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FOREWORD

The Law Review is part of RSIL's longstanding commitment to high-quality legal academia, promoting the dissemination of ideas, findings, and law and policy solutions of the multifaceted challenges facing Pakistan. Since the Law Review's first publication in 2017, we have received submissions of outstanding quality, and rhis year's publication hosts articles on a range of topics pertinent to Pakistan's legal landscape on issues of climate change, human rights, comparative constitutional law, and Islamic law.

We would also like to welcome our new members of the Advisory Board to the RSIL Law Review. Their guidance and support throughout the publication process is greatly appreciated, and we look forward to their continued participation in future volumes.

We are grateful to our authors who have dedicated their time and effort in producing quality legal academic writings. These articles have undergone a rigorous peer review from respected professionals in legal academia and practice. We are indebted to our peer reviewers for generously contributing their time and expertise and whose comments and insightful guidance have helped raise the journal's academic standard.

I would like to acknowledge the hard work and professionalism of our editorial team led by Managing Editor, Ms. Ayesha Malik, and Research Associates, Mr. Faraz Khan Yousafzai, Ms. Maha Husain and Mr. Raas Nabeel. I must also acknowledge the efforts of RSIL alumni, whose commitment and dedication in RSIL's formative years has allowed the organization to stand on its own feet today.

It goes without saying that none of this would be possible without the experience, mentorship and funding provided by our President, Mr. Ahmer Bilal Soofi, who has spent the last three decades tirelessly working to improve scholarship in the field of international law in Pakistan.

I hope you will enjoy reading this edition of the RSIL Law Review. We welcome your feedback and look forward to your contributions.

Jamal Aziz[1*]
Editor-in-Chief
RSIL Law Review
December 2022

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Dr. Amna Nazir is an interdisciplinary academic with research expertise in international human rights law and Islamic theology. She is a Reader in Law and Associate Director of the Centre for Human Rights at Birmingham City University. Dr Nazir's research focuses on the UN's Universal Periodic Review mechanism and Islamic law, both as separate and interlinked areas, exploring pertinent human rights issues such as capital punishment and freedom of religion. She has also been invited by the UK Foreign, Commonwealth and Development Office to advise the British government on their strategy for bilateral engagement in death penalty cases. Her work for the highly influential 'UPR Project at BCU' is regularly cited by the UN Office of the High Commissioner for Human Rights, has won several awards, and was also shortlisted for the national Times Higher Education (THE) Award 2021 for International Collaboration of the Year. She has also been ranked in the top two candidates for appointment by the UN Human Rights Council as the UN Special Rapporteur on freedom of religion or belief.

Dr. Nudrat E. Piracha is leading the legal team of Pakistan's first global law firm, Samdani & Qureshi, which is a collaborating firm of Andersen Global. She has served both as counsel and arbitrator in international 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 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.

Dr. Dawood I. Ahmed received B.A. and M.A. degrees in Jurisprudence from Oxford University, and LL.M. and J.S.D. degrees from the University of Chicago. He is a Research Associate at the Comparative Constitutions Project and the author of Democracy Under God (Cambridge University Press 2023) and various scholarly and opinion pieces; previously, he worked on constitutional design projects with the Max Planck Foundation, International IDEA and the U.N. Department of Political Affairs.

Dr. Ahmad Ghouri is a Senior Lecturer in Commercial Law and Director of Internationalization at the School of Law, Politics and Sociology, University of Sussex. He is also the Editor-in-Chief of Manchester Journal of Transnational Islamic Law & Practice. Dr Ghouri has been a faculty member in International Economic Law and Policy at the Harvard Law School's Institute for Global Law and Policy. He is a member of the Global Advisory Board of the Centre for International Investment and Commercial Arbitration, Pakistan, and Sustainable Market Actors for Responsible Trade, University of Oslo. Dr Ghouri has published a number of leading works on international law, law of treaties, and international dispute resolution including investment and commercial arbitration.

Dr. Sikander Ahmed Shah is a pioneering member of the Shaikh Ahmad Hassan School of Law (SAHSOL), Lahore University of Management Sciences (LUMS). He has been awarded an interdisciplinary PhD and he also obtained a BA in Economics and a Juris Doctorate (Cum Laude) from the University of Michigan, Ann Arbor. He held visiting faculty positions at the Temple Law School, the Wayne State Law School and the University of Michigan Law School, and held the position of Adjunct Faculty at the Maurer School of Law, Indiana University, Bloomington. Professor Shah served as the Legal Advisor to the Ministry of Foreign Affairs in 2012-2013.

Mr. Ali Sultan is a Public International Law Expert and Vice President of RSIL. He served as the Executive Director of RSIL from 2012-2016. Mr. Sultan holds a Bachelor's degree with honours in Economics and Political Science from Middlebury College, Vermont, United States, where he remained College Scholar for six consecutive semesters, and a Juris Doctor from the University of Virginia Law School in Charlottesville, Virginia, United States. At law school, he was the senior editor of the Virginia Law and Business Review and the Journal of Law and Politics. Mr. Sultan is an Adjunct Professor of Business Law at the Lahore University of Management Sciences and has been invited to deliver guest lectures on international and comparative law topics.

Mr. Uzair Kayani is an Assistant Professor and has served as head of the department of Law & Policy at the Shaikh Ahmad Hassan School of Law (SAHSOL), LUMS. He has advised the Government of Pakistan Strategic Policy Planning Cell Working Group on International Investments and Arbitrations. He has been a Board member of the Government of Punjab Public-Private Partnership Authority and has served as an instructor at the Lahore High Court Research Cell, and on the Lahore High Court Bar Association's Committee on Teaching, Learning, and Research. He obtained a Bachelors (Cum Laude) in Political Science from Middlebury College, an M.A in Political Science from Washington University in St. Louis, and a J.D from the University of Chicago Law School. He teaches and researches in the areas of Law and Economics, Common Law, International Law, Business Organizations, and Game Theory.

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 specializations 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 organizational 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.

ABOUT THE 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 utilizing a creative, trans-disciplinary approach or addressing comparative law issues as they relate to international and domestic law are also encouraged. RSIL accepts student notes (up to 2500 words) and full-length articles (3000 – 8000 words). All those interested, should submit an abstract/articles for review through the submission form available on our website: journal.rsilpak.org or email us at rsil-review@rsilpak.org

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EDITOR'S NOTE

The Research Society of International Law is proud to present the 6th Edition of the RSIL Law Review. The successor publication to the Pakistan Journal of International Law (2012), RSIL Law Review was founded in 2017 per the vision of Mr. Ahmer Bilal Soofi and Mr. Jamal Aziz who sought a forum for the publication of premium research on international law within Pakistan. Since then, the Review has evolved its ambit to include articles on social and humanitarian issues, matters of policy, economics, and security.

The articles in this volume cover a range of issues across the breadth of legal and political disciplines which are of pressing importance in 2022. The first article by Stephanie Tsang (*LL.B* and *LL.M (Edinburgh)*) and Muhammad Adil (*LL.B. (Hons) London)*) discusses the policing of greenhouse gas and other dangerous gas emissions in Pakistan's automobile sector, arguing that Pakistan's massive progress in its automotive policies has not been consistently implemented.

Muhammad Shahzeb Usman (*B.A./LL.B. (LUMS)* and *LL.M (Nottingham)*) considers the climate change impacts of Western incorporated parent companies in many developing countries and the role of the courts in imposing scrutiny on these companies. Shahzeb notes that this is a positive development in line with other trends in international law which seek to oblige businesses to comply with environmental due diligence standards.

The third paper by Aiema Husain (*B.A./LL.B. (LUMS)*) analyses how political Islam can successfully contribute to establishing stable, democratic political systems. She draws comparisons between Pakistan, Saudi Arabia and Tunisia to argue that a thriving Muslim democracy, one where the state is neither secular nor Islamist but simply a torchbearer of freedom of thought, religion and belief, is possible.

The fourth article by Masooma Hasan (*B.A./LL.B. (LUMS)*) and Wahiba Junejo (*B.A./LL.B. (LUMS)*) focuses on the barriers to attaining citizenship and legal identification faced by certain segments of the population. Their article argues that substantive equality can only be achieved when these social, cultural, political, and economic hurdles are eradicated.

The final article by Muhammad Hassan Qaiser Khan (*B.A./LL.B (LUMS)* and *LL.M (University of Texas-Austin)*) considers a question that has plagued

academics, politicians, religious clerics, and the citizens of Pakistan: how 'Islamic' is Pakistan's Constitution? He concludes by stating the necessary preconditions for the successful Islamisation of Pakistan's constitution.

This year's review also features a book review by Shazeen Waseem (LL.B. *(Hons) London)*) on *New Technologies And The Law In War And Peace (Cambridge University Press, 2019)* edited by William H. Boothby, and a Case Comment by Nimra Mansour (B.A. *(Oxon)*) on the case Raja Muhammad Owais v. Mst. Nazia Jabeen And Others.

The articles in this volume underwent a rigorous peer-reviewed process and I would like to extend my sincerest gratitude, on behalf of the Law Review, to our esteemed peer-reviewers:

- Mr. Ahmad Rafay Alam, Environmental Lawyer and Activist and Founding Partner of Saleem, Alam & Co.
- Dr. Zubair Abbasi, Professor and Researcher at the University of Oxford, (*D.Phil (Oxon)*)
- Mr. Rafae Saigal, Partner at Saigal, Tarar & Leghari LLP, (*LL.M (NYU)*)
- Ms. Minahil Khan, Legal Consultant, (*LL.M (Sussex)*)
- Dr. Muhammad Asif Khan, Associate Professor, NUST
- Mr. Syed Muaz Shah, Director of Centre for Human Rights, Ziauddin University
- Mr. Mustafa Khan, Partner, Khan & Ijaz Advocates

Thank you also to Maha Husain and Raas Nabeel who worked tirelessly on this year's review and contributed their valuable editorial assistance. I am eternally grateful to you for all your effort in getting this iteration out.

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RSIL Law Review
December 2022

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PAKISTAN AUTOMOTIVE LEGISLATION: DRIVING EMISSIONS UP OR SLOWING THEM DOWN?

STEPHANIE TSANG | MUHAMMAD ADIL

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Muhammad Adil is a graduate of the University of London, he is currently working as a lawyer in Islamabad and is also a global research fellow at the Global Institute of Law.

ABSTRACT

The United Nations Intergovernmental Panel on Climate Change has sounded an extremely urgent alarm to reduce carbon dioxide emissions to avoid catastrophic climate change. However, despite this warning to act, 43% of all harmful emissions in Pakistan can be attributed to the country's transport industry, including the automotive sector. This paper discusses greenhouse gas and other dangerous gas emissions standards along with their policing in the automobile sector in Pakistan, in juxtaposition to similar international standards, against the background of environmental law. It considers domestic and international legislation regarding automotive manufacturing guidelines on the control and policing of emissions and the fuel policy in Pakistan. It also critiques the electric vehicle policy in Pakistan that is being spearheaded by the government as a sustainable solution to the global environmental crisis, given that Pakistan is in the thick of being the fifth most populous country in the world. Both governmental and international bodies have done much research on Pakistan's current environmental position. To this end, this paper aims to uncover how legislation in Pakistan has enabled vehicle emissions to reach this environmental tipping point and provide workable policy changes and recommendations that can be incorporated into future emissions regulations and legislation, specifically in relation to automobiles.

KEYWORDS: United Nations, Climate Change, Pakistan, Automobiles, Environmental Law, Intergovernmental Panel on Climate Change, Harmful Emissions.

1. INTRODUCTION

Pakistan's transport industry has been instrumental in the country's development. However, it has also played a significant role in the country's environmental degradation, with the Food and Agriculture Organization attributing 43% of all harmful emissions to the transport sector in Pakistan in a 2019 report measuring emissions in rice-growing districts.[3] The United Nations Environment Programme also estimates that a quarter of "all energy-related greenhouse gas emissions" originate from the transport industry.[4] Greenhouse gases (**'GHG'**) is an umbrella term for a plethora of noxious emissions that come off exhaust fumes, including ultrafine particles, black carbon, nitrogen oxides, carbon monoxide and particulate matter 2.5 and 10.[5] Studies have shown that the last two have a direct effect on shortening lifespans.[6] Pakistan's national temperatures have also risen at a level higher than the global average.[7] This thus raises the question of what legislative action Pakistan is taking to circumvent the automotive industry and reduce vehicle emissions to prevent the country from facing an environmental disaster. This paper aims to answer that by considering the legislation surrounding fuel standard guidelines, guidelines to auto manufacturers to

[3] Food and Agriculture Organization of the United Nations, 'FAO Report Analyzes the Causes of Smog in Punjab Focusing on Agriculture' (*Food and Agriculture Organization of the United Nations*, 5 February 2019) <https://www.fao.org/pakistan/news/detail-events/en/c/1179183/> accessed on 28 April 2022. Despite its limited geographical scope, the report is the only recent one apportioning emissions in Pakistan.

[4] United Nations Environment Programme, 'Transport' (*UN Environment Programme*) <https://www.unep.org/explore-topics/energy/what-we-do/transport> accessed 26 April 2022.

[5] Doug Brugge, John L Durant and Christine Rioux, 'Near-Highway Pollutants In Motor Vehicle Exhaust: A Review Of Epidemiologic Evidence Of Cardiac And Pulmonary Health Risks' (2007) 6 Environmental Health 1, 2.

[6] Ali Habib, Sanval Nasim, Amna Shahab, 'Charting Pakistan's Air Quality Policy Landscape' (2021) E-21019-PAK-1, 2.

[7] Khaleeq Kiani, 'Climate Change to Cost Pakistan $3.8 Billion Yearly' *Dawn News* (Islamabad, 19 May 2021).

lower emissions, and existing checks and balances to observe and police vehicle emissions, particularly on Pakistan's land freight economy. Taking into account emission levels, Pakistan's electric vehicle policy will be analysed as a feasible solution, along with alternatives to the policy. This analysis will be conducted in light of international legislation on climate change, such as the United Nations Framework Convention on Climate Change (the '**UNFCCC**'). Finally, the paper will conclude with policy recommendations.

2. FUEL QUALITY

2.1. Standard Use in Pakistan

Pakistan follows the European Union ('**EU**') standards for fuel quality. It adopted these standards through a two-part process, the basis of which lies in the *Mansoor Ali Shah v Government of Pakistan* decision.[8] The case led to the creation of the Punjab Clean Air Commission, which recommended that Pakistan adopt the Euro II, Euro III and Euro IV fuel quality standards. The commission's findings also led to the promulgation of the National Environmental Quality Standards for Motor Vehicle Exhaust and Noise 2008,[9] which mandated the adoption of Euro II standards across the board for all vehicles in Pakistan. This standard would be used until the late 2010s but was archaic as it is similar to fuel standards used in the 1990s in Europe and has almost three times the sulphur content in its diesel compared to standards used in other South Asian countries.[10]

[8] *Mansoor Ali Shah v Government of Pakistan,* 2007, PLD 403.

[9] National Environmental Quality Standards for Motor Vehicle Exhaust and Noise 2008.

[10] Rizwan Haider, Abdullah Yasar, Amtul Bari Tabinda, 'Impact of Transport Sustainability on Air Quality in Lahore, Pakistan' (2018) 114 Current Science 2380, 2383.

It took Pakistan nearly 12 years to shift from the Euro II fuel standard to the more modern Euro V fuel standard, as announced by the Ministry of Energy.[11] This was a massive step forward due to the significant difference between Euro II and Euro VI standards with regard to mg/km pollutant emission.[12] However, this new policy seems to be largely performative. A survey from one of the major Petroleum/Diesel suppliers, Shell Petroleum, showed that out of their 1020 pumps in Pakistan, only 185 offered or advertised the offering of Euro V fuel.[13] Past legislation has also not set up a timeline by which all fuel suppliers in Pakistan must equip themselves with the new standard, nor penalties for failure to comply with the standard.

Fuel companies' adherence to these new standards has been controversial. As highlighted, in 2018, Honda Atlas filed a complaint about fuel quality in Pakistan with the Oil and Gas Regulatory Authority ('**OGRA**'). Following engine-knocking issues in their recently debuted Honda Civic Turbo models, Honda tested fuel samples from different fuel suppliers in Pakistan. They found that fuel suppliers used additives to artificially increase the fuel's Research Octane Number. The fuels were also found to have dangerous levels of manganese (53 mg/kg).[14] The case is relevant here for two reasons

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[11] Khaleeq Kiani, 'Govt Orders all Petrol, Diesel Imports be Euro-V Compliant as Oil Companies Protest Move' *Dawn News* (Islamabad, 9 July 2020) (hereinafter 'Kiani 2020').

[12] Ali Habib, Sanval Nasim, Amna Shahab, 'Charting Pakistan's Air Quality Policy Landscape' (2021) E-21019-PAK-1, 3.

[13] Shell, 'EURO 5: Available at Shell Retail Stations Now!' (*Shell*) <https://www.shell.com.pk/motorists/shell-fuels/euro-5-available-at-shell-station.html#iframe=Lz9sb2NhbGU9ZW5fUEsmcHJlZmlsdGVycz1mdWVscy5zdXBlcl9wcmVtaXVtX2dhc29saW5lIy9AMzAuMzc0NSw2My42NzMyNiw2eg> accessed 25 April 2022.

[14] Usman Ansari, 'Honda Says Fuel From Shell, Total and PSO Harms Engines' (*Car Spirit PK,* 2 November 2017) <https://carspiritpk.com/honda-says-fuel-shell-total-pso-harms-engines/> accessed 23 April 2022.

– (i) these lower-quality fuels kept auto manufacturers from releasing more fuel-efficient engines and catalytic converters in Pakistan, and (ii) lower concentrated fuels lead to higher emissions of dangerous gases and chemicals, such as benzene and sulphur dioxide.[15] Only after the complaint did the Ministry of Energy issue new metal level standards in fuel at 40 mg/litre maximum.[16] Importantly, under section 15(2) Pakistan Environmental Protection Act 1997 ('**PEPA**'),[17] the Pakistan Environmental Protection Agency is solely responsible for setting fuel standards. However, in recent years, the Ministry of Energy has issued Research Octane Number standards.[18] This encroaches on the powers vested in PEPA and goes against the trichotomy of powers.[19]

Following this complaint, Pakistan State Oil, a state-owned petroleum company, made a statement claiming that their "products fully adhere to official specifications laid out by the Ministry of Energy", though later testing by OGRA on samples proved that there were excessive chemicals in the samples.[20] Notably, neither the sections of the Petroleum Exploration and

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[15] Haider and others (n 10) 2384.

[16] Monitoring Report, 'Govt Finally Imposes Restrictions on Metal Contents Level in Gasoline Products' (*Pt Profit*, 26 May 2018) <https://profit.pakistantoday.com.pk/2018/05/26/govt-finally-imposes-restrictions-on-metal-contents-level-in-gasoline-products/> accessed 18 October 2022.

[17] Pakistan Environmental Protection Act 1997, s 15(2) (hereinafter 'PEPA').

[18] Monitoring Report (n 16). The Research Octane Number is used to measure a fuel's ability to combust – the higher the number, the less easy the fuel is able to auto-ignite and the higher the quality of the fuel is.

[19] *Syed Mushahid Shah v Federal Investment Agency [2017]* SCMR 1218.

[20] Usman Ansari, 'OGRA Tests Confirm Petrol in Pakistan is Harmful for Engines, Environment & Health' (*Car Spirit PK*, 13 March 2018) <https://carspiritpk.com/ogra-tests-confirm-petrol-in-pakistan-is-harmful-for-engines/#:~:text=According%20to%20a%20media%20outlet,as%20well%20as%20human%20health> accessed 23 April 2022.

Production Policy 2012[21] of the Ministry of Energy nor that of the Technical Standards For Oil Refineries 2009[22] of OGRA mention any standards or procedures for testing fuel quality. Furthermore, the HydroCarbon Development Institute of Pakistan ('**HDIP**') is the only government institute responsible for testing fuel. Its objectives are provided in the HydroCarbon Development Institute Act 2006.[23] Section 4(p) states that "[an aim of HDIP is] to establish laboratories, facilities and infrastructure anywhere in Pakistan, and to take all steps and measures which are necessary to promote, implement and undertake assignments and tasks to fulfil its objectives and functions".[24] This is extremely vague – it establishes no timeline and/or method or standard by which fuel tests should be conducted, nor does it set up a body responsible for laboratory testing. This means that an objective analysis cannot be made comparing other countries' fuel quality. However, an inference may be drawn, keeping the Honda Atlas scandal in mind. OGRA only took heed of the fuel tampering by large corporations after Honda Atlas took it upon itself to test and send samples to the authority. Thus, one may conclude that OGRA does not test fuel often enough or at all.

Consequently, this area of policy and procedure requires more transparency and stricter guidelines. These may help in pursuing consumer protection litigation where a customer of these large fuel companies has been wronged. Also, in lowering emissions levels, testing would lead to the regulation of the

[21] Petroleum Exploration and Production Policy 2012.
[22] Technical Standards For Oil Refineries 2009.
[23] HydroCarbon Development Institute Act 2006.
[24] *Ibid.,* s 4(p).

standards mentioned above, which ensures accountability of large fuel companies, and cleaner-burning fuels, leading to fewer emissions.

2.2. Fuel Quality Standards from Third Countries

Contrary to the lack of a specific fuel quality policy in Pakistan, many countries have introduced and implemented guidelines and legislation on fuel quality. Although there are no standardised international standards for 'fuel', countries have taken the liberty to break this component down into different fuel derivatives, including gasoline, diesel and autogas, which are subsequently subdivided into separate fuel specifications. The reason for doing so is that depending on the particular fuel derivative, the composition of its parameters can be very different. Thus, regulating fuel as a whole would be unrealistic, if not impossible.

2.2.1. The EU

As fuel qualities have a bearing on fuel trading within the EU, matters relating to fuel quality fall within the ambit of the Common Commercial Policy, over which the EU enjoys exclusive competence.[25] Subsequently, under the principle of uniformity and to safeguard the European Single Market, the

[25] Consolidated versions of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ L 326/47, art. 3. See also, Luigi Lo Piparo and others, 'Support Study on the Evaluation of Article 7A of the Fuel Quality Directive and Assessment of Approaches to Reduce Greenhouse Gas Emissions from Transport Fuels: Final Report' [2021] 1, 119 <https://www.technopolis-group.com/wp-content/uploads/2021/12/ML0521317ENN.en_.pdf> accessed 26 April 2022 and Opinion 1/75 of 11 November 1975 [1975] ECR 1975-01355.

European Commission (the '**Commission**'), rather than the EU Member States, proposes fuel quality standards.

Within the EU, both directives, where compliance is mandated, and the European Standards, where compliance is voluntary, establish the guidelines for fuel quality.

a. Directives

The primary European directive regulating fuel qualities is the Fuel Quality Directive (the '**FQD**'),[26] which details binding harmonised standards for all EU Member States. Such standards regulate the qualities of petrol, diesel, biofuel and gas-oil and are determined by assessing the impact of fuel derivatives on the environment and human health. Apart from requiring Member States to comply with the specific fuel quality standards provided in Annexes I and II,[27] the FQD also imposes a duty on Member States to oblige fuel suppliers to monitor and report on life cycle GHG emissions from automotive fuel[28] and to reduce these emissions by no less than 6% by the end of 2020.[29] Member States must also report fuel quality data from the previous year.[30]

[26] Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions and amending Council Directive 1999/32/EC as regards the specification of fuel used by inland waterway vessels and repealing Directive 93/12/EEC [2009] OJ L 140/88.

[27] *Ibid.*, arts. 1(3) and 4, Annexes I and II.

[28] *Ibid.*, art. 7a(1).

[29] *Ibid.*, art. 7(a)(2)(a).

[30] *Ibid.*, art. 8(3).

The FQD is supplemented by two other directives – Directive 2015/652 and Directive 2018/2001. Directive 2015/652 acts as an extension of the FQD and specifies detailed methods to calculate GHG emissions stemming from fuels,[31] as well as the mode that Member States should use when reporting their fuel quality data from the previous calendar year.[32] In contrast, Directive 2018/2001 complements the FQD and regulates the usage of renewable energy sources for energy generation. It establishes an overall target for the share of energy via renewable energy sources in the gross final energy consumption that is to be achieved in 2030[33] and requires Member States to maintain national contributions to achieve this target. Finally, as well as laying out specifications, such as the regulation on calculating the GHG emissions from burning biofuel, the Directive also obliges Member States to require fuel suppliers to comply with the target that the shares of renewable energy sources be at least 14% of the final energy consumption in the transport sector.[34]

b. European Standards

European Standards are standardised technical guidelines established by the European Committee for Standardization ('**CEN**'). Unlike the binding nature

[31] Council Directive (EU) 2015/652 of 20 April 2015 laying down calculation methods and reporting requirements pursuant to Directive 98/70/EC of the European Parliament and of the Council relating to the quality of petrol and diesel fuels [2015] OJ L 107/26, Annexes I and II.

