by Hon. Ralph Regenvanu, Vanuatu's Special Envoy on Climate Change and the Environment, 23rd ICC ASP' (*ICC Legal Tools Database*, 3 December 2024) https://asp.icc-cpi.int/sites/default/files/asp_docs/ASP23-GD-VUT-3-12-ENG.pdf accessed 10 December 2024.

[9] Stop Ecocide International, 'Ecocide Bill Passes First Reading in Azerbaijan' (*Stop Ecocide International*, 8 October 2024) https://www.stopecocide.earth/2024/ecocide-bill-passes-first-reading-in-azerbaijan accessed 10 December 2024.

[10] Stop Ecocide International, 'Bill to Criminalise 'Ecocide' Proposed in Italy' (*Stop Ecocide International*, 13 September 2024) https://www.stopecocide.earth/breaking-news-2023/bill-to-criminalise-ecocide-proposed-in-italy accessed 10 December 2024; 'Two New Ecocide Bills Presented in Peru's Parliament' (*Stop Ecocide International*, 30 June 2024) https://www.stopecocide.earth/2024/two-new-ecocide-bills-presented-in-perus-parliament accessed 10 December 2024.

1.1. Why Should Ecocide be Criminalised?

Between 1962 and 1971, the United States (US) used 60 litres of 'Agent Orange' during the Vietnam War. This chemical, classified as a herbicide, was deployed with the primary purpose of defoliating forests and destroying crops 'to remove ariel cover and food supplies to the North Vietnamese and Allied Forces.'[11] The chemical has had long-lasting impacts, including causing birth defects, skin diseases, cancer, and more.[12] Similarly, the Deepwater Horizon oil spill in 2010 caused thousands of chronic respiratory cases, with some people being diagnosed with cancer.[13] In 2016, a palm oil plant in Guatemala released high levels of agricultural insecticide into the river, resulting in the extermination of 23 species of fish which affected the local community.[14] More recently, the Amazon wildfires in 2022 were of an alarming scale.[15]

These are a few examples of why the world must recognise ecocide as a crime. The term 'ecocide' was coined during the 1972 United Nations Conference on the Human Environment in Stockholm. Olaf Palme, the Swedish Prime Minister at the time, described the act of using harmful chemicals causing ecological destruction by the US during the Vietnam War as ecocide.[16]

In 1991, the International Law Commission (ILC) proposed a new crime of 'wilful and severe damage to the environment' under Article 26 of the proposed Draft Code of Crimes Against the Peace and Security of Mankind

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[11] Michael G. Palmer, 'The Case of Agent Orange' (2007) 29(1) Contemporary Southeast Asia 172-195.

[12] Doug Ashburn, 'Dow Chemical Company' (*Britannica Money*, 10 December 2024) https://www.britannica.com/topic/Dow-Chemical-Company accessed 10 December 2024.

[13] Sara Sneath, 'They Cleaned up BP's Massive Oil Spill. Now they're Sick and Want Justice' *The Guardian* (London, 20 April 2023) https://www.theguardian.com/environment/2023/apr/20/bp-oil-spill-deepwater-horizon-health-lawsuits accessed 9 June 2024.

[14] Carlos Chavez, 'Guatemala's La Pasión River is Still Poisoned, Nine Months after an Ecological Disaster (*Mongabay*, 1 February 2016) https://news.mongabay.com/2016/02/guatemalas-la-pasion-river- accessed June 2023.

[15] Chris Greenberg, 'Amazon rainforest fires 2022: Facts, causes, and climate impacts' (*Greenpeace*, 5 September 2022) https://www.greenpeace.org/international/story/55533/amazon-rainforest-fires-2022-brazil-causes-climate/ accessed 9 June 2024.

[16] Gladwin Hill, 'US at UN Parley on Environment, Rebukes Sweden for 'Politicizing' Talks' *The New York Times* (New York, 8 June 1972) https://www.nytimes.com/1972/06/08/archives/us-at-un-parley-on-environment-rebukes-sweden-for-politicizing.html accessed 18 December 2024.

(Draft Code).[17] Only three countries went on record to completely oppose the inclusion of this crime, namely the Netherlands, the UK, and the US, while States like Australia, Austria and Belgium suggested amendments to make Article 26 more inclusive.[18] The UK's position was that 'it would be extending international law too far to characterise such damage as a crime against the peace and security of mankind',[19] whereas the US said Article 26 was 'perhaps the vaguest of all the articles' and that it failed 'to consider fully the existing and developing complex treaty framework concerning the protection of the environment'.[20] While there were justified reasons for opposing the introduction of environmental crime by the US and UK, there was nevertheless potential to work collectively and address the concerns of abstaining States, but this did not occur. Later, in 1996, the ILC withdrew the reference to Article 26 on environmental crime from the Draft Code without any recorded reasoning,[21] and in 1998, the number of core crimes in the Rome Statute was reduced to four.[22] This appears to be a missed opportunity to protect the environment under international criminal law.

In 2020, the Stop Ecocide Foundation formed an Independent Expert Panel (IEP) to create a legal definition of ecocide. The IEP comprised of 12 lawyers from around the globe specialising in criminal law, environmental and climate law.[23] The IEP defined ecocide as 'unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.'[24]

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[17] Yearbook of the International Law Commission (1991) Volume 2 Part II A/CN.4/SER.A/1991.Add.1, 94-107.
[18] Yearbook of the International Law Commission (1995) Volume 2 Part I A/CN.4/SER.A/1995/Add.1.
[19] Yearbook of the International Law Commission (1993) Volume 2 Part I A/CN.4/448 and Add.1, 102.
[20] ibid 105.
[21] Yearbook of the International Law Commission (1996) Volume 2 Part II A/CN.4/SER.A/1996/Add.1 (Part 2), 50.
[22] Saloni Malhotra 'The International Crime That Could Have Been but Never Was: An English School Perspective on the Ecocide Law' (2017) 9 The International Journal of Vrije Universiteit Amsterdam 49.
[23] Stop Ecocide International, 'Independent Expert Panel for the Legal Definition of Ecocide Commentary and Core Text' (*Stop Ecocide Foundation*, June 2021) https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/1624368879048/SE+Foundation+Commentary+and+core+text+rev+6.pdf accessed 27 June 2023.
[24] ibid.

The IEP also expanded the definition of each term. For example, under the proposed legal definition, 'environment' means 'the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere as well as outer space'.[25] The definition succinctly covers all systems of the earth and forestalls ambiguity without narrowly limiting it to specific acts. Others argue that the omission of any underlying acts in the definition potentially clashes with the principle of legality,[26] i.e., that if an act or omission did not constitute a criminal offence under national or international law, an individual must not be accused or convicted of it.[27]

The key indicators that distinguish environmental harm from ecocide are severity and either widespread or long-term damage to the environment. The term 'wanton' means 'reckless disregard for damage which would be excessive concerning the social and economic benefits anticipated'.[28] However, some have criticised this as taking away the symbolic value of ecocide, acknowledging that humans can, in some instances, legitimately cause environmental damage for social or economic benefit.[29]

The diverging academic positions on the elements of the crime already illustrate the challenges in reaching a consensus. Other international movements to recognise ecocide as an international crime include the End Ecocide on Earth Initiative, a non-governmental organisation (NGO) which defines ecocide as 'extensive damage or destruction which would have for consequence a significant and durable alteration of the global commons or Earth's ecological systems'.[30] This article supports the authoritative legal definition proposed by the IEP and uses it as the basis for its discussion while

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[25] ibid.
[26] Matthew Gillett, 'A Tale of Two Definitions: Fortifying Four Key Elements of the Proposed Crime of Ecocide' (*Opinio Juris*, 20 June 2024) http://opiniojuris.org/2023/06/20/a-tale-of-two-definitions-fortifying-four-key-elements-of-the-proposed-crime-of-ecocide-part-i/ accessed 23 June 2024.
[27] International Committee of the Red Cross, 'The Principle of Legality' (*ICRC*) Volume II, Chapter 32, Section N, Rule 101 https://ihl-databases.icrc.org/en/customary-ihl/v1/rule101 accessed 19 November 2024
[28] Stop Ecocide International (n 23) article 8 ter 2(a).
[29] Liana Gerogieva Minkova, 'The Fifth International Crime: Reflections on the Definition of "Ecocide"' (2023) 25(1) Journal of Genocide Research 62.
[30] End Ecocide, 'What is Ecocide?' (*End Ecocide*), https://www.endecocide.org/en/what-is- accessed 9 June 2024.

cognisant of its aforementioned criticisms.[31] The Pacific Islands States, in their proposal at the 23rd Session of ASP, have also adopted the IEP's definition and expanded on its commentary.[32]

2. OVERVIEW OF INTERNATIONAL LEGAL MECHANISMS

2.1. The International Criminal Court (ICC)

The ICC's subject matter jurisdiction is limited to the Rome Statute's core crimes of genocide, crimes against humanity (CAH), war crimes, and the crime of aggression.[33] Currently, the only reference in the Rome Statute to the environment is in Article 8(2)(b)(iv), which lists among the activities constituting a war crime the act of intentionally launching an attack in the knowledge that such attack will cause 'widespread, long-term and severe damage to the natural environment'.[34] The reference is specific to environmental harm committed during a state of war and does not suffice to cover ecocide caused during peacetime. I consider two ways in which ecocide can be tried at the ICC: firstly, by leveraging the positions outlined in Article 7 of the Rome Statute,[35] and secondly, through an amendment to the Rome Statute.

2.1.1. Article 7 Discretion of the ICC

Article 7(1) of the Rome Statute defines CAH as acts committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack.[36] Apart from the listed activities in paragraphs (1)(a) to (1)(j), Article 7(1)(k) allows for wide discretion to consider 'other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health' as CAH.[37] As the phrase 'other

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[31] 'Kevin Jon Heller, 'Skeptical Thoughts on the Proposed Crime of "Ecocide"' (*Opinio Juris*, 23 June 2021) http://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/ accessed 16 June 2024.
[32] ICC ASP (n 7) Annex II.
[33] Anja Gauger, 'Ecocide is the missing 5th Crime Against Peace' (2013) Human Rights Consortium, School of Advanced Study University of London https://sas-space.sas.ac.uk/4830/1/Ecocide_research_report_19_July_13.pdf accessed 22 June 2024.
[34] Rome Statute (n 5) art 8(2)(b)(iv).
[35] ibid art 7.
[36] ibid art 7(1).
[37] ibid art 7(1)(k).

inhumane acts' is broad, if any action that is directed against a civilian population eventually causes environmental harm, ecocide can be prosecuted as a CAH.

In *Prosecutor v Zdravko Tolimir*,[38] the International Criminal Tribunal for the former Yugoslavia (ICTY) decided that while the *actus reus* (the act constituting the crime)[39] for CAH requires the crime to be a widespread or systemic attack directed against a civilian population, the 'victims of the underlying crime do not have to be civilians.'[40] Consequently, the environment can be an unintentional but justified victim for the purposes of prosecution.

However, this can prove complex. The Office of the Prosecutor (OTP) would need to establish *mens rea* (the intent or knowledge that one possesses when perpetrating a crime)[41] to commit harm against the civilian population, with the effect on the environment constituting an 'inhumane act' under Article 7(1)(k). Ecocide can be prosecuted at the ICC as an inhumane act of CAH under Article 7(1)(k) of the Rome Statute in cases where, for example, an individual attempts to displace people from their homes by affecting their source of income or depriving them of means of agriculture as their primary source of food. Similar impacts could include deliberate water-source contamination, affecting access to water for livelihoods, sanitation and hygiene. In such cases, both the civilian population and the environment are victims of the CAH.

2.1.2. Amending the Rome Statute of the International Criminal Court

A second approach is that of the Stop Ecocide Foundation, now also proposed by the Pacific Islands States, which is to amend the Rome Statute to include a separate prosecutable crime of ecocide. A specific amendment to the Rome Statute was recommended as the IEP stressed that 'the Statute addresses crimes that are deemed to be of international interest and relevance,

[38] *Prosecutor v Zdravko Tolimir* (2015) Case No. IT-05-88/2-A.
[39] Rome Statute (n 5) art 25(3).
[40] *Prosecutor v Zdravko Tolimir* (n 38) [141]-[142].
[41] Rome Statute (n 5) art 30.

and the time has come to extend the protections for serious environmental harm, already recognised to be a matter of international concern'.[42] Vanuatu asserted the amendment is required to deal with grave cases of environmental harm in times of peace.[43] The principal differences between the suggested ecocide provision recommended by the Stop Ecocide Foundation and the Pacific Islands States (as discussed above) with the existing Article 7 of the Rome Statute are the elements of 'foreseeability' in the suggested article and committing an act with the knowledge of 'substantial likelihood' under Article 7, which creates a lower evidentiary threshold for ecocide than CAH. Similarly, with an amendment, the environment can be the sole victim of a crime; a nexus does not have to be drawn with harm to a civilian population.

Article 121(2) and 3 of the Rome Statute require the ASP to vote on whether to take up the proposal for amendment at the next meeting. The adoption of an amendment requires a consensus or a two-thirds majority of States Parties where consensus cannot be reached.[44] There is no update yet as to when the proposal could be considered. It is also notable that if consensus is not reached but a two-thirds majority is reached to introduce ecocide as a fifth crime in the future, the court cannot exercise its territorial jurisdiction on States Parties that voted against the amendment, nor on the State Party's nationals, the limited jurisdiction would leave another gap in the effective implementation of the proposed crime.[45]

2.1.3. Limitations of prosecuting ecocide at the International Criminal Court

Despite the avenues discussed above, there are several limitations posed by prosecuting ecocide at the ICC. The two main limitations include an absence of appropriate penalties and issues with attribution.

[42] Stop Ecocide Foundation (n 23).
[43] Ralph Regenvanu (n 8).
[44] Rome Statute (n 5) art 121(2), (3).
[45] ibid art 121(5).

a. *Absence of Penalties*

As per Article 77 of the Rome Statute, the penalties available to the ICC are imprisonment, fines, and forfeiture of the proceeds of the crime.[46] If ecocide is prosecuted under Article 7(1)(k), the remedies will not provide appropriate means of reparation for the effects of the crime, such as environmental remediation. If an amendment is to be made to the Rome Statute, its effectiveness hinges on a concurrent amendment to Article 77 allowing for additional sanctions such as environmental remediation and injunctions, which are better suited to deal with environmental damage.[47]

b. *Attribution of Ecocide*

Attributing criminal acts raises questions about modes of liability. Article 25(3)(a) of the Rome Statute States that a person can be liable for acts committed by another person.[48] Article 28(b) provides that a superior would be liable for crimes 'committed by subordinates under his or her effective authority and control'.[49] Many recommend that ecocide should be a strict liability crime,[50], i.e., a crime where the prosecution is not required to prove *mens rea* and 'guilt can be established by the commission of an act (and not the intent behind it).'[51] Establishing intent is essential to prove ecocide because if the ICC prosecutes ecocide through Article 7(1)(k), proving CAH requires an element of intent and knowledge.[52]

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[46] ibid art 77.

[47] Parliamentarians for Global Action, 'Modernising the International Criminal Court: Crimes against the Environment, Trafficking in Human Beings, Hybrid Justice and Corporate Accountability' (*Parliamentarians for Global Action*, 2022) https://www.pgaction.org/pdf/2022/report-expanding-the-jurisdiction-of-the-icc.pdf accessed 27 June 2023.

[48] Rome Statute (n 5) art 25(3)(a).

[49] ibid art 28(b).

[50] Tarini Mehta, 'Accountability for Environmental Destruction–Ecocide in National and International Law (Part II) The Way Forward' (*Opinio Juris*, 29 September 2020), https://opiniojuris.org/2020/ accessed 24 June 2024.

[51] Christopher Sykes, 'Strict Liability' (*Lexis Nexis Practice Notes*) https://www.lexisnexis.co.uk/legal/guidance/strict-liability accessed 8 June 2024.

[52] Rome Statute (n 5) art 7(1).

Similarly, the Stop Ecocide Foundation definition includes an element of knowledge, and Article 30(1) of the Rome Statute States that a person would only be criminally liable if the acts were committed with intent and knowledge unless otherwise provided.[53] Thus, knowledge and attribution are inherently linked prerequisites for a successful ecocide prosecution.

3. A DOMESTIC ECOCIDE LAW IN PAKISTAN

3.1. Pakistan's Environmental Crisis

As per the World Climate Index, Pakistan is the 8th most vulnerable country to the impacts of climate change. This costs the economy approximately $38 billion annually.[54] Many elements that worsen the climate change crisis are not in Pakistan's direct control, as the majority of global emissions are caused by countries like China, India and the US, which have the highest amount of carbon emissions.[55] Nevertheless, Pakistan is responsible for protecting its environment and nurturing it for a sustainable future by preventing domestic practices that degrade the environment.

Pakistan experiences significant environmental damage through illegal logging, contamination of water sources and air pollution. According to a 2010 study, around 250,000 tonnes of hazardous medical waste are annually produced by healthcare facilities and dumped without proper management.[56] In Karachi, 30% of deaths caused by gastro-intestinal diseases are caused by polluted water.[57] Similarly, in early 2023, toxic gas was discharged from factories in the Keamari district of Karachi, leading to the demise of 18

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[53] ibid art 30(1).
[54] United Nations Development Programme, 'Resilience, Environment and Climate Change' (*UNDP Pakistan*) https://www.undp.org/pakistan/environment-and-climate-change accessed 15 April 2024.
[55] World Economics, 'Carbon Emissions' (*World Economics*) https://www.worldeconomics.com/Indicator-Data/ESG/Environment/Carbon-Emissions/ accessed 18 December 2024.
[56] Ramesh Kumar, 'Healthcare Waste Management (HCWM) in Pakistan: Current Situation and Training Options' (2010) 22 Journal of Ayub Medical College Abbottabad 1010; Zalmay Azad, 'Unmanaged Hospital Waste Disposal Poses Grave Threats in Pakistan' *The Friday Times* (Islamabad, 20 March 2024) https://thefridaytimes.com/20-Mar-2024/unmanaged-hospital-waste-disposal-poses-grave-threats-in-pakistan accessed 26 November 2024.
[57] South Asia Co-operative Environment Programme, *Environmental legislation and institutions in Pakistan* (Colombo, 2001) 69 http://www.sacep.org/pdf/Reports-Technical/2001-UNEP-SACEP-Law-Handbook-Pakistan.pdf accessed 27 June 2023.

people.[58] A medical board confirmed in April 2023 that the 'causative factor [of these deaths was] mainly environmental', whereas the Sindh Environmental Protection Agency claimed that the deaths were caused by measles.[59] The release of the toxic gas was not only a crime against persons but a crime against the environment as well. While the Sindh High Court (SHC) is investigating the factory owners of the crime under charges of manslaughter and criminal negligence,[60] the examination of this incident does not extend to considering their impact on the environment under a criminal lens within the current trial.

Pakistan has passed several environmental laws and policies; they are cohesive laws built on strong foundations, but they fail to account for serious environmental harm that could constitute an ecocide. An ecocide law in Pakistan is imperative to combat environmental degradation. The existing legal framework can set the foundation for a new ecocide law. This section first recommends the foundations for a special criminal law on ecocide, how it would be different from mere environmental damage, and the threshold required to invoke criminal liability. It then conducts an overview of existing legal provisions in the environmental legal framework in Pakistan to determine gaps and how existing laws and procedures can assist lawmakers in developing new complex ecocide provisions.

3.2. Recommended Ecocide Legal Framework in Pakistan

At the regional level, the European Union issued a new Directive in 2024 for environmental crimes that are 'comparable to ecocide', which applies to all Member States.[61] At the domestic level, several countries have adopted a domestic crime of ecocide or a more general 'environmental crime'

[58] Azfar-ul-Ashfaque, 'Toxic emissions from factories kill 18 in Keamari in two weeks' *Dawn* (Karachi, 27 January 2023) (https://www.dawn.com/news/1733832 accessed 27 June 2023.
[59] Imtiaz Ali, 'Toxic gases, not measles, caused deaths in Karachi's Keamari, rules Medical Board' *Dawn* (Karachi, 6 April 2023), https://www.dawn.com/news/1746063 accessed 6 October 2024.
[60] Naimat Khan, 'Karachi factory owner arrested for manslaughter, negligence after 15 dead from suspected gas leak' *Arab News* (Karachi, 30 January 2023) https://arab.news/vx56j accessed 15 April 2024.
[61] Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law (2024) PE-CONS 82/23 (Brussels, 13 March 2024) https://data.consilium.europa.eu/doc/document/PE-82-2023-INIT/en/pdf accessed 18 December 2024.

framework, such as Uzbekistan[62] and Kyrgyzstan.[63] Kyrgyzstan introduced ecocide as a strict liability crime in 1997 under Article 374 of its Criminal Code. This penalises 'massive destruction of the animal or plant kingdoms, contamination of the atmosphere or water resources, and commission of other actions capable of causing an ecological catastrophe, shall be punishable by deprivation of liberty for 12 to 20 years.'[64]

There are two notable elements in Kyrgyzstan's ecocide law: firstly, the definition identifies the non-human victims of the crime, i.e., animals, atmosphere and water resources. The open-ended term 'ecological catastrophe' leaves room for interpretation and overcomes the impracticality of introducing an exhaustive list of actions that can constitute an ecocide. Secondly, Kyrgyzstan's definition of ecocide provides a strict punishment focused on the deprivation of liberty, i.e., imprisonment, which Pakistani environmental law does not currently provide for. Virtually most States that have ecocide law in their jurisdiction have incorporated it into their constitutional or criminal codes; however, the recommendation for Pakistan goes one step further and proposes a separate ecocide statute.

3.2.1. Defining the Environment and Ecocide

The Constitution of the Islamic Republic of Pakistan 1973 does not currently define the term 'environment'.[65] However, the Pakistan Environmental Protection Act 1997 (PEPA) defines the 'environment' to include the following:

> (a) air, water and land.
> (b) all layers of the atmosphere;
> (c) all organic and inorganic matter and living organisms;
> (d) the ecosystem and ecological relationships;
> (e) buildings, structures, roads, facilities and works;
> (f) all social and economic conditions affecting community life and

[62] Criminal Code of Uzbekistan 1994, art 196 and 198.
[63] Criminal Code of the Kyrgyz Republic 2024, art 374.
[64] Ecocide Law, 'Ecocide law in national jurisdictions' (*Ecocide Law*) https://ecocidelaw.com/existing-ecocide-laws/ accessed 27 June 2023.
[65] Constitution of the Islamic Republic of Pakistan 1973.

> (g) the inter-relationships between any of the factors in sub-clauses (a) to (f).[66]

Alongside this, the IEP definition of the environment encompasses all of water, air, land and space.[67] It is nevertheless vague about what constitutes 'ecocide' without a reference to a non-exhaustive list of actions. At the domestic scale, a definition should contain a list of defined acts that incorporate the current understanding of the environment while also including open-ended language that leaves room for future developments. This was recommended by Dr. Matthew Gillett in his proposed definition of ecocide, such as 'killing or harming, or removing protected flora or fauna', 'trafficking of dumping hazardous substances' and more.[68]

The statute can adopt simpler language to classify 'ecocide' or 'environmental crime' as actions that cause mass destruction or pollution of the environment or other actions that cause ecological disasters.[69] The term 'ecological disaster' leaves room for many interpretations. Dr Gillett's proposed definition of ecocide provides for a similar unrestricted provision, i.e., 'any other acts of a similar character where those acts involve unsustainable harm to the natural environment'.[70] This approach balances the need for legal certainty to combat crime with the need for flexibility to incorporate future developments.

3.2.2. Elements of the Crime

The proposed new law will distinguish between ecocide and environmental harm that invokes civil liability along the lines of severity, whether it is widespread or contained or whether its impact is in the short-term or the long-term, as recommended by the Stop Ecocide Foundation.

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[66] Pakistan Environmental Protection Act 1997, s 2(x).
[67] Stop Ecocide Foundation (n 23).
[68] Matthew Gillett, *Prosecuting Environmental Harm before the International Criminal Court* (Cambridge University Press 2022) Chapter VI.
[69] Melly Aida, 'Ecocide in the International Law: Integration Between Environmental Rights and International Crime and Its Implementation in Indonesia' (2023) Proceedings of the 3rd Universitas Lampung International Conference on Social Sciences (ULICoSS 2022).
[70] Opinio Juris, 'Dr Matthew Gillett's Proposed Definition of Ecocide' (*Opinio Juris,* 20 June 2024) http://opiniojuris.org/wp-content/uploads/Dr-Matthew-Gilletts-Proposed-Definition-of-Ecocide.pdf accessed 23 June 2024.

a. *Severity*

The IEP defines 'severe' damage as 'damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources.[71] While the severity of each incident will be assessed on a case-by-case basis, if the matter involves very serious adverse changes to any element of the environment but does not have a long-term impact or is not widespread, it will not cross the threshold of environmental harm to become ecocide. It is additionally discussed below that upon establishing ecocide, various types of penalties should be part of the statute to address each incident according to the scale of severity and its level of impact, considering different levels of culpability and aggravating factors. This will make the law more comprehensive and act as an effective deterrent.

b. *Widespread*

The IEP defines 'widespread' damage as 'damage which extends beyond a limited geographic area, crosses State boundaries, or is suffered by an entire ecosystem or species or a large number of human beings.'[72] Pakistan's ecocide statute can borrow this definition while omitting a reference to State boundaries and ensuring 'widespread' is not limited to a geographically widespread impact but also widespread in impact on livelihood in a small vicinity as well.

c. *Long-term*

The IEP defined long-term as 'damage which is irreversible, or which cannot be redressed through natural recovery within a reasonable period.[73] The IEP suggested that a 'reasonable period' will hinge on the circumstances of a case; the recovery time could vary depending on the extent of the damage, the resources present to assist in its natural recovery, and the state of the

[71] Stop Ecocide Foundation (n 23).
[72] ibid [2(a)(ii)].
[73] ibid [2(a)(iii)].

biological and chemical components of the environment.[74] A similar definition is recommended for the statute with a case-by-case determination of a reasonable period for the natural recovery of damage.

3.2.3. *Mens Rea*

In their proposed ecocide crime that utilises the IEP's definition of ecocide, the Pacific Islands States, take a different stance on *mens rea* whereby they propose a test of recklessness that requires knowledge of the substantial likelihood of severe and either widespread or long-term damage.[75] It focuses on the likelihood of harm rather than knowledge of actual harm. Presently, more than a dozen countries have included ecocide as a strict liability crime in their domestic laws.[76] A strict liability crime does not require the prosecutor to establish criminal intent or mental state to determine the offender's guilt.[77] It can help act as an effective deterrent against future incidents of ecocide.[78] It is proposed that ecocide in Pakistan should be a strict liability crime. The purpose of ecocide in Pakistan is to punish environmental catastrophes irrespective of one's intentions or knowledge, and liability should be based on the level and impact of the offence, as per the legal threshold.

José Destéfanis argued that a strict liability crime disregards the nature of human beings,[79] their ability to make mistakes and the absence of knowledge about the environment and the law. According to Destéfanis, being 'obsessed with risk prevention would sometimes justify the punishment of persons whose freedom, in the sense of knowledge, is absent.'[80] Although a rarity, Australia's Criminal Code has a defence to strict liability offences akin to that of a 'reasonable mistake of fact'.[81] While this could, in some instances, protect

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[74] K. Kindji, 'Assessing Reparation of Environmental Damage by the ICJ: A lost opportunity' (2019) 57 Questions of International Law 5 [3.2.2].
[75] Report of the Working Group on Amendments (2024) ICC-ASP/23/26 Annex II
[76] Ecocide Law (n 64).
[77] Daniel S. Nagin, 'Deterrence in the Twenty-First Century' (2013) 42(1) Crime and Justice 199.
[78] Rosemary Mwanza, 'Enhancing Accountability for Environmental Damage under International law: Ecocide as a Legal fulfilment of Ecological Integrity' (2018) 19 (2) Melbourne Journal of International Law 586.
[79] José Ignacio Destéfanis, 'Should Criminal Law Only Prevent Risks? On Strict Liability' (*Centre for Criminology Oxford*, 8 March 2024) https://blogs.law.ox.ac.uk/centre-criminology-blog/blog-post/2024/03/ accessed 8 October 2024.
[80] ibid.
[81] Commonwealth Criminal Act (1995) (Australia), s 9.2.

from the shortcomings of a strict liability offence, in practice, it will not be feasible because strict liability operates on the notion of securing conviction if the criminal act is proved despite intention or knowledge. In Pakistan, where environmental literacy is low, there is a potential for prosecution against individuals who were not reasonably aware of the severity and impact of their acts. The absence of knowledge can be raised as a mitigating factor at the sentencing stage and assist in imposing a fair penalty within the wide range of penalties discussed below; the mitigation can balance the shortcomings of a strict liability crime.

Another criticism of a strict liability approach is that it increases the burden of proof in proving the *actus reus*, requiring the responsible bodies to collect evidence and carry out effective investigations to prove the unlawful act was committed beyond a reasonable doubt.[82] This is countered because the burden of proving the occurrence of the unlawful act and attributing it to the accused remains the same, with or without strict liability. *Mens rea* in the form of intention to harm the environment or knowledge of the likelihood of a large-scale harm can be extremely difficult to prove. A number of these actions are driven by financial gain rather than a specific motive of harming the environment, which furthers the case for a strict liability crime.

In 2005, England's Environment Agency recorded 50,000 environmental incidents; it adopted a strict liability model and 'conviction [was] the norm… [leading] to moderate fines.'[83] Since 2005, much has changed in the way data is collected and how the environment is regulated. In the Agency's 2022 review, the number of serious pollution incidents decreased, but the '5-year moving average still increased', whereas 114 environmental prosecution cases were brought by the Agency with fines totalling £4.8 million.[84] There is a lack of statistics illustrating whether strict liability crime has reduced criminality in developed States such as England that have stronger law enforcement;

[82] W Wilson, *Making Environmental Laws Work: An Anglo-American Comparison* (Hart Publishing, Oxford 1999) 110.
[83] Dr. Michael Walson, 'The Enforcement of Environmental Law: Civil or Criminal Penalties?' (2005) 17(1) Environmental Law and Management 3.
[84] UK Government, 'Review of Activities Regulated by the Environment Agency 2022' (*GOV.UK*, 28 February 2024) https://www.gov.uk/government/publications/ accessed 16 October 2024.

nevertheless, the strict liability model persists in many countries, and its benefits outweigh the downsides of the proposed law.

3.2.4. Penalties

The punishment for ecocide should be wide-ranging, with a combination of financial, punitive, and reparative measures. This approach is adopted in many jurisdictions. In February 2024, the European Union issued a new directive introducing various penalties for such cases, from imprisonment to heavy fines, and also requiring offenders to 'reinstate the damaged environment and compensate for it'.[85] For example, perpetrators should be responsible for 'restoring the environment in a given period.'[86] This can be in different forms, such as decontamination of water bodies or building waste disposal systems. The Directive then places an obligation for compensation if the damage cannot be rectified or if the perpetrator is unable to undertake such restoration.[87]

Similarly, in India, the High Court of New Delhi ordered an offender who was responsible for discharging untreated effluents into the public sewer to plant 100 trees in the city along with a fine and a bank guarantee for 3 years for continued compliance with the Delhi Pollution Control Committee.[88] While the 'polluter pays' principle is an important principle in international environmental law (IEL) – i.e., that the cost of the pollution should be borne by those who produce it –[89] a purely financial penalty might not effectively deter large businesses and corporations that can afford the fine while maintaining high-profit margins gained through environmental harmful activities.

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[85] European Parliament, 'Environmental Crimes: MEPs adopt extended list of offences and sanctions' (*European Parliament News*, 27 February 2024) https://www.europarl.europa.eu/news/en/press-room/ accessed 27 April 2024.

[86] Directive of the European Parliament and of the Council of 11 April 2024 on the Protection of the Environment Through Criminal Law (2024) PE/82/2023/REV/1 (Brussels, 11 April 2024), art 7.

[87] ibid.

[88] *Vikash Bansal v Delhi Pollution Control Committee* (2018) SCC OnLine Del 12523, 8

[89] Grantham Research Institute on Climate Change and the Environment, 'What is the Polluter Pays Principle', (*LSE*, 18 July 2022), https://www.lse.ac.uk/granthaminstitute/explainers/what-is-the-polluter-pays-principle/ accessed 14 October 2024.

Alternatively, prison sentences have proven to be more effective. For example, in the Australian case of *R v Dempsey,* 'an actual period of prison custody was held to be likely to have a deterrent effect.'[90] Similarly, in 2016, the Spanish Supreme Court held the captain of an oil tanker liable to two years of imprisonment for reckless damage to the environment when the oil tanker sank off the coast of Spain, causing severe environmental damage in the process.[91] Adopting this approach can be useful when navigating between different categories of penalties

In Bangladesh, the Environment Conservation Act 1995 provides for wide-ranging punishments listed in the statute.[92] This approach is better than leaving punishments at the wide discretion of the judges on a case-to-case basis. The difficulty in wide-ranging punishments for a new law could be the challenge judges face in determining the extent of environmental harm. This might be more challenging in some cases where the immediate impact of the harm is not visible.[93] Furthermore, the absence of jurisprudence specifically on punishment for environmental crimes to assist judges can make the task more difficult. The area of law will slowly develop to address these different gaps, but the right approach at the outset is for the suggested statute to comprise wide-ranging penalties with appropriate sentencing guidelines for judges, which will help establish a balance between legal certainty and flexibility. Pakistan already follows this approach to some extent under section 17 of PEPA with several penalties,[94] but it later forms part of the discussion on how these existing penalties are not rigorous for ecocide.

3.2.5. Corporate Liability

Pakistan is not a party to the Rome Statute; therefore, even if the Rome Statute is amended to incorporate ecocide, it will not make any difference to Pakistan unless Pakistan accepts the jurisdiction of the ICC or if any foreign individual commits an environmental crime in Pakistan is a national of a State

[90] *Dempsey v R* (2002) QCA 45 (McPherson JA).
[91] *Prestige* (2016) Spanish Supreme Court Ruling 865/2015.
[92] Bangladesh Environment Conservation Act 1995, s 15.
[93] Prof. Dr. Gert Vermeulen & Wendy De Bondt, 'Exploring the Potential of Criminal Law in Protecting the Environment' (2013) 1(1) Revista Eletronica de Direito Penal 81.
[94] Pakistan Environmental Protection Act 1997, s 17.

Party to the Rome Statute. Furthermore, the ICC can only try 'natural persons' as opposed to legal persons such as corporations.[95] Some argue that it is imperative to include corporate criminal liability (CCL) to effectively prosecute ecocide at the ICC.[96] While this is another hurdle for the ICC, corporations are considered legal persons in Pakistan and can be prosecuted domestically, like in many other States.[97] For example, in 2016, the Environmental Court in Guatemala held an African corporation liable for ecocide as it contaminated the Pasión River and killed millions of fish, and severely affected over 20 different species of fish, reptiles, birds and mammals.[98] A similar model can be introduced under the proposed ecocide law in Pakistan, one that also exists in the current law.[99]

3.3. Existing Environmental Law in Pakistan

In 2024, the 26th Amendment to the Constitution introduced a new fundamental right to a 'clean, healthy and sustainable environment' under Article 9A of the Constitution.[100] Before this, the right was interpreted under the right to life under Article 9.[101] After the 18th Amendment to the Constitution's removal of the Concurrent Legislative List from the Fourth Schedule, environmental protection fell under the legislative jurisdiction of the provincial governments as opposed to the federal government.[102] Consequently, the provincial governments have enacted equivalent environmental protection statutes in their respective jurisdictions. However, Article 142(b) of the Constitution clarifies that the Parliament and the Provincial Assembly shall both have the power to make criminal law.[103] Therefore, an ecocide statute would be introduced at the federal level as a

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[95] Rome Statute (n 5) art 25(1).
[96] Ricardo Pereira, 'After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation: Towards an International Crime of Ecocide?' (2020) 31 Criminal Law Forum 179.
[97] Pakistan Penal Code 1860, art 11; Pakistan Environmental Protection Act 1997, s 18.
[98] Cindy Woods, 'The Guatemala Ecocide Case: What it Means for the Business and Human Rights Movement' (*Due Process of Law Foundation*, 10 March 2016) https://dplfblog.com/2016/03/10/the-guatemala-ecocide- accessed 30 April 2024.
[99] Pakistan Environmental Protection Act 1997, s 18.
[100] The Constitution (Twenty-sixth Amendment) Act (2024), s 2.
[101] *Shehla Zia v WAPDA* (PLD 1994 SC 693) .
[102] Firuza Pasatakia, 'Environmental Protection and the Eighteenth Amendment' (*IUCN Pakistan*, 2014) www.eia.nl/docs/mer/diversen/pos722-environmentalprotection-18amendment accessed 14 April 2024.
[103] Constitution of Pakistan (n 65), art 142(b).

criminal law. Nevertheless, exploring how the proposed ecocide law would work in conjunction with the existing environmental legal framework is pertinent.

3.3.1. Pakistan Environmental Protection Act 1997 and the Environmental Protection Tribunals

Section 14 of the PEPA prohibits actions that adversely affect the environment. As a foundation, similar actions can be incorporated in the ecocide statute and invoke criminal liability for ecocide once they pass the threshold of severity and either widespread or long-term damage, as recommended above.[104]

The PEPA establishes the Pakistan Environmental Protection Agency (EPA) that administers the implementation of this act.[105] It also establishes a system of specialised Environmental Protection Tribunals and Environmental Magistrates.[106] These Tribunals can exercise both civil and criminal jurisdiction depending upon the cases they hear, whereas the Magistrates exercise criminal jurisdiction.[107] A judicial Magistrate can be granted the powers of an Environmental Magistrate and try instances of non-compliance with the orders of the Council of Federal or Provincial Environmental Agencies.[108] The Environmental Magistrate also has the exclusive capacity to try breaches of the provisions on handling hazardous substances and regulation of motor vehicles.[109] The PEPA has dedicated provisions that prohibit certain discharges and emissions, import of hazardous waste, etc. The text of the PEPA is sufficiently broad to account for various harmful activities for the environment. Section 2 defines some of these acts to include discharging hazardous waste, emissions from motor vehicles, [110] and all others that cause adverse environmental effects.[111]

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[104] Pakistan Environmental Protection Act 1997, s 14.
[105] ibid s 5.
[106] ibid s 20.
[107] ibid ss 21(4), (5) and (6).
[108] ibid s 17(2).
[109] ibid ss 14 and 15.
[110] ibid ss 11 and 15.
[111] ibid s 2(i).

In the presence of all these provisions, one might question the role and exigency of a separate ecocide law. There are three reasons for this: firstly, the proposed law seeks to deal with cases of a certain gravity, scale and effect that differentiates it from the existing law. Secondly, the current law is inadequate to penalise and deter cases that could constitute ecocide, as it omits a uniform approach and presents gaps that will impede the functionality of the proposed ecocide law.[112] Thirdly, the proposed law in the present time would not only be symbolic in the international community but would also bring greater awareness locally about the repercussions of grave environmental harm and the importance of protecting it.

a. *Lack of penalties*

Section 17 of PEPA 1997 provides for a range of penalties, starting with fines up to one million rupees, or one hundred thousand rupees, for some offences, such as for failure to comply with the license issued by the Federal Agency in the handling of hazardous substances.[113] There is also a scope to impose an additional fine that may extend to one hundred thousand rupees for every day the failure to comply with Sections 11, 12, 13 or 16 of the PEPA. These provisions related to the prohibition of certain discharges or emissions, failure to conduct environmental impact assessment, prohibition of import of hazardous waste and breach of an environmental protection order (EPO), are only triable by the Environmental Protection Tribunal.[114] The fines can adequately penalise for a certain scale of environmental damage, but due to their limit, it does not accommodate for serious breaches. Furthermore, some cases below prove that the enforcement of the fines, compared to the scale and duration of the breach, has been inadequate.

In *DG EPA vs Sheikh Yousaf*,[115] the respondent was held guilty as his tannery was found to be polluting the environment by discharging untreated wastewater beyond the limit permitted.[116] He also failed to close his tannery

[112] Maryam Umer Khayam, 'Decentralisation of Environment in Pakistan: Issues in Governance' (2020) 17(2) Policy Perspectives 101.
[113] Pakistan Environmental Protection Act 1997, ss 17(1) and (2).
[114] ibid ss 11, 12, 13 and 16.
[115] *DG EPA vs Sheikh Yousaf* (2019 CLD 155).
[116] ibid.

when an EPO was issued. He was only fined Rs 500,000 for non-compliance with the EPO. Later, his tannery was found to still be operational. Similarly, in *DG EPA v Messrs RB Poultry Farm No. 1*,[117] the owner of the poultry farm was evading compliance with an EPO of six years requiring him to clean up the site, and he was fined Rs 500,000 after an extensive period of breaking a legal order.[118] There is an absence of strict penalties that the Tribunal awards and can award under the legislation; corporations or individuals leading large businesses can easily afford to pay some of these fines without incurring a financial impact that creates a deterrent impact on them and the wider community.

The current discussion predominately focuses on PEPA, but the absence of strict penalties can also be seen in the Pakistan Penal Code 1860's (PPC) provisions relating to the environment. Section 277 of the PPC states that the fouling water of a public spring or reservoir will be punishable by imprisonment of up to three months or a fine of up to one thousand five hundred rupees or both.[119] Furthermore, Section 278 of the PPC penalises making the atmosphere noxious to health with a fine of up to one thousand five hundred rupees.[120] The fines under both articles used to be five hundred rupees, but they were substituted and increased by the Criminal Laws (Reforms) Ordinance 2002.[121] The penalty on these articles is outdated as it has not been subject to an amendment since 2002. In 2002, one thousand five hundred rupees was a decent sum to deter individuals, but over 20 years later, the sum is not significant and adjusted to account for inflation; therefore, it is not a deterrent penalty now, nor does it provide reparations for actions whose effects cannot always be reversed and has long term implications.

The Environmental Protection Tribunals and Magistrates have the power to pass a prison sentence of up to two years and even order a person to restore the environment at his own cost, but only if it is held to be a repeat offence.[122] In the first instance, the existing law does not empower the Tribunals to

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[117] *DG EPA v Messrs RB Poultry Farm No. 1* (2018 CLD 1484).
[118] ibid.
[119] Pakistan Penal Code 1860, s 277.
[120] ibid s 278.
[121] Criminal Laws (Reform) Ordinance 2002.
[122] Pakistan Environmental Protection Act 1997, s 17(5).

impose a prison sentence. The provincial statutes of Sindh, Punjab, Balochistan and Khyber Pakhtunkhwa follow the same structure. This raises two concerns: firstly, despite the seriousness of an offence, the Tribunals are not at liberty to impose serious punishments such as a prison sentence in the first instance. Where one's liberty is not at risk despite the offence unless one repeats it, this can inadvertently build disregard for the environment. Secondly, the prison sentence time is also limited to two years in all provinces and three years in Sindh.[123] The severity of ecocide and massive impact require incarceration as a choice of penalty in the first instance, and a penalty limited to two or three years would not sufficiently penalise the grave offence nor be an effective deterrent. States such as Russia, Belgium, Georgia and Tajikistan have introduced the terms of imprisonment in their ecocide provisions to be up to 20 years as this adequately reflects the seriousness of the offence.[124] While the suggestion for Pakistan is to have a wide range of penalties, a long-term prison sentence within the range is crucial alongside higher fines, and the suggested ecocide law seeks to fill the existing gaps.

An amendment to the penalties within the existing law is an alternative, but due to the 18th Amendment, each province would have to initiate an amendment to their acts separately. This can be futile to the proposed law as some States might not reach a consensus to pass the law. It could be a long exercise to amend separate acts compared to one legislative process at the parliament and could limit the jurisdiction of ecocide within the nation. Reaching a consensus is already challenging under international law, and the division can be overcome feasibly locally.

b. *Environmental Protection Tribunals*

There are currently four Environmental Protection Tribunals in Pakistan situated Across Lahore, Karachi, Peshawar, and Quetta. As per the Ministry of Law and Justice Pakistan, only the Lahore Tribunal is fully operational, with the remaining only partially operational.[125] While there is no updated

[123] Sindh Environmental Protection Act 2014, s 22(5)(a).
[124] Criminal Code of Russian Federation 1996, art 358; Belgian Criminal Code 1967, art 96; Criminal Code of Georgia 1999, art 409; Criminal Code of Tajikistan 1998, art 400.
[125] Ministry of Law and Justice Pakistan, 'Environmental Protection Tribunal' (*Ministry of Law and Justice Pakistan*)

information on how active the Tribunals are at present, the presence of only four Tribunals creates an accessibility challenge. The proposed law does not give the Tribunal a specialised jurisdiction to conduct the case with the risk of impeding the progress of an ecocide case, leaving it dependent on the functionality of a Tribunal.

In the broad subject matter jurisdiction, the lack of uniformity comes in existence with the Environmental Protection Tribunals exercising exclusive jurisdiction in certain cases, whereas cases relating to the handling of hazardous substances and regulation of motor vehicles are exclusively triable by the Environmental Magistrates.[126] Both the Tribunals and Magistrates can hear cases of offences that are beyond their exclusive jurisdiction if there is a complaint in writing by any agency, government, or local council and aggrieved person under a certain time frame.[127] At the same time, only the Tribunal has the power to issue bailable arrest warrants for breaches that are exclusively triable by the Tribunal.[128] The effectiveness of the new proposed law would require uniformity. Currently, the division of subject matter jurisdiction between the Tribunal and Magistrate, whereby the Tribunal can issue arrest warrants if required, will not assist the functionality of the proposed law of ecocide. The Environmental Protection Tribunal would require a higher power of arrest in a situation where there is suspicion of ecocide based on the legal test, and the power to issue a warrant is not limited to contraventions of certain provisions relating to hazardous substances, emissions, failure to comply with an EPO and failure to complete environmental impact assessment.

c. *Environmental Protection Agencies*

The EPAs have a multifunctional role, from implementing the provisions of the legislation to establishing systems for surveillance, issuing licenses, certifying laboratories, aiding the government in natural disasters and more.[129]

https://molaw.gov.pk/Detail/ZDIzYmE2MWMtYTk3ZS00ZDFiLTllMDktZjVjOGVlZGYwMmU3 accessed 10 December 2024

[126] Pakistan Environmental Protection Act 1997, s 24.

[127] ibid s 21(3).

[128] ibid s 21(7).

[129] ibid s 6.

While the wide functioning of the provincial EPAs illustrates their important functions, the role of the police is very limited despite such cases being dealt with under the Code of Criminal Procedure. The police provide assistance in the enforcement of the Acts.[130] In criminal cases, the police are usually the first point of contact and are responsible for the investigation unless the statute, such as the Environmental Protection Act, provides otherwise. Under the existing law, the EPAs are also responsible for the investigation of environmental issues,[131] and are authorised to undertake searches with warrants issued by the Tribunal or a court.[132]

The proposed ecocide law seeks to deal with severe cases of environmental harm. The involvement of the police will be important from the initial investigation stages, like in any other crime. Introducing ecocide would mean that EPAs do not have the exclusive responsibility to manage such cases. This could also work positively as police inherently have investigation training, including collecting witness evidence.[133] It has also been noted that 'pursuing criminal prosecution of environmental offenders gives rise to the reluctance on the part of regulatory agencies to pursue more difficult cases.'[134] Because of their inherent serious, widescale or long-term impact, ecocide cases mean they could require more resources and investigation, and the role of the police can be useful in this regard. This was noted in Bangladesh, where the environmental courts closer link to the Department of Environment than the police was a barrier to 'maximising capacity and encouraging collaboration'.[135] EPAs can work collaboratively and use their expertise on the subject to lead the case without undertaking the sole investigation responsibility.

One of the gaps in the PEPA and all provincial Environmental Protection Acts is that they only allow aggrieved persons or government agencies to

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130 The Environmental Tribunals (Procedure and Functions) Rules 2008, rule 22.
131 Pakistan Environmental Protection Act 1997, s 6(2)(a).
132 ibid s 7.
133 Code of Criminal Procedure 1898, s 161.
134 Amin Rosencranz and Videh Upadhyay, 'Some Suggestions and recommendations towards a Model State Pollution Control Board (SPCB) in India' (2011) 1 Environmental Law and Practice Review 106, 113.
135 Sarker Faroque, 'Law-Enforcement Challenges, Responses and Collaborations Concerning Environmental Crimes and Harms in Bangladesh' (2020) 66(4) International Journal of Offender Therapy and Comparative Criminology 389.

bring a case before the Tribunals.[136] However, under the proposed ecocide law, anyone will be able to make complaints and bring a case. This crime should be introduced by being cognisant of a threshold that qualifies one to hold standing to bring a case, such as by geographical proximity, special interest in the case or impact suffered. Permitting individuals to bring a case invoking the protection of the environment creates more accessibility to cases that might usually be overlooked.

d. *Symbolic Value*

A law against ecocide holds symbolic value, illustrating a State's commitment towards criminalising serious harm to the environment. States such as Italy, which already have crimes against the environment in its penal code with comparatively stricter punishments than Pakistan, also want to strengthen their commitment towards the environment with a proposed ecocide bill.[137] The ecocide terminology gives it distinct importance and symbolic value while spreading greater awareness about gravely harming the environment and its stricter repercussions.

In *D.G. Khan Cement vs Government of Punjab*,[138] the Supreme Court of Pakistan referred extensively to the rights of nature.[139] Rights of nature, in one way, means the right of natural objects to be 'respected and allowed to exist, thrive and flourish for themselves and not for utilitarian purposes'.[140] The Court ruled against the installation of a plant affecting the local groundwater and affirmed that 'the environment needs to be protected in its own right'.[141] The judgment also referred to the well-established precautionary principle of international environmental law (IEL), reflected in the Rio Declaration on Environment and Development 1992.[142] The reference to IEL in this

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[136] Pakistan Environmental Protection Act 1997, s 21(3).
[137] UN Food and Agriculture Organisation, 'Law 68-2015 Amending the Italian Criminal Code' (*FAOLEX Database*) https://www.fao.org/faolex/results/details/en/c/LEX-FAOC145750/ accessed 10 December 2024
[138] *D.G. Khan Cement Company Ltd v Government of Punjab* (2021 SCMR 384).
[139] ibid.
[140] Tolulope N. Ogboru, 'Recognising the Rights of Nature: How Have the Courts Fared?' (2024) 29(3) European Law Journal 445.
[141] *D.G. Khan Cement Company Ltd* (n 138) [16].
[142] Rio Declaration on Environment and Development 1992 31 ILM 874, Principle 10.

domestic judgment already shows Pakistan's inclination towards following IEL principles protecting the environment.[143] Much like Italy's, the proposed ecocide law could further Pakistan's commitment towards the environment.

3.3.2. Efficacy of Criminal Prosecution

An effective and potent criminal law must comprise four elements.[144] The first element is institutionalism, which entails a functioning executive that upholds the administration of justice. The second element is specificity, which demands that the law is unambiguous. The third element is uniformity, which requires a uniform application of the law. The fourth element is the penalty, which must be implemented consistently and be clear to ensure that individuals are aware of their consequential punishment if a crime is committed.[145] The proposed law would seek to meet these requirements with its codified structure defining ecocide, setting out a threshold of severity and widespread and a list of adequate punishments.