[32] *Ibid.*, art. 5, Annexes III and IV.

[33] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L 328/82, art. 3(1).

[34] *Ibid.*, art. 25.

of EU Directives, these standards apply to the Member States of the CEN – all EU and European Free Trade Association Member States and other countries which are part of the European Single Market,[35] and do not mandate compliance unless the standards are ratified and incorporated into domestic legislation.[36]

Currently, there are three European Standards on fuel quality – EN 228 for gasoline, EN 589 for automotive LPG and EN 590 for diesel fuel,[37] each of which provides detailed lower and upper limits regarding specific properties of the fuel derivative.

3. AUTO MANUFACTURER GUIDELINES

3.1 Pakistan

Auto manufacturer guidelines for emissions standards in Pakistan primarily operate under the Motor Vehicle Rules 1969.[38] Section 158 explains the rules for vehicular noise production. It states, "Every motor vehicle shall be so constructed and maintained as not to cause undue noise when in motion".[39] This makes no mention of the maximum level of decibels of sound allowed,

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35 European Committee for Standardization, 'European Standardization' (*European Standardization*) <https://www.cencenelec.eu/european-standardization/> accessed 25 April 2022.

36 Hart Energy, 'International Fuel Quality Standards and Their Implications for Australian Standards' 1, 10 <https://www.scribd.com/document/338533924/international-feul-quality-standards-pdf> accessed 25 April 2022.

37 DieselNet, 'EU: Fuels' (*Fuels: European Union*) <https://dieselnet.com/standards/eu/fuel.php#:~:text=Three%20standards%20cover%20automotive%20fuels,mandatory%20reductions%20in%20sulfur%20content> accessed 25 April 2022.

38 Motor Vehicle Rules 1969 (hereinafter 'MVR 1969').

39 *Ibid.*, s 158.

nor does it make any distinction between urban and highway noise pollution ambits. Section 163 has to do with emissions. It reads, "[e]very motor vehicle shall be so constructed, shall be maintained in such condition, and shall be so driven, and used that there not be emitted therefrom any smoke visible vapour, grit, spark, ashes, cinders, or oily substance".[40] These guidelines grant copious interpretative leeway to automotive manufacturers, as they do not mention measurable statistics or industry standards. Cases like the Volkswagen ('**VW**') DieselGate scandal are a testament to what happens when a government takes a lenient approach to automotive manufacturing guidelines and their enforcement. In 2015, the United States Environmental Protection Agency issued a notice of violation to VW under the Clean Air Act,[41] in which the automobile manufacturer had intentionally programmed their turbocharged direct injection engines to only switch on emission controls during laboratory-controlled emission tests. This meant that outside of lab conditions, these vehicles released illegal levels of GHG; VW was therefore sued for billions. Unlike America, Pakistan has no definite detailed standards for exhausts, fuel systems and crankcases (the three primary sources of automobile emissions)[42] nor lab testing standards equivalent to the United States Environmental Protection Agency's,[43] which could be catastrophic for the environment.

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[40] *Ibid.*, s 163.

[41] Clean Air Act 2015.

[42] John H. Johnson, 'Automotive Emissions' in Ann Y. Watson, Richard R. Bates, Donald Kennedy (eds), *Air Pollution, the Automobile, and Public Health* (National Academy Press 1988).

[43] The United States Environmental Protection Agency, 'Engine Certification & Compliance Testing' (*The United States Environmental Protection Agency*, 22 February 2022) <https://www.epa.gov/vehicle-and-fuel-emissions-testing/engine-certification-and-compliance-testing> accessed 7 September 2022.

Recently, the Government of Pakistan introduced the Automotive Development Policy 2016 (**'ADP'**).[44] The policy details an action plan for compliance with international standards by requiring an amendment to Motor Vehicle Rules 1969[45] and an introduction of this legislation on a provincial level. Notable standards advocated by the policy are a vehicle certification system in Pakistan based on various United Nations regulations,[46] the creation of an emissions standard for vehicles and the formulation of tests that can be used to see whether vehicles fall within international emissions standards.[47] Notably, corresponding legislation, namely the Motor Vehicles Ordinance 1965 (which reiterates the above-mentioned section of the Motor Vehicle Rules 1969 in Chapter VI "Construction, Equipment and Maintenance of Motor Vehicles"),[48] Motor Vehicle Rules 1969,[49] and the Highway Safety Ordinance 2000 (which, in Section 50, reiterates the above-mentioned section of the Motor Vehicle Rules 1969)[50] would be reviewed and amended.[51] The proposed policy represents a massive leap forward, as more definite parameters are provided – this ensures greater transparency in how emissions testing in Pakistan is taking place and what identifiers the testing is based on, leading to more efficient testing. The ADP has also mandated the creation of a new government institution called the Pakistan Automotive Institute ('**PAI**'), whose sole responsibility will be to test automotive products "from

[44] Auto Development Policy 2016-2021 (hereinafter 'ADP 2016-2021').
[45] *Ibid.*, 73
[46] *Ibid.*, 74-5.
[47] *Ibid.*
[48] Motor Vehicles Ordinance 1965, Chapter VI.
[49] MVR 1969 (n 38).
[50] National Highway Safety Ordinance 2000, s 50.
[51] ADP 2016-2021 (n 44) 74.

the raw materials up to the finished product"[52] to ascertain the products' quality. The PAI will achieve this through a merger with the Automotive Testing and Training Centre, another government institution which the ADP itself concedes has remained inactive in its role of research in the automotive sector.[53]

The creation of this new body, along with the fact that the ADP also aims to introduce the Pakistan New Car Assessment Program,[54] leads to the conclusion that emission standards have a bright future in Pakistan, especially if they can adopt international standards, such as those mentioned in the subsequent sections. The only recommendation is that upon implementation, the policy takes special measures to curtail GHG emissions from motorcycles and auto-rickshaws. The two-stroke engines in these vehicles are much less efficient than their four-stroke counterparts, leading to greater amounts of dangerous emissions[55] – two-stroke engines create 5,500 parts per million (ppm) of hydrocarbon compared to 4 stroke engines' 850 ppm.[56] Moreover, 74% of all registered vehicles in Pakistan in 2018 were motorcycles,[57] and from 2018 to 2019, there was an 11.5% increase in motorcycles in Pakistan.[58]

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52 *Ibid.*, 79.

53 *Ibid.*

54 *Ibid.*

55 Habib and others (n 6) 3.

56 Koshy and Mehrunkar, 'Two Stroke or Four Stroke?' *Down To Earth* (India, 31 January 1993).

57 Habib and others (n 6) 3.

58 CEIC, 'Pakistan Number of Registered Vehicles' (*CEIC*, 1 December 2019) <https://www.ceicdata.com/en/indicator/pakistan/number-of-registered-vehicles#:~:text=Pakistan%20Number%20of%20Registered%20Vehicles%20data%20is%20updated%20yearly%2C%20averaging,of%201%2C411%2C226%20Unit%20in%201990> accessed 24 April 2022 (hereinafter 'CEIC I').

Thus, the need to shift motorcycle production from two-stroke to four-stroke is extremely dire. This is a much-anticipated development, as, among its recommendations, the 2007 Punjab Clean Air Commission proposed shifting auto-rickshaws from two-stroke to four-stroke engines.[59] Hence, when the ADP is brought to full force, one of the first orders of business should be the amendment or introduction of legislation to ban the production of two-stroke engine motorbikes and auto-rickshaws.

3.2. International Standards

Pakistan's import of carbon dioxide amounts to 2.26% of its domestic emissions,[60] with its manufacturing industry and construction sub-sector contributing the most emissions within the energy sector.[61] Therefore, the transformation of the automotive manufacturing industry to be more environmentally-friendly is pertinent – adopting guidelines on the use of recycled materials in automotive manufacturing would help reduce GHG emissions from the industry.

3.2.1. Recycled materials used in manufacturing

There are no universal international standards for recycled materials used in car manufacturing, with specifications differing from country to country.

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59 *Mansoor Ali Shah v Pakistan* (n 8).

60 Hannah Ritchie, 'How do CO2 Emissions Compare when We Adjust for Trade?' (*Our World in Data*, 7 October 2019) <https://ourworldindata.org/consumption-based-co2> accessed 26 April 2022.

61 Government of Pakistan, 'Updated Nationally Determined Contributions 2021' (2021) 1, 73 <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Pakistan%20First/Pakistan%20Updated%20NDC%202021.pdf> accessed 26 April 2022.

Although Pakistan does not currently require automotive manufacturers to utilise a certain percentage of recycled materials in the manufacturing process, it could refer to third countries' requirements, such as those of the EU, and tailor them to its purpose.

a. The EU

Numerous European directives and decisions have entered into force to deal with recycled materials from end-of-life vehicles. It was estimated that out of the 6.9 million tonnes of waste generated from end-of-life vehicles in 2019, 95.1% of the scrapped materials were reused and recovered, with a further 89.6% reused and recycled.[62]

This subsection will consider the End-of-Life Vehicles Directive (the '**ELV Directive**'), Directive 2005/64/EC and Commission Decision 2005/293/EC.

i. The ELV Directive

The ELV Directive was adopted in 1997 to combat the waste generated from end-of-life vehicles, as a considerable percentage of these scrapped wastes could be reused, recovered and recycled. It establishes the requirements for the reusability and/or recyclability and reusability and/or recoverability of passenger vehicles and small trucks. Under Article 7(2), the Directive specifies two deadlines for satisfying specific percentages of reuse and recovery, and reuse and recycling. Notably, it requires the percentage of reuse and recovery

[62] Eurostat, 'End-of-Life Vehicle Statistics' (*Statistics Explained*, November 2021) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=End-of-life_vehicle_statistics> accessed 26 April 2022.

and the percentage of reuse and recycling for end-of-life vehicles to be at least 85% and 80%, respectively, by the average weight per vehicle by 1 January 2006, and at least 95% and 85% respectively by the average weight per vehicle by 1 January 2015.[63] However, the Directive does not dictate how Member States should meet these targets, other than mandating them to undertake measures to promote the reusability, recovery and recycling ('**3R's**') of end-of-life vehicle materials. Therefore, the ELV Directive's wording is vague enough to allow Member States the policy freedom to meet the targets described above whilst being specific enough to ensure the outcome would be satisfied.

On top of the 3R's targets, the ELV Directive bans certain hazardous substances from vehicles.[64] Member States must also report to the Commission triennially regarding end-of-life vehicles and their dismantlement.[65] Finally, to minimise the impacts that end-of-life vehicles have on the environment, the Directive establishes guidelines on the collection and treatment of end-of-life vehicles[66] and requires Member States to comply with minimum technical standards in the treatment of these vehicles under Annex I.[67] These thus allow the minimisation of adverse impacts from end-of-life vehicles.

ii. *Directive 2005/64/EC*

63 Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of life vehicles – Commission Statements [2000] OJ L 269/34, arts. 7(2)(a) and 7(2)(b).

64 *Ibid.*, art. 4(2)(a).

65 *Ibid.*, art. 9.

66 *Ibid.*, arts. 5-6.

67 Ibid., arts. 6(1) and (3) and Annex I.

Pursuant to and complementing the ELV Directive, Directive 2005/64/EC specifies the requirements for reusing, recycling and recovering vehicles with up to eight passenger seats and small vehicles used for carrying goods and with a maximum weight of no more than 3.5 metric tonnes.[68] Similar to the ELV Directive, although it establishes the minimum percentage by mass by which these vehicles are to be reusable and/or recyclable and reusable and/or recoverable, Directive 2005/64/EC does not govern how Member States should accomplish these targets. This offers Member States sufficient policy space, whilst the explicit targets clarify what Member States are to achieve.

The Directive also obliges Member States to confer EC type-approval to vehicle types that comply with the 3R's requirements as stipulated in Annex I[69] upon the satisfaction of a preliminary assessment of the automotive manufacturer.[70] In prescribing the documentation model format for the preliminary assessment and the type-approval, instead of giving Member States free-rein over their content and format, the Directive offers a better sense of consistency and predictability to the Member States, thus enabling a better execution of the Directive and its objectives.

iii. Commission Decision of 2005/293/EC

Commission Decision of 2005/293/EC seeks to clarify the Commission's obligation to monitor Member States' compliance with the 3R's targets established in Article 7(2) of the ELV Directive. In doing so, the Decision

[68] Directive 2005/64/EC of the European Parliament and of the Council of 26 October 2005 on the type-approval of motor vehicles with regard to their reusability, recyclability and recoverability and amending Council Directive 70/156/EEC [2005] OJ L 310/10, art. 1 and Annex I.

[69] *Ibid.*, art. 5.

[70] *Ibid.*, art. 6.

establishes tables that Member States are required to complete in its Annex. It details how they are to be filled in, how Member States should calculate the ELV Directive Article 7(2) targets and the deadlines for their submissions.[71] This provides policy clarity to Member States.

4. LEGISLATION ON EMISSIONS

4.1. Legislation in Pakistan

Pakistan has no effective policing of emissions from vehicles. Regular testing of vehicles on the road is necessary to ascertain real-world emission values and ensure that inefficient vehicles are taken off the road. Currently, the standards for vehicle emissions testing in Pakistan are those mentioned above, in that no visible soot, oil or smoke, etc, should come out of a vehicle's exhaust.[72] This standard is vague and fails to establish a timeline for yearly emissions testing or mandate traffic police officers to carry special apparatus to test vehicle emissions. Between December 1990 and 2019, a total of 6.2 million cars were registered in Pakistan,[73] and the Euro V standard for new motor vehicles was only introduced in 2020.[74] However, there is no testing to ensure that older cars comply with the Euro II standard, the oldest standard to be introduced in Pakistan. This harms the environment because non-compliant vehicles burn fuel less efficiently. Section 15(2) PEPA is relevant here – it empowers the Federal Agency to require any motor vehicle to install pollution control devices to meet National Environmental Quality

[71] 2005/293/EC: Commission Decision of 1 April 2005 laying down detailed rules on the monitoring of the reuse/recovery and reuse/recycling targets set out in Directive 2000/53/EC of the European Parliament and the Council on end-of-life vehicles (notified under document number C(2004) 2849) [2005] OJ L 94/30, arts. 1-3 and Annex.

[72] MVR 1969 (n 38) s 163.

[73] CEIC (n 58).

[74] Kiani 2020 (n 11).

Standards,[75] thus allowing for the enforcement of lower vehicle emissions and their compliance. Moreover, PEPA forbids the driving or use of such vehicles[76] and is ahead of its time in policing non-compliance through the imposition of levies[77] and penalties.[78]

The problem is that PEPA's implementation has been left to the provincial governments, which have yet to implement any of these recommendations. An illustration of this is the city of Lahore, which has an extremely dangerous Air Quality Index ('**AQI**') score of 148 or higher.[79] In the past, when the AQI was alarmingly high, rather than adopting a long-term solution mandating the installation of emission control devices as promulgated in Section 199 PEPA,[80] the provincial government chose to ban Euro II fuel in the city.[81] Consequently, there is a dire need for provincial governments to incorporate PEPA as it is the only workable solution to vehicle testing; as mentioned above, there are more than 6.2 million Euro II-compliant vehicles in Pakistan, and the only way to control their emissions is to incorporate federal legislation, like PEPA, into provincial laws. Notably, the ADP, in its action plan, also aims to introduce a vehicle emission testing system.[82] This, coupled with PEPA, could create a tight-knit policing system that could, to a large

[75] PEPA (n 17) s 15(2).
[76] *Ibid.,* s 15(1).
[77] *Ibid.*, s 11.
[78] *Ibid.*, s 17.
[79] IQAir, 'Air Quality Index In Lahore' (*IQAir,* 26 April 2022) <https://www.iqair.com/pakistan/punjab/lahore> accessed 26 April 2022.
[80] PEPA (n 17) s 199.
[81] The Express Tribune, 'Euro-2 Fuel Banned in Lahore to Combat Worsening Air Pollution' *The Express Tribune* (Lahore, 16 November 2021).
[82] ADP 2016-2021 (n 44) 75.

extent, cull extreme environmental effects brought on by obsolete vehicles on the road.

Legislative development regarding Pakistan's freight economy is also required. 96% of all cargo in Pakistan is transported by road,[83] with most transporters overloading their trucks to increase profits.[84] The overloading of commercial vehicles leads to a 74.13% increase in carbon dioxide emissions.[85] The policy response has been to issue fines under the Tenth Schedule of the National Highway Safety Ordinance 2000.[86] These fines are in the thousands of rupees, which is not severe enough to cull the malpractice of overloading. Although freights are at the very edifice of any good economy, the environmental effects of the current freight system in Pakistan are ominous. Therefore, Pakistan desperately needs intermodal freight transport, which has proven to be much more environmentally efficient.[87]

4.2. International Legislation on Fuel Economy

Fuel economy legislation is vital to combat climate change, as it reduces fuel consumption and vehicular GHG emissions.[88] Presently, however, no

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[83] Government of Pakistan, 'Pakistan Economic Survey' (first published 2008, Ministry Of Finance) 224.

[84] Omer Masood Qureishi, Sajad Afzal Afridi, Muhammad Ahmed Hafeez, 'Geometric Loading Patterns of Goods Vehicles in Pakistan' [2019] <https://adcr.com.pk/wp-content/uploads/2020/08/NTRC_Report_24_April_19-IST-online.pdf> accessed 24 April 2022.

[85] Wahid Wahyudi, and others, 'Effect of Overloading Freight Vehicles to Increased Carbon Dioxide Emissions' (2014) 3 IRJES 30, 36–7.

[86] National Highway Safety Ordinance 2000 (n 50) schedule 10.

[87] Ekki Kreutzberger and others, 'Is Intermodal Freight Transport more Environmentally Friendly than All-road Freight Transport? A Review.' (2003) 7 Nectar Conference 1, 19.

[88] Fuel economy measures the distance that an automobile has travelled using a particular amount of fuel. Often, automobile manufacturers will measure this parameter in lab conditions, using tests that may be stipulated by law. The better a car's fuel economy is, the

standardised international guidelines on fuel economy exist, with countries devising their own standards and approaches for measuring fuel efficiency.[89] For example, in the EU, Directive 1999/94/EC mandates the display of each vehicle model's fuel economy and carbon dioxide emissions[90] and a poster containing its specific carbon dioxide emissions data.[91] Correspondingly, Regulation (EU) 2019/631 imposes EU fleet-wide carbon dioxide emissions targets for 2020, 2025, and 2030[92] and specific emissions targets for different vehicle categories that are to be met by automotive manufacturers.[93] Member States, automotive manufacturers and the Commission must also comply with various monitoring, reporting, and publishing obligations, with excess emissions premiums imposed on automotive manufacturers whose average specific GHG emissions surpass the stipulated targets.[94] Crucially, the Commission must publish an annual list indicating manufacturers' performance in reaching their designated emission targets.[95] These requirements promote transparency and accountability. The Regulation also acknowledges the importance of eco-innovation and allows the Commission

more distance it can travel within a given amount of fuel. Therefore, a car with good fuel economy will use less fuel and emit fewer emissions, compared to a car with bad fuel economy.

89 A.E. Atabani and others, 'A Review on Global Fuel Economy Standards, Labels and Technologies in the Transportation Sector' (2011) 15 Renewable and Sustainable Energy Reviews 4586.

90 Directive 1999/94/EC of the European Parliament and of the Council of 13 December 1999 relating to the availability of consumer information on fuel economy and CO2 emissions in respect of the marketing of new passenger cars [2000] OJ L 12/16, art. 3.

91 *Ibid.*, art. 5.

92 Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 is setting CO2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) No 510/2011 [2019] OJ L 111/13, art. 1.

93 *Ibid.*, art. 4.

94 *Ibid.*, art. 8.

95 *Ibid.*, art. 9.

to introduce implementing acts to approve environment-related innovative technologies.[96] Finally, the Commission must keep abreast with real-world GHG emissions data and evaluate the Regulation's effectiveness. This enables the EU to be flexible in its fuel economy, and GHG emissions policy, which will be crucial as the fight against climate change is continuously evolving.

5. THE UNFCCC AND PAKISTAN'S ELECTRIC VEHICLE ('EV') POLICY

EVs are electricity-powered vehicles.[97] An increasing focus on environmental protection and sustainable development has led to the growing global usage of EVs. In 2020, over 10 million EVs were estimated to be on the road globally – this was a 43% increase compared to data from 2019.[98] 2020 also saw a 70% increase in worldwide EV sales share to 4.6%, with car registrations from approximately 3 million new EVs.[99]

Although EVs are not the cure-all for climate change,[100] they are still widely promoted to reduce oil use and combat climate change.[101] This is due to their

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96 *Ibid.*, art. 11(2).

97 Australian Renewable Energy Agency, 'Electric Vehicles' (*Australian Renewable Energy Agency*) <https://arena.gov.au/renewable-energy/electric-vehicles/> accessed 24 April 2022.

98 International Energy Agency, 'Global EV Outlook 2021' [2021] Global EV Outlook 1, 19.

99 *Ibid.*

100 Saheli Roy Choudhury, 'Are Electric Cars 'Green'? The Answer is Yes, But It's Complicated' (*CNBC*, 26 July 2021) <https://www.cnbc.com/2021/07/26/lifetime-emissions-of-evs-are-lower-than-gasoline-cars-experts-say.html> accessed 24 April 2022.

101 Hiroko Tabuchi and Brad Plumer, 'How Green are Electric Vehicles?' (*The New York Times*, 2 March 2 2021) <https://www.nytimes.com/2021/03/02/climate/electric-vehicles-environment.html> accessed 24 April 2022.

relatively lower fuel and maintenance costs than non-EVs, reducing fuel dependency. Additionally, battery-powered EVs emit no tailpipe GHGs when operating and, thus, are more environmentally friendly than fossil fuel-powered vehicles.[102]

5.1. The EV Policy in Pakistan

There is already a considerable market for hybrid cars in Pakistan,[103] with high potential existing in the market for bringing EVs into the country.[104] Consequently, the Automotive Industry Development and Export Policy 2021-26 ('**AIDEP 2021-26**')[105] was officially introduced in 2021, forming the bulk of the EV policy in Pakistan.

The AIDEP 2021-26 addresses the promotion of environmentally friendly technologies in the transport sector, including EVs and hybrid vehicles. In promoting the use of EVs, the policy adopts a multifaceted approach by providing tax and non-tax incentives for the manufacturing of EVs[106] and an action plan on how infrastructure is to be developed to promote the use of EVs[107] – these are incorporated from the National Electrical Vehicle Policy

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102 Alternative Fuels Data Center, 'Emissions from Hybrid and Plug-in Electric Vehicles' (*Alternative Fuels Data Center*) <https://afdc.energy.gov/vehicles/electric_emissions.html> accessed 26 April 2022.

103 Isha Lodhi, 'Future of Electric Vehicles in Pakistan' (*TechJuice*, 1 June 2017) <https://www.techjuice.pk/future-of-electric-vehicles-in-pakistan/> accessed 26 April 2022.

104 *Ibid.*

105 Auto Industry Development and Export Policy 2021-26 (hereinafter 'AIDEP 2021-26').

106 *Ibid.*, 31-2.

107 *Ibid.*, 33-4.

2019.[108] Correspondingly, the AIDEP 2021-26 action plan aims to increase the accessibility of charging infrastructure by installing and employing various charging facilities and technologies.[109]

5.2. Relationship between the Pakistani EV Policy and the UNFCCC

The UNFCCC, to which Pakistan is a Party, was adopted in 1992 to stabilise atmospheric GHG levels in such a way that would prevent anthropogenic climate change.[110] Although not legally binding, the treaty plays a significant role in the global fight against climate change – not only does it establish the Conference of the Parties, which meets annually, but it also forms the backbone for subsequent climate change treaties and protocols, including the Kyoto Protocol and the Paris Agreement. Whilst the UNFCCC neither establishes specific emission targets nor specifies what it means by "at a level that would prevent dangerous anthropogenic interference with the climate system",[111] it creates commitments for Parties to the Convention in Article 4. These apply to all Parties of the Convention.[112]

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[108] See Ministry of Climate Change, Government of Pakistan, 'National Electric Vehicle Policy' [2019] 1 <https://policy.asiapacificenergy.org/sites/default/files/National%20Electric%20Vehicle%20Policy%20%282019%29.pdf> accessed 25 April 2022 (hereinafter 'NEVP'). It is important to note, however, that progressive targets on the usage of certain EV types under the NEVP were not incorporated into the AIEDP 2021-26.

[109] *Ibid.*, 32-3.

[110] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 U.N.T.S. 107 (UNFCCC), art. 2 (hereinafter 'UNFCCC').