Nevertheless, despite the structure of the law, its efficacy depends on its implementation. Ecocide crimes will be prosecuted in the criminal court system, i.e., the Magistrates and the Sessions Courts. However, these Courts are already overburdened with significant backlogs and processing delays.[146] There is a paucity of data to determine how similar ecocide laws are unfolding in other States. Challenges such as a lack of eyewitnesses, the recording of evidence and procedural delays exist in India's environmental criminal legal framework – issues that might be replicated in Pakistan as well.[147] The proposed ecocide law in Pakistan would permit the Sessions Courts to take up such cases like any other criminal case without limiting the jurisdiction of

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[143] Basel Convention on the Transboundary Movements of Hazardous Wastes and their Disposal (adopted on 22 March 1989) 1673 UNTS 125; United Nations Convention of the Law of the Sea (10 December 1982) 1833 UNTS 3.

[144] Hamza Hameed, 'A Study of the Criminal Law and Prosecution System in Pakistan' (*Manzil Pakistan*, October 2013) https://manzilpakistan.org/pdf/Law-and-Justice-Study-on-Criminal-Prosecution.pdf accessed 8 October 2024.

[145] ibid

[146] Muhammad Imran, 'Pendency of Cases in Pakistan: Causes and Consequences' (2024) 4(1) Current Trends in Law and Society 54.

[147] Sairam Bhat and Rohith R Kamath, 'Comparative Enforcement Mechanisms and Pinning of Liability in Environmental Crimes in India and Asia Pacific Region' (*Law Asia*, October 2022) https://lawasia.asn.au/sites/ accessed 8 October 2024.

such crimes to only certain dedicated Environmental Protection Tribunals or Magistrates. As an ecocide law seeks to primarily focus on criminal prosecutions of the more serious cases of the environment that meet the criteria of widespread severity and impact, the division of cases also creates accessibility to Session Courts all around the country.

Dr. Martin Lau's assessment of the reported judgments under the criminal jurisdiction showed that the Environmental Protection Tribunals had not experienced a particular need for additional scientific or technical expertise.[148] This further encourages the idea of introducing environmental crime and extending its subject matter jurisdiction to all criminal courts like any other crime in Pakistan, as the need for separate technical expertise might not become an obstacle for the criminal courts. Experts are often required during criminal trials; therefore, when an ecocide case necessitates the use of experts, they can be instructed to assist the Court. The application or use of the proposed law would not be exclusive to the Tribunals or the Courts, but they can co-exist and adjudicate upon ecocide cases. The allocation of a case can depend on the jurisdiction and administrative factors, such as a particular court's capacity to deal with a case in the given time. The geographical limitation that inherently comes with domestic law is a feasible benefit compared to international law,[149] as the proximity that supports the ability to collect evidence, arrest alleged perpetrators and carry out investigations more smoothly.

Shafqat Masud conducted a study which highlights the barriers to implementing climate change policies in Pakistan, in which he predominantly concluded that the 'inability of federally administered climate change policy framework to merge with existing decentralised model, however, has created ineffective policy implementation'.[150] His study focused on the climate change framework and how it overlaps with the environmental legal framework, which experiences similar operational challenges. In Pakistan, there are

[148] Dr. Martin Lau, 'The Role of Environmental Tribunals in Pakistan: Challenges and Prospects' (2018) 20(1) Yearbook of Islamic and Middle Eastern Law Online 1 https://brill.com/view/journals/yimo/20/1/article-p1_2.xml accessed 18 December 2024.
[149] Mwanza (n 78)
[150] Shafqat Maud and Ahmed Khan, 'Policy Implementation Barriers in Climate Change Adoption: The Case of Pakistan' (2023) 34(1) Environmental Policy and Governance 42.

several agencies, dissected laws found in different sources and the enforcement authority is dispersed between different agencies. A codified ecocide statute provides a way to have a unified system whose aim is to deal with the serious cases of environmental harm constituting ecocide. The existing environmental legal framework is not coherent because it exists differently in all provinces and has its challenges, but the important consideration is that a framework does exist, and many aspects of it could prove to be foundational for introducing an environmental crime in Pakistan, such as the due diligence mechanisms that can assist in attributing the conduct to the individual or corporation and a non-exhaustive list of unlawful activities.

4. CONCLUSION

The UN Environment Programme has recognised the severity of environmental crimes and urged for universal jurisdiction to prosecute them.[151] Introducing ecocide as a fifth crime requires more than an amendment to the Rome Statute; States Parties would have to amend the Rome Statute to introduce more penalties, widen its territorial jurisdiction, and accept principles such as CCL that could assist in prosecuting corporations for ecocide. This article looked at the feasibility of introducing a law against ecocide in domestic law and concluded that it is currently more practical to advocate for the recognition and incorporation of ecocide in domestic laws.

Criminalising environmental crime in a domestic legal system like Pakistan will inevitably bring challenges. These challenges can range from bureaucratic challenges to documenting the crime and managing the complementarity of roles where the judiciary and executive can work with the EPAs to bring the alleged perpetrators to court. This ensures the court is supported with expert evidence when needed and, most importantly, a strong mechanism to enforce orders.[152] Given Pakistan's strongly established environmental institutions,

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[151] United Nations Environment Programme, 'Observations on the Scope and Application of Universal Jurisdiction to Environmental Protection', (*United Nations Environment Programme*) https://www.un.org/en/ga/sixth/75/universal_jurisdiction/unep_e.pdf accessed 28 June 2023.
[152] A. K. Biswas, M. R. Farzanegan, and M. Thum 'Pollution, Shadow Economy & Corruption: Theory and Evidence' (2012) 75(C) Ecological Economics 114.

introducing and prosecuting the crime of ecocide may not necessitate a drastic change, especially as it may often be intertwined with other illegal activities like providing unlawful land clearances or license to operate factories without a proper evaluation of the impact on the environment. This is the benefit of having environmental regulators in domestic settings that are not present internationally.[153]

Pakistan has already been working to increasingly identify environmental crimes by becoming a member of the Asia/Pacific Group on Money Laundering (APG) and with the help of the Financial Action Task Force (FATF) that focuses on creating a link between money laundering that fuels environmental crimes such as illegal wildlife trade. However, no measurable progress has been made so far, which can be attributed to the lack of environmental crime's definition.[154] This article suggested a domestic ecocide statute for Pakistan that deals with serious cases crossing the suggested degree of threshold on severity, widespread, long-term impact of the crime and the potential penalties focussed on deterrence and reparation. The deteriorating state of the environment and its tangible effects on the current and future generations signify Pakistan's need to strengthen its environmental protection with a more stringent law.

[153] Darryl Robinson, 'Ecocide – Puzzles and Possibilities' (2022) 20 Journal of International Criminal Justice 313.
[154] Dr. Bahadur Ali, Parveen Gul and Muhammad Humayun, 'The Dynamics of Environmental Criminology and Response from the Legal System of Pakistan' (2021) 15(2) International Journal of Innovation, Creativity and Change 1177.

A COMPARATIVE ANALYSIS OF PAKISTAN'S MENTAL HEALTH LEGISLATION VIS-À-VIS THE INTERNATIONAL LEGAL FRAMEWORK: A CONCISE EXAMINATION

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ABSTRACT

This article aims to provide a comprehensive examination of the evolution of mental health legislation in Pakistan. It seeks to explore the historical background while analysing the trajectory of mental health laws over the years across different provinces. Additionally, the article will scrutinise the legal structures within each province. Furthermore, it intends to assess Pakistan's mental health legislation against international benchmarks, emphasising the disparities between local legal frameworks and global standards. Employing a comparative lens, in the final chapter, the article will pinpoint areas where Pakistan's legislation falls short in comparison to international norms and provide recommendations for improvement.

KEYWORDS: Mental Health Legislation, Pakistan's Mental Health Laws, Mental Health Ordinance 2001, Mental Health Act, International Standards of Mental Health Legislation, Mental Illness.

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1. INTRODUCTION

With a population of 244 million, Pakistan is home to the fifth-largest population in the world.[1] Pakistan faces a growing mental health crisis, with reports suggesting that between 22% and 60% of the population in major

[1] Worldometer, Pakistan Population https://www.worldometers.info/world-population/pakistan-population/ accessed 1 March 2024.

cities suffers from mental health issues such as anxiety and depression.[2] According to another estimate, one in four Pakistanis over the age of 18 may experience a mental health illness at some point in their lives, out of which over 80% will not be able to obtain mental health support.[3] Despite this, Pakistan lacks a comprehensive national mental health policy, and past legislative efforts have fallen short of effectively addressing the wider requirements of mental health care.[4] This gap is evident both in health care services and the legal framework that governs the care and rights of individuals with mental illnesses.

From a psychiatric perspective, 'mental health' refers to 'a state of well-being in which individuals can cope with the normal stresses of life, work productively, and contribute to their community.'[5] The World Health Organisation (WHO) defines mental health as an integral part of overall health, highlighting its importance in ensuring that individuals live fulfilling and meaningful lives.[6] Some common mental health conditions are 'depression, anxiety disorders, bipolar disorder, and schizophrenia' – many of these remain untreated in Pakistan due to stigma and a lack of access to healthcare.[7]

However, in terms of the law, mental health is largely confined to discussions surrounding criminal liability and civil capacity. In criminal law, mental illness is often invoked as a defence to reduce criminal responsibility, as seen in the principle of diminished responsibility in cases involving persons with serious mental disorders. In civil matters, mental health is primarily discussed in the

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[2] Zafar Iqbal, Ghulam Murtaza and Shahid Bashir, 'Depression and Anxiety: A Snapshot of the Situation in Pakistan' (2016) 4(2) International Journal of Neuroscience and Behavioral Science 32-36 https://www.hrpub.org/journals/article_info.php?aid=5112 accessed 1 March 2024.

[3] Ikram Junaidi, '80pc Pakistanis Lack Mental Health Treatment Facilities' Dawn (Islamabad, 11 October 2021) https://www.dawn.com/news/1651249 accessed 1 March 2024.

[4] National Commission on Human Rights, 'Malpractice in Mental Health in Pakistan: A Call for Regulation' (2022) https://www.nchr.gov.pk/wp-content/uploads/2022/08/Mental-Health-Report.pdf accessed 1 March 2024.

[5] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (5th edn, American Psychiatric Publishing (2013) https://doi.org/10.1176/appi.books.9780890425596 accessed 1 March 2024.

[6] World Health Organisation, 'Mental Health' (*WHO*) https://www.who.int/health-topics/mental-health#tab=tab_1 accessed 1 March 2024.

[7] World Health Organisation, 'Mental Disorders' (*WHO*) https://www.who.int/news-room/fact-sheets/detail/mental-disorders accessed 3 March 2024.

context of contracts and property transactions, where individuals of 'unsound mind' may lack the legal capacity to engage in binding agreements.[8]

The evolution of mental health legislation in Pakistan reflects this limited legal scope. The Mental Health Ordinance 2001 (MHO) replaced the archaic Lunacy Act 1912 but fell short of providing a comprehensive framework for mental health care.[9] While the MHO represented progress, it primarily focused on addressing severe mental illnesses, leaving gaps in addressing common but debilitating conditions like depression and anxiety.[10] The devolution of health legislation to the provinces after the 18th Amendment to the Constitution of the Islamic Republic of Pakistan 1973 has resulted in provincial mental health laws that reflect the limitations of the Mental Health Ordinance and do not fully comply with international standards set by organisations like the WHO and the United Nations (UN).

2. INTERNATIONAL STANDARDS FOR MENTAL HEALTH LEGISLATION

2.1. Overview of the International Framework

The right to health is a basic human right encompassing physical, mental, and social well-being. It is essential for the realisation of other human rights and applies universally, irrespective of race, religion, political beliefs, or socioeconomic status. Mental health is 'an integral and essential component of the right to health.'[11] The United Nations has established critical frameworks for the protection of mental health, particularly through key instruments such as the Universal of Human Rights (UDHR),[12] the

[8] Faraaz Mahomed et al., 'Mental Health, Human Rights, and Legal Capacity' (2022) 9(5) The Lancet Psychiatry Issue 341, 341-342.
[9] AI Gilani, UI Gilani, PM Kasi and MM Khan, 'Psychiatric Health Laws in Pakistan: From Lunacy to Mental Health' (2005) 2 PLoS Medicine e317, https://journals.plos.org/plosmedicine/article/file?type=printable&id=10.1371/journal.pmed.0020317 accessed 17 March 2024 ('AI Gilani et al.').
[10] Mental Health Ordinance 2001.
[11] World Health Organisation, 'Constitution of the World Health Organisation' (1946) https://www.who.int/about/accountability/governance/constitution accessed 3 April 2024.
[12] UN General Assembly, Universal Declaration of Human Rights, (10 December 1948) 217 A (III).

(ICESCR),[13] and the Convention on the Rights of Persons with Disabilities (CRPD).[14]

Under Article 12 of the ICESCR,[15] every person has a right to enjoy the highest attainable standard for physical as well as mental health.[16] This includes providing comprehensive healthcare services that address not only severe mental illnesses but also common conditions such as anxiety and depression. In addition to Article 12, the ICESCR requires States to take progressive steps towards the full realisation of its rights, ensuring that all individuals can access necessary health services. Article 11 further underscores the importance of adequate nutrition and housing as determinants of health, linking social well-being directly to mental health outcomes.[17]

The CRPD complements these rights by explicitly affirming that individuals with disabilities, including those experiencing mental health issues, must enjoy the Convention's rights on an equal basis with others, including persons without disabilities. Article 3 highlights principles such as 'respect for inherent dignity, individual autonomy, and independence,'[18] while Article 5 focuses on non-discrimination.[19] These articles collectively emphasise the necessity of reasonable accommodations—modifications or adjustments that ensure individuals can fully exercise their rights without facing barriers.

To effectively fulfil these obligations under both the ICESCR and CRPD, countries must adopt a holistic approach to mental health legislation. This includes integrating mental health care into primary health services, promoting community-based care models, and ensuring that mental health

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[13] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 ('ICESCR').
[14] UN General Assembly, Convention on the Rights of Persons with Disabilities A/RES/61/106 (24 January 2007) ('CRPD').
[15] ICESCR (n 13) art 12.
[16] Paul Hunt, 'Interpreting the International Right to Health in a Human Rights-Based Approach to Health' (2016) 18(2) Health and Human Rights Journal 109–130 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5394996/ accessed 13 April 2024.
[17] ICESCR (n 13) art 11.
[18] CRPD.
[19] ibid.

policies are inclusive and non-discriminatory. Moreover, accountability mechanisms are essential for monitoring compliance with these international standards and providing remedies when rights are violated.[20]

The emergence of modern public health approaches in the twentieth century has highlighted the significance of mental health as an integral part of overall health. However, the stigma surrounding mental health care often stems from the historical division between mental and physical health, which is reflected in global policies.[21] Addressing this stigma is essential for creating an effective framework that promotes mental well-being and ensures that individuals with mental health conditions receive the care and support they need. Thus, international frameworks have emerged to establish a foundation for countries to develop mental health legislation that guarantees the rights of individuals with mental health conditions.

2.2. International Rules for Mental Health Legislation

By adhering to the rules and standards outlined in various international legal frameworks, countries can establish a comprehensive approach to mental health legislation. These rules provide a roadmap for implementing basic measures.

2.2.1. Equality and Non-Discrimination

International human rights law seeks to ensure non-discrimination in both access to and provision of mental health care services, as well as in addressing the underlying determinants of health.[22] Additionally, domestic legislation is

[20] E Riedel, 'The Right to Health under the ICESCR: Existing Scope, New Challenges and How to Deal with It' in A von Arnauld, K von der Decken and M Susi (eds), The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric (Cambridge University Press 2020) 107-123 https://doi.org/10.1017/9781108676106.009 accessed 24 April 2024.
[21] United Nations, Human Rights Council, Dainius Pūras, 'Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health' (A/HRC/35/21, 28 March 2017) [6] https://undocs.org/A/HRC/35/21 accessed 24 April 2024 ('Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health').
[22] United Nations Committee on Economic, Social and Cultural Rights, 'General Comment No. 20 (2009) on Non-Discrimination in Economic, Social and Cultural Rights' (E/C.12/GC/20)

necessary to frame attitudes and behaviours towards those who are suffering distress, have been diagnosed with a mental illness, or have a psychosocial disability.[23] According to the CRPD, 'States Parties shall prohibit discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.'[24] This legal framework is essential for shaping societal attitudes towards individuals with psychosocial disabilities. However, psychiatric diagnostic biases are common, and research demonstrates that racial and gender-based prejudices result in incorrect diagnoses.[25] The law itself can perpetuate prejudice and stereotypes. For instance, several laws now in effect use terminology that is highly symbolic, such as 'idiot' or 'lunatic', and thus have a detrimental effect on the stigma attached to mental health issues.[26]

The biomedical model of mental health, which emphasises the biological explanations for distress while minimising the role of environmental and social factors, characterises mental illness as an individual issue and promotes 'a fatalistic view of recovery.'[27] This approach in law and policy can perpetuate public stigma and self-stigma surrounding mental health. Moreover, mental health diagnoses have been abused to pathologise identities and members of diverse communities, as highlighted by the UN Special Rapporteur on the Right to Everyone to the Highest Achievable Standard of Physical and Mental Health.[28]

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https://documents.un.org/doc/undoc/gen/g09/434/05/pdf/g0943405.pdf?token=JPuM6XjXE3GKbEW1y5&fe=true accessed 24 April 2024 ('CESCR General Comment No. 20').

[23] United Nations, Human Rights Council; Report of the Office of the United Nations High Commissioner for Human Rights, 'Awareness-Raising under Article 8 of the Convention on the Rights of Persons with Disabilities' (A/HRC/43/27, 17 December 2019) para. 55 https://undocs.org/en/A/HRC/43/27 accessed 24 April 2024.

[24] CRPD, art 5.

[25] Suite DH, La Bril R, Primm A and Harrison-Ross P, 'Beyond Misdiagnosis, Misunderstanding and Mistrust: Relevance of the Historical Perspective in the Medical and Mental Health Treatment of People of Color' (2007) 99(8) Journal of the National Medical Association 79–85 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2574307/ accessed 24 April 2024.

[26] World Health Organisation and United Nations, Mental Health, Human Rights and Legislation: Guidance and Practice (2023) https://iris.who.int/bitstream/handle/10665/373126/9789240080737-eng.pdf?sequence=1 accessed 24 April 2024.

[27] ibid.

[28] Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (n 21) [6].

To uphold the right to health effectively, States must actively facilitate preventive, curative, and palliative mental health care for all individuals on an equitable basis. This involves implementing policies that not only address direct healthcare needs but also consider the social determinants affecting mental well-being, such as socioeconomic status, education, and community support.[29] The Committee on Economic, Social and Cultural Rights (CESCR) has emphasised that mental health is a critical component of the right to health, as articulated in its General Comment No. 14.[30] The CESCR underscores the importance of non-discrimination and equal access to mental health care, advocating for reasonable accommodations to support individuals with mental health conditions.[31] By adopting a comprehensive approach that aligns with the CESCR's guidelines, States can create a legal framework that fosters equality and non-discrimination in mental health care delivery, ultimately enhancing the overall well-being of their citizens.

2.2.2. Reasonable Accommodation

According to Article 5 of the CRPD, a 'reasonable accommodation' is any modification or change that is suitable and required to guarantee that individuals may exercise their rights equally.[32] However, it does not include placing an unfair or disproportionate burden on the State or a private entity when providing accommodation for persons with disabilities (PWDs).[33] 'Reasonable' relates to the accommodation's applicability, efficacy, and relevance without 'imposing a disproportionate or undue burden' on service providers.[34] The focus is on ensuring that these accommodations effectively

[29] World Health Organisation (WHO), Mental Health Action Plan 2013-2020 https://iris.who.int/bitstream/handle/10665/89966/9789241506021_eng.pdf?sequence=1 3 June 2024 ('Mental Health Action Plan 2013-2020').
[30] Committee on Economic, Social and Cultural Rights, International Covenant on Economic, Social and Cultural Rights: General Comment No.14: The Right to the Highest Attainable Standard of Health (art. 12) (E/C.12/2000/4), [34] https://digitallibrary.un.org/record/425041?ln=en accessed 3 June 2024 ('CESCR, General Comment No. 14').
[31] CESCR General Comment No. 20 (n 22).
[32] CPRD.
[33] Committee on the Rights of Persons with Disabilities, General Comment No.6 on Equality and Nondiscrimination (CRPD/C/GC/6) [23–27] (2018) https://undocs.org/CRPD/C/GC/6 accessed 10 June 2024 ('CRPD, General Comment No. 6').
[34] CRPD, art 2.

enable individuals to participate fully in society and access services, thereby fulfilling the intended purpose of promoting equality and inclusion.[35]

The rejection of a reasonable accommodation must be recognised as discrimination and should be explicitly addressed in legislation.[36] Considering the significance of legal capacity, States Parties are obligated to formally recognise and grant adequate accommodations to ensure that individuals can exercise their legal rights effectively. This obligation is not optional; rather, it is a fundamental obligation under international law to promote equality and non-discrimination for PWDs.[37]

It is important to emphasise that the requirement for accommodation and social assistance does not entail measures that involve deprivation of liberty. Protective actions should, whenever possible, reflect the wishes of individuals capable of expressing their preferences. Failing to do so can result in abuse and hinder the exercise of the rights of vulnerable individuals. Consequently, any action taken without prior consultation with the affected person must undergo thorough scrutiny.[38]

2.2.3. Accountability

Accountability in the right to mental health includes three elements: (a) monitoring; (b) independent and non-independent review, including by political, administrative, quasi-judicial, and judicial bodies; and (c) remedies and redress.[39] Accountability gives rights holders the chance to comprehend how responsibility bearers have care out their responsibilities and to seek compensation when rights are infringed.[40] As a body of experts, the CESCR plays a crucial role in establishing authoritative standards and interpretations regarding the right to health. Their guidance underscores the importance of

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[35] United Nations, Human Rights Council, 'Mental Health and Human Rights' (A/HRC/34/32), [9] (7 June 2017) https://undocs.org/A/HRC/34/32 accessed 10 June 2024.
[36] Mental Health Act. Republic Act No. 11036, art 4 (e). Manila: Republic of the Philippines (2017) https://lawphil.net/statutes/repacts/ra2018/ra_11036_2018.html accessed 10 June 2024.
[37] CRPD General Comment No. 6 (n 33) [48].
[38] *Stanev v Bulgaria* [GC], no. 36760/06, §153 (ECHR, 9 February 2011).
[39] UN HRC (n 35).
[40] Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (n 21).

accountability mechanisms that allow individuals to hold States accountable for their commitments under international law.[41] By ensuring transparency and responsiveness, States can foster an environment where rights holders are empowered to seek remedies and where violations are addressed effectively.

States Parties should take the necessary actions to guarantee 'that the private business sector and civil society are aware of,'[42] and take into consideration the right to health when conducting their activities in order to foster an environment that is conducive for the realisation of the right.[43] Accountability requires individuals in positions of authority to accept responsibility for their conduct, to be open and honest with those in question, and to see that the proper corrective and restorative measures are implemented.[44]

To support, safeguard, and oversee the application of the mental health regulations under the CRPD, States should monitor the implementation of national or sub-national mental health legal and policy frameworks.[45] States can track progress through various indicators at the population, service, and individual levels. The WHO Guidance on Community Mental Health Services: Promoting Person-Centered and Rights-Based Approaches provides examples of such indicators within and beyond the health system.[46] Additionally, the UN Office of the High Commissioner for Human Rights (OHCHR) has created 'human rights indicators on the CRPD as a tool' to help with the comprehension and application of its provisions.[47] These indicators may be used as a guide to direct activities and measures to be followed while 'implementing a rights-based mental health system.'[48]

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[41] CESCR General Comment No. 14 (n 30).
[42] ibid [55].
[43] ibid.
[44] United Nations, Human Rights Council, Catalina Devandas Aguilar, Report of the Special Rapporteur on the Rights of Persons with Disabilities (A/75/186) [72] (20 July 2020) https://undocs.org/en/A/75/186 accessed 9 July 2024.
[45] CRPD, art 33(2).
[46] World Health Organisation (WHO), Guidance on Community Mental Health Services: Promoting Person-Centered and Rights-Based Approaches (2019).
[47] United Nations Office of the High Commissioner for Human Rights (OHCHR), *Human Rights Indicators: A Guide to Measurement and Implementation* (*OHCHR* 2014).
[48] United Nations High Commissioner for Human Rights, SDG-CRPD Resource Package https://www.ohchr.org/en/disabilities/sdg-crpd-resource-package 9 July 2024.

Furthermore, States should also ensure access to justice and opportunities for compensation and support for survivors and victims of abuses of human rights in mental health care. [49]

2.2.4. Free and Informed Consent

One of the core components of the right to health is the freedom to give informed and voluntary consent.[50] It includes the freedom to accept medical care as prescribed, to reject it, or to select an alternative.[51] The freedoms include the right to control one's health and body and the freedom from 'interference, such as the right to be free from torture, non-consensual medical treatment and experimentation.'[52]

In general, individuals have the freedom to decline any kind of medical care, even if it may save their lives. Individuals with psychosocial impairments and mental health disorders need to have the same access to this right as everyone else.[53] Adolescents should always provide their consent for mental health care and support, regardless of whether parental or guardian consent is also obtained.[54] Article 12 of the Convention on the Rights of the Child (CRC) affirms that children who are capable of forming their own views have the right to freely express those views in matters affecting them, including health care decisions. This provision highlights the importance of respecting adolescents' autonomy and ensuring their participation in decisions regarding their mental health treatment.