[111] *Ibid.*

[112] Patricia Birnie, Alan Boyle and Catherine Redgwell, 'The Climate Change Regime,' *International Law and the Environment* (3rd edn, Oxford University Press 2009) 356, 359.

Although the AIDEP 2021-26 does not explicitly mention the UNFCCC, references are made to mitigating the adverse impacts of climate change in the policy's stated objectives.[113] This mirrors Article 4(1)(f) of the UNFCCC, where Parties to the Convention must take into consideration climate change concerns in their "social, economic and environmental policies and actions".[114] Similarly, Article 4(1)(c) relates to the sector-wide promotion and cooperation "in the development, application and diffusion"[115] of technology and other aspects that relate to the mitigation of anthropogenic GHG emissions. This is reflected in the AIDEP 2021-26, where the Pakistani government seeks to promote EVs, hybrid vehicles and other new technologies in the transport sector by initiating tax and other incentives[116] and developing the necessary infrastructure to accommodate these new technologies.[117] In this regard, the EV policy in Pakistan, by extension of the AIDEP 2021-26, introduces specific proposals that reflect the more general UNFCCC Article 4 obligations.

5.3. Generation of Electricity – Renewable Energy?

Successful implementation of the AIDEP 2021-26 and the EV policy will create a higher electricity demand, which will have to be satisfied. Yet, additional generation of electricity through the burning of fossil fuels would defeat the purpose of both the policy and the UNFCCC. This raises the

[113] AIDEP 2021-26 (n 105) 30. Such an objective is also reflected in the Updated National Determined Contributions 2021 and the Living Indus Initiative.
[114] UNFCCC (n 110) art. 4(1)(f).
[115] *Ibid.*, art 4(1)(c).
[116] AIDEP 2021-26 (n 105) 31-2.
[117] *Ibid.*, 33.

question of how the increased demand for electricity can be satisfied. The answer to this lies in renewable energy.

In 2020, fossil fuels generated 57% of all energy from Pakistan's total installed power generation capacity, with 31% generated via hydropower.[118] This contrasts the percentages of electricity generated through renewable energy sources and nuclear power, which were a mere 4% and 8%, respectively.[119] Thus, there is potential for developing and using other renewable energy sources to generate electricity.

Considering these low percentages, it may be inferred that the low use of renewable resources to generate electricity is due to the unavailability of renewable energy. Yet, existing literature has concluded that Pakistan is a renewable resources-rich country, with hydropower, wind, solar and biomass as the main harnessable renewable energy sources.[120] In this respect, the Pakistani Government has acknowledged the importance of generating electricity through renewable resources. Under the Alternate Renewable Energy Policy 2019, the government has set a target of a minimum of 20% generation by capacity via renewable energy sources by 2025 and a minimum of 30% by 2030[121] and has sought approval from various organisations,

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118 International Trade Administration, 'Pakistan – Renewable Energy' (*International Trade Administration*, 27 January 2022) <https://www.trade.gov/country-commercial-guides/pakistan-renewable-energy#:~:text=According%20to%20National%20Electric%20Power,and%208%20percent%20from%20nuclear>, accessed 26 April 2022.

119 *Ibid.*

120 See Abdul Raheem and others, 'Renewable Energy Deployment to Combat Energy Crisis in Pakistan' (2016) 6 Energy, Sustainability and Society 1, 2.

121 Alternative and Renewable Energy Policy 2019, 2, 6 (hereinafter 'AREP 2019').

including the World Bank,[122] in the country's transition to renewable energy. It has also launched multiple initiatives to promote the use of renewable energy, including financial incentives like tax exemptions,[123] exchange protection,[124] and debt financing.[125]

5.4 The Efficacy of the EV Policy in Pakistan

At first glance, given the considerations mentioned in Section 5.3 of the article, the EV policy would help Pakistan achieve its goals of reducing fuel dependency and transitioning to renewable energy. However, the EV policy may be less efficient and popular given (i) the realities of the Pakistani environment and (ii) the adverse environmental impacts that EVs pose.

5.4.1. The Reality of Pakistan's Environment

Pakistan is deemed a lower-middle-income country[126] with a poor investment climate[127] and infrastructure quality[128] and an ongoing and deepening energy

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122 Support provided by the World Bank to the Government of Pakistan is evident in the former loaning $100 million to finance the Sindh Solar Energy project in January 2019 and an approval of $450million in September 2020 to finance the Khyber Pakhtunkhwa Hydropower and Renewable Energy Development Project.

123 AREP 2019 (n 121) 26-7.

124 *Ibid.*, 27.

125 *Ibid.*

126 World Bank, 'Pakistan' (*The World Bank*) <https://data.worldbank.org/country/pakistan> accessed 26 April 2022.

127 ANI, 'Pakistan Foreign Investment slip 33 PC in February' (*ANI*, 18 March 2022) <https://www.aninews.in/news/world/asia/pakistan-foreign-investment-slip-33-pc-in-february20220318192008/#:~:text=The%20Pakistani%20publication%20added%20that,218.7m%20in%20December%202021> accessed 26 April 2022.

128 Asian Development Bank, 'Economic Corridor Development in Pakistan: Concept, Framework, and Case Studies' [2022] 1, 35

crisis caused by inadequate energy generation and procurement from cheap sources.[129] This crisis has been exacerbated by increasing fuel prices due to the war in Ukraine, leading to hours-long electricity shutdowns across the country.[130] Months into the Ukrainian-Russian war, there are no signs that it will be alleviated or end soon. Therefore, at least in the short run, Pakistan's energy crisis is unlikely to be quickly relieved. These problems are relevant as the execution of the EV policy largely hinges on a good investment climate, infrastructure, and electricity availability. For example, the 85 charging points in motorways across Pakistan[131] are largely performative, and any electricity shutdown from the energy crisis will prevent efficient EV charging. Moreover, the high summer temperatures in Pakistan require frequent use of air-conditioners inside EVs – this decreases the car's driving range and leads to higher EV charging frequencies. Thus, unless these problems are resolved, owning an EV rather than a conventional vehicle may be more cumbersome, and promoting these vehicles could further worsen the energy crisis.

Furthermore, in 2019, the average monthly income in Pakistan was 21,326 PKR.[132] Yet, the average price of a car in Pakistan is estimated to be 4 million

<https://www.adb.org/sites/default/files/publication/768396/economic-corridor-development-pakistan.pdf>.

129 Abdul Rehman and others, 'Energy Crisis in Pakistan and Economic Progress: Decoupling the Impact of Coal Energy Consumption in Power and Brick Kilns' (2021) 9 Mathematics 1, 13.

130 Faseeh Mangi, 'Pakistan is Cutting Electricity to Homes, Industry. It Can't Afford Fuel' (*NDTV*, 18 April 2022) <https://www.ndtv.com/world-news/cash-strapped-pakistan-cuts-power-to-households-on-fuel-shortage-2897642> accessed 26 April 2022.

131 Jawwad Rizvi, '85 Locations Identified for EV Charging Stations at Motorways' (*The News International*, 4 January 2022) <https://www.thenews.com.pk/print/922257-85-locations-identified-for-ev-charging-stations-at-motorways> accessed 26 April 2022.

132 CEIC, 'Pakistan Average Monthly Wages' (*CEIC*) <https://www.ceicdata.com/en/pakistan/average-monthly-wages-by-industry/average-monthly-

PKR,[133] with EVs costing 140% more than non-EVs.[134] Consequently, the unaffordability of EVs will pose an extremely high barrier for an ordinary Pakistani earning an average wage to purchase an EV. Even if an average Pakistani purchases an EV, they will still face significant problems with a lack of electricity to charge their car. The National Electric Power Regulatory Authority's approval of an increase of power tariffs to 4.8 PKR per unit of electricity[135] does not help either.

Consequently, the realities in Pakistan may disincentivise people to switch to an EV, despite the incentives included in the EV policy. It would also seem counterintuitive to introduce a policy encouraging EV use when the country is already plagued with electricity shortages.

5.4.2. Environmentally-(Un)friendliness of EVs

Whilst EVs are generally regarded as more environmentally friendly than their conventional counterparts, there are also significant environmental issues to consider when implementing an EV policy.

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wages#:~:text=Pakistan%20Average%20Monthly%20Wages%20data,to%202019%2C%20with%209%20observations> accessed 26 April 2022.

133 Waleed Shah, 'Here's How Much Car Prices Have Gone up in Pakistan since 2015 [Updated]' (*Propakistani*, 22 January 2022) <https://propakistani.pk/2022/01/22/heres-how-much-car-prices-have-gone-up-in-pakistan-since-2015/> accessed 26 April 2022.

134 Shahbaz Rana, 'Electric Vehicles 140% Pricier than Conventional Cars' (*The Express Tribune*, 19 January 2021) <https://tribune.com.pk/story/2280470/evs-pricier-than-conventional-cars> accessed 26 April 2022.

135 FP Explainers, 'Explained: After Political Upheaval, Why Pakistan is Facing an Energy Crisis' (*Firstpost*, 19 April 2022) <https://www.firstpost.com/world/explained-after-political-upheaval-why-pakistan-is-facing-an-energy-crisis-10573781.html> accessed 26 April 2022.

The EV manufacturing process has high life-cycle emissions and is energy-intensive[136] due to its lithium-ion battery.[137] Depending on the type of lithium compounds extracted and lithium sources, the GHG emissions per tonne of lithium extracted can range from 0.08g to 20.4 tonnes of carbon dioxide.[138] High temperatures of 800 to 1000 degrees Celsius are necessary for the calcination of cathode materials made from lithium.[139] Therefore, to be cost-effective, cheap but highly-polluting fuels, such as coal and fossil fuel, are used to reach such high temperatures.[140]

Crucially, although EVs are powered by electricity, the latter may be generated by burning fossil fuels.[141] Thus, the environmental benefits stemming from introducing an EV policy will depend on the type of power grid used in the country. In Pakistan, the majority of electricity is generated from fossil fuels. This may cancel out any environmental benefits stemming from the EV policy, thus undermining its effectiveness.

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136 Choudhury (n 100).

137 The International Council on Clean Transportation, 'Effects of Battery Manufacturing on Electric Vehicle Life-Cycle Greenhouse Gas Emissions' [2018] 1, 5 <https://theicct.org/sites/default/files/publications/EV-life-cycle-GHG_ICCT-Briefing_09022018_vF.pdf> accessed 26 April 2022.

138 Jarod C. Kelly and others, 'Energy, Greenhouse Gas, and Water Life Cycle Analysis of Lithium Carbonate and Lithium Hydroxide Monohydrate from Brine and Ore Resources and Their Use in Lithium Ion Battery Cathodes and Lithium Ion Batteries' (2021) 174 Resources, Conservation and Recycling 1, 11.

139 Kanthal, 'Lithium-Ion Battery Production' (*Kanthal*) <https://www.kanthal.com/en/applications/energyrenewablesustainability/lithium-ion-battery-production/> accessed 26 April 2022.

140 Iris Crawford, Shao-Horn Yang and David Keith, 'How much CO2 is Emitted by Manufacturing Batteries?' (*MIT | Climate Portal*, 16 February 2022) <https://climate.mit.edu/ask-mit/how-much-co2-emitted-manufacturing-batteries> accessed 26 April 2022.

141 Joseph Glandorf, 'On the move: Unpacking the Challenges and Opportunities of Electric Vehicles' (*EESI*, 5 November 2020) <https://www.eesi.org/articles/view/on-the-move-unpacking-the-challenges-and-opportunities-of-electric-vehicles> accessed 26 April 2022.

5.5. The Way Forward

Given the harms of EVs identified above, other alternatives can be used to power vehicles, including hydrogen, solar and biofuel. However, unlike EVs, vehicles powered by these sources have yet to be materialised or popularised in mainstream vehicle markets. Hence, within the transport sector, despite the misgivings in their manufacturing process, EVs are still currently the best way to move away from conventional vehicles.

Consequently, introducing the EV policy in Pakistan is still a step forward. However, for the policy to have maximum efficacy, the Pakistani Government must address the inaccessible pricing of cars, the country's high carbon power grid system, and energy shortages. Creating a friendly investment climate will encourage domestic and foreign investments in Pakistan's renewable energy and EV markets. This will have knock-on and spill-over effects, as investments, especially foreign direct investments, are often regarded as drivers for economic growth, development,[142] and higher employment and wages.[143]

6. CONCLUSION

Moving into the second decade of the 21st century, Pakistan has made massive progress in its automotive policies. However, legislation in Pakistan has not

[142] Division for Employment Analysis and Policy, Directorate for Employment, Labour and Social Affairs, 'The Impact of Foreign Direct Investment on Wages and Working Conditions' [2008] OECD Social, Employment and Migration Working Papers 1.

[143] Galina Hale and Mingzhi Xu, 'FDI Effects on the Labor Market of Host Countries' [2016] Federal Reserve Bank of San Francisco, Working Paper Series 1, 2.

consistently been implemented nor developed to encompass all vehicles. Regulating the fuel standards used in Pakistan will require legislation inspiration, which can be drawn from standards and regulations, such as the European Standards and the EU directives analysed in Section 2.2 of the article – this will allow Pakistan to make up for lost time. Pakistan will also benefit from adopting regulations on end-of-life vehicles, similar to those considered in Section 3.2 of the article, to transition into entirely built vehicle production. To improve its vehicle emissions standards, Pakistan will need to prioritise the provincial enactment and incorporation of federal legislation, such as PEPA and the ADP, insofar as the regulation and production of vehicles are concerned. There is also an urgent need to conduct further research in the field of vehicular emissions, as shown by the discussion on Pakistan's motorcycle policy, freight economy and EV policy. Simply put, Pakistan's legislation in many areas does not reflect reality. Finally, there is a need to increase the automotive sector's efficiency. This cannot be achieved by merely focusing on a particular vehicle class, such as promoting EV use.

Ultimately, Pakistan is on the right track towards lowering vehicle emissions. However, to make further progress in reducing GHG emissions, Pakistan must introduce and enforce automotive legislation of a more aggressive nature.

CLIMATE CHANGE IMPACTS: AN ANALYSIS ON THE POSSIBILITY OF LEGAL LIABILITY ON THE PARENT DUE TO THE ACTIONS OF ITS FOREIGN SUBSIDIARY

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ABSTRACT

In the last three decades, several subsidiaries of Western incorporated parent companies have caused and exacerbated climate change impacts in many poor countries. These climate change impacts have also intensified environmental disasters in these countries. Therefore, it is essential that parent companies of these subsidiaries are also held responsible for the impact of climate change. This article highlights legal cases from various Western courts to form a jurisprudential picture to explore the evolution of legal doctrines to hold parent companies accountable for the environmental harm caused by their subsidiaries overseas. In this process, intricacies of the legal tests and national laws are also perused to understand the implications of this evolution in law on the internal functioning and corporate structure of parent companies so that parent companies ensure compliance to the current legal apparatus. Lastly, the economic impact of the changing business milieu owing to the intensification of legal responsibility on parent companies shall also be evaluated to elucidate the loss of financial competitive advantage for the parent companies.

KEYWORDS: Climate Change, Company Law, Corporate Veil, Chandler v Cape, Parent Companies, Due Diligence.

1. INTRODUCTION

In company law, a company and its subsidiaries are generally considered separate legal entities, a concept termed as the 'corporate veil'. Because of this, parent companies escape liability arising from the actions of their subsidiaries as the 'corporate veil' cannot be pierced. Multinational companies are structured in such a way that parent companies and subsidiaries are incorporated in different nation states.[144] One example of this is British Petroleum, which owns 1,200 subsidiaries in different jurisdictions.[145]

This separate legal personality is often used to the parent company's benefit: subsidiaries incorporated in low-income, investment-hungry countries cause detrimental impacts on their natural environment and, by extension, the citizens dependent upon those national environments. At the same time, parent companies of these subsidiaries are mostly incorporated in the European Union ('**EU**'), the United States of America ('**USA**'), Australia, New Zealand and the United Kingdom ('**UK**'). Therefore, because of their separate legal personality, parent companies cannot be held responsible for the damage to the natural environment and to local citizens, which means that courts in the aforementioned States deprive plaintiffs of the poorer States of their right of access to justice.[146]

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144 Michael Anderson, 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer?' (2002) 41 Washburn Law Journal 399, 401.

145 P. I. Blumberg, 'Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity' (2004) 24 Hastings International and Comparative Law Review 297, 304.

146 Claire Bright and Benedict S. Wray, 'Corporations and Social environmental Justice: The Role of Private International Law' (2018) European University Institute Law Working Paper 2/2012 < Corporations and Social Environmental Justice: The Role of Private International Law by Claire Bright, Benedict S. Wray :: SSRN> accessed 16 May 2022.

In light of this context, the aim of this article is twofold. First, it argues that the evolving global and national jurisprudence is strong enough to implicate Western parent companies in their own countries. For this purpose, the case law of different Western jurisdictions shall be evaluated to comb out basic principles which have the potential to hold parent companies responsible for the environmentally hazardous actions of their foreign subsidiaries. This article will then analyse the impacts of potential liability on parent companies by outlining the effects on the internal structure and working of parent companies so that they can legally comply with evolving jurisprudence of law. Moreover, the external business implications on parent companies for non–compliance to the changes in evolving jurisprudence shall also be analysed.

2. ESTABLISHMENT OF LIABILITY ON PARENT COMPANIES

Historically, Western courts have been considerably reluctant to hold parent companies accountable. The *Chevron* case[147] is a prime example of this reluctance. In this case, the indigenous community native to the Amazon rainforest suffered from oil contamination to their river caused by Chevron's subsidiary which operated in Ecuador. The Ecuadorian courts provided considerable relief to the plaintiffs. The community filed a subsequent plea for the enforcement of the relief in Canada against a Chevron subsidiary which was incorporated in Canada. In response to this plea, the Court of Appeal for Ontario held that the Ecuadorian plaintiffs could not enforce the original judgment against Chevron's Canadian subsidiary as the subsidiary had

147 *Pacific Coast Federation of Fishermen's Associations v. Chevron* (2018) CGC – 18 – 571285

no links with Chevron which operated in Ecuador. Thus, the plea of the plaintiffs in Canada was unsuccessful.[148]

The reluctance of Western courts is further exhibited in USA where doctrines such as *forum non conveniens*, i.e., a discretionary power allowing courts to dismiss a case where another court is better suited to hear the case, continue to reign supreme and cause problems in terms of enforcement against a parent. As a result, domestic plaintiffs are provided an advantage over foreign plaintiffs as the victims of the environmental effects of subsidiaries are considered outside the jurisdiction of the courts in the country of the incorporation of the parent.[149]

2.1. Evolution of Legal Jurisprudence on Parent Company Liability

However, various cases have increasingly emerged which make parent companies liable for the actions of their subsidiaries. The pioneer case in this context was *Chandler v Cape plc*[150] wherein the English Royal Court of Justice held that the extension of the duty of care to a parent can arise if the following three conditions are met: the businesses of the parent company and subsidiary are relatively similar; the parent might or should have knowledge of the safety

148 Tracy Hester, 'Transnational Liability in U.S. Courts for Environmental Harms Abroad' (2018) 64 Rocky Mountain Mineral Law Institute Annual Proceedings 27-1 < Transnational Liability in U.S. Courts for Environmental Harms Abroad by Tracy Hester SSRN> accessed 16 May 2022.

149 Ibid.

150 *Chandler v Cape plc* [2012] 1 WLR 3111

concerns arising from the industry; and that there was considerable evidence to demonstrate that the parent did intervene in the affairs of the subsidiary.[151]

Similarly, in *United States v. Bestfoods*,[152] the U.S. Supreme Court stated in a nuanced fashion that a parent can only be held liable for the conduct of the subsidiary for emitting hazardous wastes if the corporate veil is pierced. However, at the same time, the Court reasoned that if a parent is actively participating in the operations of a facility, they can be held liable for the conduct of the subsidiary. The Court further noted that an agency relationship can also arise between the subsidiary and the parent which can make the parent liable if there is a 'consensual' transaction rather than a 'controlling' transaction.[153] In this context, a consensual transaction entails mutual cooperation between the parent company and the subsidiary on an equal footing; in contrast, a controlling transaction would entail greater coercive control from the parent company.

2.2. Assumption of Responsibility Test

Emerging jurisprudence in various countries highlights an increasing willingness of courts to implicate parent companies for the harmful environmental effects of their subsidiaries. In *Lungowe v Vedanta Resources*,[154] the UK Supreme Court coined the 'assumption of responsibility' test, whereby the responsibility of a parent over a subsidiary depends upon the

151 Ibid. [80]

152 *United States v. Bestfoods* 524 U.S. 51 (1998)

153 *Kingston Dry Dock Co. v. Lake Champlain Transp. Co., 31 F.2d,* 265 (2d Cir. 1929) 267; *Bendix Corp. v. Adams* (1980) 610 P.2d 24, 32-33

154 *Lungowe v Vedanta Resources plc* [2019] UKSC 20 [51], [52], [53], [63]

extent to which the parent company assumes control of the management and operations of the subsidiary. This would require an active interest in the management, supervision, and training of the subsidiary company beyond merely issuing guidelines on the policy materials of the parent company. In essence, the parent company would need to ensure that the subsidiary does not substantially contribute to environmental disasters.

Moreover, if the parent company portrays, in these policy materials, to have undertaken the responsibility of such active management of the environmental concerns of the subsidiary, and proceeds to fall short of said portrayed responsibility, the parent company can be held liable. It must also be noted that if businesses are established along functional lines with a parallel corporate structure, and they have considerable input from the functional head, these businesses can be considered as a 'group business' which might attract the liability of the parent company over its subsidiaries.[155]

2.3. How the Level of Control can be Determined

One of the most important cases in establishing a level of control and responsibility of the parent company over its foreign subsidiary is *His Royal Highness Okpabi v Royal Dutch Shell plc*.[156] In this case, the Nigerian subsidiary of Royal Dutch Shell ('RDS'), a UK-based holding company, caused significant environmental damage in the surrounding areas of its operations due to oil spills. The UK Supreme Court claimed that it is extremely important to peruse the relevant documents, especially the internal

[155] Ibid.

[156] *His Royal Highness Okpabi v Royal Dutch Shell plc* [2021] UKSC 3

documents of the company, when establishing a particular style of relationship between the subsidiary and the parent company. If the relationship is considered to be an operational one, a link can be established through the operational documents of the company to decide the level of engagement between the subsidiary and the parent company.

The Court further reasoned that *de facto* control is an inherent part of the literal meaning of the term 'subsidiary'. The Court maintained that the establishment of the element of 'control' must be considered in relation to the 'relevant activity'. This is important because there is no general doctrine within tort law which recognises the responsibility of the parent company over the subsidiary.[157] In light of these factors, the Court decided that RDS was an autonomous company with considerable separation and size, and the operations of RDS were limited to their financial matters.[158]

Similarly, in the *AAA v Unilever* case,[159] the UK Court of Appeals further elaborated that the 'level of control' will not normally arise if the subsidiary handles the management structure on its own, along with incorporating relevant safety policies in line with local conditions and regulations.[160] Therefore, it was noted that the liability of the parent company extends to the actions of its subsidiary if organisational, legal, and economic linkages between the two entities can be established. For this purpose, there should be a holistic analysis of these linkages while determining the liability for the

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157 Ibid. [143] – [149]

158 Claire Bright, "The Civil Liability of the Parent for the Acts or Omissions of Its Subsidiary: The Example of the Shell Cases in the UK and in the Netherlands' in *A. Bonfanti* (eds), *Business and Human Rights in Europe* (1st edn, Routledge 2018) 217 – 219.

159 *AAA v Unilever plc* [2018] EWCA Civ 1532

160 Ibid. [37]

parent company. Generally, a full disclosure is required to establish the link between the parent company and the subsidiary.[161] Thus, the determination of a 'level of control' requires considerable divulgence into the functioning of companies which is exhibited through various forms of evidence which can ultimately reflect a certain pattern of control of the parent company over the subsidiary to hold the parent company liable.