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[49] United Nations Committee on the Rights of Persons with Disabilities, Guidelines on Deinstitutionalisation, Including in Emergencies (2022) (CRPD/C/5) https://www.ohchr.org/en/documents/legal-standards-and-guidelines/crpdc5-guidelines-deinstitutionalisation-including accessed 9 July 2024.

[50] United Nations General Assembly, International Covenant on Civil and Political Rights, UN Doc A/RES/2200(XXI) (1966) art 7.

[51] United Nations Human Rights Council, Dainius Pūras, Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (A/HRC/38/36), [25] (10 April 2018) https://undocs.org/en/A/HRC/38/36 accessed 10 July 2024.

[52] CESCR General Comment No. 14 (n 30) [8].

[53] CRPD, art 25(d).

[54] World Health Organisation, WHO QualityRights Core Training: Mental Health and Social Services: Course Guide 'Freedom from Coercion, Violence and Abuse', 24 (2019) https://apps.who.int/iris/handle/10665/329582 accessed 10 July 2024.

Moreover, 'medical or scientific research' is also prohibited 'without free consent' under Article 7 of the ICCPR.[55] Article 4(2) of the ICCPR emphasises that this provision is non-derogable and cannot be restricted. Article 15 of the CRPD reaffirms this principle. The right to health includes protection from medical treatment and scientific experimentation conducted without one's free and informed consent, as the CESCR has repeatedly emphasised.[56] Similarly, Article 25(d) of the CRPD provides that States Parties guarantee that healthcare for PWDs is delivered based on their free and informed consent.[57] Involuntary treatment is seen as a violation of 'not only the right to health but also legal capacity,'[58] protection from 'torture and ill-treatment,'[59] 'freedom from violence, exploitation, and abuse,'[60] as well as 'the right to personal integrity.'[61]

The CESCR has outlined that States should adopt specific legislation prohibiting discrimination in mental health and develop and implement policies and plans addressing both formal and substantive. Furthermore, human rights education and training programs should be conducted for public officials and integrated into both formal and non-formal education to promote equality, tolerance and understanding of human rights principles.[62]

2.3. WHO's Comprehensive Mental Health Action Plan 2013–2030

The World Health Assembly endorsed the Comprehensive Mental Health Action Plan 2013–2020 in May 2013.[63] In 2019, the Seventy-second World Health Assembly extended this Action Plan until 2030. The main objectives of the Action Plan are to promote mental health, prevent mental illnesses, provide care, support recovery, protect human rights, and reduce the death,

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[55] Human Rights Committee, International Covenant on Civil and Political Rights: General Comment No. 20: Article 7: Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, para. 3 (1992) https://www.refworld.org/legal/general/hrc/1992/en/11086 accessed 10 July 2024.
[56] CESCR, General Comment No. 14 (n 30), [8].
[57] CRPD, art 25(d).
[58] ibid art 12.
[59] ibid art 15.
[60] ibid art 16.
[61] ibid art 17.
[62] ibid.
[63] Mental Health Action Plan 2013-2020 (n 29).

morbidity, and disability rates among individuals affected by mental illnesses.[64] Its four main goals are to 'improve mental health leadership and governance'; to 'offer comprehensive, integrated, and responsive mental health and social care services in community-based settings'; to put 'mental health promotion and prevention strategies' into practice; and to 'improve mental health information systems, evidence, and research.'[65] The Action Plan also suggests important steps that Member States (including Pakistan), the WHO Secretariat, and other national and international partners should take to accomplish each of these goals.[66]

As a signatory to this Action Plan, Pakistan should align its national mental health policies with these objectives. By actively engaging with the WHO's framework, States can strengthen its mental health legislation and improve the quality of care for individuals experiencing mental health challenges.

2.4. The World Health Organisation's QualityRights Initiative

The WHO launched the global QualityRights initiative as a capacity-building initiative aimed at advancing the rights of those with psychosocial, intellectual, and cognitive disabilities. This initiative seeks to enhance the quality of mental health services and care worldwide by providing a framework for best practices and supporting countries in developing and implementing mental health policies that adhere to international human rights standards. The WHO QualityRights initiative includes resources such as the module titled 'Transforming Services and Promoting Rights'.[67] This offers valuable information and resources to States for assessing and improving human rights and quality standards in mental health and social care institutions in conjunction with the WHO QualityRights assessment tools.[68] Patients who have received QualityRights training reported feeling more

[64] Mental Health Action Plan 2013-2020 (n 29), 7.
[65] ibid 36-37.
[66] ibid 12.
[67] World Health Organisation, WHO QualityRights Training and Guidance: Mental Health and Social Services: Course Guide: Transforming Services and Promoting Human Rights (2019) https://apps.who.int/iris/handle/10665/329611 accessed 19 July 2024.
[68] World Health Organisation, WHO QualityRights Tool Kit to Assess and Improve Quality and Human Rights in Mental Health and Social Care Facilities (2012) https://apps.who.int/iris/handle/10665/70927 accessed 19 July 2024.

empowered to support their own recovery in mental facilities.[69] The initiative has also influenced broader policy frameworks, such as the creation of a European Declaration and Action Plan for 'the health of children and young people with intellectual disabilities and their families in 2011.'[70]

3. PAKISTAN'S LEGAL ARCHITECTURE IN RELATION TO MENTAL HEALTH LEGISLATION

3.1. The Evolution of Pakistan's Mental Health Legislation

The Lunacy Act 1912, which originated in British India, was inherited by Pakistan following the Partition in 1947. This Act remained the primary legal framework for mental health until it was replaced by the Mental Health Ordinance (MHO) in 2001. The Pakistani Government proposed new mental health laws in 1992 and circulated a draft for feedback from psychiatrists; however, significant reform did not occur until 2001.[71]

The Lunacy Act holds historical significance as it defined key terms such as 'asylum', 'lunatic' and 'medical officer'[72] and outlined procedures for admitting mentally ill individuals to asylums.[73] It provided for the care of wandering or dangerous individuals and detailed medical examination processes, including the issuance of medical certificates. Notably, Sections 13-16 allowed for the detention of those suspected to be 'lunatics' for up to ten days, extendable to thirty days with magistrate approval, before an inquiry into their mental status.[74] This provision was susceptible to exploitation due to widespread corruption in the legal system.[75]

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[69] Akwasi O Osei et al., 'Implementation of the World Health Organisation's QualityRights Initiative in Ghana: An Overview' (2024) 10 BJPsych Open https://doi.org/10.1192/bjo.2024.11 accessed 19 July 2024.
[70] World Health Organisation, WHO European Declaration and Action Plan on the Health of Children and Young People with Intellectual Disabilities and their Families (EUR/RC61/R5).
[71] A Tareen and KI Tareen, 'Mental Health Law in Pakistan' (2016) 13 BJPsych International 67 https://europepmc.org/backend/ptpmcrender.fcgi?accid=PMC5618880&blobtype=pdf accessed 25 July 2024 ('A Tareen and KI Tareen').
[72] Lunacy Act 1912, s 3.
[73] ibid s 22.
[74] ibid s 13-16.
[75] AI Gilani et al. (n 9).

The term 'lunacy' itself perpetuated stigma, with the Act defining a lunatic as 'an idiot or person of unsound mind.'[76] Despite criticism from mental health professionals regarding its harshness and inaccuracy, this terminology remained until the enactment of the MHO in 2001.[77]

On 20 February 2001, the MHO came into force, repealing the Lunacy Act.[78] The MHO represented a major advancement in modernising Pakistan's mental health regulations by replacing the outdated terminology of the Lunacy Act and providing comprehensive descriptions of mental illnesses.[79] However, after the 18th Amendment to the Constitution in 2010, Pakistan underwent a significant political transformation that granted provinces complete legislative authority over various subjects, including healthcare.[80] Consequently, health became a provincial subject, leading each province to promulgate its own mental health laws.[81]

3.2. Federal Legal Framework

3.2.1. The Constitution of the Islamic Republic of Pakistan 1973

Under the Constitution of Pakistan, the dignity, security, and health of all citizens are inviolable rights.[82] Key provisions of the Constitution relevant to this discussion are Articles 9, 14, 25 and 38. Article 9 addresses the right to life and security of a person, ensuring that all individuals, including those with mental disabilities, are entitled to protection under this right. The Supreme Court also recognised that the right to life under Article 9 encompasses not only a person's physical existence but also their right to live with dignity,

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[76] Dyer AR and Bloom JD, 'Forensic Psychiatry in India and Pakistan' (2020) 48(1) Journal of the American Academy of Psychiatry and the Law https://pmc.ncbi.nlm.nih.gov/articles/PMC7026664/ accessed 23 July 2024.
[77] AI Gilani et al. (n 9).
[78] A Tareen and KI Tareen (n 71).
[79] RQ Khan and AM Khan, 'Crime and Punishment: Pakistan's Legal Failure to Account for Mental Illness' (2021) 18 BJPsych International 94 https://www.cambridge.org/core/journals/bjpsych-international/article/crime-and-punishment-pakistans-legal-failure-to-account-for-mental-illness/E2F24EE61A186CF42562425CF72A1A19 accessed 23 July 2024 ('RQ Khan and AM Khan').
[80] Tahir Maqsood Chheena, 'The Significance of the 18th Amendment for the Federalism and Devolution' Republic Policy (24 October 2023) https://republicpolicy.com/the-significance-of-the-18th-amendment-for-the-federalism-and-devolution/ accessed 23 July 2024.
[81] *Mst. Safia Bano v Home Department Govt. of Punjab through its Secretary and others* (PLD 2021 SC 488).
[82] Constitution of the Islamic Republic of Pakistan, 1973 ('Constitution').

emphasising the State's obligation to provide necessary medical facilities to ensure the well-being of its citizens.[83] Similarly, Article 14 upholds the right to dignity and states that the dignity of man and the privacy of home shall be inviolable subject to the law. Article 25 of the Constitution specifies that all people residing in the State are equal in the eyes of the law. According to Article 38(d) of the Constitution, the State must strive towards providing essentials to those who are unable to make a living due to illness or other circumstances.[84]

A landmark judgment by the Supreme Court, *Safia Bano v. Home Department, Government of Punjab*,[85] prohibited the execution of individuals suffering from recognised mental disorders. The Court stated that 'the execution of a person who is unable to comprehend the rationale behind their punishment is a violation of their right to life and dignity' under Articles 9 and 14. Thus, it is the State's responsibility to ensure that mentally ill offenders do not receive the death penalty as a sentence for a crime.

3.2.2. The Pakistan Penal Code 1860

Under Section 84 of the Pakistan Penal Code (PPC), 'nothing is an offence done by a person who at the time of the commission of the offence, because of unsoundness of the mind, was incapable of knowing the nature of the act or what he was doing was contrary to the law'.[86] Thus, individuals who suffer from mental illness and are unable to comprehend the nature of their actions cannot be tried or convicted.

If the accused can demonstrate sufficient impairment to his mental responsibility as a result of even partial or borderline insanity, as stated in Section 84 of the PPC, he/she is entitled to a favourable finding on the plea of insanity. This does not need to be proven as 'scientifically certain, but can

[83] *Shehla Zia v WAPDA* (PLD 1994 SC 693).
[84] Constitution.
[85] *Safia Bano v Home Department, Government of Punjab* (2018 SCMR 1234).
[86] The Pakistan Penal Code, s 84.

be established on the balance of probabilities' and a 'proper resolution of doubts.' [87]

Not every individual with a mental disorder is automatically exempt from criminal responsibility. For Section 84 of the PPC to apply, a person must demonstrate that, at the time of the offence, they were experiencing such a defect of reason that they could not understand the nature or consequences of their actions.[88] Furthermore, there is a clear distinction between medical and legal insanity, with courts focusing solely on the legal aspect: legal insanity serves as a defence against criminal responsibility, requiring that the accused demonstrate a complete impairment of cognitive faculties due to mental unsoundness. To qualify as legally insane, the individual must be unable to understand the nature of their actions or 'recognise that what they are doing is wrong or against the law.'[89]

3.2.3. The Code of Criminal Procedure 1898

Sections 464-475 of the Code of Criminal Procedure 1898 (CrPC) describe the rights and exemptions for those lacking a 'sound mind'.[90] Section 464 discusses the incompetency to proceed due to lunacy and unsoundness of mind in the Magistrates' Court. Section 465 determines the incompetency to stand trial in a Sessions or High Court. The legal framework established by Sections 464 and 465 requires that a Magistrate must have reasonable grounds to believe that an accused individual is of unsound mind and unable to comprehend the proceedings. Additionally, it must be evident to the Court during the trial that the accused suffers from mental unsoundness, rendering them incapable of making a defence. In both instances, the actions taken depend on the subjective assessment of the Magistrate or Court regarding the situation presented.[91]

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[87] Muhammad Umer Ali Ranjha & Ariba Fatima, 'The Death Penalty and Mental Illness in Pakistan's Courts: A Critical Analysis' LUMS Law Journal https://sahsold7.lums.edu.pk/law-journal/death-penalty-and-mental-illness-pakistan%E2%80%99s-courts-critical-analysis accessed 25 July 2024.
[88] *Khizar Hayat v The State* (2006 SCMR 1755).
[89] *Meharban alias Munna v The State* (PLD 2002 SC 92).
[90] RQ Khan and Am Khan (n 79).
[91] *Fauqual Bashar v The State* (PLD 1997 SC 847).

Other relevant sections in the CrPC outline procedures for the acquittal of individuals due to mental health conditions, the release of individuals pending investigation or trial, custody arrangements, resumption of inquiry or trial, and appearances before a magistrate or court.[92] Section 466 permits the release of 'an accused person found to be of unsound mind' pending investigation or trial, protecting his/her rights while acknowledging their mental health condition.[93] Section 467 ensures that individuals deemed mentally ill are held in appropriate facilities rather than traditional prisons.[94] Section 468 addresses cases where a mentally ill prisoner is capable of making their defence.[95] Lastly, Section 471 addresses the detention of acquitted persons in safe custody.[96]

3.2.4. The Mental Health Ordinance 2001 (MHO)

The MHO addresses and regulates matters related to mental health within Pakistan.[97] According to its Preamble, it has brought about significant changes to the legislation 'relating to mentally disordered persons with respect to their care and treatment and management of their property and other related matters.'[98]

The first major improvement the MHO brings is in the terminology used. Prior to 2001, mental illnesses were classified using antiquated and vague terminology such as 'lunacy' under Pakistani law. These phrases were dropped from the MHO, which replaced them with thorough definitions of mental illnesses, severe personality disorders, and severe mental impairments.[99] According to the MHO, mental illness is defined as "a substantial disorder of thought, mood, perception, orientation, or memory that significantly impairs judgment, behavior, capacity to recognise reality, or ability to meet the

[92] Ali Ajmal and Faiza Rasool, 'Legal Analysis of Competency to Stand Trial' (2023) 4 Pakistan Journal of Development and Social Sciences http://dx.doi.org/10.47205/jdss.2023(4-III)73 accessed 25 July 2024.
[93] Code of Criminal Procedure 1898, s 466.
[94] ibid s 467.
[95] ibid s 468.
[96] ibid 471.
[97] Mental Health Ordinance (n 10).
[98] AI Gilani et al. (n 9).
[99] ibid.

ordinary demands of life."[100] This modern terminology reflects a more accurate understanding of mental health conditions and promotes a more respectful approach to individuals experiencing these challenges.

Secondly, it established the Federal Mental Health Authority (FMHA) under Section 3, which was made up of seven members, most of whom are bureaucrats, and seven 'eminent psychiatrists of at least 10 years standing'.[101] The FMHA was tasked with establishing national standards for care and treatment, monitoring the quality of mental health services offered in the nation, and carrying out a number of other duties.[102] However, with health now being governed at the provincial level, the FMHA was dissolved in 2010.[103]

Thirdly, the MHO enhanced safeguards for involuntary detention, which is one of the four categories of detention it provides for. Section 19(2) of the MHO limits the amount of time that a patient can spend in involuntary detention to no more than 72 hours. A psychiatrist or their designated medical officer must examine the patient within this time frame and make the required arrangements to begin care and therapy. This section attempts to lessen the widespread legal abuses that were typical prior to 2001.[104]

Fourthly, the MHO includes provisions pertaining to guardianship and property management of the victims under Chapter V. It creates a structure outlining the duties of property managers and guardians, as well as their appointment procedures and guidelines for the inventory, investment, and disposal of their ward's property.[105]

[100] Mental Health Ordinance (n 10), s 2(m).
[101] ibid s 3(3)(v).
[102] ibid.
[103] Fawad Kaiser, 'Challenges to Mental Health Law in Pakistan' Asia Times (24 February 2020) https://asiatimes.com/2020/02/challenges-to-mental-health-law-in-pakistan/ accessed 1 August 2024.
[104] Mental Health Ordinance (n 10), s 19.
[105] ibid ss 29-46.

3.3. Provincial Legal Frameworks

3.3.1. Punjab Mental Health (Amendment) Act 2014

The Punjab Mental Health (Amendment) Act 2014 applies the Mental Health Ordinance 2001 (MHO) to Punjab following the 18th Amendment to the Constitution, making it the Punjab Mental Health Ordinance (PMHO).[106] The PMHO aligns with international standards, emphasising patient rights, community care, and rehabilitation.[107] The PMHO defines mental disorders based on significant impairments in mood, thought, perception, memory or orientation that affect an individual's ability to function effectively.[108]

The Punjab Mental Health Authority (PMHA) was established under Section 4 of the PMHO to oversee mental health matters in Punjab. The creation of the PMHA ensures that mental health governance is more localised, allowing for better adaptation to the specific needs and conditions of Punjab.[109] Section 5 outlines its composition, with the Punjab Government nominating a chairperson and up to ten members. The PMHA advises the Government on mental health promotion, prevention, and governance.[110]

Section 7 covers involuntary admission and treatment procedures, incorporating legal safeguards and judicial oversight to protect individual rights.[111] Section 8 requires all mental health facilities to register with the PMHA and comply with care standards, ensuring adequate treatment and services. The PMHO emphasises the protection of individuals with mental disorders under Section 6, ensuring their dignity, privacy, and safeguards against abuse and exploitation. Section 9 promotes rehabilitation and community integration through aftercare services, while Section 10 mandates

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[106] A Tareen and KI Tareen (n 71).
[107] S Dey, G Mellsop, K Diesfeld et al., 'Comparing Legislation for Involuntary Admission and Treatment of Mental Illness in Four South Asian Countries' (2019) 13 International Journal of Mental Health Systems 67 https://ijmhs.biomedcentral.com/articles/10.1186/s13033-019-0322-7 accessed 5 August 2024 ('S Dey, G Mellsop, K Diesfeld et al.').
[108] Punjab Mental Health Ordinance 2001, s 2(m).
[109] ibid, s 4.
[110] Suleman Chaudhry, 'Punjab Mental Health Authority Given Go-Ahead' Daily Times (9 December 2016) https://dailytimes.com.pk/41283/punjab-mental-health-authority-given-go-ahead/ accessed 7 August 2024.
[111] Punjab Mental Health Ordinance 2001 (n 108), s 6.

public awareness programs to reduce stigma and enhance understanding of mental health.[112]

Altogether, the PMHO is a positive step towards more consolidated treatment of mental health issues in Punjab. However, the PMHO's effectiveness is contingent upon proper implementation, adequate resources, and sustained efforts to raise public awareness and reduce stigma associated with mental health issues.

3.3.2. Khyber Pakhtunkhwa Mental Health Act 2017

The Khyber Pakhtunkhwa Mental Health Act 2017 is also based on the MHO.[113] It aims to regulate mental health care, protect patient rights, and provide community support in Khyber Pakhtunkhwa.[114] The Act emphasises the treatment, care, and management of mentally ill individuals and their families, including the management of their properties and affairs, in accordance with contemporary mental health needs.[115]

Sections 3 and 4 establish the Khyber Pakhtunkhwa Mental Health Authority, tasked with overseeing mental health matters in the province. This Authority is responsible for regulating mental health care, ensuring ethical treatment, and addressing peripheral matters related to mental health in the province.[116] While the Act does not explicitly elaborate on detention mechanisms, it emphasises ethical treatment and care for individuals with mental health conditions, ensuring safeguards are in place to protect their rights during treatment and management.

The Act aims to create a comprehensive framework for mental health care in Khyber Pakhtunkhwa, focusing on regulation, patient rights, ethical

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[112] Punjab Mental Health Ordinance 2001 (n 108), s 9.
[113] S Dey, G Mellsop, K Diesfeld et al. (n 107).
[114] Operationalisation of Mental Health Authority, Provincial Assembly Khyber Pakhtunkhwa, Resolution No.244 https://www.pakp.gov.pk/resolution/res-no-244-s7-2018-23/ accessed 9 August 2024.
[115] Khyber Pakhtunkhwa Mental Health Act 2017 (Khyber Pakhtunkhwa Act No XVII of 2017).
[116] Zeenat Khan, 'Mental Health Disorders in Khyber Pakhtunkhwa: Women Suffer More than Men' Hamara Internet (21 October 2019) https://hamarainternet.org/mental-health-disorders-in-khyber-pakhtunkhwa-women-suffer-more-than-men/ accessed 10 August 2024.

treatment, and community support. However, challenges such as resource constraints and infrastructure limitations must be addressed to fully realise its objectives. Without adequate funding and infrastructure, the ambitious provisions of the Act may struggle to achieve their intended impact.

3.3.3. Sindh Mental Health Act 2013

While the Punjab and Khyber Pakhtunkhwa Acts are largely similar to the MHO, the Sindh Act has made significant improvements. The Sindh Mental Health Act 2013 was the first provincial mental health law enacted after the 18th Amendment to the Constitution, which placed health under provincial jurisdiction.[117] Built on the foundation of the MHO, the Act aligns with contemporary understandings of mental health. It defines mental illness as substantial disorders of thought, mood, perception, orientation, or memory that significantly impair an individual's ability to function.[118]

The Sindh Mental Health Authority, established in August 2017 under the Act,[119] is tasked with implementing mental health policies and ensuring compliance with legal standards. Sections 3 and 4 outline the composition of the Mental Health Authority and the Board of Visitors, which includes a retired High Court judge from Sindh.[120] Sections 7 and 8 of the Act detail voluntary and involuntary admissions procedures, aiming for a balanced approach that respects patients' autonomy while providing mechanisms for care when individuals cannot make informed decisions.[121]

Section 54 empowers the Inspector-General of Prisons to visit mentally disordered individuals in custody and mandates provisions for diverting offenders with mental illnesses from the criminal justice system to mental health services.[122] The Act recognises two primary types of detention: civil detention for individuals requiring treatment due to severe mental illness and

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[117] 'New Law: Sindh Finalises Mental Health Ordinance' The Express Tribune (9 May 2013) https://tribune.com.pk/story/546246/new-law-sindh-finalises-mental-health-ordinance accessed 11 August 2024.
[118] Sindh Mental Health Act 2013, s 2(n).
[119] Sindh Mental Health Authority, 'Background' https://smha.sindh.gov.pk/background/ accessed 11 August 2024.
[120] A Tareen and KI Tareen (n 71).
[121] Sindh Mental Health Act 2013 (n 118).
[122] ibid s 54.

forensic detention for offenders with mental disorders who pose a risk to public safety.[123] Section 53(3) mandates the evaluation of individuals detained for offences affecting "public health, safety, convenience, decency, or morals" to determine their mental state. These evaluations help differentiate between offenders who require medical intervention and those subject to penal measures.[124] The Act further emphasises the importance of forensic mental health services to ensure appropriate treatment for offenders, facilitating their rehabilitation and reducing the risk of recidivism.

In recent years, the Sindh Government launched its first Mental Health Policy, developed with input from local and international stakeholders.[125] This policy addresses the province's growing mental health challenges by proposing measures such as integrating mental health education into medical curricula, allocating budgets, and translating legislation into local languages.[126]

The Sindh Act and its accompanying policy signify a progressive shift towards comprehensive and rights-based mental health care in Sindh. However, their success depends on effective implementation, sufficient resources, and sustained public awareness to combat the stigma surrounding mental health issues.

3.3.4. Balochistan Mental Health Act 2019

The Balochistan Mental Health Act 2019 is a progressive Act aimed at regulating mental health care, safeguarding the rights of patients, and promoting accessible and ethical mental health services in Balochistan. The Act defines mental illness and mental disorders similarly to the MHO 2001.[127] However, it highlights the need for expanded definitions that reflect advancements in medical science and align with WHO-recognised mental and

[123] S Dey, G Mellsop, K Diesfeld et al. (n 107).
[124] M Husain, 'Blasphemy Laws and Mental Illness in Pakistan' (2014) Psychiatric Bulletin 38:40–44 https://www.cambridge.org/core/journals/the-psychiatric-bulletin/article/blasphemy-laws-and-mental-illness-in-pakistan/60CB4CFE7BF4F665C4D4E8720E467509 accessed 17 August 2024.
[125] 'Mental Health Wave' The Nation (28 January 2024) https://www.nation.com.pk/28-Jan-2024/mental-health-wave accessed 24 August 2024.
[126] 'Sindh Leads the Way: Introduces First-Ever Comprehensive Mental Health Policy' SOHRIS (28 January 2024) https://sohris.com/sindh-leads-the-way-introduces-first-ever-comprehensive-mental-health-policy accessed 24 August 2024.
[127] Balochistan Mental Health Act 2019 (Act No IX of 2019).

behavioural disorders.[128] This would ensure a broader and more contemporary understanding of mental health issues.

Section 3 establishes the Balochistan Mental Health Authority, which is tasked with regulating mental health services in the province.[129] The Authority oversees hospital management, indoor treatment, and the roles of approved psychiatrists, ensuring compliance with ethical and legal standards. It further establishes clear protocols for voluntary and involuntary admissions under Section 8, requiring oversight by professionals and judicial review to safeguard patient autonomy. While similar to MHO, the Act aims to establish a comprehensive framework for mental health care in Balochistan, addressing both individual needs and systemic challenges.

However, the full implementation of the Act is contingent on the formulation of rules, which have yet to be developed. Additionally, the Act would benefit from updates to the definitions of mental and behavioural disorders to align with international medical standards.

4. THE WAY FORWARD: RECOMMENDATIONS FOR PAKISTAN

Pakistan grapples with intricate legal challenges in maintaining coherence across its mental health legislation. Although the provinces have made great efforts since the 18th Amendment, there has not been much notable federal advancement to improve policy beyond the Mental Health Ordinance of 2001.[130] Additionally, there is a pressing need for the provinces to establish further measures to augment mental health legislation and policies. The following recommendations could assist Pakistan in paving the way for future improvements in mental health legislation:

4.1. Establishment of Mental Health Authorities

Currently, only the Sindh Mental Health Authority (SMHA), established in 2017, is operational. However, it remains only partially functional despite its

[128] World Health Organisation, *International Classification of Diseases (ICD-11)* (*WHO*, 2019) https://www.who.int/standards/classifications/classification-of-diseases accessed 23 December 2024.
[129] Balochistan Mental Health Act 2019 (n 127), s 3.
[130] A Tareen and KI Tareen (n 71).

mandate.[131] Punjab is underway in establishing the PMHA. Meanwhile, the other two provinces are also in the process, but concrete legislative measures for operational mental health authorities are yet to be observed.[132]

At present, there is no specific authority or independent body responsible for evaluating the alignment of mental health legislation with international human rights standards.[133] To ensure compliance with international standards such as the CRPD, it is essential to establish a dedicated body that can monitor, assess, and guide legislative frameworks, ensuring they uphold the rights of PWDs and align with global human rights norms.

4.2. Amendments and Updates in the Existing Legislation

The existing provincial mental health legislation closely resembles the MHO, with minimal updates or adaptations to reflect changing times. Neither the provincial nor federal Acts have undergone significant modifications to address evolving needs and challenges in mental health care, such as the integration of mental health into primary care, the need for specific provisions addressing common disorders like anxiety and depression, and the establishment of crisis intervention services. Additionally, there is a lack of clear guidelines for forensic mental health services, insufficient emphasis on patient rights and autonomy, and a need for culturally competent care that considers Pakistan's diverse population. Furthermore, legislation should include provisions for public awareness campaigns to reduce the stigma associated with mental illness, encouraging individuals to seek help without fear of discrimination.

As per the Mental Health and Human Rights Report by the UN High Commissioner for Human Rights, [134] it is imperative to revise and refresh the

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[131] Sindh Mental Health Authority, 'Background' (n 119).
[132] K Dayani, M Zia, O Qureshi et al., 'Evaluating Pakistan's Mental Healthcare System Using World Health Organisation's Assessment Instrument for Mental Health System (WHO-AIMS)' (2024) 18 International Journal of Mental Health Systems 32 https://doi.org/10.1186/s13033-024-00646-6 accessed 13 September 2024.
[133] World Health Organisation, 'Mental Health Atlas, 2020: Member State Profile [Pakistan]' (*WHO*) https://cdn.who.int/media/docs/default-source/mental-health/mental-health-atlas-2020-country-profiles/pak.pdf?sfvrsn=62378896_6&download=true accessed 13 September 2024.
[134] Office of the United Nations High Commissioner for Human Rights and United Nations General Assembly, 'Mental Health and Human Rights: Report of the United Nations High Commissioner for

provincial mental health legislation and integrate feedback from mental health professionals such as psychiatrists, psychologists, psychotherapists, and individuals who have personally experienced mental health issues. Such amendments would ensure that the legislation aligns with international human rights standards and addresses the current needs of mental health care in Pakistan.

4.3. Formulation of Rules and Regulations

The Mental Health Acts of Punjab, Sindh, and Balochistan require the government to enact rules and regulations to enforce the intended objectives of the Acts. Specifically, the Sindh Mental Health Rules 2014[135] were formulated by the Sindh Mental Health Authority (SMHA), making Sindh the only province with such a governing body. These Rules complement the Act by providing detailed procedures for implementation, including guidelines for patient admission, treatment protocols, and mechanisms for protecting patient rights. All provinces should establish similar rules regarding involuntary admission processes to ensure that individuals' rights are uniformly protected across jurisdictions.

Furthermore, it is imperative to develop Rules and Regulations for the Mental Health Acts of Balochistan, Punjab and Khyber Pakhtunkhwa and to align them with international standards. Additionally, reviewing and updating the Rules for the Sindh Mental Health Authority will help ensure consistency and effectiveness across all provinces, promoting a cohesive approach to mental health care in Pakistan.

4.4. Establishment of Board of Visitors

The mental health legislation in Sindh, Punjab, and Balochistan still empowers the formation of a Board of Visitors to oversee mental health institutions. This Board, consisting of seven members from Sindh and Punjab and nine from Balochistan, serves to ensure that patients receive proper

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Human Rights' A/HRC/39/36 (24 July 2018) https://www.ohchr.org/en/documents/reports/mental-health-and-human-rights-report-united-nations-high-commissioner-human accessed 15 September 2024.

[135] Sindh Mental Health Rules 2014, Chapter III: License.

treatment and that facilities operate ethically. Despite the establishment of a Board of Visitors in Sindh, there has been limited substantive scrutiny.[136] Notably, the Khyber Pakhtunkhwa Mental Health Act does not mention such a board, and neither Punjab nor Balochistan has appointed one yet.

Establishing a Board of Visitors in every province aligns with international standards outlined in the WHO QualityRights Initiative, which emphasises the importance of independent monitoring bodies in safeguarding the rights of individuals with mental health conditions. By implementing these boards, Pakistan can enhance accountability and promote a culture of ethical treatment in mental health care.

4.5 Free Consent and Involuntary Detention

The MHO and provincial legislation outline four categories of involuntary patient detention: admission for treatment (up to six months, renewable), admission for evaluation (up to 28 days), urgent admission (up to 72 hours), and emergency holding in a hospital (up to 24 hours). Applications for detention must be submitted by a medical official or the patient's parent, spouse, or guardian. These provisions are intended for situations where the patient poses a risk to their own or others' health and safety due to mental disorder. However, there are concerns about ambiguity in the criteria, leading to patients being detained against their will inappropriately.

The Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, adopted by the UN in 1991, emphasise that involuntary treatment should be a last resort, applied only when a person poses a danger to themselves or others and is incapable of giving informed consent.[137] By incorporating these principles into mental health legislation, we can promote a more ethical and humane approach to mental health care that prioritises the rights and well-being of individuals.

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[136] Sindh Mental Health Authority, 'Board of Visitors' https://smha.sindh.gov.pk/board-of-visitors/ accessed 14 September 2024.

[137] United Nations General Assembly, 'The Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care', Resolution 46/119 (17 December 1991) https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-protection-persons-mental-illness-and-improvement accessed 14 September 2024.

5. CONCLUSION

This article examines international standards for mental health legislation and evaluates Pakistan's legal framework and recent advancements in mental health law. While there have been improvements, significant gaps remain, including vague definitions, inadequate provisions for involuntary detention, insufficient regulation of mental health professionals, and weak malpractice mechanisms.

Key recommendations to enhance Pakistan's mental health legislation include establishing independent mental health authorities in all provinces, formulating comprehensive rules and regulations, creating Boards of Visitors for oversight, and prioritising informed consent in treatment. Addressing these gaps and implementing these recommendations will strengthen mental health legislation, ensuring quality, ethical, and rights-based mental health services for all citizens.

LEGAL RECOGNITION OF ETHNO-LINGUISTIC MINORITIES: COMMUNAL CHALLENGES AND ALTERNATIVE FEDERAL ARRANGEMENTS

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ABSTRACT

This article examines the legal recognition afforded to ethnic and linguistic minorities in Pakistan. Using in-depth qualitative interviews, it focuses on two ethno-linguistic communities; the Hazara community of Quetta and the Torwali community of Swat. These ethno-linguistic communities experience unique challenges in their everyday lives, including threats of language extinction and cultural assimilation. These difficulties are documented through a review of the existing scholarship and participatory action research conducted via interviews. This article also analyses the shortcomings of the existing legal framework in its treatment of ethnic and linguistic minorities. To address these challenges, it proposes several solutions, including structural changes through federalism, a more expansive definition of 'minorities' and substantive legal recognition of ethno-linguistic minorities in Pakistan.

KEYWORDS: Ethnic Minorities, Religious Minorities, Nationalism, Constitutional Recognition, Ethno-linguistic, Hazara Community, Torwali.

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1. INTRODUCTION

Ethnic minorities are 'groups exhibiting cultural preferences different to those of the majority population, or groups with different cultural and societal origins.'[1] As a diverse country, Pakistan is home to several ethnic minorities. Unfortunately, minorities like the Hazara, Torwali and Meo communities are not granted formal recognition based on ethnicity across the Constitution, legislation and judicial decisions. In this paper, 'recognition' is defined as the

[1] Martin Kahanec, Anzelika Zaiceva & Klaus F. Zimmermann, 'Ethnic Minorities in the European Union: An Overview', in Martin Kahanec & Klaus F. Zimmermann (eds), *Ethnic Diversity in European Labor Markets* (Edward Elgar Publishing, Cheltenham 2011), Ch 1.

constitutional acknowledgement of ethno-linguistic minorities, as well as the preservation of their interests and rights.

Unfortunately, the terms 'minorities' and 'religious minorities' are considered almost interchangeable in Pakistan. Although the Constitution of the Islamic Republic of Pakistan 1973 (Constitution) refers to 'minorities' frequently, there is no express definition of the term or an outline of what kinds of minorities are recognised.[2] Many jurisdictions share this problem despite international legal attempts to consolidate a single definition. For instance, Pakistan is a party to the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (CERD). In 2009, the CERD Committee stated that Pakistan failed to produce a database of 'race, colour, descent and national or ethnic origin' of its population, which was also missing from the 1998 census.[3] While the Government recognised some regional languages (apart from the provincial languages) like Hindko and Brahui, there was 'no link made to the ethnic dimension of the language speakers'.[4] The lack of acknowledgement of the minority ethnic groups of Pakistan has been observed by NGOs and UN agencies alike. This paper builds on these observations by conducting a substantive analysis of the issue.

2. RESEARCH METHODOLOGY

This essay employs a qualitative and participatory approach to investigate the status of ethno-linguistic minorities in Pakistan, focusing on the Torwali and Hazara communities. The core inquiry explores how these communities experience life in Pakistan as an ethno-linguistic minority and whether they share commonalities in their challenges.

Purposive sampling identified two individuals directly involved with these communities.[5] In-depth interviews (IDIs), lasting over two hours each, were conducted using pre-developed interview guides. Zubair Torwali, a

[2] Shaheen Sardar Ali, 'The Rights of Ethnic Minorities in Pakistan: A Legal Analysis' (1999) 6(1) International Journal on Minority and Group Rights 69, 95.
[3] Minority Rights Group International, 'Redressing a History of Neglect: Discrimination of Ethnic Groups and Indigenous Peoples of Pakistan' (Shadow NGO Report, MRG CERD, 2009).
[4] ibid.
[5] Steve Campbell et al., 'Purposive Sampling: Complex or Simple? Research Case Examples' (2020) 25(8) Journal of Research in Nursing 652 https://doi.org/10.1177/1744987120927206 accessed 23 December 2024.

prominent activist from Swat and founder of the organisation *Idara Baraye Taleem-o-Taraqi*, detailed his efforts to preserve Torwali culture, his experiences with various stakeholders, and his legal petitions for language preservation. Similarly, Rahila Haidar, a schoolteacher and public service officer from the Hazara community living in Quetta, provided insights into her community's political, social, and educational challenges. Both interviews were conducted online due to geographical constraints. The interviews are complemented by references to international reports, existing literature, and legal databases.

3. A COMPARATIVE APPROACH TO ETHNIC MINORITIES

Different jurisdictions have taken a nuanced approach towards ethnic minorities. The Constitution of the United States (US), for example, does not define 'minority', but the US Civil Rights Act 1964 prohibits discrimination on account of 'race, colour, religion, sex, or national origin.'[6] Similarly, the Voting Rights Act 1965 specifically prohibits the denial of voting rights to anyone based on 'race or colour.'[7] Interestingly, the US Higher Education Act 1965 is one of the few statutes that defines 'minority'. Title 20 of the Act, in the context of education, defines minorities as:

> American Indian, Alaskan Native, Black (not of Hispanic origin), Hispanic (including persons of Mexican, Puerto Rican, Cuban, and Central or South American origin), Pacific Islander or other ethnic group underrepresented in science and engineering.[8]

Nevertheless, the conceptualisation of 'minority' in American social thought has evolved over time. Back in 1945, Wirth defined minorities as:

> a group of people who, because of their physical or cultural characteristics, are singled out from the others in the society in

[6] Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964).
[7] Voting Rights Act of 1965, 52 U.S.C. § 10301 (1965).
[8] Higher Education Act of 1965, 20 U.S.C. § 1067k (2020).

> which they live for differential and unequal treatment and who therefore regard themselves as objects of collective discrimination.[9]

A collective reading suggests that minorities in the US are historically perceived in terms of their race or ethnicity, considering American history and ethnic pluralism.

The Canadian understanding of minorities has also evolved over time. Section 15(1) of the Canadian Charter of Rights and Freedom 1982 prevents discrimination based on 'race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'[10] Section 17 protects linguistic minorities by securing a citizen's right to receive education in their preferred language, even if they reside in an area with a different majority language.[11] Moreover, the Canadian Multiculturalism Act 1988 explicitly mentions three categories of minorities, 'ethnic, religious, or linguistic', rather than leaving the term vague.[12] Section 5(1)(g) of the Act states that an appointed Minister will help 'ethno-cultural minority communities to conduct activities with a view to overcoming any discriminatory barrier and, in particular, discrimination based on race or national or ethnic origin.'[13] Apart from these foundational statutes, Canada has defined its 'visible minorities' in terms of colour or race for employment and immigration purposes.[14]

Along similar lines, Australia has taken an expansive approach towards multiculturalism. A Multicultural Council was established in 2011, and federated states like New South Wales and Victoria have devised unique educational policies for fostering different cultures.[15] The Australian Special Broadcasting Services also airs shows in different regional languages[16]. There

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[9] Louis Wirth, 'The Problem of Minority Groups', in Ralph Linton (ed), *The Science of Man in the World Crisis* (New York 1945) 347-72; reprinted in Louis Wirth, *Community Life and Social Policy: Selected Papers*, eds. Elizabeth Wirth Marvick and Albert J. Reiss (Chicago 1956) 237-60.
[10] Canadian Charter of Rights and Freedoms, RSC 1982, Appendix II, No 44, s 15(1).
[11] ibid s 17.
[12] Canadian Multiculturalism Act, RSC 1988, c 24 (4th Supp), preamble.
[13] ibid s 5(1)(g).
[14] Employment Equity Act, SC 1995, c 44, s 2.
[15] Australian Government, 'Our Policy History' (Department of Home Affairs) https://www.homeaffairs.gov.au/about-us/our-portfolios/multicultural-affairs/about-multicultural-affairs/our-policy-history accessed 18 October 2024.
[16] SBS, 'FAQs' (SBS, 2024) https://www.sbs.com.au/aboutus/contact-us/faqs/ accessed 3 December 2024.

has been an overall effort to accommodate different linguistic and ethnic communities through exemptions from uniform dress codes, representation in media, and the availability of various legal departments for this purpose.[17] Despite these frameworks, Australia has received global criticism for its discriminatory treatment of indigenous people, refugees, and asylum seekers.[18] This divide between the legislative framework and practical realities is common in Pakistan, too, especially with regard to religious minorities.

Some States have implemented ethnic quotas for their minorities. For example, Taiwan has separate reserved indigenous districts that participate in multi-party electoral democracy, even though the 16 recognised indigenous groups make up only 2.73% of the Taiwanese population. Likewise, Singapore has reserved ethnic quotas for Malays, Indians, and other ethnic minority groups.[19] These ethnic quotas 'strengthen representational links, create positive attitudes towards government, and encourage political participation' of ethnic minorities.[20]

Internationally, organisations have adopted a comprehensive attitude towards minorities. Article 1 of the UN Minorities Declaration refers to minorities as 'based on national or ethnic, cultural, religious, and linguistic identity'.[21] Similarly, Francesco Capotorti, the UN Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, defined a minority as:

> a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the state—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only

[17] ibid.
[18] Human Rights Watch, 'Australia' (*World Report 2024*, 2024) https://www.hrw.org/world-report/2024/country-chapters/australia accessed 18 October 2024.
[19] Netina Tan and Cassandra Preece, 'Ethnic Quotas, Political Representation and Equity in Asia Pacific' (2022) 58 Journal of Representative Democracy 1-25.
[20] ibid.
[21] United Nations General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, A/RES/47/135, (3 February 1992), art 1.

> implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[22]

In sum, ethnicity is globally recognised as a basis for the recognition of a minority. Unfortunately, there are no parallel provisions in Pakistan; the meagre protection afforded to minorities in Pakistan is largely for religious minorities. This leads to various legal, social and cultural challenges faced by these communities in their daily existence. This article shall further demonstrate how constitutional provisions and judicial interpretations exacerbate their challenges.

4. WHY ARE ETHNIC MINORITIES NOT RECOGNISED IN PAKISTAN?

Although Pakistan's provinces are divided along ethnic lines, this framework has not effectively promoted tolerance between different communities. Theoretically, an ethnic federation with provincial autonomy may be a source of pride for larger communities. However, this experience is not shared by ethnic minorities. Even within larger ethnic groups, the economic, institutional, and political dominance of Punjab has been a source of grievance.[23] Especially after 1971, many communities felt that Punjab's 'demographic density became democratic density' at the expense of other provinces.[24] It became more apparent since Punjab's dominance significantly increased after the separation of East Pakistan. Besides, 'region-based political groups in Pakistan have been historically mobilised for political power largely around their ethnic and linguistic identities', marginalising smaller communities by amplifying ethnonationalism.[25]

The constant tussle for power among dominant ethnic groups means that the interests of smaller communities are often overshadowed. This can result in ethnic violence. In Karachi alone, there have been several cases of target

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[22] Francesco Capotorti, 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities' (UN Doc E/CN.4/Sub.2/384/Rev.1, 1979).
[23] Moonis Ahmer, 'The Challenge of National Integration' *Dawn* (23 March 2019) www.dawn.com/news/1471231 accessed 16 October 2023.
[24] Murtaza DN, 'Punjab Dominance' (DAWN.COM, 11 September 2017) https://www.dawn.com/news/1357045 accessed 18 October 2024.
[25] Maryam S Khan, 'Ethnic Federalism in Pakistan: Federal Design, Construction of Ethno-Linguistic Identity & Group Conflict' (2014) 30 Harvard Journal on Racial & Ethnic Justice https://ideaspak.org/images/Publications/Social-Exclusion-and-Marginalisation/Ethnic-Federalism-in-Pakistan.pdf.

killings on ethnic grounds and goons that attack local businesses run by Pashtuns.[26] Many social movements, like the demands for a Saraikistan within Punjab, Sindhudesh in Sindh, and Baluchi separatism, feed on the same ethnicity-based angst which fosters nationhood, or a sense of national identity based on ethnicity. This competition for resources, autonomy, and recognition does not yield positive results for ethno-linguistic minorities who already lack adequate representation.

Such problems originated at the time of the conceptualisation of Pakistan when the founding fathers placed 'an unnecessarily high premium on the Islamic charter' of the new State.[27] The Two-Nation theory illustrated this divide, but soon after Partition, many realised that 'religion was not a bedrock of a [timeless] identity but simply a political resource instrumentalised by the elite groups'.[28] Several ethnic movements emerged, casting doubts on whether religion was an effective adhesive force between different ethnic groups.

The case of Bangladesh is a poignant illustration of ethnonationalism in Pakistan. The stigmatisation of the Bengali language and the political oppression faced by the Bengali community highlighted that religious unity alone did not guarantee cultural unity.[29] When the Bengalis, who were deeply attached to their language and literature, protested against the forced endorsement of Urdu in the region, the State responded with violence.[30] Despite the East Bengal Assembly's unequivocal demand for Bengali as the national language, Jinnah remained adamant on Urdu as the only State language, deepening the feelings of neglect.[31] Demands for ethnic nationalism challenged the notion that the country 'should be governed according to the ideology of Islam rather than language, ethnicity, or place of origin'.[32] By

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[26] Immigration and Refugee Board of Canada, Pakistan, *Criminal activity and violence in Karachi perpetrated or directed by political, ethnic or religious groups, including the state's response* (Ottawa, 7 December 2011) Ref. No. PAK103866.E https://www.refworld.org/docid/5072ca722.html accessed 16 October 2023.
[27] Shaheen Sardar Ali (n 2), 193.
[28] Christophe Jafferlot and Rasul Bakhsh Rais, 'Interpreting Ethnic Movements in Pakistan [with Comments]' (1998) 37 The Pakistan Development Review 153-179.
[29] Moonis Ahmer (n 23).
[30] Farooq Tirmizi, 'The Sad History of International Mother Tongue Day'*, The Express Tribune* (21 February 2011) https://tribune.com.pk/story/121515/the-sad-history-of-international-mother-tongue-day accessed 16 October 2023.
[31] Tahir Kamran, 'Pakistan's First Decade' (2016) in H. Kumarasingham (ed), *Constitution-Making in Asia* (Cambridge: Cambridge University Press) Chapter 5.
[32] Moonis Ahmer (n 23).

branding these incidents as political conflicts, the West Pakistan-dominated State dismissed their ethno-linguistic root causes and subsequent implications for ethno-linguistic recognition.

5. ARGUMENTS REGARDING THE LACK OF RECOGNITION

To reiterate, 'recognition' in this article includes recognition along constitutional terms but also goes beyond it. Article 27 of the International Covenant on Civil and Political Rights 1966 (ICCPR) mandates that:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[33]

Inferred from this provision, 'legal recognition' refers to formal acknowledgement and guarantees by a State of the rights of a minority to practice their distinct cultures, languages, and religions without any discrimination. Thus, a national framework that ensures the integration and protection of a community is essential.

While it is surprising to reflect that ethnic minorities were never recognised as a distinct category in Pakistan, there are three possible reasons for this. Firstly, recognition along ethnic terms would only breed more demands of nationalism. Secondly, recognition in itself is not a solution, as demonstrated by the plight of religious minorities, but rather a means to substantive equality. Finally, the Constitution already entails provisions for the protection of cultures and languages of all communities, making the additional demand for recognition redundant.[34] However, this article addresses these arguments to establish otherwise.

A historical analysis of Bangladesh and Balochistan negates the view that ethnic recognition can amplify the demand for nationhood. In fact, demands

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[33] United Nations General Assembly, International Covenant on Civil and Political Rights, UN Doc A/RES/2200(XXI) (1966) ('ICCPR'), art 27.
[34] Constitution of the Islamic Republic of Pakistan 1973, arts 2A, 33, 36 ('Constitution of Pakistan 1973').

for self-determination can become stronger by a lack of substantive recognition. To this end, many ethnic groups complain that the State remains apathetic towards their unique struggles. Zubair Torwali, a Dardic language activist who runs an organisation working to preserve the Torwali language, shed further light on this issue.[35] He shared that during his organisation's work and engagement with institutions like the media, security forces, and the government,[36] he found the local government to be the most apathetic stakeholder.[37] This perspective stems from his experience of receiving no governmental support for his language preservation efforts. Thus, the lack of consideration afforded to distinct communities does not necessarily stiffen separatist movements. Rather, it generates feelings of resentment among communities.

Regarding the second argument, recognition has to be substantive and not merely declaratory. Although religious minorities have been recognised constitutionally, they still face challenges regarding national integration. Nevertheless, constitutional recognition of their separate status has – at the very least – provided a basis for the protection of their rights. For example, the Sindh Department of Minority Affairs has an annual endowment fund scholarship reserved for students belonging to the Christian, Hindu, Parsi, and Sikh communities.[38] Educational initiatives like scholarships and quotas can also be extended to people from ethnic minorities if they are entitled to constitutional and legal recognition.

Besides, constitutional recognition is foundationally important for reform because the Constitution offers a framework for governance, and its provisions cannot be overridden by ordinary legislation. Making specific provisions for ethno-linguistic minorities creates a framework for the enforcement of their unique interests as a matter of the protection of their fundamental rights. This is especially important because the current safeguards available to these communities are subject to judicial

[35] Interview with Zubair Torwali, Language Activist, Founder of Idara Baraye Taleem-o-Taraki (Bahrain, Swat District, Pakistan, 5 December 2023.
[36] ibid.
[37] ibid.
[38] Government of Sindh, 'Minorities Affairs Department, Government of Sindh' (*Minorities Affairs Department*, nd) https://minorityaffairs.sindh.gov.pk/ accessed 23 December 2024 .

pronouncements and subjective interpretations – as demonstrated by a later section of this paper.

Lastly, the challenges faced by religious minorities should not hinder the progress of other minorities. Rather, they can serve as a critical lesson and inform the development of strategies that are cognisant of the unique needs of the community. The crux is that the right to comprehensive (both declaratory and substantive) recognition in the national landscape should be argued for as a fundamental right of ethnically and linguistically diverse communities.