2.4. The Liberal (Pro-Environment) View of the Dutch Courts

The Dutch courts are among the most progressive in holding parent companies accountable for environmental damage caused by their subsidiaries. The *Urgenda Foundation* case[162] is one of the most important cases in establishing the liability of a parent company over its subsidiary. The Dutch Supreme Court reasoned that the duty of care of a parent company extends to all climate change obligations of its subsidiaries. Moreover, the Court stipulated that those obligations extend to the end user of the company's value chain, as the end user is the most vulnerable to the harmful effects of carbon emissions according to the United Nations Guiding Principles ('**UNGP**'). The level of obligation will be proportional to the control and influence a parent company exercises in relation to the carbon emissions which impact the end user. Along with its directors, a parent company can be held liable for the lack of effective implementation of an internal policy which can be used to manage and mitigate the adverse effects of climate change.[163]

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161 *Tesco Stores Ltd v. Mastercard Inc* [2015] EWHC 1145 [73]

162 *Urgenda Foundation v The State of The Netherlands* (2018) HAZA C/09/00456689

163 Ibid.

The implication of directors along with the company is necessary as the lack of an effective system to counter climate change within the corporate structure of the parent company can cause the company considerable financial damage and subject the directors to derivative claims. This line of thinking is in consonance with the reasoning of *Antuzis*,[164] wherein it was held that a company's directors can be held liable for the damage to the reputation of the company by acting in a manner which is wilfully ignorant, crass and careless.[165] Thus, a parent company can suffer a loss of goodwill due to breaches of environmental law of its foreign subsidiary. It necessarily follows that subsequent human rights issues in developing countries caused by these subsidiaries can be attributed to the parent company and, by extension, its directors.

In *Akpan v. Royal Dutch Shell*,[166] the Dutch courts further examined the actions of RDS' subsidiary, Shell Petroleum Development Company of Nigeria ('**SPDC**') over the damages caused by their oil spills. The Dutch Court reasoned that it has jurisdiction over claims against both RDS and SPDC. However, the claims against both companies must be intertwined, and must have a legal basis under the law of the parent company's country of incorporation. Article 7(1) of the Dutch Code of Civil Procedure allowed the Court to hear connected claims to the extent that reasons of efficiency require a joint hearing. The Court considered it totally irrelevant whether the liability would be established once the judicial proceedings come into play.[167]

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[164] *Antuzis v DJ Houghton* [2019] EWHC 843

[165] Ibid. [121]

[166] *Akpan and others v Royal Dutch Shell and Shell Petroleum Development Company of Nigeria Ltd,* [2013] LJN BY9854

[167] Ibid.

Lastly, the expansive attitude of the Dutch courts towards jurisdiction is further manifested by the fact that even non-governmental organisations ('**NGOs**') which are not impacted by the effects of the actions of the subsidiary, can bring claims if they fit within the ambit of their advocacy. The claim must fit within the statutory objective of the NGO and must fulfil the criteria of standing under the relevant law of the country.[168] Therefore, it can be claimed that Dutch courts are one of the most environmentally progressive courts in the Western world in holding a parent liable for the actions of foreign subsidiaries, provided the requisite legal requirements are clearly fulfilled to bring a claim within the ambit of the Dutch courts.

2.5. What is an Appropriate Jurisdiction?

The question of jurisdiction is a central concern in transnational corporate responsibility. A determination of jurisdiction requires a court to consider several factors, such as the irreconcilability of multiple judgments if a case is pursued in two jurisdictions; the places where the incident occurred; the ease with which the case can be pursued between the two different jurisdictions; and the substantive access to justice in terms of economic and technical circumstances across the different jurisdictions.[169] Considering these complex issues, the UK Supreme Court held that a case could be heard in the UK if the country was the most convenient forum to hear the case, and if the case was triable in the UK. Moreover, if there is a risk that absence of legal and

[168] Nicola Jägers, Katinka Jesse and Jonathan Verschuuren, The Future of Corporate Liability for Extraterritorial Human Rights Abuses, (2014) 107 AJIL Unbound 36, 40 – 41.
[169] *Lungowe v Vedanta Resources plc [2019] UKSC 20* [79] – [87]

financial apparatus would restrict justice in countries like Zambia, the convenient forum would then be in the UK.[170]

In terms of establishing jurisdiction in foreign countries, the importance of local law remains intact in all cases. A German court did not entertain a case under its jurisdiction, although for a different subject matter unrelated to climate change, since the local law of limitations in Pakistan did not allow filing of the case after two years.[171] This example highlights that if any local law bars filing of a case for an environmentally hazardous activity due to procedural matters, the relevant foreign court should consider the technicalities of the procedural law of that country where hazardous activity occurred. In essence, the determination of jurisdiction over environmentally hazardous activities which have occurred overseas requires the courts in the parent company`s jurisdiction to undertake complex legal analysis which involves multiple considerations.

2.6. Foreign Cubed Cases

The Dutch Courts are also more receptive to hear 'foreign cubed' cases. This is best demonstrated by the Palestinian Doctors cases where the Dutch Court allowed the application against unnamed perpetrators who were instrumental in the incarceration of the Palestinian doctors for eight years in Libya under false charges. There was no manifest link with the Netherlands, but the Court invoked the doctrine of *forum necessitates*, i.e., court exercising jurisdiction on

[170] Anita Lloyd, 'UK Supreme Court Considering Parent Liability for Environmental Harm Caused by Overseas Subsidiaries' (f*rESH*, 1 May 2019) <www.freshlawblog.com/2019/05/01/uk-supreme-court-considering-parent-company-liability-for-environmental-harm-caused-by-overseas-subsidiaries/> accessed 16 May 2022.

[171] *Jaber and others v. KiK Textilien and Non-Food GmbH* (2015) Case No. 7 O 95/15

account of no other appropriate court able to exercise jurisdiction, for allowing the case within the jurisdiction of the Netherlands.[172] Despite this case's irrelevance to climate change, the holding does imply that those human rights which can be tarnished due to climate change impact might be justiciable in a Dutch court as *forum necessitates* even if a parent company or its subsidiary are not incorporated in the Netherlands. This supports the notion that environmental risks created by corporate entities are directly linked to human rights issues such as the right to life, the right to health, and the right to shelter. Thus, cases of the Western courts which outline the legal contours to hold the parent company under their jurisdiction liable for violations of human rights committed overseas, can also make the parent company liable for the climate change impacts of its foreign subsidiaries.

3. IMPLICATIONS OF THE LIABILITY ON PARENT COMPANIES

Despite the increased judicial scrutiny and development of these legal principles, companies continue to be involved in causing extremely disastrous impacts on the natural environment. Cargill, the largest privately held corporation in the United States in terms of revenue, has caused numerous environmental problems, including the spillage of wastes from hog farms and fertiliser plants into nearby streams. Cargill has also caused significant carbon monoxide emissions, and is reported to have been growing crops in protected areas in the Ivory Coast.[173] Large oil and gas companies including

[172] Editorial, 'Dutch court compensates Palestinian for Libya jail' *BBC* (London, 28th March 2012) < https://www.bbc.com/news/world-middle-east-17537597> accessed 26th October 2022

[173] Lucy Jordan and others, 'Cargill: the company feeding the world by helping destroy the planet', (Unearthed, 25th November 2020), <https://unearthed.greenpeace.org/2020/11/25/cargill-deforestation-agriculture-history-

ExxonMobil, Shell, Chevron, BP, and Total have also invested over one billion US dollars in three years on misleading climate-related branding and lobbying.[174] Crab fishing waters have also been forced to close down due to the creation of algae blooms in the warming Pacific waters, which was caused by the activities of oil companies. This harm to food sources in turn threatens the livelihoods of many people.[175]

Considering the jurisprudence that has evolved, there are several legal doctrines that can be invoked to hold a parent company liable for the environmental impacts of its subsidiaries. Therefore, parent companies are exposed to a risk of protracted litigation for the environmentally hazardous activities of their subsidiaries. However, parent companies are still not taking reasonable precautions to reduce their impacts on climate change which can result in legal liability for them sooner or later. As a result, the implications of evolving legal principles as well as subsequent domestic legal developments are that parent companies must take considerable precautions to escape tentative legal liability and business contraction in future.

3.1. Compliance with National Laws

pollution/?fbclid=IwAR0fZGlfDVCqs5s8XhqDmGuJanFh7ddDg98pkmMCewiyOBIjxlaUSOBoz?> accessed 17th May 2022.

174 Editorial, 'InfluenceMap report alleges misleading climate-related branding & lobbying by major oil & gas companies; BP, Chevron, ExxonMobil, Shell & Total responded' (*Business and Human Rights Resource Center*, 6th May 2019) <https://www.business-humanrights.org/en/latest-news/influencemap-report-alleges-misleading-climate-related-branding-lobbying-by-major-oil-gas-companies-bp-chevron-exxonmobil-shell-total-responded/> accessed 17th May 2022.

175 David Hasemyer, 'Crab Fishers Sue Fossil Fuel Industry Over Climate Change Damage', (*Inside Climate News*, 14th November 2018) < https://insideclimatenews.org/news/14112018/crab-fishermen-climate-change-lawsuit-fossil-fuel-companies-ocean-algae-neurotoxin-fishery-closure/> accessed 17th May 2022.

A company must establish effective monitoring systems in accordance with national legislation and regulations to avoid liability. This is crucial, as directors can be subject to considerable statutory obligations and duties under both environmental law and human rights law, as the latter inevitably applies to the former. Evolving jurisprudence on the precautionary principle in environmental law has materialised into statutory legal obligations. This fact can be illustrated in the Spanish Environmental Liability Law of 2007 which extends the liability to a parent company if an environmental harm is caused to the people by the subsidiary company.[176] Accordingly, parent companies incorporated in Spain must conduct environmental impact assessments ('**EIAs**') to prevent liability for future environmental harms. Similarly, the Austrian National Contact Point also requires that human rights in all manifestations must be respected by the parent in relation to the subsidiaries.[177]

The French vigilance plan is the most elaborate as it applies to both direct and indirect foreign subsidiaries.[178] The vigilance plan requires parent companies to conduct risk mapping to identify, analyse, and prioritise risks associated with certain business activities. Procedures must also be set within companies for the assessment of suppliers, subcontractors, and subsidiaries. Control procedures need to be present for these harms, and a system of alerts

176 'Law 26/2007, Of October 23, Environmental Responsibility' (*Global Regulations*, 23rd October, 2022) < https://libguides.swansea.ac.uk/oscola/websites#:~:text=To%20reference%20information%20from%20a%20website%2Cyou%20should%20include%20the,the%20URL%20and%20accessed%20date.&text=Format%3A%20Author%2C%20'%20Webpage',)%20accessed%20date.> accessed 5th November 2022.

177 David W. Rivkin and others, *UN Guiding Principles on Business and Human Rights at 10; The Impact of the UNGPs on Courts and Judicial Mechanisms* (*Debevoise and Plimpton* 2021) .79

178 European Parliament, *Corporate Social Responsibility (CSR) and its implementation into EU Company law*, (PE 658.541, 2020) 27

and mechanisms should be in place which realise and monitor these risks.[179] Thus, in line with this vigilance plan, a French court required that Total, the oil company, must comply with the vigilance plans to escape any kind of liability.[180]

Furthermore, parent companies must also consider their corporate structure in which there is no control of a subsidiary and the location of said subsidiary is separated from the parent company. The shareholding in the subsidiary should not be in any preferential manner nor intermediate subsidiaries should be created.[181] Different people should sit at different boards of directors for separate representation of each company and there must be fewer guarantees as well as indemnities of the subsidiary on behalf of the parent company.[182] Local systems must be designed to gauge environmental impacts, and the management should be operated in such a way that the parent company has absolutely no involvement in the process.[183] Thus, these processes allow the Western parents to actively comply with the emerging legal doctrines in relation to environmental jurisprudence.

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[179] Vidal SS and Charles Dauthier, 'French Companies Must Show Duty of Care for Human and Environmental Rights' (*Morgan Lewis*, 3rd April 2017) <https://www.morganlewis.com/pubs/2017/04/french-companies-must-show-duty-of-care-for-human-and-environmental-rights> accessed May 17, 2022

[180] 'Climate Change Litigation against Total: A First Victory for the NGOs and Local Authorities' (*Business & Human Rights Resource Centre*, 11th February 2021) <https://www.business-humanrights.org/en/latest-news/climate-change-litigation-against-total-a-first-victory-for-the-ngos-and-local-authorities/> accessed May 17, 2022.

[181] 'Oil and Gas: Parent Liability for the Tortious Acts of Its Subsidiary - Practical Considerations' (*Fieldfisher,* 8 August 2018) <https://www.fieldfisher.com/en/insights/oil-and-gas-parent-company-liability-for-the-tortious-acts-of-its-subsidiary-practical-considerations> accessed May 17, 2022.

[182] Ibid.

[183] Ibid.

3.2. Codes of Conduct

Designing 'Codes of Conduct' is very important for parent companies to create a framework that prevents future liability claims. In these codes, parent companies should not use language which portrays the imminence of the obligations or the mandatory effect of the promises. In 2013, the Ontario Supreme Court held that public statements are important evidence to establish the link of control between the parent and subsidiary.[184] These codes influence legal standards as they have a substantial impact on the legislation and regulations that are shaped in the future as well as the widespread corporate practices that become commercial norms.[185] For example, Shell's Code of Conduct is important as the oil company has a history of 'importing' their Codes of Conduct into their contracts and thus creating a 'pre–sourcing' approach to make them legally binding. In this way, Shell's contractors and suppliers take responsibility in case of non–compliance with the Voluntary Principles of Security and Human Rights, which are embedded in their Codes of Conduct. Thus, Shell creates a legal obligation through importing voluntary principles into their contracts and adds to the industry norms which can eventually take the shape of soft law. [186]

Moreover, parent companies must avoid the use of words that create legally binding obligations, such as 'shall', when drafting their Codes of Conduct.[187]

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184 *Choc v Hudbay Minerals Inc*., 2013 ONSC 141 [69]; Sarah Rathke, 'Problem with Palm Oil (Or Next Wave of Supply Chain Class Actions?)' (*The National Law Review*, 9 December 2015) <www.natlawreview.com/article/problem-palm-oil-or-next-wave-supply-chain-class-actions> accessed 16 May 2022.

185 Lara Blecher, 'Codes of Conduct: The Trojan Horse of International Human Rights Law' (2017) 38 Comp Lab L & Pol'y J 437, 473.

186 Ibid, 449.

187 Ibid, 450.

In *Choc v. Hudbay Minerals Inc.*,[188] the parent company was considered responsible because of the public statements it made regarding its obligations to the human rights of the employees of the subsidiaries. These statements established a relationship of proximity between the parent company and the subsidiary, and by extension, between the parent company and the local community. As a result, these statements resulted in increased expectations from the parent company in relation to those actions of its subsidiary which had detrimental impacts to the environment of the local community.[189]

3.3. What does Compliance with International Standards Entail for the Companies?

To protect parent companies from liability arising from third-party activities, the UNGPs require parent companies conduct due diligence of their conduct and take reasonable steps to prevent and mitigate potentially adverse environmental impacts.[190] Therefore, companies should conduct human rights due diligence to assess potential and actual human rights impacts; track responses; and integrate information from all stakeholders to protect people from any kind of human rights violations which might occur incidental to environmental impacts of the parent's operations.[191]

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[188] Ibid.

[189] Ibid. 465.

[190] Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights' (2017) 28:3 The European Journal of International Law 899, 903 – 905.

[191] Working Group on Business and Human Rights, 'Corporate human rights due diligence – identifying and leveraging emerging practices' (*OHCHR*, 2011) <OHCHR | Corporate human rights due diligence – identifying and leveraging emerging practices> accessed 17th May 2022

There is also emerging consensus that the UNGPs must be observed in the internal and external behaviours of the company. The UNGPs are increasingly recognised as soft law in the domain of corporate responsibility.[192] The presence of a smart mix of soft law and hard law is important as it will allow a bottom-up approach to raise awareness and include the input of all relevant stakeholders for greater corporate accountability.[193] Thus, in the *Milieudefensie* judgment, the Dutch District Court of The Hague relied on the UNGPs to interpret RDS's duty of care under the Dutch Civil Code and considered it authoritative soft–law as well.[194] Moreover, in *Milieudefensi*e, the Dutch court frames the UNGPs as the global standard for conduct which corporations should adhere to, a perspective also in line with the Organization for Economic Co-operation and Development ('**OECD**') Guidelines for Multinational Enterprises. There is also an evolving consensus of the legal value of the OECD Guidelines amongst various multinational companies. Similarly, most national commissions consider the OECD Guidelines as one of the standards which need to be complied with, and that parent companies should give evidence that the OECD Guidelines have been incorporated into the various processes of companies.[195]

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[192] Chiara Macchi and Josephine van Zeben, 'Business and human rights implications of climate change litigation: Milieudefensie et al. v Royal Dutch Shell' (2021) 30:3 Review of European, Comparative and International Environmental Law <Business and human rights implications of climate change litigation: Milieudefensie et al. v Royal Dutch Shell - Macchi - 2021 - Review of European, Comparative & amp; International Environmental Law - Wiley Online Library> accessed 16 May 2022, 412

[193] Jennifer Zerk and Kumaravadivel Guruparan, 'Influence of soft law grows in international governance' (*Chatham House – International Affairs Think Tank*, 21 June 2021) <www.chathamhouse.org/2021/06/influence-soft-law-grows-international-governance> accessed 16 May 2022.

[194] *Milieudefensie et al. v Royal Dutch Shell* PLC (2021) HAZA C/09/571932

[195] Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights' (2017) 28:3 The European Journal of International Law 899, 953.

To comply with UNGPs and OECD Guidelines, it is essential that parent companies change the way their processes are constituted to incorporate greater due diligence obligations. For instance, Schneider Electric, a French multinational company, constituted a committee of representatives of its CSR, purchasing, environment, and safety teams, to identify risks in all their companies in terms of environment as well as all the streams of supply chain whether downstream or upstream. They also identified risks according to the geographical locations giving more importance to places which are more prone to environmental disasters. In terms of on-site audits, second and third risk assessments were established if the conditions were not improved after the preventive measures implemented during the first risk assessments. [196]

In sum, to prevent environmental damage and thus liability, parent companies must identify relevant risks; devise processes for assessment of these risks; tailor actions to mitigate or prevent these risks; establish a risk alert system; and create a monitoring system to evaluate the effectiveness of these systems.

3.4. Climate Change Due Diligence

OECD and UNGP Guidelines are in line with the emerging concept of 'climate due diligence' which require corporations to assess and address climate change risks through vigilance planning, corporate reporting, external communication, and investment decisions. In this context, larger companies

[196] Brabant S and Elsa Savourey, 'French Law on the Corporate Duty of Vigilance' (*Dossier thématique,* 14 December 2017) <http://www.bhrinlaw.org/frenchcorporatedutylaw_articles.pdf> accessed May 16, 2022

have a more serious effect on the natural environment due to the size of their operations; thus, they have greater disclosure responsibilities of their emissions.[197] Nevertheless, the UNGPs still require smaller corporate entities to effectively comply equally with climate change due diligence obligations. However, highly hazardous sectors such as oil producing companies and the agricultural sector have enhanced responsibilities to conduct risk assessments of the effects of their actions on climate change, as well as subsequent effects on workers, communities, and local natural resources. For this purpose, Human Rights Impact Assessments ('**HRIAs**') and Environmental and Social Impact Assessments ('**ESIAs**') must be integrated to understand the complex nature of the threat to the environment.[198] In this regard, it is important to note that environmental harms such as oil spills and deforestation are connected with climate change impacts such as greenhouse gas emissions. Forests act as carbon sinks that absorb greenhouse gases; similarly, the risk of oil spills increases with climate change especially in low lying coastal areas.[199] Moreover, oil spills and greenhouse emission both also considerably impact human rights such as the rights to food and health.

Environmental Management Systems ('**EMS**') can be important tools for parent companies to escape liability for their conduct. This system would, *inter alia*, require training and education of employees as well as the consultation of various stakeholders in finding effective cost-efficient

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197 Chiara Macchi, 'The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of Climate Due Diligence' (2001) 6(1) Business and Human Rights Journal 93, 99 – 101.

198 Ibid, 108 – 115.

199 Audrey Carlton, 'Why More Climate Change Means More Oil Spills' *Vice* (New York, 14th September 2021) <https://www.vice.com/en/article/93y4ba/why-more-climate-change-means-more-oil-spills> accessed 5th November 2022.

measures to reduce harms to the environment. Contingency plans would also be required to control and reduce the serious environmental damages that might be caused along with efficient reporting mechanisms for such harms.[200] It must be noted that if the parent company seeks any defence from such due diligence obligations, they must provide evidence that they established 'due care' to identify and avoid damage. Consequently, in environmental litigation, the burden of proof is placed on the parent company to establish that they met their due diligence obligations rather than merely asserting that they were not involved in the environmental management of the subsidiary. [201]

3.5. Regional Regulation

Another important implication for parent companies pursuant to the evolving jurisprudence in transnational corporate accountability is regulation at the regional level. Regulations such as the European Union's Environmental Liability Directives ('**ELD**') of 2004 impact Member States' corporate entities in relation to their working and structure. For example, the 'polluter-pays' principle within the ELD requires that industrial activities that are inherently dangerous to the environment will be held 'strictly liable' to the polluter,[202] requiring a causal link between the activity and the company without the need to establish culpability. The ELD further enunciates that a

[200] FIDH – International Federation of Human Rights, 'Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms' (May 2016) <www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf> accessed 16 May 2022, 393 – 395.

[201] Office of the United Nations High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights' (2011) < GuidingPrinciplesBusinessHR_EN.pdf (ohchr.org)> accessed 16 May 2022, 76 – 77.

[202] Consolidate Version of the Treaty on the Functioning of European Union [2012] OJ C 326/49 (TEFU) Article 191(2)

damaged environment must be physically reinstated by the culpable party through the replacement of similar or identical natural components in terms of primary remediation. If this is not possible, a complementary remediation with similar primary measures elsewhere is required to cover the interim losses until the environment is fully restored. Therefore, parent companies should adopt a precautionary approach which encompasses the establishment of an EMS and the investment in technologies which reduce the environmental risks of their subsidiaries.[203] Moreover, parent companies like oil producing companies should also establish a financial guarantee for their subsidiaries which involve high-volume hydraulic fracturing to remedy any foreseeable liability. [204]

3.6. Business Implications

The increase in liability on parent companies may ultimately lead to a significant loss of investment. Due to the increase in costs from more stringent environmental regulation, investment capital tends to move from high-risk industries to other industries which are presumably less environmentally dangerous. For example, Norway's Sovereign Wealth Fund decided to sell its stakes in 23 palm oil companies and reduce its investments in the palm oil industry by 40% in 2013 due to the concerns of increased

[203] European Commission, 'Report from the Commission to the European Parliament and to the Council pursuant to Article 18(2) of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage' (April 2016) < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0121&from=EN> accessed 17th May 2022, 7 -14.

[204] European Commission Recommendation 2014/70/EU of 22 January 2014 on minimum principles for the exploration and production of hydrocarbons (such as shale gas) using high-volume hydraulic fracturing [2014] OJ L39/72 para 12.

deforestation. Thus, loss of access to the global capital markets due to the abuse of local people and environment can cause a major concern for industries that are inherently associated with environmental risks, such as the palm oil industry.[205]

Furthermore, access to global capital markets and international funding for parent companies can also be made conditional through certain pre-conditions which parent companies must comply with. For instance, the Norwegian Fund required from the tropical rainforest companies to disclose its footprint on forests if these companies want to access their Fund.[206] Parent companies are increasingly also subjected to carbon taxes to disincentivise industries like oil and gas, and are subjected to policies such as a moratorium on cutting of forests to reduce the use of carbon degraded land.[207] Most agricultural companies are also now signing the Cerrado moratorium which encourages farmers through a financial incentive to move

[205] Editorial, '*Norway's wealth fund dumps 23 palm oil companies under new deforestation policy*' *Mongabay* (Menlo Park, 11th May 2013) <https://news.mongabay.com/2013/03/norways-wealth-fund-dumps-23-palm-oil-companies-under-new-deforestation-policy/#:~:text=Norway's%20$700%20billion%20pension%20fund,led%20the%20campaign%20for%20divestment.> accessed 17th May 2022.

[206] Editorial, '*Norway's $650B pension fund to require deforestation disclosure among portfolio companies*' *Mongabay* (Menlo Park, 12th November 2012) <https://news.mongabay.com/2012/11/norways-650b-pension-fund-to-require-deforestation-disclosure-among-portfolio-companies/> accessed 17th May 2022.

[207] Jeremy Hence, 'Norway to double carbon tax on oil industry for climate change programs' *Mongabay* (Menlo Park, 15th October 2012) < https://news.mongabay.com/2012/10/norway-to-double-carbon-tax-on-oil-industry-for-climate-change-programs/> accessed 17th May 2022; Editorial, 'Indonesia's moratorium will not significantly reduce emissions, but has other benefits, finds analysis' *Mongabay* (Menlo Park, 27th February 2012) <https://news.mongabay.com/2012/02/indonesias-moratorium-will-not-significantly-reduce-emissions-but-has-other-benefits-finds-analysis> accessed 17th May 2022.

in the direction of not indulging in deforestation.[208] This particular trend can have a substantial impact on agricultural companies like Cargill which might not be able to access suitable land for their business. Thus, a company's failure to comply with globally evolving regulations results in the loss of financial competitive edge as well as constraints in their supply chain.