6. CHALLENGES FACED BY ETHNO-LINGUISTIC MINORITIES

While arguing for the recognition of ethno-linguistic minorities, it is essential to delve deeper into the challenges they face. This section explores their shared adversities while also highlighting the unique challenges faced by the Hazara and Torwali communities discovered through primary research.

6.1. Lack of Recognition in Census

In 2009, a shadow report by Minority Rights Group International analysed the results of Pakistan's 1998 census.[39] It notes the composition of various ethnic groups in Pakistan based on their mother tongues. While well-known communities like the Seraiki make up 10.53% of the national population and the Muhajirs make up 7%, lesser-known ethno-linguistic groups like the Hindko and Brahvi people make up 2.43% and 1.21% of the total population respectively.[40] The 2.81% of the remaining population and the languages they speak are classified as the 'Other'.[41] The Annex to the 1981 census shows that the 'Other' category does account for languages like Torwali, Hazaragi, and over fifty other minority languages.[42] However, this textual otherisation has far-reaching consequences because it mirrors the legal isolation found in

[39] MRG Report 2009 (n 3).
[40] ibid.
[41] ibid.
[42] Tahir Rehman, 'Language, Power and Ideology' (2002) 37(44) Economic and Political Weekly https://www.jstor.org/stable/4412816 accessed 18 October 2024.

public attitudes, judicial interpretation, and administrative mistreatment of smaller minorities.

Thus, minority communities require the inclusion of their language as a 'mother tongue' option in the census form rather than as an 'Other' category. The last census that attempted to screen people based on ethnicity was held in 1961, and no similar efforts have been made thus far.[43] Indeed, in the 2017 census, only nine languages were officially part of the data collection forms – Urdu, Sindhi, Punjabi, Pashto, Balochi, Kashmiri, Saraiki, Hindko and Brahui. In the 2023 census, five new languages were included – Shina, Balti, Mewati, Kalasha, and Kohistani.[44] The fact that these five languages made it out of the 'Other' category in the 2023 census shows that the demand from communities to make their language an official part of the census has some impetus.

This first step towards legal recognition would prevent minority languages from cultural erasure where 'Torwali' is currently misunderstood as simply being a dialect of Kohistani.[45] The lack of acknowledgement in the official census is a core problem of these communities since it hampers any additional measures that can be taken to protect their interests, such as their political representation and preservation of their languages.

6.2. Public Discrimination

Discrimination and marginalisation are often reported by people belonging to non-mainstream ethnicities. This includes stereotypes about their right to land, literacy level, and culture from the moment they begin schooling. Zubair Torwali elaborated on the struggles of his community that has been living in the Swat Valley for decades. He shared that Torwali-speaking children are subjected to ridicule and mockery in public schools.[46] Besides, if an adult community member has to interact with local agencies for work purposes, the officials regard them as inferior or label them *'wehshi'* and *'jaahil'*

[43] Pakistan Bureau of Statistics.
[44] Pakistani Bureau of Statistics (2023 Census form) https://census.pbs.gov.pk/questionnaire/#1643951222396-e656c8ec-d459 accessed 18 October 2024.
[45] Zubair Torwali Interview (n 35).
[46] Zubair Torwali Interview (n 35).

(uncivilised and illiterate) due to their unique language.[47] This stereotyping is also identifiable in Appadurai's definition of minorities, which recognises that the existence of groups whose culture, language, or religion is different from the mainstream practices centrally makes majorities 'uncomfortable'.[48] It results in otherisation, leading to further contempt and intolerance towards the minority group.

This, in turn, negatively impacts the socio-economic opportunities afforded to members of ethnic minorities. According to Rahila Haider, there are identifiable discriminatory trends within workplaces in public sector jobs in Balochistan.[49] Her colleagues believe that due to political manipulation, Pashtun members are preferred for promotions and higher ranks in Quetta. Regarding education and employment, she highlighted that although a significant portion of Hazara youth attends the Balochistan University of Information Technology, Engineering and Management Sciences (BUITEMS), they do so with the belief that it will not guarantee them employment within the country.[50] She claimed that '[E]ver since the target killings, these bright minds want to leave for Australia and Europe right away', indicating that this phenomenon contributes to 'brain drain' in Pakistan.[51] Thus, workplace discrimination and a lack of employment opportunities for the community are some of the challenges faced by members of ethnic minorities.

The worst cases of discrimination result in isolation and violence against ethnic communities like the Hazara people, who are targeted for their ethnicity, religion and – in some instances – language.[52] An Office of the United Nations High Commissioner for Refugees (UNHCR) study recognises that many people from minority groups are either displaced internally or externally as refugees. This rate of displacement is a powerful

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[47] Zubair Torwali Interview (n 35).
[48] Arjun Appadurai, *Fear of Small Numbers: An Essay on the Geography of Anger* (New York, USA: Duke University Press 2006) 8.
[49] Interview with Rahila Haider, Public Commissioned Officer and Teacher (Quetta, Balochistan, Pakistan, 22 November 2023).
[50] ibid.
[51] ibid.
[52] IRIN, Minorities under pressure in Pakistan, 17 October 2013 https://www.refworld.org/docid/5261065b4.html.

illustration of the lack of protection they face within their home country.[53] The Internal Displacement Monitoring Centre records particularly high internal displacement rates in the northwest regions of Pakistan, including Khyber Pakhtunkhwa and the Federally Administered Tribal Areas (FATA).[54] Approximately 5 million people who were displaced by sectarian violence and human rights abuses since 2008 have been unable to cross national borders.[55] Like asylum seekers abroad, internally displaced persons (IDPs) also experience threats to their integrity, restrictions on their freedom of movement, and a lack of access to basic amenities.[56] Indeed, the common inclination or pressure within Hazara and Torwali communities (and other ethnic minorities) to leave their hometowns speaks volumes about their plight.

6.3. The Problem of Political Representation

Ethnic minorities often lack a voice in local and national politics. Article 51(2A) of the Constitution specifies that, in addition to the provincial allocation of seats in the National Assembly, there will be 'ten seats reserved for non-Muslims'. Similarly, Article 106(3) reserves seats for religious minorities in the provincial legislature.[57] However, there are no parallel provisions for ethnic minorities in either the federal or provincial legislatures.

Furthermore, the explanation clause of Article 51(2A) states that if no seat has been allocated to a 'minority in a province for being very small in number', the seat jointly allocated to non-Muslims will be deemed to include them.[58] This interesting addition can enable ethnic minorities that are also religious minorities, such as Parsis, to secure political representation. However, it cannot extend to ethnic minorities that are Muslims, like those from Mewat, Hazara, or Swat. It echoes the question raised by change seekers: 'Why is it that all references to minorities in the Constitution of Pakistan always focus

[53] UNHCR Report 'Minority Rights: International Standards and Guidance for Implementation' (2010).
[54] Internal Displacement Monitoring Centre (IDMC) (2013) 'Pakistan: Massive New Displacement and Falling Returns Require Rights-Based Response' [online].
[55] ibid.
[56] ibid.
[57] Constitution of Pakistan 1973 (n 34), Article 106 (3).
[58] Constitution of Pakistan 1973 (n 34), Article 51 (2A).

on religious minorities, and not ethnic, linguistic, or racial ones?'[59] It also goes to the heart of the problem of interpretation of the term 'minority,' as discussed earlier.

Rare ethno-linguistic minorities that find some representation through local elections face further hurdles. Most of the Hazara population in Balochistan resides either in Mari Abad within the eastern suburbs of Quetta city or in Hazara Town within the western outskirts of the city.[60] In the past elections, two ministers of Hazara origins were elected to the Provincial Assembly of Balochistan.[61] Mr Abdul Khaliq Hazara, from the Hazara Democratic Party, became a member of the Provincial Assembly in 2018.[62] Despite some representation in the political landscape, which other ethnic minorities (like the Meo community) see little of, the ground reality is quite different.

This view was affirmed by Rahila Haider, who shared that the ministers who make it through are often detached from their own communities 'in hopes of pleasing the political party and elites that brought them to power.'[63] The community reports that the elected members refrain from bringing their genuine issues to the forefront, prioritising their own political benefits and alluding towards a worse sense of isolation in the people. Political scientists have emphasised the need for 'substantive representation' of ethnic groups, which can only occur when the minority representatives are able to 'substantively represent, advocate and defend the interests of their communities.'[64] Through this lens, many ethnic minorities like Hazaras are only descriptively, and not substantively, represented.

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[59] Shaheen Sardar Ali and Javaid Rehman, *Indigenous Peoples and Ethnic Minorities of Pakistan: Constitutional and Legal Perspectives* (1st edn, Routledge, London, 2001) 23.
[60] Saadia Zahra, 'Hazaras of Quetta: From a Thriving Tribe to an Enclaved Community' The Geopolitics (Quetta, 1 March 2024) https://thegeopolitics.com/hazaras-of-quetta-from-a-thriving-tribe-to-an-enclaved-community/#:~:text=Furthermore%2C%20The%20Hazara%20People%20predominantly,to%20the%20ongoing%20security%20situation accessed 13 October 2024
[61] Rahila Haider Interview (n 49).
[62] Member Profile 2018 (The Provincial Assembly of Balochistan 2018) https://www.pabalochistan.gov.pk/member-profile/2 accessed 13 October 2024.
[63] Rahila Haider Interview (n 49).
[64] Netina Tan and Cassandra Preece (n 19).

6.4. Neglect Towards Minority Languages

Languages of ethnic minorities are often the conduits of their identity and are directly linked with their self-esteem; however, they do not receive their due regard.[65] Fang, in her research on Chinese minorities, identifies three means through which a minority language can be maintained: educational use, legal and administrative support, and use in places of worship or public news outlets.[66]

In Pakistan, none of the languages of ethnic minorities are taught in schools. Some of these languages are not even passed down to newer generations, meaning they are on the verge of extinction. The endangerment of local languages is a pressing concern in Pakistan. Approximately 25 languages fall under the definition of 'endangered' as provided by the United Nations Educational, Scientific and Cultural Organisation (UNESCO), which regards languages as 'vehicles of value systems and cultural expressions' and 'an essential component of the living heritage of humanity.'[67] The indigenous languages from the northern areas of Pakistan, particularly Torwali, Gawri, Palula, Kalasha, Dumaki, Brushaski, Ushojo, and Balti, are classified as endangered since native speakers of the languages are either dead, have migrated to other places, or switched to other languages.[68] The creation of new dialects after mixing various local languages has also been reported.[69]

The language of the Hazara people, Hazaragi, is a mix of Dari, Urdu and Pashto. Haider disclosed that the new generation cannot write or understand the script and barely manages to speak it with their family.[70] The State also does not recognise these languages as a possible medium of instruction in the education system. She shared the personal anecdotes of her daughter, who was baffled by many Hazaragi words for common objects, and added that, as a teacher, she senses the same unease with their language among young

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[65] Tingting Fang, 'How to Maintain a Minority Language through Education' (2017) 6 Chinese Studies 1-11.
[66] ibid.
[67] Stephen Wurm, 'Atlas of the World's Languages in Danger of Disappearing' (2001) UNESCO Digital Library.
[68] Zubair Torwali, et al., 'Challenges to the Linguistic Diversity of North Pakistan' (2017) Lokaratna www.academia.edu/32881846/Challenges_to_the_linguistic_diversity_of_North_Pakistan.
[69] ibid.
[70] Rahila Haider Interview (n 49).

Hazara students.[71] The students especially join coaching centres to learn English due to its increased popularity and utility in the public sphere. Speakers of Torwali, Gawri, Ushojo and Gujari in the Swat Valley, where Pashto is the main language, also face similar issues.

Secondly, there have been identifiable displacement and migration patterns among ethnic communities in recent years. A Torwali speaker shared that in 2015, 30% of their people moved to urban centres for better opportunities.[72] While the older generation in Swat is somewhat connected to the culture and language, the same cannot be said about the newer generation that lives in metropolitan areas. Some efforts for the revival of music, poetry, and other art forms in local tongues have been made by members of the ethnic community itself. For example, Zubair Torwali, along with representatives of the Gawri and Gujari community, filed a petition in the Peshawar High Court for the recognition of three indigenous languages in the future census.[73] The Presiding Judge eventually accepted this 2022 petition in March 2023, but Torwali reports that the execution of the decree is a further challenge as government organs like the National Database & Registration Authority (NADRA) are not as cooperative.[74] Even in the recent 2023 census, Torwali was listed under the 'Other' category of languages among sixty others in the Annexure rather than as an option under the 'Mother Tongue' category in the form itself.[75]

While such efforts of language preservation from within the community are commendable, the lack of efforts from the State should not go unnoticed because 'institutional support generally makes the difference between success and failure in maintaining a minority group language.'[76] Besides, the threat of

[71] Rahila Haider Interview (n 49).
[72] Zubair Torwali, 'The Ignored Dardic Culture of Swat' (2015) 6 *Journal of Languages and Culture* pp. 30-38.
[73] Unreported Judgement, but mentioned in the following article: Zubair Torwali, 'How to ignore a language' (14 January 2023) Sabah https://sabahnews.net/english/news/24918/ accessed 13 October 2024.
[74] Zubair Torwali Interview (n 35).
[75] Pakistan Bureau of Statistics (2023 Census result) https://www.pbs.gov.pk/sites/default/files/population/2023/tables/kp/dcr/table_11.pdf accessed 18 October 2024.
[76] Tingting Fang (n 65).

extinction continues to linger for languages of other ethnic minorities that do not have as much internal activism.

6.4.1. Threats of Cultural Erasure

Ethnic minorities of Pakistan also deal with issues regarding their cultures, values, and traditions. The Kalash people from the Chitral valleys, for example, have often been cited as a 'remarkable story' of cultural survival since they have maintained their unique language and polytheistic faith.[77] However, even their cultural identity is not immune to external pressures, as the National Commission for Human Rights (NCHR) reported that many community members convert to Islam to feel secure.[78] The number of natives that still practice the Kalash customs and cultural practices has been decreasing over time.

Likewise, the Torwali community reports that their traditional dance, *thiz* (similar to the Kalash community's dance), is no longer practised by the people.[79] Instead of their folk music, wedding ceremonies now play either Pashtun music or Bollywood songs, further threatening their cultural capital.[80] Along similar lines, male members of the Hazara community residing in Quetta are often dressed in *shalwar kameez* in an effort to blend in with the rest of the population rather than their cultural robes.[81] Thus, identity markers of these communities also face threats of extinction.

Economic disparity and poverty are familiar realities for these communities as they grapple with a lack of developmental opportunities. A lack of formal acknowledgement of their challenges means that their access to justice and legal protection is also impaired. A UN report captures the hazards of allowing the situation to worsen, suggesting that the 'lack of respect for, lack of protection and lack of fulfilment of the rights of minorities may be at least a contributing factor, if not the primary cause, of displacement and may—in

[77] Minority Rights Group, Pakistan, https://minorityrights.org/country/pakistan/.
[78] National Commission for Human Rights, Saga of Survival: The Kalash Report (2023) https://nchr.gov.pk/wp-content/uploads/2023/09/Saga-of-Survival-Kalash-Report.pdf.
[79] Zubair Torwali Interview (n 35).
[80] Zubair Torwali Interview (n 35).
[81] Rahila Haider Interview (n 49).

the worst cases—even lead to the extinction of such communities.'[82] Hence, legal safeguards alongside social reform are essential to ameliorate the threats faced by these ethno-linguistic groups.

7. Legal Framework For the Protection of Ethno-Linguistic Minorities in Pakistan

It is important to analyse why the existing legal framework has failed to guard the interests of these groups. This section provides an overview of Pakistan's inadequate constitutional and statutory protections for ethno-linguistic minorities and how the judicial system also falls short in interpreting these provisions.

7.1. Constitutional Guarantees

In 1949, Prime Minister (at the time) Liaquat Ali Khan passed the Objectives Resolution, which provided that the rights and freedoms of minorities should be protected.[83] This document became the Preamble to the Constitution and then a substantive part of it under Article 2A.[84] The Objectives Resolution emphasises that 'adequate provisions shall be made for the minorities freely to profess and practise their religions and develop their cultures'; hence, all future provisions should reflect this aspiration.[85] Therefore, Article 2A could be read as a positive step towards formalising constitutional recognition and protection of minority rights within Pakistan's legal framework.

However, scholars argue that the Objectives Resolution fails to acknowledge the existence of ethnic or cultural minorities while acknowledging the rights of 'members of religious minorities to further develop their religion and culture.'[86] The rest of the Constitution also makes frequent references to religious minorities and the textual freedoms afforded to them; however, there is no direct acknowledgement of ethnic minorities. For example, petitions under Article 26 (discrimination in access to public places) and Article 27 (discrimination in services) cannot be filed by members of ethno-

[82] UNHCR Report (n 53).
[83] Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi: OUP, 2017).
[84] Constitution of Pakistan 1973 (n 34), art 2A.
[85] ibid.
[86] Shaheen Sardar Ali and Javaid Rehman (n 59).

linguistic minorities because an 'ethnic' or 'linguistic' minority is not recognised under Article 26 and 27 (which is limited to race, religion, caste, sex, residence and place of birth).[87]

Furthermore, Article 28 of the Constitution allows 'any section of citizens' to preserve their language and culture. However, it is 'subject to Article 251', which envisions the promotion of Urdu and 'provincial languages.'[88] The phrase 'language and script' could potentially include Torwali, Hazaragi and other languages besides the major provincial languages. However, the scope of Article 251 is unlikely to be alternatively construed because the Constitution leaves promotion, teaching, and use of languages up to provincial governments, which are more likely to devote resources to preserve majority regional languages, pushing minority languages to the periphery.

Given the loopholes that exist in constitutional provisions, one could turn to statutory protections that might exist for ethno-linguistic minorities. While the legislative assembly of any ethnic federation should be concerned with passing statutes that protect minorities, Pakistan proves to be an anomaly in that regard.

7.2. Statutory Protection

The state of minority protection in the national and provincial assemblies is deeply concerning. Minority protection bills were proposed at both the national and provincial levels between 2016 and 2021.[89] However, these bills remain unpassed, and even if they are passed, their actual efficacy for safeguarding ethno-linguistic minorities is questionable.[90] These proposed bills do not define the term 'minority', and like the Constitution, they run the risk of being judicially construed in religious rather than ethnic terms.

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[87] Constitution of Pakistan 1973 (n 34), arts 26 and 27.
[88] ibid arts 28 and 251.
[89] Naeem Asgher Tarar, 'In new laws, silver lining for minorities of Sindh' Express Tribune (2 December 2016) https://tribune.com.pk/story/1251107/new-laws-silver-lining-minorities-sindh accessed 18 Oct 2024.
[90] Baseer Qalander, 'Law for protection of minorities in K-P to be enacted soon, says minister' express tribune (24 April 2015) https://tribune.com.pk/story/875241/law-for-protection-of-minorities-in-k-p-to-be-enacted-soon-says-minister accessed 18 Oct 2024.

Some statutes and specific provisions in general laws could be interpreted to protect ethno-linguistic minorities. For example, Sections 153-A and 505 of the Pakistan Penal Code 1860 (PPC) punish people who promote enmity or incite hatred between different 'groups' with fines and imprisonment extending up to 5 and 7 years, respectively. In these provisions, 'groups' refers to religious, racial, language, and regionality categories.[91] Language and regionality could apply to ethno-linguistic minorities, but it is again subject to judicial interpretation. Moreover, the Sindh Provincial Assembly passed the Sindh Language Authority Act 1972[92] and the Teaching, Promotion and Use of Sindhi Language Act 1990[93] for the protection and promotion of the Sindhi language in schools and public spaces. While this is a positive step, it again shows how identity-oriented provinces (like Sindh and KP) will preserve languages for the ethno-linguistic majority in the province. Therefore, the preservation of minorities within minorities remains a challenge.

7.3. Judicial Interpretation

In *Mst. Zahra v. Ministry of Interior*,[94] the Balochistan High Court condemned NADRA personnel for refusing to issue CNICs to members of the 'ethnic Hazara community'. Likewise, in a 2018 Suo Moto case, Justice Saqib Nisar recognised the Hazaras as an ethnic minority when he labelled a communal attack as an attempt at 'ethnic cleansing'.[95] Despite such recognition, these judgements only cite Principles of Policy like Articles 33 and 36, which discourage tribal prejudice and protect minorities, respectively. Article 30(2) clarifies that State action that is not in accordance with the Principles of Policy cannot be valid grounds for seeking a legal remedy, implying their unenforceable nature.[96] Had these judgements cited Fundamental Rights provisions dealing with discrimination of minorities, as was done in the case of religious and sectarian conflict related to employment,[97] it would have dispelled the assumption that constitutional protections for minorities are

[91] Pakistan Penal Code, s. 153-A and s. 505.
[92] Sindh Language Authority Act 1972.
[93] Teaching, Promotion and Use of Sindhi Language Act 1990.
[94] *Mst. Zahra v. Ministry of Interior* (PLD 2013 Balochistan 133).
[95] Muhammad Zafar, 'CJP calls killing of Hazaras ethnic cleansing' *Tribune* (Quetta, 11 May 2018) https://tribune.com.pk/story/1707695/hazara-killings-tantamount-ethnic-cleansing-cjp accessed 16 October 2023.
[96] The Constitution of Pakistan 1973 (n 34), art 30(2).
[97] *Mubashar Nadeem v. Member Board Revenue* (2018 CLC 702).

only used to solve religious communities' challenges and not those of ethno-linguistic communities.

Judicial interpretation also reveals a tendency to neglect less spoken languages. In 2017, the Supreme Court recognised the importance of major legal statutes being translated into the national and provincial languages so that people could refer to the law with expediency.[98] However, reference to provincial languages only included principal vernacular languages within the provinces, i.e., Punjabi, Sindhi, Pashto and Baluchi. Hence, even the Supreme Court has a narrow interpretation of Article 28 and may not widen its scope to include minority languages like Torwali or Hazaragi. Moreover, the Court leaves translation to the discretion of the provincial governments.[99] While the decision to delegate translation responsibilities may appear logical due to the assumed proximity between provincial governments and minority communities, it overlooks the potential for provincial bias in favour of majority languages. Due to this bias, provincial governments may be more likely to ignore the preservation and production of minority languages than the Federal Government for the sake of upholding the linguistic status quo within the province.

In *Ameen Masih v. Federation of Pakistan,*[100] the Lahore High Court emphasised that minority rights are not simply fundamental rights enshrined in the Constitution but also those mentioned in the Principles of Policy, international conventions and judicial precedents. Although this is a case concerning Christian family law, it has implications for all kinds of minorities. Hence, if the judiciary starts expanding the scope of 'minority' to include religious as well as ethno-linguistic minorities, it may also shift legislative and public attitudes to the treatment of these communities.

8. FEDERALISM AND ALTERNATIVE MODES OF EXISTENCE

The daily challenges faced by the Torwali and Hazara communities show why immediate constitutional recognition of smaller minorities and change in judicial attitudes is important. However, these alone would not be enough

[98] *2017 Suo Moto case* (PLD 2017 SC 257).
[99] The Constitution of Pakistan 1973 (n 34), art 251 (3).
[100] *Ameen Masih v. Federation of Pakistan* (PLD 2017 Lahore 610).

without executive restructuring, which amends the larger system of federal governance. These macro-level disruptions may range from creating new federating units to vesting more power with local constituencies. Accordingly, the following sections investigate whether horizontal and vertical separation is effective in Pakistan by looking at the Indian model in terms of creating more provinces and the *panchayat raj* (village-level devolution) system.

8.1. The Effectiveness of Horizontal Separation: Creating New Federating Units

Federalism is a governance system that divides and shares power between the centre and regional units. The 18th Amendment to the Constitution in 2010 transferred power from the Federal Government to the provincial governments by abolishing the Concurrent Legislative List.[101] The current federal system endangers ethno-linguistic minorities because proportional representation in provincial assemblies allows the majority group to dominate while minority concerns go unheard. Therefore, exploring alternative federal arrangements and different power-sharing structures could possibly mean that ethno-linguistic minorities' concerns are addressed more effectively.

Historically, Pakistan has experimented with its federal design. The 1956 Constitution recommended the One-Unit Scheme, which merged West Pakistan into one province to break up the perceived East Pakistani dominance.[102] However, while East Pakistan was already a homogenous unit due to its Bengali majority, the merger of ethnicities in the Western wing was marked by Sindhi dissent against Punjabi dominance.[103] The One-Unit Scheme revealed that in an ethnically divided society, a smaller number of provinces can cause federal instability.[104]

India is the only comparable model to Pakistan due to their shared colonial legacy and geographical location. After the language movements, India passed the States Reorganisation Act in 1956. This altered the territorial boundaries

[101] Constitution (Eighteenth Amendment) Act 2010.
[102] Abdul Shakoor Chandio, 'One Unit Scheme in the Federation of Pakistan: A Case Study of Sindh' (2021) 12(11) International Journal of Scientific & Engineering Research 297.
[103] ibid.
[104] Katharine Adeney, *Federalism and Ethnic Conflict Regulation in India and Pakistan* (Palgrave Macmillan 2007) 172.

of some provinces so that they existed along linguistic lines, leading to the creation of twenty-eight states and union-territories.[105] Due to a greater number of political units within the federation along linguistic lines, India does not demonstrate the same tendency of federal instability that ails Pakistan. However, the creation of Sikkim in 1992 and the subsequent recognition of Nepali as a language in the Eighth Schedule to the Indian Constitution showed that demands for constitutional recognition of language alone do not suffice.[106] The language being spoken by the ethno-linguistic minority also needs to have a corresponding geographically recognisable territory.

Yet, in 1992, Konkani was also recognised in India,[107] despite Konkani speakers being dispersed throughout Maharashtra rather than geographically concentrated. Konkani recognition suggests that languages with dispersed populations (like Torwali or Hazaragi) can gain recognition without creating new provinces. Article 239(4) of the Pakistani Constitution requires two-thirds of the vote of the total membership in provincial assemblies to alter provincial boundaries, making new federating units nearly impossible.[108] provincial assemblies, often dominated by regional majorities, are unlikely to support geographical fragmentation due to concerns over cultural and linguistic homogeneity, power-sharing, and resource allocation. Where there are existing historical grievances between the minority and provincial majority, like the Hazara-Pashtun debate in Khyber Pakhtunkhwa (KP), there may be even more reluctance to grant any form of autonomy to the group. Hence, while Article 239(4) arguably serves an essential purpose by ensuring that provincial governments retain control of their defined boundaries, it overlooks existing ethnic hierarchies within provinces, subjecting minorities to the will of the provincial majorities and creating a constitutional barrier.

The movement to create a separate Hazara province gained traction when the 18th Amendment changed the name of the North-Western Frontier Province

[105] States Reorganisation Act 1956.
[106] Nilamber Chhetri, 'From Jat-Jati to Janjati: Demands for Recognition as Scheduled Tribe and Claims of Indigeneity in Darjeeling' (2017) 66 Sociological Bulletin 75, 90.
[107] 71st Amendment to the Indian Constitution 1992, 8th Schedule.
[108] Constitution of Pakistan 1973 (n 34), art 293(4).

to 'Khyber Pakhtunkhwa'.[109] The Hazaras felt that this change denied their distinct identity because it only acknowledged the Pashtun community. Even though demands for a Hazara province have waned, the creation of a separate province was impossible to begin with under the current legal framework. Hazaras are concentrated in parts of KP and Balochistan, with others dispersed across Pakistan in search of economic opportunities. Altering the boundaries of one province under Article 239(4) would be a considerable feat; altering two would be virtually impossible. In the event that a province is carved out in KP (since six districts are populated with Hazara majority), it would give reason to geographically dispersed Hazaras to migrate to that new province. It would also put economic pressure on a nascent federal unit that would not be able to handle the incoming population, possibly increasing unemployment and political competition within the province.

As a result, the creation of separate federal units along ethno-linguistic lines would not suit a politically fragile state like Pakistan, where resource distribution under the National Finance Commission Award is already contested. Additionally, provincial governments are plagued by poor governance and institutional issues, such as corruption, which means the budget is seldom allocated effectively for economic development. Haider also acknowledged that while the creation of a Hazara province would help the minority politically and legally, focusing on practical steps like adding Hazaragi to the provincial or national curriculum would mitigate linguistic erasure more effectively.[110] For example, Sindh has made teaching Sindhi mandatory alongside Urdu in private and public schools.[111] It should be acknowledged that the case of Sindhi is also one of a majority language, and challenges faced by languages like Torwali and Hazaragi are unique due to their smaller speaker bases and lack of political representation in the province. Nevertheless, these examples demonstrate State efforts to preserve minority languages could reduce the risk of assimilation for ethno-linguistic minorities.

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[109] Sultan Mahmood, 'Ethnic Mobilization and Effort to Establish New Provinces in Pakistan: Case Study of the Movement for a Hazara Province' In Ryan Brasher (eds), *The Politics of Ethnicity and Federalism in Pakistan: Local, National and Comparative Perspectives* (Oxford University Press 2020).
[110] Rahila Haider Interview (n 49).
[111] Hafeez Tunio, 'Cambridge Schools Asked to Include Sindhi as Compulsory Subject' *The Express Tribune* (19 August 2022) https://tribune.com.pk/story/2371919/cambridge-schools-asked-to-include-sindhi-as-compulsory-subjec accessed 16 October 2023.

In India, the twenty-eight federal units have official languages, but the minorities-within-minorities problem persists. While constitutional provisions such as Articles 29 and 30 mandate that state governments allow children to be educated in schools in their mother tongue, and Article 351 appoints Special Officers for linguistic minorities to safeguard their social and cultural rights, several challenges remain.[112] Pressure to assimilate and instances of discriminatory treatment continue to undermine these protections.[113] If, across the border, linguistic minorities face the danger of erasure despite having such constitutional protections, it raises even graver concerns for such minorities in Pakistan, where linguistic constitutional protections are almost non-existent.

Global examples suggest that in order to prevent the tyranny of the majority, the dominant group should be subdivided into smaller groups so that more federal units attain ethnic homogeneity. Indeed, the Germans in Switzerland were divided into a separate federating unit to break German dominance and retain their self-determination.[114] Nigeria was also divided into four regional units (like the One-Unit Scheme) before the Biafra War, which led to political and legal restructuring and the creation of thirty-six provinces.[115] Hence, creating more federal units often breaks up the power of the dominant majority.

However, the applicability of these examples is marred by the assumption that relations between ethno-linguistic minorities and the majority are identical across countries. This solution does not take cognizance of the fact that creating new provinces might be legally impossible and may lead to violence in its aftermath. As demonstrated by the Hazara case, the argument for creating more federal units along ethno-linguistic lines in Pakistan faces logistical and legal hurdles that come with migration, which are exacerbated if State officials are corrupt.

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[112] The Constitution of India 1950, arts 29, 30 and 351.
[113] David Stuligross and Ashutosh Varshney, 'Ethnic Diversities, Constitutional Designs, and Public Policies in India' (2003) in Andrew Reynolds (ed.), *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*, Oxford Studies in Democratisation.
[114] Ivo Duchacek, *Comparative Federalism: The Territorial Dimension of Politics* (University Press of America 1991) 31.
[115] ibid.

8.2. The Effectiveness of Vertical Separation: Local Devolution and the Indian Example

Pakistan's federal instability, marked by attempts to create new provinces like Seraikistan,[116] calls for a more streamlined federal structure with fewer federating units and more efficient division of power across more tiers of government. The Pakistani Constitution recognises three tiers of government: centre, provincial, and 'local'.[117] However, local governments face two issues: unclear power demarcation and provincial control over their formation. provincial assemblies, often dominated by ethno-linguistic majorities due to proportional representation, tend to hoard power and hinder the formation of effective local governments.

Given Pakistan's political constraints, the most viable federal arrangement for protecting smaller ethno-linguistic minorities would involve defining 'local' in Article 140A by constitutionally mandating four tiers of local government: city, district, *tehsil*, and Union Council. These divisions already exist in provincial legislation, but their effectiveness is questionable due to the unfair allocation of fiscal, political and administrative power across these lower tiers.[118] From an ethnic minority protection framework, constitutional delineation of district governments is especially important. This is because the geographical arrangement of ethno-linguistic minorities is such that they already form majorities in districts and neighbourhoods across the country. For instance, Hazaras are concentrated in six districts of KP (including Kohistan, Batagaram, and Charikkas)[119] and in Quetta's Mari Abad and Hazara Town. Similarly, 70% of Torwali speakers live in the Bahrain and Chail areas of the Swat district.[120] Furthermore, granting more power to grassroots representation at the district level (that has an identifiable ethno-linguistic majority) should ideally ensure that communal concerns are at least being discussed at local governance forums, as such issues currently remain

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[116] Omair Zeeshan, 'Seraikistan is our right' *The Express Tribune* (2012) https://tribune.com.pk/article/9919/seraikistan-is-our-right?amp=1 accessed 4 December 2024.
[117] The Constitution of Pakistan 1973 (n 34), art 140-A.
[118] Jinnah Institution, 'Devolution: Provincial Autonomy and the 18th Amendment' (Report Jinnah Institute Publications 2014).
[119] Ivo Duchacek (n 114), 152.
[120] Hermann Kreutzmann, 'Linguistic diversity in space and time: A survey in the eastern Hindu Kush and Karakoram' (2005) 4 Himalayan Linguistics (Center for Developmental Studies, Free University of Berlin).

absent from the national agenda and are not treated as a priority at the state level.

India's *panchayat raj* system exemplifies a vertical governance model where districts gain more power within the federal structure. Established by the 73rd Amendment to the Indian Constitution in 1992,[121] the *panchayat raj* system decentralised administrative and decision-making authority to village-level units, bringing governance closer to the citizenry.[122] Using '*panchayat*' in the name does not refer to the judicial nature of the village council – rather, it was used to indicate the possibility of self-government at the lowest administrative level. Therefore, after executive power was divided across central, provincial, and city-level governments, the *panchayat raj* system introduced three more tiers of government: *gram panchayats* (village level), *panchayat samitis* (block level), and *zila parishads* (district level).[123] *Gram panchayats* manage village-level issues like sanitation, education, and health, while *panchayat samitis* coordinate development projects across blocks and act as intermediaries between villages and districts.[124] *Zila parishads* oversee and align district-wide policies, linking state-level planning with local governance, thereby ensuring decentralised decision-making closer to the citizenry.[125]

A similar system in Pakistan would ensure that smaller ethno-linguistic minorities like Torwalis and Hazaras are at least being heard at some level because the issue in Pakistan is one of basic legal recognition; development becomes secondary when the State fails to acknowledge a community's existence. Multiple tiers within district governments would ensure that even if a smaller minority populates a particular neighbourhood in a larger district, it will still get political recognition by having self-governing institutions like *gram panchayats* or *samitis*. However, assessing the benefits and drawbacks of India's *panchayat raj* system is essential to evaluate its viability in Pakistan.

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121 73rd Amendment to the Indian Constitution 1992.
122 Kieth Miller, 'Advantages and Disadvantages of Local Government Decentralization' (2002) Caribbean Conference on Local Government and Decentralization 4.
123 ibid.
124 Participatory Research in Asia, 'Functioning of the Gram Panchayat' (*PRIA*, March 1997) https://www.pria.org/knowledge_resource/1556527209_Functioning%20of%20the%20Gram%20Panchayat.pdf accessed 23 December 2024.
125 ibid.

The *panchayat raj* system's grassroots decentralisation offers several benefits. Village and district councils address specific community needs through effective development initiatives. Direct elections for *gram panchayats*, *samitis*, and *zila parishads* enable participatory governance, while reserved seats for marginalised groups promote social inclusivity and political representation.[126] Financial devolution to *gram panchayats* supports local development projects. If Pakistan mandates provincial governments to allocate funds to district governments, ethno-linguistic minorities could fund cultural preservation projects. For example, KP transferring funds to Swat, and then to Chail and Bahrain, would allow the Torwali community to create language classes, develop educational material in Torwali, and run cultural festivals, thus preserving their language without relying on personal finances. This fiscal decentralisation would acknowledge community existence, eliminating the need for legal petitions. Lastly, the *panchayat raj* system fosters community ownership of local issues, motivating minorities to ensure their survival within a multi-tiered federal structure.

However, decentralisation has its limitations. Firstly, *panchayats*' capacities vary due to resource variation across regions, assuming no bias in fiscal devolution.[127] Corruption in the executive branch in Pakistan presents significant challenges to ensuring transparent financial decentralisation, making it a difficult goal to achieve. Secondly, the task of narrowing down factors that determine fund allocation (like cultural engagement or community size) may lie beyond the technical expertise of village councils.[128] Lastly, *panchayats* lack autonomy as they rely on higher government levels for funds and resources, restricting independent policymaking. Similarly, district governments in Pakistan would depend on local governments to launch language preservation or cultural projects, which could withhold funds for personal gain. It has been over two decades, and India has not been able to sort out structural issues in the devolution of power to the *panchayat raj* in all

[126] J.S. Sodhi and M. S. Ramanujam, 'Panchayati Raj System: A Study in Five States of India' (2006) 42 Indian Journal of Industrial Relations 25.
[127] Roy Bahl, et al, 'Fiscal Decentralization to Rural Local Governments in India: A Case Study of West Bengal State' (2010) 40 Publius 312–331 http://www.jstor.org/stable/40608380 accessed 23 December 2024.
[128] Rahul Banerjee, 'What Ails Panchayati Raj?' (2013) 48 Economic and Political Weekly 173–176.

of its states.[129] Therefore, it is difficult to see how Pakistan will be able to avoid corruption in fiscal decentralisation, marginalisation of intersectional minorities, and limitations to capacity building if it starts creating multiple tiers within a federal structure.

In Pakistan, the problem is exacerbated because district governments will essentially represent an ethno-linguistic minority, but under the 18th Amendment, provincial governments represent the ethno-linguistic majorities, which control resources and funds. Thus, it is unlikely that their policies will be free of bias against the minority. Unless the devolution of powers is explicitly mandated by the Pakistani Constitution, it is unlikely that any future decentralisation and vertical division of power will be transparent and free from majoritarian political will.

9. CONCLUSION

This article critiques the State's narrow religious interpretation of 'minority,' focusing on the Torwali and Hazara communities' struggles with discrimination, administrative neglect, and cultural marginalisation. It advocates for decentralisation by vesting more power at the district level rather than creating new federating units, enabling local governance that represents ethno-linguistic minorities. It is important for the Constitution to mandate such a federal structure by explicitly mentioning district governments. Additionally, Zubair Torwali also suggested that ethno-linguistic minorities could have 'indigenous' status under the Constitution.[130] Judicial reinterpretation of existing fundamental rights is required to expand their scope beyond 'religious' minorities.

To preserve their language effectively, ethno-linguistic minorities could benefit from policies aimed at promoting multiculturalism, as observed in Canadian and Australian jurisdiction in the introduction. These frameworks can make State funds available for increasing minority language visibility in mainstream literature and media. Other reforms can include equitable access

[129] ibid.
[130] Zubair Torwali interview (n 35).

to public sector positions in secondary schools and universities at the Union Council level, as suggested by Torwali.[131]

Lastly, civil society should continue working towards altering their attitudes to create a more inclusive society for ethno-linguistic minorities, who enrich Pakistan's history and diverse cultural heritage. It is important to understand how political and legal reforms can better protect and promote the rights of ethno-linguistic minorities to then offer solutions that inform both policy and future advocacy efforts to improve Pakistan's approach to ethno-linguistic inclusivity.

[131] ibid.

BOOK REVIEW:

FREER TRADE, PROTECTED ENVIRONMENT: BALANCING TRADE LIBERALIZATION AND ENVIRONMENTAL INTERESTS
BY CARLISLE FORD RUNGE WITH FRANÇOIS ORTALO-MAGNE AND PHILIP VANDE KAMP

SARA NASEER

Sara Naseer is a law student at LUMS. Her areas of interest include constitutional law and human rights law.

The book *Freer Trade, Protected Environment: Balancing Trade Liberalization and Environmental Interests*,[1] written by Carlisle Ford Runge with François Ortalo-Magne and Philip Vande Kamp, explores the relationship between trade and the environment. It draws a comparison between trade rules and environmental standards and examines cases to provide policy recommendations for the international community at large and the United States in particular. There have been many developments in how the international community protects the environment while pursuing trade in the three decades since the book was written. These include multilateral environmental agreements, such as the Kyoto Protocol and the Paris Agreement, which acknowledge that trade must be conducted keeping environmental considerations in mind while aiming to reduce greenhouse gas emissions and keep the global temperature rise to a minimum.

The book addresses key issues emerging from eight meetings of a 140-person 'Study Group on Trade and the Environment'.[2] The Study Group featured policy experts who, from mid-1992 to 1993, met under the Council on

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[1] C. Ford Runge, François Ortalo-Magne and Philip Vande Kamp, *Freer Trade, Protected Environment: Balancing Trade Liberalization and Environmental Interests* (Council on Foreign Relations Press, 1994)
[2] ibid xi.

Foreign Relations. They aimed to bridge the gap between environmental and trade disciplines and educate each other about the nexus between the two. In the book, C. Ford Runge, a professor in the Department of Agricultural and Applied Economics at the University of Minnesota and an expert on trade reform and environmental policy, discusses his perspectives on the issues arising from the meetings and proposes possible solutions. His analysis is meant for the 'informed layperson'[3] and is not intended to be a specialised or technical account.

Runge's book is divided into three main parts. In the first part, he provides a framework for the reader to familiarise themselves with the topics of his book. The first chapter in this section serves as an introduction and gives context to the tussle between trade and the environment. The second chapter delves deeper into legal, environmental, and economic frameworks through which to understand this tussle. The second part of the book introduces and examines specific trade and environmental protection cases. In this part, the third chapter explores the issue of trade liberalisation prompting increased levels of environmental damage. Chapter 4 discusses 'disguised protectionism'[4] and centres around differentiating between those measures that help the environment, disrupting trade in the process, and those that disrupt trade but do little for the environment. Chapter 5 cites the Montreal Protocol as an example to highlight the relationship between trade and international environmental agreements. In Chapter 6, the final section of the book, Runge proposes solutions to the problems he highlights in the preceding parts. He lists recommendations for the international community and policymakers in the U.S.

The book focuses on questioning whether trade liberalisation is likely to harm the environment or if trade is part of the solution. Another focal point of the book is the role that agreements such as the General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA) play in this struggle. Runge discusses the reluctance of trade groups to allow hindrance of their deals on environmental grounds. Environmental groups, on the other hand, have realised that trade can be used to strengthen

[3] ibid xii.
[4] ibid 71.

environmental standards. He explains these issues using three separate frameworks: legal, economic, and environmental.

While discussing the legal framework, Runge uses examples, including NAFTA and the Environmental Impact Statement (EIS) procedure under the 1969 Environmental Policy Act, to showcase the intersection of trade and the environment. When an EIS for NAFTA was allowed by the U.S. District Court on 30 June 1993, the Clinton administration instantly revealed its intention to appeal against the decision, arguing that NAFTA was 'primarily a presidential action with the Trade Representative playing only an advisory function'.[5] It was, therefore, not covered under the requirements of the 1969 Act. Since EISs for complex trade measures are general rather than specific, they are not very useful tools in creating required environmental safeguards. This example highlights the inherent challenges of reconciling broad trade agreements like NAFTA with effective environmental oversight, emphasising the need for more robust mechanisms to address environmental concerns without stalling international trade.

Runge discusses four legal tests applied to environmental measures in the context of trade agreements like GATT. If an environmental measure imposes a burden on trade, these legal tests or criteria can be used to assess whether it is justified. The first is the necessity test, which means that the 'goal cannot be realistically accomplished by means that are less burdensome to trade'.[6] The second is the 'primarily aimed at test',[7] which assesses whether the measure in question was primarily aimed at conservation or some other objective. The third test, derived from the 1979 Standards Code, is that of proportionality. This seeks to strike a balance between 'the benefits of environmental measure and its costs in terms of trade restriction'.[8] The fourth test is disguised restriction – this 'simply restates whether a measure is protectionism in disguise'.[9] All four of these tests emphasise that when feasible alternatives exist that are less disruptive to trade while still achieving

[5] ibid 13.
[6] ibid 18.
[7] ibid 19.
[8] ibid.
[9] ibid.

environmental protection, those alternatives should be considered in place of existing measures.

Runge uses two case studies to illustrate the intricate legal, scientific, and institutional challenges involved in distinguishing between protectionist measures and legitimate environmental policies. These include a dispute between the US and Canada over the regulation of fisheries and the *Tuna-Dolphin* dispute between the United States and Mexico.

In 1989, a dispute arose between the United States and Canada regarding the imposition of landing requirements for salmon and herring, a regulation aimed at conserving these shared fishery resources. Salmon, being a migratory species, traverse the territorial waters of both nations, making cooperative conservation efforts critical. Governments are required to restrict fishing rights to conserve resources such as salmon so that the harvest of endangered stocks is reduced as much as possible. Canada imposed a requirement that salmon and herring caught in its waters off the west coast of Canada had to be landed at Canadian counting stations. The US challenged this policy under the GATT. They argued that it was a 'disguised restriction'[10] on international trade. The panel constituted to hear the case applied the legal tests mentioned above to resolve the dispute. The landing requirements were found to impose a burden on trade – US buyers had to pay additional costs for complying with them, which was a violation of the GATT. In the next step, the panel determined whether this burden was justified. Canada was required to show that the landing requirements were *primarily aimed at* the conservation of exhaustible natural resources. If not, then it would be considered a disguised restriction on international trade. The panel allowed a wide range of economic and non-economic interests to be considered in the determination. Its decision was eventually given in favour of the US, as Canada was not able to demonstrate that the landing requirements were *primarily aimed at* conservation.

In the *Tuna-Dolphin* dispute, Mexico challenged certain provisions of the US Marine Mammal Protection Act, 1972 (MMPA). The MMPA 1972 required, among other things, trade embargoes of yellowfish tuna from any country

[10] ibid 81.

whose average catch of dolphin incidental to tuna harvesting exceeded a provided limit. This law was passed to protect dolphins that followed schools of tuna and, in the process, got caught in purse seine nets used to harvest tuna. A GATT dispute resolution panel ruled in 1991 that the US's ban on importing tuna was a violation of GATT rules. The embargo was deemed not 'necessary' to 'protect human, animal, or plant life or health'.[11] The panel noted that GATT allows for domestic measures to be taken to protect the environment, not extraterritorial ones (since the environmental policies of the importer may differ from those of the export country). This case illustrates how a 'green disguise'[12] may be created for imposing trade barriers, although the use of this disguise was unsuccessful in this case. Hence, striking a balance between protectionism and legitimate environmental policies becomes tricky.

While discussing economic perspectives, Runge proposes four principles of harmonised trade and environmental policies. These principles emphasise aligning trade instruments with trade objectives and environmental instruments with ecological conservation targets, ensuring neither compromises the other. First, 'trade targets should be matched with trade instruments and environmental targets with environmental instruments'.[13] Second, trade policies should 'aim to reduce trade barriers while remaining environmentally neutral'.[14] Third, 'environmental policies should aim to conserve natural resources and improve the quality of the ecosystem while remaining trade-neutral'.[15] The fourth and final policy he proposes is that 'national governments should be encouraged to pursue similar trade and environmental policy objectives'.[16]

Runge's environmental perspective further states the need for changes in the current trading system and institutions that promote a balance between trade and the environment. According to Runge, this balance would create a 'synthesis of legal, economic, and environmental perspectives'.[17] With the rise of transnational and global externalities, national trade and environmental

[11] ibid 72.
[12] ibid 78.
[13] ibid 29.
[14] ibid.
[15] ibid 30.
[16] ibid.
[17] ibid 31.

policies now require stronger coordination to be effective across borders. Thus, Runge suggests that multilateral organisations like the General Agreement on Tariffs and Trade (organisation)[18] and trade agreements such as those within the European Union (EU) should work to build consensus on the overarching goals of trade and environmental policy.

Runge suggests that a combination of trade and environmental policies will be most effective in attaining trade and environmental targets. Since both are *complimentary,* a trade policy can only be effective, for example, if a corresponding environmental action is taken. He further states that the United States, due to its prominence in environmental and economic matters, must take the lead in the promotion of the 'areas of complementarity'[19] that exist between environmental quality and unrestrained trade. He identifies three necessary elements to be met if the US is to help create a global balance between trade and the environment. The first is improving and enforcing US environmental standards locally as well as for US companies operating internationally. The second component involves negotiating agreements with other developed economies in the North, such as Canada, to foster stronger linkages between trade and environmental policies. The third element involves negotiating an agreement with countries in the Global South, such as Mexico, where market access is granted in exchange for commitments to improve and enforce environmental standards.

Runge's book is clear and concise, with a methodical progression of well-organised chapters that discuss trade and environmental issues in detail. While Runge attempts to speak to the 'informed layperson',[20] some of his words get lost in translation to non-economists or those unfamiliar with international environmental law. For example, while he uses figures and graphs to explain environmental and trade implications in the second chapter, it may still be confusing for someone who does not have a background in economics. His discussion of GATT and the legal disputes that arise as a result of the imposition of environmental policies, such as in the *US-Canada Fisheries*

[18] The GATT functioned de facto as an organisation, conducting eight rounds of talks addressing various trade issues and resolving international trade disputes
[19] *Freer Trade, Protected Environment* 31
[20] ibid xii.

Landing case, may also be hard to follow if one does not have basic knowledge of the law.

Further, while the use of examples such as the *Tuna-Dolphin* dispute between Mexico and the USA and the *USA-Canada Fisheries Landing Case* is helpful, he does not include other valuable case studies, especially those that do not involve the USA. Nevertheless, the two cases he uses are helpful in understanding the legal tests discussed and how protectionism may be disguised within environmental policies. While this book helps readers understand the issue, it is perhaps most useful to economists, environmental lawyers, and policymakers who are already aware of the tension between trade and environmental policies and are trying to harmonise the two. The crux of the book is still clearly articulated – that freer trade and environmental protection can go hand in hand.

Although this book was published in 1994, it is still relevant today. Since the 1990s, the global urgency surrounding climate change has increased, and the need for Runge's proposed solutions has grown stronger. The integration of both trade and environmental policies is essential for creating mutually beneficial frameworks that effectively address global challenges such as climate change while sustaining economic growth. While environmental provisions have become much more common in trade agreements since then, such as the United States-Mexico-Canada Agreement (USMCA), they have not necessarily been effective as environmental issues such as global warming remain on the rise. Runge's arguments for taking both trade and the environment hand in hand hence still resonate with current debates on the matter. Further, the United States remains prominent in environmental and economic matters, so if it takes the necessary steps that Runge suggests, it can set a positive example for the rest of the international community to follow. The United Nations' Sustainable Development Goals (SDGs) relating to climate action and environmental sustainability also reflect Runge's view that environmental objectives must be a key part of global economic systems to strike this necessary balance.