4. CONCLUSION

Ultimately, parent companies in various Western countries are increasingly implicated for the adverse environmental impacts of their subsidiaries located in regions such as Latin America, South Asia, South–East Asia, and Sub–Saharan Africa. Many Western courts are creating various expansive doctrines of law allowing claims against Western parent companies to be justiciable in their legal systems by plaintiffs who have suffered wrongs by their subsidiaries in other jurisdictions. There has been a marked change in the attitude of Western courts seeking to expand their jurisdiction in order to impose increased judicial scrutiny on parent companies incorporated under their legal system.

This change of attitude of Western courts is also reflected in changes in the domestic legal system of Western countries, as well as in the developing corpus of international soft law, such as the UNGPs and the OECD Guidelines. These shifts in domestic legal regimes work in tandem with international soft law, resulting in various implications on the business models of parent companies, as they are forced to comply with greater

[208] David Bellany, 'From Environmental Leader to 'Worst Company in the World' *New York Times* (New York, 29th August 2019) <From Environmental Leader to 'Worst Company in the World' - The New York Times (nytimes.com)> accessed 17th May 2022.

environmental due diligence obligations. These implications include changes in their corporate governance; creating a robust compliance system within companies to provide due diligence to national laws and ELDs; devising a system of climate due diligence; and crafting the language of codes of conducts which are in accordance with the evolution of jurisprudence in Western courts.

Moreover, if parent companies fail to behave responsibly even under this increased scrutiny, their survival in the international market would be difficult since any environmental hazards caused by any entity linked to them will damage their goodwill and hamper their access to any stable sources of credit from the international financial market. Thus, public communication with all stakeholders about the hazards of products of the company must be taken to make informed decisions in line with environmental due diligence obligations. Parent companies should also refrain from distorting public debates through media and share their research with the public as part of their environmental due diligence obligations. Lastly, they must also invest in renewable energy products which reduce emissions and mitigate their environmental impacts.[209]

[209] *Pacific Coast Federation of Fishermen`s Associations v. Chevron* (2018) CGC – 18 – 571285 [161], [162]

POLITICAL ISLAM AND CONSTITUTIONALISM

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ABSTRACT

The universality of Islamic principles and the extent to which they shape the modern state has been a topic of popular debate. Throughout the history of Muslim states like Pakistan, Islam has been used by the political elite to further their short-term political gains, creating the misconception that constitutions inspired by Islam result in political instability. This paper will explore how political Islam can lead to the establishment of stable constitutional systems by imposing limits on authoritarianism. By drawing comparisons between diverse Muslim states such as Pakistan, Saudi Arabia and Tunisia, this paper aims to prove that a thriving Muslim democracy is not a utopian concept; rather, under the right circumstances, conservative Islamic parties and secularists can co-exist and work towards bettering a state in the same political sphere.

KEYWORDS: Constitutionalism, Pakistan, Islamic Principles, Saudi Arabia, Tunisia, Hudood Ordinances, Shariah, Authoritarianism, Secularism.

1. INTRODUCTION

The impact of Islamic principles in the legal and political sphere varies amongst Muslim nation-states. Islamic countries such as Pakistan, Saudi Arabia, and Tunisia have pledged to be faithful to Islamic teachings in their respective constitutions. Their core values, political principles, and freedoms enshrined in their constitutions exist independently, but are not contradictory to the divine law. For example, Article 227 of the Constitution of Pakistan demands that all existing laws conform with the injunctions of Islam as laid

down in the Holy Quran and Sunnah. As a consequence, laws repugnant to Islam are not legally valid.

Unfortunately, throughout history, Islam has been misused to bolster and validate the beliefs of certain groups of society. In Pakistan, the ruling political elite has persistently misused Islamic principles for short-term political gains since the country's creation in 1947. Political parties such as the secular Pakistan People's Party or the centre-right Pakistan Muslim League (which mainly comprises of Sunni Muslims) have brought Islamists to the centre of the State apparatus.[210] Similarly, the monarchy in Saudi Arabia has been known to act arbitrarily under the guise that the *ulema* is the dominant power in Saudi politics. Yet, Tunisia, one of the more progressive Islamic democracies in the Muslim world, demonstrates that Islam is compatible with democracy and can help bolster democratic principles. Following the Arab Spring, the 2014 Constitution of Tunisia separated religion and politics, intending to prevent officials from using faith-based appeals to manipulate the public. This paper will seek to determine whether 'political Islam', i.e., the invocation of Islamic principles in the political sphere leads to the establishment of stable constitutional democratic systems by curbing and controlling potential authoritarianism.

For this paper, I will limit the concept of 'constitutionalism' to a doctrine which determines whether the actions of a government are legitimate. This involves analysing whether officials conduct their public duties in accordance

[210] Jaysheree Bajora, 'Islam and Politics in Pakistan', < https://www.cfr.org/backgrounder/islam-and-politics-pakistan > accessed 11 October 2022.

with the law.[211] Essentially, the mere presence of a constitution does not guarantee or secure constitutionalism; rather, constitutionalism refers to the degree to which the principles of the constitution are respected by state officials. I will first discuss Zia ul Haq's regime in Pakistan, marked by his authoritarian rule, during which he fundamentally altered the Constitution. I will then proceed with a discussion of Saudi Arabia's Constitution that entrenches the monarch's power to all aspects of society at the expense of the powers of the *ulema*, whose influence has been reduced to validating the actions and decisions of the King. Lastly, I will discuss Tunisia as the sole functional example of democracy in the Arab world to evaluate whether, as a democratic system, it has respected the constitution's primacy while maintaining Islamic influence throughout its political structure.

The constitution of a Muslim country is rooted in customs, conventions, and divine law. The primary sources of divine law in Islam are the Quran and Sunnah. 'Sunnah' refers to the teachings of the Prophet Muhammad (peace be upon him) that were handed down from the Companions of the Prophet.[212] The Sunnah comprises statements called 'Hadith' that explain the teachings of the Quran, and provide additional rules and guidelines. Islamic tools of interpretation incorporate these into the legal system. Other than the two primary sources, secondary sources such as '*Ijtihad*' and '*Taqlid*' are utilised to reach a certain level of agreement amongst religious scholars interpreting the primary sources of Islam.[213] *Ijtihad* refers to the exercise of

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[211] Maru Bazezew, 'Constitutionalism' (Mizan Law Review 2009). Volume 3. Page 358

[212] 'What is the Sunnah' (Islam Online) < https://islamonline.net/en/what-is-the-sunnah/> accessed 11 October 2022.

[213] Lora Hadzhidimova, 'Juridical, Religious And Globalization Perspectives On The Constitutions Of Egypt And Tunisia After The Arab Spring' (*Masters, Old Dominion University* 2016). Page 52.

independent reasoning to find solutions to pending legal questions. However, it is controversial to a certain extent because of the diversity of opinions that exist among various Muslim Jurists regarding the subject matter. On the other hand, *Taqlid* decodes Quranic texts, and brings clarity and balance in the scholarship in the presence of long-lasting debates between different schools of thought in Islamic countries. Tools like *Ijtihad* protect divine and universal principles of Islam while simultaneously allowing for adjustments to be made such that the Quran and Sunnah fit better into the the changing traditions and social needs of the modern world. The use of these tools in Pakistan, Saudi Arabia and Tunisia, respectively, shall be discussed in further detail below.

2. PAKISTAN

For this section, I shall restrict my discussion to the post-independence period under Zia ul Haq's military rule to explain the shape and direction of political Islam in Pakistan. Existing academia on this subject has recognized the fluidity of Islamic Injunctions and their subjectivity to multiple interpretations. The Honourable Supreme Court of Pakistan demonstrated the inclusion of bias in the interpretation of Islamic principles in the landmark case of *Qazalbash Waqf v Chief Land Commissioner*.[214] In this case, land reforms that were previously declared valid under Islamic law in 1980, were found to be invalid and in breach of the same Islamic injunctions a decade later by the Supreme Court.[215] The use of *ijtihad* in this case can be seen as a tool to tackle reform in the spirit of juristic opportunism in Pakistan. Similarly, the Offence

[214] *Qazalbash Waqf and others v. Chief Land. Commissioner and others* PLD 1990 SC 99.

[215] Muhammad Zubair Abbasi, 'Judicial Islamisation Of Land Reforms Laws In Pakistan: Triumph Of Legal Realism' (2018) 57 Islamic Studies. Page 230.

of Zina (Enforcement of Hudood) Ordinance 1979 was promulgated by Zia to introduce criminal penalties for *zina* (adultery) offences in accordance with the teachings of the Quran and Sunnah. However, some of its provisions were declared repugnant to the Quran and Sunnah by the Council of Islamic Ideology ('**CII**') in 2005.[216] Thus, the inconsistency in judicial decisions based on Islamic teachings highlights the propensity for these teachings to be politically skewed to attain ulterior motives.

As Farzana Shaikh posits, Zia's political Islam was designed to give the *ulema* greater autonomy than previous governments, as their support made his authoritarian rule more effective.[217] Zia's objective was to expand his political base; therefore, he employed a strategy of 'Islamisation' of the State's economic, social, political, and legal institutions. He named this strategy 'Islamic Revivalism', and used it as a guise to legitimise his rule.[218] It is important to note that Zia, who is referred to as the 'architect of Islamisation', was simply building upon the foundation already set by the previous democratically elected prime minister, Zulfiqar Ali Bhutto. In the Constitution of 1973, Bhutto introduced Article 2, declaring Islam to be the 'state religion' of Pakistan.[219] As a consequence, the army under Zia's rule identified itself as an 'army of Islam' as it transformed from an institution

[216] Muhammad Khalid Masud, 'Modernizing Islamic Law in Pakistan: Reform Or Reconstruction?' (2019) 42 Journal of South Asian and Middle Eastern Studies. Page 80

[217] Farzana Shaikh, 'From Islamisation To Shariatisation: Cultural Transnationalism In Pakistan' (2008) 29 Third World Quarterly. Page 597.

[218] Ali Shan Shah, Muhammad Waris, 'Islamization in Pakistan: A Critical Analysis of Zia's Regime', 1 (2016) <https://grrjournal.com/jadmin/Auther/31rvIolA2LALJouq9hkR/YxFmikmkcM.pdf> Page 267

[219] Ibid, 600.

concerned with only the defence of the state's territorial borders to one dedicated to guarding the ideological frontiers of the Islamic nation.[220]

Pakistan's legal framework is built upon the conformity to the *Shariah* (Islamic law as espoused in the Quran and Sunnah) as interpreted by leading entities such as the *ulema* (whom Zia wished to please to garner support).[221] While Islam as a religion is absolute and God's sovereignty is considered beyond human agency, the Islamic state acts as an agent to enforce the laws of the sovereign (i.e., God). However, it is important to understand that while this hierarchy of sovereignty and the role of God as the primary lawmaker makes sense at a theoretical level, the same does not necessarily materialise in the practical running of the state.[222] The sovereign word of God can be skewed for political motives, as Pakistan's political history indicates. Indeed, God is sovereign, but the influential heads of the state also exercise a degree of sovereignty when determining which interpretation of specific Islamic rulings should apply as law. Therefore, it should be understood that practically speaking, sovereignty is exercised by humans even in an Islamic state.[223] The lack of limitation on human sovereignty in Pakistan during Zia's rule is what makes a state vulnerable to tyranny and the authoritarian tendencies of those acting as sovereign agents.

Zia viewed the power of the *ulema* as one he could use to further legitimise and strengthen his rule. The ulema's control over *madrasas* (religious schools)

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[220] Farzana Shaikh, 'From Islamisation To Shariatisation: Cultural Transnationalism in Pakistan' (2008) 29 Third World Quarterly.Page 605.
[221] Ibid, 605.
[222] United State Institute of Peace, 'Islam and Democracy' (2002), < https://www.usip.org/sites/default/files/sr93.pdf >. Page 5
[223] Ibid.

contributed to creating a citizenry inclined to accept Islamic ideology as an appropriate foundation for the conduct of politics. The influence of religious scholars and their often archaic interpretations led to a regime that was undemocratic and predominantly discriminatory towards the rights of women and minority groups. For example, women were considered less competent than men in the law of evidence. A woman's testimony is considered half in value as a man's testimony. This is still part of the Pakistan legal system today, as seen in the Qanun-e-Shahadat Order, 1984 (which is the codified law of evidence in Pakistan).[224] However, it is agreed by various scholars that the value of women's testimony is only half in value when concerned with financial matters - in other disputes, the value of a woman's testimony is equal to that of a man.[225] Scholars recognize discriminatory laws as the product of societal traditions in Islamic culture being distorted in such a manner to repress women.[226] Ideology is crucial in building a democratic Islamic state. A state must be cautious of the power and influence given to unenlightened scholars as it can have consequences on the social, political and cultural fabric of the state.[227]

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[224] Ali Shan Shah, Muhammad Waris, 'Islamization in Pakistan: A Critical Analysis of Zia's Regime', 1 (2016) <https://grrjournal.com/jadmin/Auther/31rvIolA2LALJouq9hkR/YxFmikmkcM.pdf> Page 265

[225] 'The Testimony of Women in Islam' <https://www.dar-alifta.org/Foreign/ViewArticle.aspx?ID=143&text=testimony> accessed 5 December 2022

[226] Lora Hadzhidimova, 'Juridical, Religious And Globalization Perspectives On The Constitutions Of Egypt And Tunisia After The Arab Spring' (*Masters, Old Dominion University* 2016). Page 44

[227] Charles H. Kennedy, 'Repugnancy To Islam–Who Decides? Islam And Legal Reform In Pakistan' (1992) 41 International and Comparative Law Quarterly. Page 772.

The core of Zia's plans to 'Islamicise' Pakistan was the specialist court, the Federal Shariat Court ('**FSC**'), incorporated in chapter 3-A of Pakistan's Constitution.[228] The FSC was an institutional mechanism independent from the Majlis-e-Shura, designed to examine any law repugnant to the Quran and Sunnah. However, its limitations, as stated in Article 203-B of Pakistan's Constitution, blocked its jurisdiction in many realms important to would-be Islamic reformers of Pakistan's legal system.[229] The term 'Muslim Personal Law' was broadly interpreted to prevent any petitions being heard against the so-called Islamic laws to be evaluated against the injunctions of Islam by the FSC. The FSC for example, refused to consider on merits many Shariah petitions challenging, for instance, standardized Ramadan fast timings or other laws openly discriminatory of women.[230] This demonstrates the involvement of authoritarianism in the judicial sphere: only those petitions were allowed which did not challenge the Islamic framework of law being designed by those in power, which essentially defeats the purpose of such a judicial entity. Therefore, these human agents sitting on the FSC bench were elevated to the role of interpreters of what constitutes Muslim Personal Law. As a consequence, these human agents were also endowed with broad, unchecked arbitrary powers. The scope of discretion provided to persons sitting in the FSC contributed to aligning the concept of Islamic Law in Pakistan to their own personal understanding of Islamic principles. Such unchecked power makes a country vulnerable to political instability, as it is then subject to the whims of those in power at the time.

[228] Ibid, 772.
[229] Ibid, 772.
[230] Ibid, 773.

Zia was careful to maintain tight control over the bodies examining the validity of Islamic laws in order to use religion in a manner that would further his agenda. He personally appointed judges to sit on the Shariat Appellate Bench and reserved the power to revise impugned laws for his own CII appointees who worked in conjunction with the executive branch of the government.[231] Judicial autonomy was never Zia's aim; the FSC was designed to be nothing more but a political tool of the executive.[232] Zia wished to further strengthen his authoritarian rule by formalising Article 2-A of the Constitution, which would endow supra-constitutional powers on his courts to strike down elements of the Constitution he found disagreeable.[233] Zia also promulgated his own Shariat bill, the Enforcement of the Shariat Ordinance, 1988, which attempted to effect a compromise on the issues of the supremacy of the *Shariah* and the jurisdiction of the superior courts to interpret the *Shariah*.[234] However, this bill never passed due to Zia's untimely death.

Nevertheless, the power exercised by Zia during his dictatorship resulted in monumental changes to the history of Pakistan and its Constitution. He established the FSC and introduced punishments under Islamic law. These interpretations of Islam as discussed earlier, were subject to the biases of those interpreting them to further the objectives of Zia's regimes.

3. SAUDI ARABIA

231 Mathew J.Neslon, 'Islamic Law in an Islamic State' (*Eprints.soas.ac.uk*). Page 256.
232 Ibid, 255.
233 Ibid, 256.
234 Charles H. Kennedy, 'Repugnancy To Islam–Who Decides? Islam And Legal Reform In Pakistan' (1992) 41 International and Comparative Law Quarterly. Page 772.

In Saudi Arabia, the State and religion are relatively more co-dependent than in Pakistan. While the *Shariah* needs the ruler's commitment and enforcement, the state requires *Shariah* to legitimize its rule.[235] Submission to God is inherently linked to obedience to the temporal rules.[236] Thus, the rulers are proactive agents of Islamic governance.

The concepts of '*Maslahah*' and '*Siyasah*' legitimise the laws concerning the well-being of the public. *Siyasah* is 'the act of the ruler on the basis of *Maslahah* [protection of the objectives of the law], even if no specific text [of the Quran or the Sunnah] can be cited as the source of the act.'[237] If this power is used by rulers within the general principles of Islam, it becomes binding on their subjects. Therefore, the doctrine of *Siyasah Shariah* (rules passed by a ruler in accordance with the *Shariah*) is an effective tool for the smooth functioning of the country's justice system within the ambit of the general principles of Islamic law.[238]

Examples of *Maslahah* and *Siyasah Shariah* are employer/employee relations and traffic regulations. Articles 55 and 67 of the Saudi Constitution of 1992 enshrines *Siyasah Shariah* as the most essential tool at the monarch's disposal to conduct state matters under the protection of the *Shariah*. Frank Vogel suggests that the religious definition of *Siyasah Shariah* in Saudi Arabia offers

[235] Muhammad Al-Atawneh, 'Is Saudi Arabia A Theocracy? Religion And Governance In Contemporary Saudi Arabia' (2009) 45 Middle Eastern Studies. Page 727.
[236] Ibid, 727.
[237] Muhammad Mushtaq Ahmed, 'The Doctrine of Siyasah in Hanafi Criminal Law and its Relevance for the Pakistani Legal System' (2013) 52 Islamic Studies. Page 29
[238] Ibid, 30

the widest possible basis for royal legislation.[239] A 'fatwa' is a formal ruling by a qualified religious scholar on a point of Islamic law. It is important to note that a fatwa is authoritative but not binding. This means that, unlike decrees passed by Judges, a fatwa itself is non-obligatory in nature. The Saudi monarch either validates an existing fatwa by passing it as a royal decree or alternately, passes new legislation based on an existing fatwa. A famous example of a fatwa turned law concerns women driving in Saudi Arabia, whereby a fatwa was passed in 1990 prohibiting women from driving alone because it was seen as a threat to their safety.[240] The Saudi Ministry of Interior later turned this fatwa into law.

The monarch also legitimises political measures by employing fatwas to validate their actions. For example, the Saudi monarch passed a royal decree prohibiting women from practising certain 'inappropriate' professions, which included jobs involving interactions between men and women.[241] This decree led to the cessation of existing positions for women working in clerical or managerial jobs, which led to confusion and disarray. As a consequence, the Saudi monarch passed another fatwa to clarify the *Shariah*'s stance on this subject by stating the permissible conditions for women's employment in the work sphere.[242]

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[239] Frank Vogel, ' SIlamic Law and Legal System: Studies of Saudi Arabia', (2000), Page.169-70, 341-3

[240] Muhammad Al-Atawneh, 'Is Saudi Arabia A Theocracy? Religion And Governance In Contemporary Saudi Arabia' (2009) 45 Middle Eastern Studies. Page 730

[241] Ibid, 731

[242] Ibid, 731

The Saudi monarch is aware of its religious façade and seeks validation of political decisions, particularly those liable to contradict the Shariah.[243] An example of this is the fatwa issued in 1979 affirming the use of weapons in the al-Haram al-Sharif premises.[244] This fatwa validated the use of physical force against certain fundamentalists who had taken over the Ka'bah. However, this action was in blatant violation of the *Shariah*'s prohibition. This was a way for the Saudi Government to legitimise its decision by rooting it in Islam.[245] Therefore, it can be seen that the *ulema*'s supposedly central role contributes to the theocratic façade of the state. As a consequence, the divine law is used to advance the positivist authority of the state.

The Saudi Constitution further cements this observation by explicitly acknowledging that Islam and the state are inseparable. Islamic law is recognized as the source of both political and legal powers.[246] The monarchy secures its authoritarian rule by including provisions in the Saudi Constitution that endow on it the power to confiscate private property[247] and practice censorship.[248] The government is structured in a manner that the King also occupies the office of the Prime Minister which empowers him to appoint Deputies and members of the Council of Ministers.[249] As a consequence, the King can exercise influence in the execution of judicial judgments; command of the Armed Forces; declaration of emergency measures and the state of war;

[243] Ibid, 732.
[244] Ibid, 732
[245] Ibid, 727.
[246] The Constitution of the Kingdom of Saudi Arabia (1992). Article 1, article 48, article 67.
[247] Ibid. Article 19.
[248] Ibid. Article 40.
[249] Ibid. Article 44.

and adopting measures capable of removing dangers threatening the Kingdom or its interests.[250] The King has broad unfettered powers in Saudi Arabia, thereby allowing authoritarianism.

The King reserves the right to amend or revise the constitution via Royal Orders, which is also the same legal instrument used to promulgate it in the first place.[251] Resultantly, the Constitution is easily amendable by the King, which makes it vulnerable to frequent changes. The King also has the final say on issues the *ulema* identifies as 'harmful' to religious values. As a consequence, throughout Saudi Arabia's history, the *ulema* has been used as a tool to legitimise the monarchy. The *ulema* occupies offices in the government such as the Ministry of Education and Justice but their power is limited because it is subject to the prime minister.[252] The *ulema*'s judicial authority is also limited because of the creation of the Ministry of Justice in 1970, which subjected all religious courts to the government's political authority.[253] The role of the Ministry of Justice is to regulate the legal sphere of the country which is rooted in Islamic law. The Ministry supervises the courts and also regulates and improves judicial and documentary services. This means that the Ministry is responsible for documenting final rulings of cases. The publication of judgments and cases greatly contributes to the consistency of judgments in the practical life of the law.[254] Therefore, the publication of

[250] Ali M. Al-Mehaimeed, 'The Constitutional System Of Saudi Arabia: A Conspectus' (1993) 8 Arab Law Quarterly.
[251] Ibid.
[252] Alexander Bligh, 'The Saudi Religious Elite (ULAMA) As Participant In The Political System Of The Kingdom' (1985) 17 International Journal of Middle East Studies.Page 43.
[253] Ibid, 43.
[254] Chibli Mallat, 'Saudi Law Coming Of Age' (2017) 65 Al-Abath: Journal of the Faculty of Arts and Sciences American University of Beruit. Page 148.

judgments is recognized as a successful attempt by Saudi Arabia to strengthen Islamic law.[255] However, it is important to note that Saudi law does not formally recognize precedent without legislative text.[256] This means the *ulema*'s status has been reduced to no more than a rubber stamp for the Saudi monarch's decisions.[257]

4. TUNISIA

In light of the discussion above, it is evident that in Pakistan and Saudi Arabia, political Islam is being used as a tool by those in authority to strengthen their rule and further their agendas. Constitutions are revised and legislations are passed under the pretext that it is to align the country to Islamic principles further, when in fact, religious scholars and the ulema are not the dominant powers. Religion is subservient to politics as faith-based appeals are commonly employed to manipulate the public into obedience. However, the possibility of successful Islamic democratic states should not be ruled out entirely. Blueprints of states inspired by Islam can lead to the establishment of stable political systems by curbing authoritarianism.

Tunisia is a modern example of an Islamic democratic state where the interests of politicians are being enforced without the involvement of religion to manipulate the public. An example of this can be seen in the structure of Ennahda, a self-defined Islamic democratic political party in Tunisia. Ennahda no longer identifies with the label of 'Islamism' because of the

[255] Ibid, 153.
[256] Ibid 153.
[257] Alexander Bligh, 'The Saudi Religious Elite (ULAMA) As Participant In The Political System Of The Kingdom' (1985) 17 International Journal of Middle East Studies.Page 47.

negative connotation associated with it in light of the past acts of radical extremists.[258] Ennahda's evolution to a party of Muslim democrats shows that Islamic movements can play a vital, constructive role in fostering successful democratic transitions.[259] The Ennahda movement had originally begun as a social movement fighting against repression and dictatorship. It began in 1960 in response to fears of Westernization in post-independence Tunisia.[260] However, seeing the need of the time, the party, guided by pragmatism and transactional politics, later decided to distance the movement from ideological principles.[261] This Muslim democratic party is inspired by Islam while simultaneously observing the fundamental principles of secular democracy.[262] The Ennahda evolution proves that democracy and Islam are compatible and that Islamic movements can play a vital role in fostering successful democratic systems.[263] In Tunisia, both secularists and Islamists made concessions to guarantee and consolidate their part in Tunisian democracy.[264]

While Islam still guides the actions of the Tunisian government, the age-old ideological debate about Islamisation and secularisation is no longer considered necessary or relevant. Therefore, under Article 1 of its 2014

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258 Rached Ghannouchi, 'From Political Islam To Muslim Democracy: The Ennahda Party And The Future Of Tunisia' (*J stor*, 2016). Page 59

259 Ibid, 60.

260 Hamza Meddeb, 'Ennahda's Journey From Preaching to Politics' (2019) Ennahda Uneasy Exit From Political Islam. Page 3

261 Ibid, 7

262 Grewal Sharan, 'Where are Ennahda's competitors?'(2018) Issue Brief no.04.26.18 Rice University's Baker Institute for Public Policy.

263 Rached Ghannouchi, 'From Political Islam To Muslim Democracy: The Ennahda Party And The Future Of Tunisia' (*J stor*, 2016). Page 60

264 Hamza Meddeb, 'Ennahda's Journey From Preaching to Politics' (2019) Ennahda Uneasy Exit From Political Islam. Page 7

Constitution, Tunisia accepts the role of religion in its legal system, but it is not as determinant a source of law as it is in Pakistan or Saudi Arabia. Tunisia recognizes the vagueness of the *Shariah* legal process, its lack of standardisation, and its consequent arbitrariness.[265] The process of Shariat courts was disorganised because there was no codification process to compile the law into a single standardised form that could be understood by all concerned parties - accessible to both judges and litigants.[266] The Tunisian government does not question the content of *Shariah*, but viewed the *ad hoc* process that characterized Shariat courts as disorganised, corrupt, and unjust.[267] This view stemmed from the procedures in place for the law's implementation. There was simply a compilation of legal judgments and opinions written by mediaeval jurists that a few specialists could only understand. As a result, the law was neither accessible nor easily understood by those affected by it, leaving it to the arbitrary interpretation of the jurists implementing it.

Today, a *quid pro quo* relationship exists between the Government of Tunisia and the *ulema* because of actions taken during the authoritarian rule of Bourguiba in the mid-19th century.[268] In the 19th century, parties reached a compromise whereby the Bourguiba satisfied the *ulema* by making Islam constitutive of the State under Article 1 of their constitution. In return, the *ulema* overlooked and accepted violations of Islamic law.[269] Repression of

[265] Malika Zeghal, 'The Implicit Sharia: Established Religion And Varieties Of Secularism In Tunisia' (*Nrs.harvard.edu*, 2017) <http://nrs.harvard.edu/urn-3:HUL.InstRepos:34257917> accessed 28 April 2021.
[266] Ibid
[267] Ibid.
[268] Ibid.
[269] Ibid

political and civil liberties, the endorsement of social inequality and the spread of corruption marks the authoritarian Bourguiba regime.[270] Islam is constitutive of the state even today. Article 1, declaring Islam Tunisia's religion, and Article 2, declaring the supremacy of the law, cannot be amended.[271] In return for Article 1 of the Tunisian Constitution, the *ulema* overlooks violations of Islamic law in the Personal Status Code, which is of equivalent legal value to the Constitution in Tunisia.[272] The Tunisian Constitution does not recognise *Shariah* as a source of legislation because that would increase the role of political Islam in the legal regime.[273] However, under Article 6 of the Constitution, the State has taken the 'guardian of religion' role, making it the protector of the sacred, prohibiting incitement to hatred.[274] This role as guardian is alarming because it exposes the accused to violence and empowers state representatives to stifle freedom of speech and religion.[275]

Tunisia protects freedom of conscience and the right to freely exercise one's religious practices in Article 6 of its Constitution but fails to comment on other aspects of religious freedom. While Tunisia has taken steps to establish a democratic framework, it is not yet ready to accept all the consequences of religious freedom. Tunisia still views the state as the most potent restrainer

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[270] Rached Ghannouchi, 'From Political Islam To Muslim Democracy: The Ennahda Party And The Future Of Tunisia' (*J stor*, 2016). Page 60

[271] Tunisia's Constitution of 2014

[272] Malika Zeghal, 'The Implicit Sharia: Established Religion And Varieties Of Secularism In Tunisia' (*Nrs.harvard.edu*, 2017) <http://nrs.harvard.edu/urn-3:HUL.InstRepos:34257917> accessed 28 April 2021.

[273] Evylyn Aswad, 'The Role Of Religion In Constitutions Emerging From Arab Spring Revolutions' (2015) 16 Georgetown Journal of International Affairs.Page 165.

[274] Ibid, 165.

[275] Ibid, 165.

and governing body of religion.[276] However, Tunisia remains the most liberal Muslim country in its efforts to acknowledge liberal values such as freedom of conscience, civil liberties, social justice, religious tolerance, belief and gender equality.[277] The Tunisian government understands that there should be separation of mosque and state, and that a political party should not represent a specific religion. Neutral institutions should deal with religion because religious places like mosques should be a place to bring people together not endorse divisions.[278]

The separation of state and mosque is also crucial because the restriction on *imams* from holding positions of power in political parties and the requirement of them being trained as specialists garners them the skill and credibility required by a learned religious leader.[279] Tunisia recognises Islamic society as free from human authority and understands that the key to legitimacy is continued consent. Liberal Islam is founded on the concept that all humans are free and any acts towards suppressing this freedom contradicts the divine will.[280] Islamic tools such as *Ijtihad* which bridge the gap between contemporary texts and religious texts is the foundation of liberal Islam.[281] *Ijtihad* can be considered a philosophy of renewal because it allows access to

[276] Malika Zeghal, 'The Implicit Sharia: Established Religion And Varieties Of Secularism In Tunisia' (*Nrs.harvard.edu*, 2017) <http://nrs.harvard.edu/urn-3:HUL.InstRepos:34257917> accessed 28 April 2021.

[277] M.A Muqtedar Khan, 'Radical Islam, Liberal Islam', 102 (2003). Page 417.

[278] Rached Ghannouchi, 'From Political Islam To Muslim Democracy: The Ennahda Party And The Future Of Tunisia' (*J stor*, 2016). Page 63

[279] Ibid, 63

[280] Radwan A. Masmoudi, 'What is Liberal Islam?: The Silenced Majority', 14 (2003).Page 40-44

[281] M.A Muqtedar Khan, 'Radical Islam, Liberal Islam', 102 (2003). Page 420

the reservoir of Islamic wisdom in guiding life in the here and now, making a place for Islam in the modern world.[282]

Tunisian rulers such as Ghannouchi recognize the existence of the concept of the Islamic state. He views Islam as a code of conduct and set of principles for a systematic government.[283] He identifies the following principles as the foundation for a modern Islamic democracy: *khalifa* (the belief that man is a vicegerent on earth); freedom and responsibility; justice; legitimacy; *Shariah*; and *shura* (a council for consultation).[284] The findings of many scholars support Tunisia's division of the political and religious spheres. Upon strict analysis, the legal subject matter is dealt with in only 80 Quranic verses.[285] Therefore, Ghannouchi is correct in his claim that the political sphere was left vacant on purpose so that *Ijtihad* could be used to deal with issues in a manner appropriate to the societal circumstances of the time.[286] A nation's constitution enshrines its core values, and the framework of national covenants and declarations should exist separately from the divine sources of law.[287] While religious sources should influence a nation's political sphere, they must not dictate it.

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[282] Ibid, 420.

[283] Nazek Jawad, 'Democracy In Modern Islamic Thought' (2013) 40 British Journal of Middle Eastern Studies.Page 326.

[284] Ibid, 328.

[285] Lora Hadzhidimova, 'Juridical, Religious And Globalization Perspectives On The Constitutions Of Egypt And Tunisia After The Arab Spring' (*Masters, Old Dominion University* 2016). Page 52.

[286] Nazek Jawad, 'Democracy In Modern Islamic Thought' (2013) 40 British Journal of Middle Eastern Studies.Page 329.

[287] Lora Hadzhidimova, 'Juridical, Religious And Globalization Perspectives On The Constitutions Of Egypt And Tunisia After The Arab Spring' (*Masters, Old Dominion University* 2016). Page 52.

The restriction of religious influence on a state is essential because the separation of state and religion prevents officials from appealing to the religious sentiments of the masses and manipulating them to further their political agendas.[288] This separation of state and religion accompanied by effective governance of religious institutions by learned religious scholars contributes to better religious education, as well as more moderate and progressive Islamic thinking in Tunisia.[289] Even the regular curriculum taught in public schools in Tunisia is designed to develop universal values of cooperation, equality, responsible freedom and social justice.[290] Islamic education in public schools is taught as 'Islamic Thinking,' and its objective is to encourage analytical thinking amongst the youth which does not contradict the main pillars of Islam.[291] Tunisia treats Islam as a blueprint for human rights that prioritises the will of the public and their freedom over the interest of a sole individual, which is the crux of the concept of democracy.[292]

The Government of Tunisia is a direct result of dialogue and consensus between both political and religious spheres, and representatives of the former regime, nullifying any democratic debate. The Government of Tunisia endorsed a compromise of policy choices and negotiated contentious issues on the nature of the country's emerging democracy.[293] This national dialogue

[288] Rached Ghannouchi, 'From Political Islam To Muslim Democracy: The Ennahda Party And The Future Of Tunisia' (*J stor*, 2016). Page 64

[289] Ibid, 64

[290] Muhammad Faour, "Religious Education and Pluralism in Egypt and Tunisia" (2012, Carnegie Endowment of International Peace. Page 8

[291] Ibid, 9.

[292] Nazek Jawad, 'Democracy In Modern Islamic Thought' (2013) 40 British Journal of Middle Eastern Studies.Page 328.

[293] Hamza Meddeb, 'Ennahda's Journey From Preaching to Politics' (2019) Ennahda Uneasy Exit From Political Islam. Page 7

was essential to finalise the Tunisian Constitution in 2014. The discussion was regarding compromises between the parties and concessions from Islamists on important matters of concern such as blasphemy, equality of genders, the role of *Shariah* as a source of legislation, and lastly, freedom of belief and conscience.[294] These concessions on the part of Islamists guaranteed a neutral state that is neither secular nor Islamic. The concessions are the result of the Ennahda Government's efforts to organise workshops and meetings with its more militant members to convince them that doctrinal demands were untenable in the existing regional and national context.[295] Moreover, the affirmation of religious freedom and Muslim identity in Tunisia marked rebuilding society according to principles inspired by Islam.[296] As a result, Tunisia's durable and robust democratic structure has stood practically alone in the Arab world since 2011. While Tunisia has much to desire in the economic sphere, it has made progress in securing liberal values for its people, including (but not limited to) the freedom of speech and establishing the principle of political inclusion. The Government of Tunisia has also shown great signs of hope for women's rights.

Hence, those who argue that the Muslim world cannot embrace democracy and liberty do a great disservice to both Islam and democracy by this assertion.[297] Ghannouchi, the president of the Ennahda movement, adopted a stance which set him apart from more conservative Islamic movements. Ghannouchi garnered a wider support base for himself by collaborating with

[294] Ibid, 7
[295] Ibid, 8
[296] Ibid, 8
[297] Mark Green & Hallam Ferguson, 'Islam and Democracy' (2015) 39 Fletcher F World Aff. Page 27

similarly oppressed secular opposition.[298] While Ghannouchi accepted Western-style multi-party politics, he did so only on the condition that it did not marginalise or reject religion. The Government of Tunisia has shown a great willingness to put its country before its political interests.

5. CONCLUSION

A closer analysis of Tunisia's political structure illustrates that it is possible for political Islam to successfully contribute to establishing stable, democratic political systems while keeping authoritarian elements in check. While their society is still inspired by Islamic principles, they are more concerned with building an inclusive and democratic system, rather than simply focusing on the role of religion in the country. The separation of religion and state is crucial to checking authoritarianism and the abuse of faith-based appeals to manipulate the public. This separation of mosque and state in Tunisia rebukes secular tyrants and violent extremists alike. It restores the independence of religion as the state no longer interferes and represses religious activities. Tunisia is a democracy that promotes social and economic rights, and respects individual rights. Tunisia is not a dictatorship like other Muslim countries. This means it has the freedom to focus on a practical agenda and economic vision, instead of fighting against repression and authoritarianism. The education system in Tunisia is designed in such a manner as to foster analytical thinking, and promote pluralism and democratic values while ensuring there is no contradiction to the main pillars of Islam. Whereas, in other Muslim countries like Pakistan and Saudi Arabia, the unchecked powers

[298] Helen Haft, "Political Islam in Tunisia: The History of Ennahda" (2019) 52 NYU J Int'l L& Pol. Page 329

of rulers combined with controlling religious leaders threaten the delicate balance of their political systems.

As discussed earlier, in many Muslim-majority countries like Pakistan, the stability of their political systems is threatened when extremist Islamist groups and entities influence legislation. These parties can exercise such power as the heads of the state consider it necessary to legitimise and strengthen their rule. For example, authoritarians like Zia ul Haq's decisions were influenced by his desperation to seek the support of the ulema to legitimise his rule. This desperation stems from the fear of their political and personal survival, given the looming threats of assassinations, revolts, and military coups. Zia exploited the nation's desire for an Islamic system to strengthen his dictatorial rule for 11 years. He worked towards 'correcting' the liberal nature of Pakistan's Constitution and Islamising the nation. As a result, Islamists were given a seat in all matters of the nation. Their influence extended from the educational sphere to the affairs of the government, where particular institutions were created for them. His ideal Pakistan was devoid of any aspect of liberalism, namely liberal political groups and activists.

Similarly, the political system of Saudi Arabia is an example of authoritarian rule leading to political instability. In Saudi Arabia, power is centralised. The King reserves essential positions in the government like the Office of the Prime Minister, allowing him to influence the structure of the rest of the government as well. When one person controls such influential areas of law, it is not easy to check the exercise of authoritarianism. At the same time, the *ulema* is commonly considered representative of Islamic scholars who guide the government in Islamic issues, but that is not the case in Saudi Arabia. The

ulema gradually lost their power to the King, and now act as a rubber stamp of approval for the King's decisions.

Consequently, it can be seen that the powers of state and religious institutions considerably overlap in Pakistan and Saudi Arabia. Although, on the face of it, a party is seen to be in control, there is, in fact, another party operating behind the scenes who holds the authority to make decisions. For example, in Pakistan, while Zia was thought to be in control, in reality, every decision of his was dictated by the opinions of Islamists. Likewise, in Saudi Arabia, the *ulema* is believed to be representative of religious features, but over time their power has slowly been lost to the King. Institutions, like the government in Pakistan, and the *ulema* in Saudi Arabia, depend on the party that is actually wielding power behind the scenes. For example, Zia in Pakistan depended on the *ulema*, and the *ulema* in Saudi Arabia depended on the monarch to secure their place and role in the running of the state. Fundamental rights in Pakistan were curtailed when it was thought to be necessary to further the political agenda of Zia, who was subjected to the whims of the ulema. The FSC was provided with a scope of discretion sufficient to align the concept of Islamic Law in Pakistan to their understanding of Islamic principles. Similarly, the King of Saudi Arabia rooted his decisions in existing Islamic fatwas to legitimise them while endorsing fatwas to turn them into binding laws that aligned the state's values to his concept of what an Islamic state should be.

Therefore, a close analysis of Muslim democracies illustrates that under the right circumstances, conservative Islamic parties and secularists can co-exist and work towards bettering a state in the same political sphere. Political instability results from no consensus between political and religious groups and an existing blatant imbalance of power and influence. A stable

constitutional system results from compromise and concession by both secular and religious parties. For example, the Constitution of Tunisia is the product of debate, compromise and discussion on every article, which was made possible only because all involved parties prioritised their country over their ideologies and political interests.

A thriving Muslim democracy is one where the state is neutral, and is neither secular nor Islamist but simply the torchbearer of freedom of thought, religion and belief. Neither party should have the power to influence the other. Consequently, strict checks are necessary on the powers of both religious and political groups to maintain a balance. Stable constitutional systems result from the checking of authoritarianism in constitutional frameworks. No party should have the power to monumentally change the blueprint of a nation or the way it is run based on popular whims for their short-term political gains. Hence, Tunisia's emergence as the only functioning Muslim democracy is attributed to its foresight of allowing religion to inspire Tunisia's Constitution without overpowering or overriding it.

AN ANALYSIS OF THE OBSTACLES FACED BY WOMEN AND OTHER GENDER MINORITIES WHILE OBTAINING NATIONAL IDENTIFICATION CARDS AND THEIR CONSEQUENCES

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ABSTRACT

Citizenship is a critical element of a person's legal identity in a State. As a citizen, one is legally entitled to the various rights prescribed in the Constitution, as well as the rights afforded under the State's legislation. However, barriers to attaining citizenship and legal identification can hinder access to these rights for certain segments of the population, such as women from the lower classes and gender minorities (such as transgender persons). This paper explores the various obstacles that exist in legislation and administrative procedures which women and gender minorities face when obtaining legal identification through statutory analysis and field research. By exploring the gap between 'formal equality' and 'substantive equality', this paper argues that substantive equality can only be achieved when the social, cultural, political and economic obstacles to attaining legal identification, and thereby citizenship, are eradicated.

KEYWORDS: Women, Gender Equality, Minorities, National Database and Regulation Authority Regulations, Citizenship Act, Constitution of Pakistan, NADRA, Transgender Persons Act 2018.

1. INTRODUCTION

Being a recognised citizen of a country enables a person to have proper legal, social and economic representation in said country. In Pakistan, to be considered a full citizen of the State, it is important to secure a Computerized National Identity Card ('**CNIC**'). Essentially, citizenship governs the relationship of an individual with the State. Be that as it may, our research has led us to the conclusion that citizenship in itself is a gendered and class-based construction that is grounded in a system of stratified rights and opportunities and is arranged in a way that benefits certain individuals over others. We have found that among other factors, citizenship differentiates between subjects according to their gender and class position.

The State ends up discriminating against women and other gender minorities, as well as people from different socio-economic backgrounds by intentionally or unintentionally creating numerous hindrances for them in obtaining CNICs. These hindrances are caused by the lack of recognition and acknowledgement of the historical disadvantages gender minorities and people belonging to low-income households are subject to, as well as a lack of affirmative action on the part of the Federal Government to compensate for these historical inequalities.

By conducting field research on the subject matter, we were able to highlight additional systematic and procedural obstacles placed in the way of these disadvantaged groups. The inability of some NADRA officials in appreciating the differences between genders and their resultant skepticism in granting CNICs to gender minorities; procedural barriers that can only be overcome

by highly influential individuals and groups and not disadvantaged groups already facing issues of access and mobility; and the consistent apathy of some concerned officials regarding the issues faced by gender minorities in obtaining CNICs, were patterns that remained constant throughout our research on the subject matter. These trends, observed during our field research, further strengthened our conclusion that women and other gender minorities face resistance in trying to formulate and/or improve their relationship with the State through obtaining CNICs, at every stage.

2. RESEARCH METHODOLOGY AND LITERATURE REVIEW

This essay will delve into a cross-sectional analysis of the legislation governing citizenship rights in Pakistan, such as the National Database and Registration Authority Ordinance, 2000; the National Database and Regulation Authority (Application for National Identity Card) Regulations, 2002; and the Citizenship Act, 1951. To supplement our analysis of the aforementioned laws, we will rely on our comprehensive literature review which was conducted to help better explain how the idea of citizenship interacts with other socio-political factors that shape how one lives their life. For example, themes such as class, religion, access to public spaces, and gender were explored to gauge what citizenship means to different groups in society. In order to further expand on how legislation revolving around citizenship and issuance of CNICs is applied to the Pakistani society, we also rely on Pakistani case law that explains how these laws and policies affect gender minorities belonging to different socio-economic backgrounds in Pakistan, and how these minority groups react and respond to such laws and policies.

3. LIVED CITIZENSHIP

Lived citizenship as a key concept focuses on the ways in which social actors live, act, and practice citizenship in their everyday lives. A growing number of scholars have applied ideas of lived citizenship as a generative approach to recognise the embodied relationship and lived experiences of being a citizen on a day-to-day basis.[299] It is developed from a core of empirical works that analyse the experiences of citizenship of different categories of social actors in different contexts.[300] Lived citizenship is a key marker of contemporary feminist scholarship by allowing the same to move beyond rights-based approaches to citizenship that not only includes rights and status, but also identities, belonging, and participation as important aspects of lived citizenship. Several factors such as gender, ethnicity, class, and faith can prevent participation in and belonging to organised groups, or prevent participation and belonging in wider society. This becomes a barrier to full citizenship.[301] In other words, the notion refers to the meanings that citizenship has in people's lives and the ways in which people's social and cultural backgrounds and material circumstances affect their lives as citizens.

In Pakistan, possessing a CNIC is an integral part of improving one's experience of 'lived citizenship'. When the State advertently or inadvertently causes hindrances in the way of access to citizenship, the consequences can

[299] Kallio, Pauliina, Wood, and Häkli. "Lived citizenship: conceptualising an emerging field." Citizenship Studies 24.6 202.: 713-729.

[300] Athelstan, et al. "Thriving on the Edge of Cuts: Inspirations and Innovations in Gender Studies." 2011.http://gjss.org/sites/default/files/issues/editorials/Journal-08-02--00-Athelstan-McLuckie-Mills-Pesarini-Poll-Boulila.pdf

[301] Nyhagen, Halsaa. "Religion and Citizenship as Lived Practice: Intersections of Faith, Gender, Participation and Belonging." 2016. https://link.springer.com/chapter/10.1057%2F9781137405340_4

be that many disadvantaged groups are deterred from ever obtaining CNICs. These disadvantaged groups are then forced to live their lives in Pakistan as alien citizens by virtue of being deprived of facilities and benefits that people with CNICs enjoy with ease.

Many facilities provided to citizens of Pakistan which are considered 'basic' and 'fundamental' are exclusive to only registered citizens. Whether it is access to certain spaces and privileges or the ability to enjoy basic necessities recognised under the constitutionally protected right to life[302] or even the enjoyment of civil and political rights envisioned in the Constitution of Pakistan ('**Constitution**'), all such rights are only available to registered citizens of the State and not undocumented individuals. Amongst other things, undocumented individuals in Pakistan cannot enrol in school; open bank accounts; vote; access government departments; register FIRs; and enrol in relief funds such as the Benazir Income Support and the Ehsaas Fund. Hence, exclusive enjoyment of these rights not only alienates undocumented members of society by depriving them of these basic necessities; the consequences of this exclusivity, on top of the hurdles caused by various actors for these members in obtaining CNICs and registration, further perpetuates discrimination against these groups. For example, inability to enroll in schools ensures that these groups are denied access to education; inability to open bank accounts ensures that these groups are deprived of salaried employment; inability to register FIRs ensures that these groups are deprived from access to justice; inability to access relief funds ensures that these groups remain in poverty; and inability to vote and access

[302] Article 9 of the Constitution Islamic Republic of Pakistan, 1973 . http://www.na.gov.pk/uploads/documents/1333523681_951.pdf

government departments ensures that these groups remain unheard and unrepresented etc. Perhaps one of the most severe and life-threatening consequences of not possessing a CNIC in Pakistan amidst the global pandemic of Covid-19 was the inability to access vaccines. Thus, groups that do not possess CNICs face hurdles not only in their public lives but also their private lives owing to their varying degrees of individual identity within the State, as well as due to inability to access "State Welfare".[303]

4. THE LEGAL FRAMEWORK GOVERNING CITIZENSHIP RIGHTS IN PAKISTAN

Any right or status that is accrued to a person is derived from the law and for the purposes of expounding upon one's citizenship status. Below, we will mention the provisions of laws that govern the acquiring of citizenship and case law which shall help extend our analysis of the same. Through such scrutiny, we were able to conclude that in Pakistan, legislation governing citizenship, or the lack thereof, perpetuates the oppression of our focused groups. This part of the essay will also cover aspects which have largely been overlooked by legislators, i.e., the rights of transgender and orphaned children and the lacunas in the system whereby they face difficulties in obtaining CNICs. Lastly, this section of our essay will also discuss case law that is pertinent to our overall analysis of the concept of citizenship in Pakistan.