BOOK REVIEW:

QUR'ANIC COVENANTS: AN INTRODUCTION BY AHMER BILAL SOOFI

SUFIYAN BIN MUNEER

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Ahmer Bilal Soofi's *Qur'anic Covenants: An Introduction* offers an exploration of the Qur'an through the lens of legal and contractual obligations, presenting an intricate relationship between the divine and humans. Soofi, a distinguished international lawyer, takes an innovative approach by presenting the Qur'an not just as a religious text but also as a legal document establishing covenants between Allah and His creation. The covenant framework, as outlined in the book, is a model that highlights how compliance with legal and moral duties can be encouraged at various levels—personal, societal, and international. The essence of this framework is to remind individuals and the State that their legal duties, whether at the local or international level, are coupled with moral and religious obligations, which are deeply ingrained in the Qur'anic teachings. This moral duty permeates through multiple facets of society, as the Qur'an consistently emphasises upholding covenants. This framework bridges the gap between religious obligations and legal duties, providing a fresh perspective on how believers and societies should govern themselves.

Agreements and contracts normatively govern the relationship at the individual, State, societal and global levels. The concept of the 'covenant' ensures bilateralism where both parties wilfully agree to certain actions or inactions, thus creating an enabling environment of voluntariness in good faith. There is an extensive body of literature and a rich tradition of scholarship available on the Old and New Testaments discussing Christian covenant theology, but very little literature addressing the concept of

covenants in the Qur'an. Most of the available literature on covenants in the Qur'an revolves around the primordial covenant, commonly referred to as the 'covenant of *Alastu*', which is made between God and all of humanity before the beginning of creation.[1]

The book offers a unique perspective on the idea of covenants in the Qur'an – a lesser-explored dimension of the Qur'an. While much of the literature on the Qur'an has focused on Islamic legal rules (*shariah*), jurisprudence (*fiqh*), and moral codes, Soofi argues that covenants, both explicit and implicit, form the backbone of the Qur'anic message.[2] He draws parallels between modern legal contracts and the Qur'an, applying a legal lens to understand the text of the Qur'an. According to Soofi's thesis, there is a direct contractual relationship between Allah and human beings – what he calls a 'covenant'.[3] To establish this claim, Soofi presents a very broad definition of the 'covenant', encompassing representations and warranties, unilateral declarations, standing offers and even statements made with the intent to be binding. He posits that such agreements do not require formal documentation but can be established through the mutual conduct of the parties.[4] His definition establishes a legal framework between the believer and God, where the believer is expected to make course corrections in their conduct through the exercise of free will. Moreover, his definition emphasises the significance of the individual within the broader contract and promotes an appreciation of bilateralism in the covenant.

Soofi broadly categorises covenants into two groups: covenants 'within' the Qur'an (those explicitly mentioned in the text) and covenants 'under' the Qur'an (those that derive from its principles). Covenants in the first group

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[1] Qur'an 7:172

[2] Ahmer Bilal Soofi, *Qur'anic Covenants: An Introduction* (2nd edition 2024) 14

[3] Soofi (n 2) 16 'It includes not only formal agreements but also orally agreed understandings and implied covenants. It also includes representations and warranties, unilateral assertions or declarations, standing offers, and even assertions made with the intent to be bound by the same. The designation of such an agreement as a contract, covenant, or treaty indication in the Qur'an itself that upon the acceptance of a specific condition or assertion, the performance of a particular act, or upon the exercise of restraint to act in a certain manner, there will follow in the jurisdiction hereafter,15 as a matter of certainty, some reward or consequence including punishment that is mentioned either in general or specific terms in the Qur'an. The covenant stands formed once a person does any of the above in consideration16 of a gain as promised by Allah, whether the consideration is material or not.'

[4] Soofi (n 2) 15.

are extracted and expounded from the Qur'anic text, encompassing both explicit[5] and implicit covenants.[6] The second group consists of private contracts, legislative covenants and treaties, among others. This perspective presents a distinctive understanding of the obligations that arise from the recognition of such covenants within and under the Qur'an, establishing a personal and direct contractual relationship between Allah and His creation, free from any external intervention.

He also makes an interesting comparison to the *shariah*, suggesting that if an individual complies with *shariah* in order to seek of rewards of the hereafter, this transaction will concurrently take the form of a covenant. His central thesis posits that understanding the Qur'an as a covenant would not only influence religious obligations but also offer insights into legal and policy frameworks in Islamic societies. The book's legalistic approach is particularly useful in modern contexts, where debates on governance, State laws, and international relations often intersect with religious principles. Soofi argues that recognising these covenants can influence everything from personal behaviour to global diplomacy, suggesting that adherence to the covenants found within and under the Qur'an has far-reaching implications for both individuals and States.

The book is methodically organised, beginning with a definition of a covenant and its applicability to the Qur'an. The book is structured in a way that allows readers to build their understanding progressively, with each chapter providing new insights into the nature of covenants in the Qur'an. The accessible writing style ensures that even readers unfamiliar with legal scholarship can grasp the significance of the covenants Soofi discusses.

Soofi highlights the legal underpinnings of these covenants by referencing Islamic legal traditions and the works of respected Islamic scholars while also citing examples from international law. This dual approach enhances the reader's understanding of how these covenants are meant to be applied in modern-day scenarios, whether in personal conduct or international relations. This structured approach allows for a comprehensive understanding of the

[5] Primordial covenant, covenant of Salat, Allah's Covenants with Prophets as His Attorneys and Envoys, Covenant of 'You remember Me. I Remember You'

[6] Covenant of Access, Covenant of Communication, Covenant to Gain Worldly Knowledge

subject matter. Despite the complexity of the subject matter, Soofi's writing is clear and accessible. He successfully breaks down intricate legal and religious concepts, making them accessible to a broad audience. His use of legal terminology, combined with traditional Islamic scholarship, creates a balanced narrative that bridges both fields without alienating readers from either background.

One of the book's standout features is its ability to combine traditional Islamic scholarship with modern legal principles. Soofi adeptly applies legal terminology such as unilateral undertakings, representations,[7] and warranties[8] to explain the nature of the Qur'anic covenants. This approach not only makes the book accessible to legal scholars but also provides religious scholars with a new lens through which they can appreciate understanding the Qur'an. The most significant earlier study, *The Idea of the Divine Covenant in the Qur'an* by Robert Carter Darnell, and the *Higher Objectives (Maqāṣid) of Covenants in Islam: A Content Analysis of 'Ahd and Mūthāq in the Qurʾān* by Halim Rane focuses on describing covenants more objectively.

In contrast, Soofi's work explores the covenants as legal relationships between the Creator and creation by exploring both explicit and implicit covenants in the text of the Qur'an. His work offers a unique perspective on obligations arising from covenants in the Qur'an, presenting them as Allah's offer within the covenantal framework of the text. In the earlier articles, covenants were conceptualised based on the main Qurʾānic covenantal terms *ʿahd* and *mīthāq*, or their work was the description of the types of covenants mentioned in the Qur'an. However, Soofi expounds covenants through *quid pro quo* statements in the Qur'an, drawing his conceptualisation from the overall structure of the text.

The book's strengths are in its thorough analysis of the Qur'anic text, which is supported by both traditional scholarship and modern legal theory. Soofi's

[7] A representation, 'A presentation of fact – either by words or by conduct – made to induce someone to act, esp. to enter into a contract.'
[8] A warranty, 'An express or implied promise that something in furtherance of the contract is guaranteed by one of the contracting parties; esp., a seller's promise that the thing being sold is as represented or promised.'

detailed breakdown of different types of covenants and their implications provides an important idea: compliance with law, particularly Islamic law, is not enforced through coercion but rather through the free will of both parties, as seen in contracts. The book presents the idea that various types of agreements, such as representations, warranties, and unilateral understandings, are all inherently bilateral when viewed as covenants. However, the work would have benefited from a thorough examination of each covenant, how these covenants become bilateral, and how they interact with modern constitutional frameworks in Muslim countries.

In conclusion, *Qur'anic Covenants: An Introduction* is a commendable contribution to the field of Islamic and Qur'anic studies which shines due to its straightforward explanation of the concepts. Soofi's meticulous research and clear presentation make this book a must-read for anyone interested in the intersection of law, religion, and society. The author tried to reconcile traditional Qur'anic Studies with modern legal scholarship by emphasising the sanctity of contracts as a foundational aspect of faith in Islam. By positioning the Qur'an as a guide for both spiritual and worldly matters, Soofi encourages readers to see the relevance of Islamic teachings in contemporary legal and societal contexts. This book is particularly timely in an age where questions about the role of religion in governance and law are more pertinent than ever. It challenges believers to internalise their religious obligations as binding covenants and offers a legal framework that has the potential to influence both personal behaviour and international relations.

CASE COMMENT:

THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA ADVISORY OPINION ON CLIMATE CHANGE AND INTERNATIONAL LAW

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1. INTRODUCTION

On 12 December 2022, the Commission of Small Island States on Climate Change and International Law (COSIS) requested the International Tribunal for the Law of the Sea (ITLOS) to issue an Advisory Opinion on States Parties' obligations under international law on climate change.[1] Small Island Developing States (SIDS) bear the brunt of the effects of climate change despite the fact that they are least responsible for this development. To combat existential threats – including the risk of total submersion due to rising sea levels – Antigua and Barbuda and Tuvalu signed the Agreement for the Establishment of the COSIS (COSIS Agreement), which was then registered with the United Nations in 2021.[2] In the face of rising global temperatures, the COSIS sought this Advisory Opinion in hopes of reminding States Parties to the United Nations Convention on the Law of the

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[1] Commission of Small Island States on Climate Change and International Law, 'Re: Request for Advisory Opinion' sent to Registrar, International tribunal for the Law of the Sea (12 December 2022) https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf accessed 25 September 2024 ('COSIS Request').

[2] Commission of Small Island States on Climate Change and International Law, 'About' (*Commission of Small Island States on Climate Change*) https://www.cosis-ccil.org/about accessed 25 September 2024.

Sea (UNCLOS) of their obligations to protect and preserve the world's oceans from climate change impacts, such as ocean warming, sea level rise and ocean acidification.

Members of the COSIS include low-lying, developing island states, representing some of the most climate-vulnerable nations in the world.[3] After establishing the jurisdiction of the Court to entertain the advisory opinion request, the COSIS proceeded to request the ITLOS to clarify specific obligations under the UNCLOS to prevent, reduce and control marine environment pollution.[4] This request reflected the COSIS' growing concerns about ocean warming, rising sea levels and ocean acidification – all of which are effects of greenhouse gas emissions by many States Parties. Additionally, the COSIS also asked the ITLOS to interpret whether States Parties to the UNCLOS have an active duty not only to protect but also to preserve the marine environment.[5]

In its preamble, the COSIS Agreement recognises that SIDS bear a 'disproportionate and overwhelming burden of the adverse effects' of climate change.[6] It further notes that such adverse effects are caused by the emission of greenhouse gases (GHGs), to which SIDS' contribution is negligible.[7] Hence, it is the responsibility of States Parties to help SIDS fight off the adverse environmental effects that they are already experiencing. Article 1(3) of the COSIS Agreement explicitly lays out the COSIS' mandate to promote and implement State obligations to protect and preserve the marine environment and to take responsibility for injuries arising in case of failure to do so.[8] Due to its criticism of the 'endless' climate discussions on international

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[3] IPCC, 'Working Group II: Impacts, Adaptation and Vulnerability' (*The Intergovernmental Panel on Climate Change)*
https://archive.ipcc.ch/ipccreports/tar/wg2/index.php?idp=671#:~:text=Among%20the%20most%20vulnerable%20of,(in%20the%20Indian%20Ocean) accessed 3 June 2024.

[4] COSIS Request (n 1).

[5] Client Alert, 'The International Tribunal for the Law of the Sea's Advisory Opinion on Climate Change and its Implications' (*Gibson Dunn*, 13 June 2024)
https://www.gibsondunn.com/international-tribunal-for-law-of-the-sea-advisory-opinion-on-climate-change-and-its-implications/ accessed 27 September 2024.

[6] Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law, adopted 31 October 2021, 3444 UNTS https://treaties.un.org/doc/Publication/UNTS/No%20Volume/56940/Part/I-56940-08000002805c2ace.pdf accessed 25 September 2024.

[7] ibid.

[8] ibid art 1(3).

platforms, the COSIS approached the ITLOS in hopes of harnessing the potential of international law to protect the climate-vulnerable States against the existential threats of climate change and sea level rise.[9]

The COSIS request relied upon Article 21 of the Statute of the ITLOS[10] and Article 138 of the Rules of the Tribunal[11] to illustrate the ITLOS' express jurisdiction to entertain their application. The COSIS posed a two-part question to the ITLOS. It requested the ITLOS to shed light on the specific obligations of States Parties to the UNCLOS to prevent, reduce and control pollution of the marine environment.[12] It further focused its question on the deleterious effects resulting or likely to result from climate change through instances of ocean warming and rising sea levels, as well as ocean acidification. The question also acknowledged that such adverse effects were caused by the large-scale emission of anthropogenic GHGs into the atmosphere. The second part of the question inquired about State Party obligations to protect and preserve the marine environment in relation to the impacts of climate change.

Even though an advisory opinion by the ITLOS is not legally binding, it plays an important and influential role in the development of international law and practice.[13] The much-anticipated advisory opinion was published on 21 May 2024, in which it answered the COSIS' primary queries.

2. THE ITLOS' FINDINGS ON JURISDICTION

The main procedural obstacle before the ITLOS regarding the COSIS request was whether it had advisory jurisdiction to entertain the request in the first

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[9] Isabella Kaminski, 'Small islands slam 'endless' climate talks at landmark maritime court hearing' (*Climate Home News,* 2023) https://www.climatechangenews.com/2023/09/11/small-island-leaders-climate-negotiations-un-maritime-court/ accessed 5 June 2024.

[10] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 ('UNCLOS'), Annex VI.

[11] International Tribunal for the Law of the Sea, 'Rules of the Tribunal' (ITLOS/8, 17 March 2009) https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf accessed 23 December 2024.

[12] COSIS Request (n 1).

[13] Polly Botsford, 'Climate crisis: ITLOS Advisory Opinion 'effectively' creates new international legal obligations on signatories' (*International Bar Association*, 31 July 2024) https://www.ibanet.org/climate-crisis-itlos-advisory-opinion-effectively-creates-new-international-legal-obligations-on-signatories#:~:text=Although%20it's%20advisory%20and%20not,emissions%20on%20the%20world's%20oceans. accessed 2 September 2024.

place. The COSIS preferred to submit a request for an advisory opinion specifically as it sought clarification by the ITLOS on the obligations of States Parties to the UNCLOS.[14] The reputation of the international court or tribunal with which such a request is filed often determines the weight an advisory opinion issued by it would carry in developing international law and custom.[15] As the COSIS was concerned about issues such as rising sea levels and ocean acidification, the ITLOS – which was established under Annex VI of the UNCLOS – was the most appropriate forum.

The ITLOS' advisory jurisdiction had already been challenged in the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) in 2015.[16] This challenge was based on the fact that no explicit reference is made to advisory jurisdiction in the UNCLOS. However, ITLOS rejected these arguments as the wording of Article 21 of the ITLOS Statute allows any matter, whether contentious or advisory, to be raised before the ITLOS if it is related to the UNCLOS' purposes.[17] Secondly, Article 138(1) of the Rules of the ITLOS allows it to give an advisory opinion on a legal question if an international agreement related to UNCLOS' purposes 'specifically provides for the submission to the [ITLOS] of a request for such an opinion.' In this manner, the ITLOS argued that even though the UNCLOS did not include any reference to the ITLOS' advisory jurisdiction, *ad hoc* treaties related to the purposes of the UNCLOS could still confer advisory competence to the ITLOS.[18]

In light of this finding, the COSIS Agreement was signed by Antigua and Barbuda, and Tuvalu to request that the ITLOS render an Advisory Opinion for clarification on States Parties' obligations to protect and preserve the environment. To put it simply, the COSIS Agreement does not give member

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[14] COSIS Request Letter (n 1).
[15] Armando Rocha, 'A Small but Important Step: A Bird's-Eye View of the ITLOS' Advisory Opinion on Climate Change and International Law' (*Climate Law*, 27 May 2024) https://blogs.law.columbia.edu/climatechange/2024/05/27/a-small-but-important-step-a-birds-eye-view-of-the-itlos-advisory-opinion-on-climate-change-and-international-law/ accessed 27 September 2024.
[16] *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law: Advisory Opinion* (2024) International Tribunal for the Law of the Sea (Case No. 31) ('Advisory Opinion'), [85].
[17] ibid [107]-[108].
[18] ibid.

States any other rights or obligations regarding maritime activities. It was signed by the States as an *ad hoc* law of the sea treaty to enable them to file a request for an advisory opinion from the ITLOS.[19]

Establishing advisory jurisdiction was crucial for the ITLOS as this function allowed it to spearhead a growing movement to ensure accountability for climate change.

3. THE ITLOS' FINDINGS ON STATE OBLIGATIONS TO PROTECT AND PRESERVE THE ENVIRONMENT

The main issue highlighted by the COSIS was the question of what obligations States Parties have with regard to preventing, reducing, and controlling pollution of the marine environment.[20] The issues framed were not only limited to asking the ITLOS to reinforce the negative duty of States Parties to cut down GHG emissions but also requested the ITLOS to clearly outline States Parties' positive duty to protect and preserve the marine environment.[21]

After unanimously deciding that it did, in fact, have the jurisdiction to respond to the COSIS' request, the ITLOS proceeded to answer the first part of the COSIS"s query. It referred to Article 1(1)(4) of the UNCLOS to establish that GHG emissions into the atmosphere did indeed constitute pollution of the marine environment.[22] It then referred to Article 194 of the UNCLOS to highlight States Parties' obligations to take all measures necessary to prevent, reduce and control marine pollution triggered by GHG emissions.[23] The ITLOS noted that States were only accountable to the extent of their means and capabilities, the best available science and relevant international rules and standards.[24] This allowed the ITLOS to emphasise the unequal distribution of resources across States Parties and require them to act according to the best of their abilities. Article 194 was highlighted as one of paramount importance due to the stringent standard of due diligence it sets

[19] ibid.
[20] COSIS Request (n 1).
[21] ibid.
[22] Advisory Opinion (n 16) [179].
[23] ibid [180].
[24] ibid [194], [212].

out.[25] Such a strict standard was meant to emphasise the risk of 'serious and irreversible' harm to the marine environment lest States hesitate to reduce emissions to the best of their abilities.[26]

In its response to part (b) of the COSIS' request, the ITLOS highlighted States Parties' obligations under Article 192 of the UNCLOS to actively take measures to restore marine habitats and ecosystems where they had been degraded.[27] It further reminded States Parties of their obligation under this Article to anticipate risks relating to climate change impacts depending on the circumstances.[28] The importance of this duty was emphasised through Articles 61 and 119 of the UNCLOS, which impose an active duty on States Parties to take necessary measures to conserve living marine resources threatened by climate change impacts.[29]

4. INTERNATIONAL RESPONSIBILITIES AND OBLIGATIONS OF STATES PARTIES

The ITLOS highlighted the extent of States Parties' responsibilities not only to cut down GHG emissions within their own territory, but also to establish regional cooperation to ensure the same.[30] It also clearly emphasised their duty to assist those States less capable than themselves in terms of funds or technical expertise to allow them to achieve the same environmental protection.[31]

This provision was also relied upon by the ITLOS to highlight that these obligations are transboundary in nature – States Parties are required to ensure that any pollution caused by an activity does not transcend their sovereign territory.[32] The ITLOS referred to Articles 207 and 212 of the UNCLOS to stress the need for the establishment of regional rules, practices, and standards.[33] While Articles 211, 213, 217 and 222 focus on the domestic

[25] ibid [235].
[26] ibid [213].
[27] ibid [386].
[28] ibid [427].
[29] ibid [417].
[30] ibid [311].
[31] ibid [339].
[32] ibid [250].
[33] ibid [279].

practices States Parties must adopt, the UNCLOS also emphasises the need for regional and international cooperation to achieve its goals. The Advisory Opinion made it a point to repeat this aspect by referring to Articles 197, 200 and 201 of the UNCLOS, which specifically require States Parties to cooperate continuously and meaningfully to mitigate marine pollution in shared natural bodies and ecosystems. [34] Highlighting these provisions served to emphasise the ITLOS' objective of directing the international community to prioritise the protection of the natural environment and to coordinate uninterrupted efforts to ensure this.

Finally, the ITLOS acknowledged the COSIS' concern of becoming increasingly vulnerable to the effects of climate change. They did so by highlighting Article 202 of the UNCLOS, which requires States Parties to assist developing States in switching to sustainable practices and effectively managing the effects of climate change.[35] This aspect of the advisory opinion is of great importance in this context. This Article requires States Parties to assist other parties in their capacity-building efforts to protect their marine environment and combat the harmful effects of climate change.[36] This is particularly important as the COSIS which submitted this request for an advisory opinion consists of SIDS which contribute little to GHG emissions but are disproportionality impacted by the negative effects of climate change.[37] More developed States Parties not only bear greater responsibility for climate change through higher GHG emissions but also possess a greater number of resources to protect themselves from its effects. Additionally, the ITLOS further recognised the vulnerable circumstances faced by COSIS members by highlighting Article 203 of the UNCLOS which refers to the preferential treatment to be given to developing or climate vulnerable States in funding, technical assistance, and services from international organisations.[38]

Finally, the ITLOS elaborated on how State Party obligations to the UNCLOS should be monitored. It referred to Article 204 of the UNCLOS

[34] ibid [319].
[35] ibid [339].
[36] ibid.
[37] ibid [327].
[38] ibid [329].

to highlight that States Parties have an active duty to monitor and evaluate the risks posed by pollution from GHG emissions on the marine environment.[39] In addition, Article 206 requires States Parties to assess the impact of planned activities on the marine environment before initiating any activities in their territory that they have reasonable grounds to believe may cause substantial pollution.[40] Article 205 also provides for their accountability by asking them to publish such findings.[41] Articles 204, 205 and 206 provide a measure for continued accountability of States Parties as the UNCLOS requires them to publish updated reports on the state of their compliance.[42] Not only does this build an expectation for Parties to make an active effort to stay alert on the state of their marine environments, but it also engages the public and the international community who are interested stakeholders.

5. ANALYSIS

The ITLOS' Advisory Opinion has been impactful in many important ways. Firstly, it is pertinent to recognise the ITLOS' influence as the judicial body responsible for the enforcement of the UNCLOS, which 168 States Parties have ratified. Advisory opinions by the ITLOS are not legally binding; however, they play a major role in the interpretation of the UNCLOS and can eventually develop into international customary law. Therefore, the following points of the ITLOS' recently published Advisory Opinion are relevant to discuss: firstly, the express recognition that States Parties must act to the best of their abilities, and secondly, the emphasis placed on regional cooperation.

Firstly, the language used in the ITLOS' opinion is very clear-cut and does not allow room for speculation. It explicitly clarifies the illegality of releasing unchecked pollutants which serve to negatively impact the environment. Additionally, it clearly emphasises an explicit duty noted in the UNCLOS for States Parties to make a conscious effort to reduce and control any such emissions. It is also important to mention that the ITLOS acknowledges the

[39] ibid [367].
[40] ibid.
[41] ibid.
[42] ibid

uneven distribution of resources as it makes it a point to highlight that a State must act to the best of its abilities.

Secondly, the opinion reinforces the importance of international cooperation to successfully protect the marine environment. It is unfair for States to engage in their individual economic development while their neighbours share in the costs of worsening climate conditions. For instance, local Indian fishermen have been known to cross over into Sri Lankan maritime territory to capture fish during fish breeding seasons.[43] Similarly, Pakistani waters have also been victims of overfishing by foreign trawlers despite national laws disallowing fishing activities during fish breeding season. Hence, these examples help shed light on the importance of increasing regional cooperation to protect shared natural resources and the environment.

Finally, the ITLOS' opinion also reminds States Parties of their obligations to assist less developed nations in achieving their climate goals in conjunction with the UNCLOS. Even though States, like the members of the COSIS, do not contribute much to climate change activities, they bear the greatest burden and are most vulnerable to its impacts, especially rising sea levels. SIDS are often heavily reliant on industries like tourism and fishing with culinary cuisines and cultures often shaped by their proximity to the sea. Hence, rising ocean levels, changing ocean temperatures and ocean acidification not only increase the likelihood of flooding but further threaten their lives as marine life is increasingly put at stake. The ITLOS recognises that more developed or technically capable nations have a responsibility to help other States which may not possess the same level of resources or skills. This can be interpreted as an attempt to bridge disparity and help States achieve the same goal; more developed States then become responsible for protecting smaller States from climate change.

It can also be noted that the language of the ITLOS, while specific in listing obligations required by the UNCLOS, adopts a very general and vague tone at various points. This includes sections where the ITLOS reminds States

[43] Press Trust of India, '19 fishermen detained by Sri Lanka to return home: Indian High Commission' (*Business Standard,* 3 April 2024) https://www.business-standard.com/india-news/19-fishermen-detained-by-sri-lanka-return-home-indian-high-commission-124040301065_1.html accessed 13th June 2024

Parties of their obligations to control and prevent emissions and assist other Parties in their efforts. Hence, it does not specify the States being referred to, nor does it lay down a clear criterion for what exactly it means when requiring States to act to the best of their abilities. It also adopts very diplomatic language and does not explicitly note that members of the COSIS and others like them are not to blame for the climate crisis. Therefore, the vague and politically meek tone plays a significant role in lessening the impactful nature of the Opinion.

6. CONCLUSION

The ITLOS' Advisory Opinion is a significant step in international environmental law and its intersection with the law of the sea. It has far-reaching consequences on an international scale and is highly likely to influence upcoming directives on similar matters, which will hopefully not shy away from specifying issues leading to climate hazards. The ITLOS Advisory Opinion has served as an important push for action at both the global and national levels. It has also offered arguments and a line of thinking that may be considered by the International Court of Justice and the Inter-American Court of Human Rights in their upcoming advisory opinions.[44]

[44] Advisory Opinion (n 16) [107]-[108].