[303] Prokhovnik, Raia. "Public and private citizenship: From gender invisibility to feminist inclusiveness." Feminist review 60.1 1998. 84-104. https://www.jstor.org/stable/pdf/1395548.pdf?casa_token=uXDDT3IjTBMAAAAA:D6LoSX7FTtFT9VTP1PK9t2qkw1QiC zAPdnJpf0h0HS4kn--JGJaeMkz7PvIahIa-AmSbWAvMxkzBFpf1Qw3YULBrT1Ro7q1_Ron81Dah7OusnKSbwJYWcA

As a starting point, we must first identify the gender categories that have been laid down in the law. According to article 263 of the Constitution, words importing the masculine gender shall be taken to include females.[304] The statutory laws discussed below define "citizen" in gender-neutral terms; however, it can be observed that these 'gender-neutral' terms only denote the binary dichotomy of male-female, and consequently disenfranchise those who do not fall into the traditional gender binary, such as the *khwaja sira* community, as well as other gender non-conforming groups.

The National Database and Registration Authority (NADRA) Ordinance, 2000

The National Database and Registration Authority (NADRA) Ordinance, 2000 (the '**Ordinance**') was promulgated to facilitate the registration of all persons, and to establish and maintain multipurpose databases, data warehouses, networking, interfacing of databases and related facilities. While the Ordinance itself is quite comprehensive, with 48 sections, for the purposes of this essay, we shall focus on the sections most relevant to our analysis.

Section 8(2) of the Ordinance, which discusses the powers of registration of persons, states:

> "Notwithstanding anything contained in any other law for the time being in force the Federal Government may, by rules, for the purpose of incentivizing registration of a particular class of persons

[304] Article 263, Constitution of Pakistan 1973. http://www.na.gov.pk/uploads/documents/1333523681_951.pdf

> under this Ordinance, provide for any right, interest, privilege, benefit, reward or other advantage, tangible or intangible, available under Pakistan Law, to be extended to, or made available to or withdrawn from such class of persons required to be registered under this Ordinance and such right, interest, privilege, benefit, reward or other advantage shall accordingly become extended, or available to or withdrawn from, as the case may be, to such class of persons."

From a bare perusal of the aforementioned section, it is evident that the Federal Government is empowered to make rules and regulations beneficial for disadvantaged groups such as gender minorities, in order to incentivise such groups to apply for CNICs. On the face of it, the Ordinance preaches equal opportunities for all genders; however, our field research highlighted that it is common practice in the NADRA offices to deny granting CNICs to women unless they are escorted/accompanied by a male legal heir such as their father, husband, brother, or son. This creates problems for women and other gender minorities who either do not have male family members or who do not have a cordial relationship with their male family members. Even otherwise, regardless of whether gender minorities in Pakistan have male heirs who are alive and well and ready to accompany them to NADRA offices, this dependency on male heirs in order to access State institutions, has no basis in law. Despite being empowered to cater to the special needs of disadvantaged groups, the Federal Government has left these groups to fend for themselves as NADRA officials perpetuate bureaucratic and patriarchal hurdles in obtaining citizenship rights for such groups.

Similarly, section 9(1) of the Ordinance, regarding the registration of citizens, states:

> "Every citizen in or out of Pakistan who has attained the age of eighteen years shall get himself and a parent or guardian of every citizen who has not attained that age shall, not later than one month after the birth of such citizen, get such citizen registered in accordance with the provisions of this Ordinance: Provided that the Authority may, on case to case basis, extend the period for registration of a citizen who has not attained the age of eighteen years: Provided further that all such citizens who stand validly registered under any law immediately before the commencement of this Ordinance shall be deemed to have been registered under this Ordinance and their registration shall, subject to sections 17, 18 and 30 remain valid till the expiry of two years from the commencement of this Ordinance, or such time as may be notified by the Federal Government, or till such time as such citizen is registered afresh as hereinafter provided, whichever is earlier."

According to the aforementioned section, if a citizen is above 18 years of age, he/she can get registered as a citizen without the presence of a parent or a guardian. However, as explained earlier, such is not the case when it comes to women and other gender minorities. Despite the promulgation of seemingly beneficial and non-discriminatory legislation, cultural and societal norms dictate the behavior of many NADRA officials who still refuse to allow access to citizenship via registration to gender minorities who are not accompanied by male legal heirs. Such norms clearly contradict the aforementioned sections of the Ordinance; however, the conduct of NADRA

officials in relation to this issue has been left unchecked. From our discussions with NADRA officials regarding their conduct, we were told that they are not biased and are merely following the Standard Operating Procedures ('**SOPs**') applicable to them. While the NADRA officials we interviewed failed to specify which SOPs compelled them to refuse grant of CNICs to gender minorities unaccompanied by male legal heirs, even otherwise, the superior courts of Pakistan have ruled that their (the SOPs') only significance is to ensure efficiency and to benefit the citizens rather than making the process more complicated. In the matter of *Muhammad Salahuddin vs. NADRA*, the petitioner was unable to have his father's name changed on his NIC due to a NADRA SOP that required him to acquire a court order sanctioning the same, even though the mistake was on NADRA's part.[305] Through this case, the Lahore High Court highlighted the fact that SOPs of NADRA were not binding and were merely there to achieve optimum levels of efficiency. The SOPs, though proper, are not legally binding upon NADRA officials. This principle clarifies that if following a certain policy is against the best interest of a citizen, the SOP can and should be ignored.

Another section of the Ordinance that we explored for the purposes of our research is section 30(e) which states:

> "[if a person] does not, without reasonable cause, apply for a National Identity Card within ninety days of his attaining the age of eighteen years [it will be an offence punishable under this Ordinance]."

[305] PLD 2012 Lahore 378

The aforementioned section holds that if one does not possess an NIC within ninety days of turning eighteen (18) years of age, they are liable to be punished under the Ordinance. A large part of the population in Pakistan, as per our research, does not possess identity cards.[306] Lack of awareness and knowledge plays a significant role in the gap created between those who are holders of NICs, and those who are not. The customs and norms followed in most areas in Pakistan determine who can be the holder of NICs and whether NICs are even necessary for certain groups, particularly women and other gender minorities. Such customs disapprove of women being allowed in majority of public spaces and thus, lead to the conclusion that being a CNIC holder is an unnecessary requirement for them. These societal norms that disallow gender minorities from becoming registered citizens, further strengthen the existing dichotomy of the public and private spheres, where men are allowed to access public spaces and facilities, whereas gender minorities are restricted within the private sphere. This leads to not only a decrease in the participation of gender minorities in political and economic spheres of life, but also leads to the curtailment of their independence through not being able to vote, take a loan, apply for a job etc.

The final section of the Ordinance relevant to our analysis is section 47, which pertains to the 'removal of difficulties':

> "If any difficulty arises in giving effect to any provision of this Ordinance, the Federal Government may make such order, not

[306] Volume II, Gallup Big Data Analysis of Census 2017 https://gallup.com.pk/wp/wp-content/uploads/2022/01/GP-Big-Data-Census-2017-Vol-11-Pakistani-Citizens-Holding-Computerized-National-Identity-Cards-3.pdf

> inconsistent with the provisions of this Ordinance, as may appear to it to be necessary for the purpose of removing the difficulty."

The aforementioned section allows the Federal Government to make orders which may be beneficial for the citizens in case any difficulty arises. However, as per our research, no such orders have been passed by the Government to cater to the special needs of gender minorities in Pakistan. Hence, this provision of law is highly underutilised as, if properly used, it may assist the Government in enacting SOPs that compel NADRA officials to treat all individuals the same, regardless of their gender.

National Database and Regulation Authority (Application for National Identity Card) Regulations 2002

For the purposes of understanding the operation of NADRA through a cross-sectional approach, it is also pertinent to examine the National Database and Regulation Authority (Application for National Identity Card) Regulations, 2002 (the '**Regulations**') that lays down the procedure to be followed by a non-resident to acquire citizenship in Pakistan.

Regulation 8 of the Regulations deals with the form of application as set out in Schedule I. This procedural regulation essentially lays down the obligation upon NADRA to ensure availability of the registration form. Keeping in mind the functions of NADRA, in a *suo moto* case taken up pursuant to a news clipping published in the Daily Express, the Supreme Court took notice of the difficulties faced by Hindu women while obtaining CNICs and subsequently being deprived of other rights provided to them under the

Constitution such as the right to movement.[307] The Hindu woman in question was denied an NIC because the form in Schedule I stated that for a married woman to obtain an NIC she must submit a '*nikaahnama*'[308] to legally establish her tie of marriage. The Supreme Court held this to be extremely discriminatory against Hindu and other non-Muslim married women. The Court held that any valid legal document such as an affidavit may be used in place of the '*nikaahnama*' until an amendment is made to the form to include women of religious minorities. Unfortunately, however, no such amendment has been made yet and the NADRA officials have little to no knowledge about the Court's decision in allowing this relief to non-Muslim women. This ignorance of procedural technicalities results in further discrimination against gender minorities. This *suo moto* case established that any statutory provision that leads to unnecessary burden on any resident of Pakistan to obtain citizenship card is against the principle of natural justice, especially if it is also discriminatory.

The Citizenship Act, 1951

The final statute analysed for the purposes of this essay is the Citizenship Act, 1951 (the '**Act**') that was enacted to introduce citizenship laws in Pakistan, post-independence in 1947. Section 10 of the Act lays down the law regarding married women and states that:

[307] 2012 SCMR 1147

[308] A '*nikaahnama*', is an Islamic Marriage Contract, which is signed by both partners at the time of their marriage. This document is fundamental in officiating the marriage in Islam and helps in determining the rights and duties of both partners in a marriage (Husband and Wife).

> (1) Any woman who by reason of her marriage to a [British subject] before the first day of January 1949, has acquired the status of a British subject shall, if her husband becomes a citizen of Pakistan, be a citizen of Pakistan.
>
> (2) Subject to the provisions of sub-section (1) and subsection (4) a woman who has been married to a citizen of Pakistan or to a person who but for his death would have been a citizen of Pakistan under section 3, 4 or 5 shall be entitled, on making application therefore to the Federal Government in the prescribed manner, add, if she is an alien, on obtaining a certificate of domicile and taking the oath of allegiance in the form set out in the Schedule to this Act, to be registered as a citizen of Pakistan whether or not she has completed twenty-one years of her age and is of full capacity.
>
> (3) Subject as aforesaid, a woman who has been married to a person who, but for his death, could have been a citizen of Pakistan under the provisions of sub-section (1) of section 6 (whether the migrated is provided in that sub-section or is deemed under the proviso to section 7 to have so migrated) shall be entitled as provided in subsection (2) subject further, if she is an alien, to her obtaining the certificate and taken the oath therein mentioned.

From a bare reading of the aforementioned section, it can be seen that if a non-resident woman marries a Pakistani man, she is allowed to become a citizen of Pakistan; however, the same cannot be said for a non-resident man who marries a Pakistani woman. In the *Suo Moto* Case No. 1/K*,* the Supreme Court acted upon a newspaper clipping describing how Pakistani women

were not able to acquire citizenship for their foreign husbands whereas Pakistani men could do the same under section 10 of the Act.[309] This section was deemed discriminatory under Article 25 of the Constitution[310] as it did not treat men and women equally and directions were given to the Government to amend this section of the Act. It was also held in this case that there is nothing in Islam that prevents women from passing on citizenship rights to their husbands. Nevertheless, it is important to note that although this section was deemed to be repugnant with the principles of Islam and in contravention to Article 25 of the Constitution, no steps have yet been taken by the legislature to amend this law.

5. THE ABSENCE OF THE TRANSGENDER COMMUNITY FROM THE LAW

The terms used in the Ordinance and Regulations, and the Act are restricted to the male-female dichotomy, and hence, completely overlook the transgender community, as well as other gender non-conforming individuals. This lack of representation in statutory laws has resulted in exploitation of and discrimination against these minority groups. The Supreme Court of Pakistan issued a somewhat revolutionary order in November 2009, in the litigation instigated by Dr. Muhammad Aslam Khaki's petition relating to Pakistani transgender persons' official registration as well as the issuance to them of official governmental identity documents (the '**Order**'). In the Order, the Court directed NADRA to "adopt a strategy ... to record [a transgendered individual's] exact status in the [identity document] column meant for male

[309] PLD 2008 FC 1

[310] Article 25, Constitution of Pakistan 1973.
http://www.na.gov.pk/uploads/documents/1333523681_951.pdf

or female after undertaking some medical tests based on hormones, etc."[311] The Order could be seen as the culmination of many legislative interventions proposed in 2009 *vis a vis* transgender rights, including but not limited to ordering a census on the transgender population, with one diligently executed in Punjab.

The Order can be regarded as one of the first legislative actions towards safeguarding the rights of transgender people in Pakistan. The Order, while it had its flaws in the nomenclature it used for the transgender community it undoubtedly prompted the promulgation of the Transgender Persons (Protection of Rights) Act, 2018 (the '**TPA**').[312]

The TPA is commendable for its nuance, range and clarity. It allows the citizens of Pakistan to self-identify their gender, and bans discrimination against transgender persons in public places like schools, work, public transportation and doctor's offices. As a result of the TPA, transgender people can apply for a driving license, passport, and other official documents using their chosen identities. The TPA also delineates heavy penalties for assault, unlawful eviction, and harassment of the transgender community. Furthermore, it accounts for sensitivity training for law enforcement and streamlines the process to change one's gender in government records. However, though the enactment of the TPA is a step in the right direction, the transgender community, like all other gender minority groups, still face many difficulties in attaining CNICs.

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311 *Dr. Muhammad Aslam Khakhi v SSP Operations* (Constitutional P. No. 43/2009)

312 Transgender Persons (Protection of Rights) Act, 2018. http://www.senate.gov.pk/uploads/documents/1521612511_419.pdf

When it comes to issuance of CNICs, we have found that the problems are twofold: one pertains to the socio- economic background of those applying for CNICs, and the second pertains to the cultural norms of various communities in Pakistan. Though there are very few cases which have been taken to court regarding issuance of CNICs, those which have been taken to court have had no satisfactory outcome. As discussed in the Sections above, while the Superior Courts of Pakistan have directed the Federal Government as well as NADRA officials to ensure that religious and gender minorities are not discriminated against on the basis of outdated laws and SOPs, no action has been taken by the Government and/or NADRA officials in pursuance of these directions.

In the matter of *Tatheer Fatima v State*, the petitioner sought relief from the Supreme Court of Pakistan seeking the removal of her father's name from official documents and replacing it with her mother's name instead, as her father had abandoned her in her childhood. Although the Court acknowledged the petitioner's contention of having an absentee father, it stated that the relief sought was not within the ambit of the Supreme Court and should be sought from NADRA.[313] These cases highlight the administrative obstacles that a citizen faces to the 'Trichotomy of State Power' due to which no substantial steps can be taken by the Judiciary to improve the problems faced by women and gender minorities as this is an 'Executive' issue that can only be rectified through legislative measures. This problem needs to be addressed promptly if any breakthrough in improving access to citizenship rights is to be achieved.

[313] Civil Appeal No. 1143 of 2018

Positive steps have been taken to address the issues faced by the transgender community which will hopefully lead to more inclusion for them. However, the obstacles faced by gender minorities while obtaining NICs and the resultant discrimination and mistreatment that they endure, remains a persistent problem.

6. THE IMPORTANCE OF NATIONAL IDENTITY IN A NATION-STATE

The nation-state is a way of thinking about political and social membership, in that, identity within the State determines a person's status and influence within the wider society. Accordingly, national identity can be seen as the awareness of affiliation with the nation that gives people a sense of who they are in relation to others. But when the very basis of national identity in a State becomes exclusive to only the privileged, then what remains is a group of highly influential people who enjoy all that the State has to offer, and disadvantaged groups whose identities are ignored - if not erased – by the State.[314] In Pakistan, even before members of gender minority groups (especially those belonging to lower socio-economic backgrounds) decide to obtain a CNIC, they are faced with numerous obstacles. The issues of restriction on mobility and access faced by gender minorities due to being restricted to the private sphere to uphold patriarchal norms in society, make it increasingly difficult for them to even reach NADRA. The cycle of oppression and discrimination is sustained due to the State's inability to take affirmative action to reduce the obstacles faced by these groups, as one problem leads to the other.

[314] Taylor-Gooby P. "Citizenship, Dependency, and the Welfare Mix: Problems of Inclusion and Exclusion. International Journal of Health Services." 1993. 23(3):455-474. doi:10.2190/GNRY-39A4-F80K-GEU9

This discrimination against gender minorities is sanctioned by the State, as it allows certain groups of individuals to be better situated in society than the others. Disadvantaged groups have to face numerous problems to attain the same level of benefits and rights as privileged groups, and are often discouraged from pursuing full citizenship rights by way of obtaining CNICs.[315] There are numerous structural issues that perpetuate the plight of women and other gender minorities, specifically those belonging to lower socio-economic backgrounds. These disadvantaged groups must overcome various hurdles to acquire a CNIC, despite seemingly non-discriminatory and beneficial legislation governing citizenship in Pakistan. The State is a silent spectator in the perpetuation of the idea that gender minorities are mere extensions of the patriarchs of their families, when it refuses to remedy the situation of NADRA's unlawful requirement of affiliation with a male family member to be awarded a CNIC. This condition of affiliation with a male family member is proof that gender minorities remain second class citizens of the State when compared to their male counterparts.

Once members of gender minority groups reach NADRA, they are forced to deal with issues of harassment and derogatory treatment at the hands of NADRA officials, particularly if they belong to the transgender community. Despite the protections given to members of the transgender community under the TPA, unless they have some political sway or affiliation, members of this community are often still subject to invasive physical exams to

[315] Mr. Sarim Burney, Founder, Sarim Burney Welfare Trust (Online, 10 April, 2021)

'accurately determine' their gender. This, in turn, discourages them and proves to be a big deterrent for them from obtaining NICs.[316]

Although these conditions are often not sanctioned by law itself, the inherent bias of and patriarchal influence on NADRA officials enables discrimination against women and other gender minorities. The conditions only worsen for women and gender minorities belonging from lower socio-economic backgrounds.[317] Thus, it is evident that inclusion within a nation-state requires more than the mere institutionalisation of legal rights and political participation. In other words, civil and political rights are empty if opportunity is not equalized and if remediable handicaps linked to status position continue to prevail.[318]

As per our correspondence with the founder of Sarim Burney Welfare Trust which is a non-profitable trust representing the oppressed and less privileged population such as orphans and gender minorities, most women and gender minorities find it difficult to overcome the social and structural barriers in the way of obtaining CNICs and end up disappearing from the social eye, as well as from the eyes of the State, as an unregistered and undocumented individual.[319] This invisibility in the eyes of the State is further perpetuated when women and gender minorities cannot participate in the political sphere by way of voting due to their lack of documentation. This political incapacitation goes against the very essence of a democracy as numerous

[316] Trans Rights Activist 1 (Telephonic Conversation, 16 April 2021) [The identities of these activists have been kept confidential as per their request]
[317] Ibid.
[318] Bader, Veit. Citizenship and exclusion. Springer, 1997. Page 100
[319] Mr. Sarim Burney, Founder, Sarim Burney Welfare Trust (Online Interview, 10 April, 2021)

women and gender minority people are left out of the democratic electoral process. Lack of representation and advocacy for this issue within the Parliament only furthers this vicious cycle.

The oppression of women and gender minorities as a result of not possessing NICs is systematic and is enabled by the State at various levels. Gender minorities belonging to low-income socio-economic backgrounds are dispossessed of their ability to qualify for various welfare programs. Welfare programs such as the Ehsaas Trust and Benazir Income Support require registration through identity card numbers. Consequently, citizens who do not have NICs end up losing out on basic welfare amongst other things. Apart from these welfare programs, access to healthcare and other State funded resources becomes difficult for those who do not possess NICs.[320]

7. CONSEQUENCES OF A LACK OF CNIC

Women and gender minorities, especially those belonging to lower socio-economic backgrounds, often end up finding themselves in the informal work sector to make a living without the option of relying on welfare programs.[321] The fact that all kinds of work within the formal sector requires proper documentation and identification, is one of the reasons for 73.5% of female employment in Pakistan being in the informal sector.[322] Women and gender minorities working in the informal sector have little to no job security

[320] Member, I-Care Foundation (Telephonic Conversation, 10 April 2021)

[321] Mr. Sarim Burney, Founder, Sarim Burney Welfare Trust (Online Interview, 10 April, 2021)

[322] Covid-19 & The new normal for women in the economy of Pakistan. *Institute of Development And Economic Alternatives IDEAS,* (2020) pg. 5-10 https://think-asia.org/bitstream/handle/11540/13335/Covid-19-The-New-Normal-for-Women-in-the-Economy-in-Pakistan.pdf?sequence=1

considering they are not protected by the various beneficial legislation pertaining to labourers,[323] are subject to working in the informal sector and have no protection from issues such as harassment and abuse and these issues often do not even get brought up owing to the imbalance of power.[324] Summary dismissals are also a norm for such workers as there are no legal protections for them in place.[325] Resultantly, those working in the informal sector have to face issues such as odd working hours, no pension, insurance, or health insurance.[326] The biggest drawback of working in the informal sector, however, is extremely low wages. These workers make even less than the minimum wage in some cases, since there are no laws governing this sector of the economy. Consequently, the State further perpetuates the economic incapacitation of the women and gender minority people, who are already deprived of basic rights and benefits.[327]

Marriage can be considered as one of the most fundamental freedoms of a person and is a pre- requisite for access to many other benefits in Pakistani society. However, the State refuses to recognise those marriages that have not been officially registered. It is no surprise that for registration of a marriage in Pakistan, the first piece of documentation required are attested copies of the bride and groom's CNICs. Access to public housing and many other facilities available for married couples is denied to those not officially

[323] Ahmed, S. Irfan (2020), Home-bounds grasping at straws. *The News*. https://www.thenews.com.pk/magazine/you/692867-home-bound-grasping-at-straws
[324] Ibid.
[325] Member, I-Care Foundation (Telephonic Conversation, 10 April 2021)
[326] Ahmed, S. Irfan (2020), Home-bounds grasping at straws. *The News*. https://www.thenews.com.pk/magazine/you/692867-home-bound-grasping-at-straws
[327] Ibid.

registered as married couples.[328] Possession of NICs is also a prerequisite for obtaining passports and hence, the right to mobility and freedom of movement of those citizens that do not possess NICs is also severely affected. When these disadvantaged groups are refused recognition by the State and are also punished at every step of the way for this non-recognition, they become even more vulnerable and prone to exploitation. Unfortunately, these disadvantaged groups do not have recourse as access to the Pakistani criminal justice system is difficult enough for documented citizens owing to the various procedural technicalities at every step, let alone citizens who do not possess a CNIC. Thus, the State's passive attitude towards these groups deprives them of various rights at various levels.

8. CONCLUSION

In light of the discussion above, it is evident that without possession of a CNIC, a person is reduced to a second-class citizen of the State. The problem faced by women and other gender minorities, especially those belonging to lower income households, begins as soon as they aim to achieve some autonomy by identifying themselves as officially registered citizens of the State. Patriarchal biases of Pakistani society particularly in relation to the role of women in society and their restriction to the private sphere, as well as conservative ideas of gender dichotomies, make it almost impossible for gender minorities to achieve any kind of autonomy and independence in society. This discourages women and other gender minorities from even trying to achieve full citizenship rights within Pakistan and as a result they are met with a number of other problems. The State keeps perpetuating their

[328] Trans rights Activist 2, (Telephonic Conversation, 16 April 2021).

ordeals at various levels and it is as if no branch of Government is ready to take any substantial step or make any useful effort to end the miseries of these disadvantaged groups. Although there is legislation pertaining to 'equality of all' members of the State, the debate of 'formal equality versus substantive equality' is pertinent to understand why the mere promulgation of acts and laws declaring everyone equal is not enough. Not taking away from the benefits of any such legislation, it is important to note the fundamental flaw in their lack of recognition of the need for affirmative action to situate these historically disadvantaged groups at an equal footing to those that are considered privileged. This problem of non-issuance of NICs to gender minorities is extremely pertinent in our current political and social context. Those without NICs and proper documentation cannot even be registered into schools and colleges and the vicious cycle of unawareness and lack of education keeps on continuing and the plight of these disadvantaged groups appears unending. The only way forward is if the State enacts appropriate legislation taking affirmative action for gender minorities to make it easier for them to access the Executive branches; apply the law in its true spirit of justice and equality; and ensure such application by keeping every concerned party in check and also providing them with necessary sensitivity training so they deal with the already disadvantaged groups with the care they deserve.

CONSTITUTIONAL REFORMATION: CAN PAKISTAN BE ISLAMISED?

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ABSTRACT

This article seeks to address a question that has plagued academics, politicians, religious clerics, and the citizens of Pakistan: how 'Islamic' is Pakistan's Constitution? It is divided into six parts. Part I lays down the working definitions of key terms such as the Constitution and Islamic law and elucidates the perceived divergence between the two concepts. Part II explores whether it is theoretically conceivable and practically feasible to Islamise the constitution of a nation-state. Scholarly opinion in favour of the Islamisation of constitutions will be discussed in this section. Part III focuses on the theoretical and practical challenges associated with Islamising constitutions. Furthermore, scholarly views opposed to the Islamisation of constitutions will be explored in this section. Part IV of the article attempts to reconstruct the linkages between positive law, the Constitution, and Islamic law in light of the problems highlighted by esteemed scholars such as Wael Hallaq and Abdullahi An' Naim in Part III. Part V traces the attempts made at Islamising Pakistan's Constitution by various actors. In this part, legislation and case law will be considered. Part VI of the article scrutinises the effectiveness of attempts to Islamise Pakistan's constitution. Part VII concludes by stating the necessary preconditions for the successful Islamisation of Pakistan's constitution.

KEYWORDS: Constitution, Islamic Law, Legislation, Islamisation, Constitutional History.

1. INTRODUCTION

When the Pakistani state was negotiating with the Tehreek-i-Taliban Pakistan (TTP) in 2014, talks failed because the group stated that they would not negotiate with politicians governed by a constitution that the group

considered un-Islamic.[329] The former Prime Minister Imran Khan consistently evoked the principles of *Riyasat-e-Madinah* upon which the Pakistani state must be structured.[330] The Tehreek-e-Labbaik Pakistan (TLP), a religious party fuelled by the desire to Islamise the country and its laws, received over 2.1 million votes in the 2018 general elections, becoming the sixth-largest party in terms of votes received across the country.[331] These examples demonstrate that there are a number of organisations across Pakistan's political spectrum which believe that there is a greater need to incorporate Islam into the Constitution. Pakistan's Constitution is one which has been Islamised in the past by several actors, often with much criticism for those who engage in this task. This article seeks to answer the question of whether constitutions can and should be Islamised, and, following on from that, if they are what issues does this bring to the fore. It will use Pakistan's example as a case study in assessing how effective the Islamisation of Pakistan's Constitution has been and outline possible ways through which this task can be undertaken successfully.

2. Part I: Setting the Framework: Constitution and Islamic Law

Charles Borgeaud defines a constitution in the following words:[332]

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329 1 Rafia Zakaria, 'Islam and The Constitution' (DAWN.COM, 2014) <https://www.dawn.com/news/1148376> accessed 25 May 2022

330 Imran Khan, 'Spirit Of Riyasat-I-Madina: Transforming Pakistan | The Express Tribune' (The Express Tribune, 2022) <https://tribune.com.pk/story/2339025/spirit-of-riyasat-i-madina-transforming-pakistan> accessed 25 May 2022

331 'Tehreek Labbaik Pakistan Received 21,91,679 Votes In Elections 2018' (*Dispatch News Desk*, 2018) <https://dnd.com.pk/tehreek-labbaik-pakistan-received-2191679-votes-in-elections-2018/147268> accessed 25 May 2022

332 Charles Borgeaud, 'The Origin And Development Of Written Constitutions' (1892) 7 PSQ <https://www.jstor.org/stable/2139444?seq=1> accessed 25 May 2022

> A Constitution is the fundamental law according to which the government of a state is organized and agreeably to which the relations of individuals or moral persons to the community are determined. It may be a written instrument, a precise text or series of texts enacted at a given time by a sovereign power or it may be the more or less definite result of a series of legislative enactments, ordinances, judicial decisions, precedents, and customs, of diverse origin and of unequal value and importance.

As per this definition, the Constitution is the supreme law that controls the operations of a State. However, it is crucial to highlight that the process of developing and evolving the constitution involves individuals, the community, and the State.

Islamic law is a contentious term. It has repeatedly been misinterpreted as being the *shari'ah*. There are several differences between *shari'ah* and Islamic law.

The term *shari'ah* has been broadly translated as "the path leading to water", or the source of life. *shari'ah* includes the preeminent sources of guidance for Muslims. The Qur'an, the Hadith or *sunnah* of the Prophet Muhammad (PBUH), the *fatwas* and rulings of Islamic scholars are all considered to be part of the *shari'ah*.[333] The term Islamic law has been understood and interpreted differently by scholars studying the concept. Wael Hallaq believes that Islamic law has four essential attributes: (1) the evolution of a complete judiciary, (2) the full elaboration of a positive legal doctrine, (3) the full

[333] Almas Khan, 'The Interaction between Shariah and International Law in Arbitration' (2006) 6 Chicago JIL 791, 793-794

emergence of a science of legal methodology and interpretation, and (4) the full emergence of doctrinal legal schools.[334] Some scholars believe that Islamic law is what people do, so references to Islamic law should focus on the practices of people invoking Islamic law rather than attempting to understand the term in an abstract manner.[335]

While there are critical differences between a Constitution and Islamic law, such as the existence of divine revelation and collections of material of an ordained Prophet, the similarities are also noteworthy. Both the Constitution and Islamic law espouse fundamental principles and values that govern a State. Both processes involve the interaction between the State, community (of interpreters), and individuals.

The following section will analyse the viewpoint of scholars that believe that there is a need for constitutional reformation and reconstruction to synchronize Islamic law and the Constitution. Iqbal and Justice Cornelius discuss the necessity of connecting Islamic law and the constitution. While Iqbal was discussing it in the context of the subcontinent, Justice Cornelius discusses the importance of connecting the constitution to Islamic law in Pakistan because he realized that Islam was necessary for connecting the Pakistani nation to its original and proper roots.[336]

3. Part II: Constructing a world for an Islamic State and constitutional coexistence

334 Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (CUP 2005), 3

335 Baudouin Dupret, 'What is Islamic Law? A Praxiological Answer and an Egyptian Case Study, (2007) 24(2) Theory, Culture and Society 79, 81

336 A.R Cornelius, 'Restoration of Judicial Responsibility to People' (1965) 15 The All-Pakistan L D 1, 12

The belief that Islamic ideas are compatible with the constitution of a modern nation-state underpins attempts to incorporate Islamic doctrines into the constitution. According to Justice Cornelius, the constitution is the highest form of positive legislation since it is designed to represent the nation's beliefs and ideals.[337] Since the constitution is the most fundamental legal document governing a state, proponents of Islamising states think that Islamic law should be incorporated into the constitution.[338]

Preeminent Muslim philosopher and poet, Allama Iqbal noted that the 'pressure of new-world forces and political experience of European nations are impressing on the mind of modern Islam the value and possibilities of the idea of *ijma'*.[339] Iqbal believed that a Muslim legislative assembly composed of members from different parts of society was best suited to perform the function of *ijma* in lieu of the growth of opposing sects in modern society.[340] On the role of *ulema*, Iqbal remarked that they should be an integral part of the Muslim legislative assembly, guiding free discussion on questions relating to law.[341] According to Iqbal, the ultimate aim of Islam is spiritual democracy.[342]

Iqbal makes several crucial observations that need to be discussed further. The first crucial idea propounded by Iqbal is that the legislative

337 A.R Cornelius Iqbal Day Lecture Cornelius, A. R. 'Ideological Foundation for Democracy in Pakistan.' Iqbal Day Session Lahore 1964 4

338 Clark B. Lombardi, 'Designing Islamic Constitutions: Past Trends and Options for a Democratic Future (2013) 11 International JCL 615

339 Muhammad Iqbal, *Reconstruction of Religious Thought in Islam* (SUP 2013), 138

340 ibid

341 ibid 139-140

342 ibid 142

assembly, considered to be an integral part of a secular state, is the modern realization of the concept of *ijma* that has been integral in Islamic law since the advent of Islam. One reason that Iqbal proffers for the compatibility of the secular (state) and Islamic principles is that unlikely Christianity, Islam was a civil and political entity since the beginning.[343] In Islam, the distinction between the spiritual and the temporal is not as sharp as the division between the sacred and the profane in Christianity. The second pivotal insight provided by Iqbal is the importance of diversity in the Muslim legislative assembly so that opposing views are adequately represented. The third important contribution that Iqbal makes to the discussion is that he saw the *ulema* as part of the legislative assembly. Lastly, the fact that Iqbal sees Islam as a spiritual democracy shows that his vision of Islam is compatible and complementary with democracy.

Justice Alvin Robert Cornelius was a prominent jurist, legal philosopher, and former Chief Justice of the Supreme Court of Pakistan. He claimed that the constitution and the democratic system in Pakistan should not be secular.[344] Efforts should be made to ensure that the constitution works towards organizing the lives of Muslims in accordance with the fundamental beliefs of Islam. This shift would create the incentive structure required for them to obey the Constitution.[345] His ideas were premised on the principle that 'law should in some sense grow out of the society; it should be a projection of the common personality'.[346] Justice Cornelius also uses the work of Simone Weil to further his point about the need for constitutional

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343 ibid

344 Clark B. Lombardi, 'Can Islamizing a Legal System Ever Help Promote Liberal Democracy? A View from Pakistan' (2010) 7 U St Thomas L J 649, 661

345 Cornelius (n 12) 9

346 ibid 12

legality to be derived from the eternal source of all legality rather than from the immediate historical experience of colonialism, because colonialism caused a break in historical continuity.[347]The point that is being made here is that a constitution derived from the historical experience of colonialism would have significantly less legitimacy than a constitution derived from the external source of all legality, which in the context of Pakistan is Islamic law.

Justice Cornelius cements the ideas espoused by Iqbal earlier. He realized that Islamic principles were best suited for the purposes of inspiring Pakistanis to respect the rule of law and the constitution. He recognized that a political system devoid of the principles and values that shaped and governed the behaviour of the polity was unlikely to garner support from the public.

4. Part III: A State and Constitution based on Islamic law: a theoretical and practical impossibility

Wael Hallaq and Abdullahi an' Naim staunchly oppose the creation of a state and constitution based on Islamic law.

According to Abdullahi, an Islamic State is theoretically impossible to imagine. He argues that the components which make up a modern state are antithetical to the fundamental nature of the *shari'ah*. The State is a political entity that primarily relies upon coercion to enforce its will on its citizens. Fear of sanctions and repercussions drives obeyance and compliance with laws promulgated by the State. Given that this is the character of the State, it is inconceivable that the Constitution can be based on normative Islamic

[347] ibid

principles that replace the State's coercive power with the moral authority of God. [348]

Furthermore, the character of the *shari'ah* is diametrically opposed to the nature of the state. The *shari'ah* is a normative system that encompasses diverse ideas and beliefs. According to Abdullahi, the *shari'ah* allows individuals to formulate their own opinions and act accordingly. Positive law cannot be used to enforce the *shari'ah* because it undermines the flexibility and richness of the *shari'ah*, thereby contradicting the essence of Islam and the *shari'ah*.[349] Another reason for the incompatibility of *shari'ah* and positive law is that Muslims commonly understand the *shari'ah* to mean the expression of Divine Will, while positive legislation reflects the State's political will.[350] Enforcement of *shari'ah* through positive legislation is an attack on the divinity of the *shari'ah* and opens it up to the challenge that the will of God can be altered and changed by man. Therefore, an Islamic State is a conceptual impossibility because enforcement of *shari'ah* through positive legislation distorts the qualitative purpose that the *shari'ah* is supposed to serve in the life of Muslims.[351] The principles of *shari'ah* are incompatible with principles of domestic constitutionalism and foundational principles of international law, which is why it is impossible to enforce Islamic principles through positive legislation by the State.[352] In light of Abdullahi's observations, Islamising a constitution vitiates the essence of the *shari'ah* and

[348] Abdullahi An-Naim, 'Shari'a and Positive Legislation: Is an Islamic State Possible or Viable?' (Hague 2000) 29-30
[349] ibid 30
[350] ibid 32
[351] ibid
[352] ibid 37

attempts to Islamise constitutions are based on a faulty understanding of the foundational premises underpinning the State and Islamic law.

Wael Hallaq builds on the arguments of Abdullahi by distinguishing Islam from the modern State. He purports that the modern State has five central features: (i) specificity of the constitution as a historical experience, (ii) sovereignty, (iii) legislative monopoly and monopoly over violence, (iv) bureaucratic machinery, (v) cultural hegemonic engagement in the social order.[353] Hallaq distinguishes the *shari'ah* from the modern State by stating that the (iii) and (v) features of the State are incompatible with the *shari'ah*. Legislative monopoly and positive legislation are contrary to the essence of the *shari'ah* because the development of the *shari'ah* has been founded on diversity of opinion. The emphasis on the divergence of opinion and promotion of discourse has led to the formation of different schools of legal thought in Islam. Islam's different schools of legal thought arrived at different conclusions while scrutinising the same sources. Enshrining Islamic principles through the constitution or positive legislation would inevitably lead to privileging one school of thought to the detriment of others. Preference for one school of thought over others leads to a legitimacy crisis as adherents to a school of thought not enacted through positive law would be unwilling to abide by laws made in contravention to their beliefs.[354]

5. Part IV: Reconstructing the Relationship Between the State, Constitution, and Islamic Law

353 Wael B. Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (CUP 2014) 1-36, 155-70

354 ibid 163

Hallaq and Abdullahi's analysis led to the conclusion that there is an irreconcilable divide between the State and *shari'ah*. This section will attempt to repair the divide and create preconditions for reconciliation between these concepts.

Fadel presents a counter-narrative that helps to heal the divisions between the State and *shari'ah* proffered by Hallaq and Abdullahi. He posits that Hallaq's conclusion that *shari'ah* and the State are incompatible is flawed because Hallaq failed to discuss a normative account of Islamic politics.[355] Furthermore, Fadel states that a modern State based upon the dictates of Islam is viable. This compromise can be achieved by making 'clear distinctions between the normative domain of a political judgment of a State of modern citizens and that of an Islamic legal judgment'.[356] In this way, Islam and the State can coexist by delegating responsibilities to the legislative body and to the judiciary of a state.

Moreover, Fadel believes that Abdullahi and Hallaq's analysis is based on an incomplete understanding of Islamic law. Islamic law is not exclusively based on substantive morality or a normative system. Muslim jurists devised al-*ahkam al-wad'iyya* or 'positive rules' for effective governance. According to Fadel, there are a few approaches through which the State can incorporate Islam through positive law. The first thing is to understand the difference between the domain of State legislation and individual normative practice. The State can embrace Islamic law while remaining true to the normative tradition with this distinction in mind. A country's Constitution is a document

[355] Mohammed Fadel, 'A Tragedy of Politics or an Apolitical Tragedy?' (2011) 131 Journal AOS 110
[356] ibid 118

that can enshrine this distinction. The second point to mention is that Islamic law can be codified and enforced through the governmental infrastructure, as seen by customary law and codes such as the Majjalah.[357]

The author of this article believes that Hallaq and Abdullahi's attacks on the compatibility of Islam and the State are based on an incorrect understanding of both concepts. Both scholars have reified the State as a static, monolithic entity that exercises its authority through brute force. They have completely eliminated the role played by individuals and the community in state formation. Their inability to see the State as a flexible entity that comprises individuals who may have subjective notions precludes them from creating room for the accommodation of Islamic law in the modern State. Moreover, both authors have confused *shari'ah* and Islamic law to create a wedge between the State and Islamic law. While the literal contents of the Qur'an and *sunnah* might be unchangeable, Islamic law focuses on the interpretation of these sources in conjunction with on-ground realities. This interpretive role allows legislators and the judiciary to incorporate Islam into the constitution without undermining the sanctity of the *shari'ah*.

The author of this article would like to posit that enshrining Islamic principles in the constitution of a state is the most prudent way to maintain a balance between ensuring citizens comply with the law and avoiding overreach by legislators and judges.

6. Part V: Case Study: Islamization of the Pakistani Constitution

[357] ibid 119

In post-partition Pakistan, it was a foregone conclusion that the Constitution would be based on Islamic principles since that was one of the central issues that led to the partition of the subcontinent. The process of formulating a constitution was initiated in 1949 with the Objectives Resolution which signified the importance of Islam and identified that the role of the Constituent Assembly was to frame a constitution that allows Pakistanis to live their lives according to the principles of Islam.[358]The Basic Principles Committee (BPC) was set up in the aftermath of the Objectives Resolution to ensure that the future Constitution of Pakistan was made in accordance with the Objectives Resolution.[359] The Basic Principles Committee was split up into several subcommittees. One such subcommittee was a board of experts consisting of reputed scholars well versed in *Talimat-I-Islamia.*[360] The power of the board was limited to an advisory nature, and that too only on matters that were referred to it.[361]The next crucial decision adopted by the Constituent Assembly was a proposal that accorded the Supreme Court exclusive authority to issue declarations about the compatibility and repugnancy of laws vis-à-vis Islam.[362]

The first Constitution of Pakistan contained a series of Islamic provisions. The State's official name was the Islamic Republic of Pakistan, and the Objectives Resolution was added as a non-binding preamble to the constitution. The final authority to declare the repugnancy of laws vis-à-vis Islam was transferred from the Supreme Court to the National Assembly

358 Mathew J. Nelson, 'Islamic Law in an Islamic Republic: What Role for Parliament?' (CUP 2015) 9

359 Leonard Binder, *Religion and Politics in Pakistan* (UCP 1961) 155

360 ibid 156

361 ibid

362 Nelson (n 34) 12

through Articles 197 and 198 of the Constitution.[363] The President was tasked with setting up an organization devoted to Islamic research and an 'advisory' board that would make recommendations regarding the Islamisation of the law.[364]

Field Marshal Ayub Khan furthered the Islamisation of Pakistan's legal system through the promulgation of the Muslim Family Laws Ordinance (MFLO),[365] which institutionalised Islamic practices and accorded the State the authority to regulate them. Ayub Khan promulgated Pakistan's second Constitution in 1962.[366] The Constitution afforded protection to the newly promulgated MFLO by enshrining that it was ineligible for judicial review. However, the Constitution of 1962 scaled back on some of the Islamic provisions added in the Constitution of 1956. The word Islamic was removed from the country's name but was later introduced through the First Amendment to the 1962 Constitution.[367] The phrasing of the Objectives Resolution clauses was amended to allow the state and individuals more freedom to enact the provisions of the Qur'an and Sunnah privately. One commonality between the two constitutions was that the National Assembly would still decide the matter of repugnancy. This is not to undermine the role of the Council of Islamic Ideology (CII) or its other predecessor advisory committees that were accorded an advisory role in judging the matter of repugnancy of laws to Islamic principles.

363 The Constitution of the Islamic Republic of Pakistan 1956 art 197-98

364 Richard Wheeler, *The Politics of Pakistan: A Constitutional Quest* (CUP 1970) 99; Binder (n 35) 371-374

365 The Muslim Family Laws Ordinance 1961

366 The Constitution of the Islamic Republic of Pakistan 1962

367 Constitution (First Amendment) Act, 1963 (I of 1964)

The Constitution of 1973, promulgated by Zulfiqar Ali Bhutto, largely preserved the preceding Constitutions' provisions on the Islamization of laws. The parliament's supremacy to make decisions regarding the repugnancy of laws vis-à-vis Islam was reinforced by the Supreme Court in *State v Zia ur Rahman*.[368] The judges opined that their powers were restricted to making declarations about laws that contravened Islam. The Supreme Court ruled that the power to initiate legislation in accordance with Islamic principles was held solely by the Parliament.[369]

However, in the Constitution of 1973, additional provisions relating to Islam were inserted. The Objectives Resolution was retained as a non-binding preamble, and Article 2 of the Constitution identified Islam as the state religion of Pakistan.[370] A constitutional amendment was passed in 1974 declaring that the Ahmadiyya community were non-Muslim. This amendment was rooted in the politics at the same as well as the State's determination that it had the prerogative to define and give value to religious identity in Pakistan.

General Zia-ul-Haq spearheaded the next phase of Islamisation in Pakistan's constitutional history. In 1979, he passed a Constitutional Amendment that empowered provincial High Courts to decide whether a piece of legislation was repugnant to Islam. Following this, a Shar'iat Appellate Bench (SAB) was set up in the Supreme Court, where appeals pertaining to matters of Islamization would be entertained. Then, reversing his previous decision, Zia disbanded provincial *shari'at* courts and created the Federal Shari'at Court (FSC). Under Article 203B of the Constitution, the

[368] PLD 1973 SC 49
[369] ibid
[370] The Constitution of the Islamic Republic of Pakistan Art 2A

FSC was not empowered to review the constitution or any Muslim personal law.[371] Initially, the courts were reluctant to exercise power bestowed upon them by the dictator. However, when they did exercise their power, it was usually in favour Zia's policies. In *Dr Amanat Ali v Federation of Pakistan*,[372] the FSC ruled that it could not review issues that did not have a community-wide consensus, an approach that was in line with what earlier judges had said regarding their power in matters of repugnancy. Dismayed by the unwillingness of the FSC and SAB to serve his ends, Zia introduced another Constitutional Amendment.[373] Under the revised Article 2A[374] of the Constitution, the Objectives Resolution was made a substantive constitutional provision. However, the courts were still reluctant to support Zia in his bid to undermine the separation of powers. A critical case in this regard is the *Kaneez Fatima* case,[375] in which the judges ruled that Article 2A could not be treated as a supra constitutional provision superseding the power of the parliament.[376]

Before Zia's regime, judicial oversight of Islamic laws was minimal. The Parliament, advised by the Council of Islamic Ideology was primarily tasked with the responsibility of ensuring the conformity of laws with Islamic principles.[377] However, during the 1980s, after the creation of the FSC, the

[371] ibid Art 203B

[372] PLD 1983 FSC 15

[373] Charles Kennedy, 'Repugnancy to Islam—Who Decides? Islam and Legal Reform in Pakistan,' International CLQ 41 (1992), 769-87

[374] Constitution (n 46)

[375] PLD 1993 SC 901

[376] Martin Lau, *The Role of Islam in the Legal System of Pakistan* (Leiden: Brill 2006) 65-68

[377] ibid 66

courts emerged as an 'institutional mechanism to Islamise the legal system independently'.[378]

7. Part VI: Evaluating the Effectiveness of Islamisation in Pakistan

In Pakistan, authoritarian rulers primarily initiated and furthered the drive towards Islamisation. Zia 'used Islam strategically to legitimize his military authoritarian rule'.[379] Moreover, dictators and nationalist politicians are constantly under scrutiny from traditional Islamists.[380] This pressure results in dictators making Islamic policies to retain the approval of religious leaders and further their stay in power. The reason dictators in Pakistan have been forced to appease Islamic leaders is that they hold tremendous sway over the public. This can be attributed to the public's desire to live life according to Islamic principles. Another factor that explains why dictators primarily pass Islamisation policies is that it is structurally easier for them to pass policies of their own accord via ordinances. Dictators do not face the pressure of having to build consensus in parliament or the threat of being thrown out of power through re-election. Therefore, they can enact provisions swiftly and decisively.

An evaluation of Islamisation in Pakistan lends credence to the fears expressed by Hallaq that allowing the State to enforce its brand of Islam

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[378] ibid 48

[379] Muhammad Ziaul Haque Sheikh, Zahid Shahab Ahmed, 'Military, Authoritarianism and Islam: A Comparative Analysis of Bangladesh and Pakistan,' Politics and Religion 13 (2020), 334

[380] Binder (n 35), Binder focuses on the 'traditionalist' ulema (Group 1), the 'modernist' politicians (with occasionally references to 'secularist' soldiers and bureaucrats) (Group 2), and the 'fundamentalist' Jama'at-e-Islami (Group 3)

comes at the behest of marginalising specific valid interpretations of Islam. The obvious response to this would be that the CII and its predecessors had representation from all major sects present in Pakistan. Another response would be that the privileging of a specific interpretation of Islam in Pakistan is in line with the values of much of the polity.

Islamisation in Pakistan suggests that a ruler's desire to elongate their reign seems to be one of the driving motivations behind the introduction of *shari'ah*. This is evidenced by Ayub and Zia's use of Islamization as a means of enhancing their control and legitimacy with the citizenry.

Given that Pakistan's Islamisation has failed to produce acceptable results, what can be done to secure a balance in which Islamic ideals are upheld, but abuse by the governing class is avoided?

The first step is to assess the popularity/affinity that people have with Islam. The State of Pakistan has often undermined the desire for people to be governed in accordance with Islamic laws, which has resulted in protests and discontent. One strategy that the State could adopt is to relegate Islamic matters to the domain of civil society. This poses the risk of strengthening Islamic civil organisations that might hold opinions that contradict those of the state. Considering the deep-rooted popularity of Islam in Pakistan, organisations such as the TLP and JUI (F) have effectively rallied people for their cause and became a fierce and robust opposition to the writ of the State. The rise of the Muslim Brotherhood in Egypt followed a similar trajectory. The other approach that the State can adopt is to enforce Islam through state apparatuses. This has its own set of challenges. First, the State must make the unenviable choice of deciding which organ of the state should be given the authority to implement Islamic laws. Vesting this power exclusively in the

legislature means creating the room for elected representatives to use Islamic provisions to enhance their popularity rather than cater to the needs of the public. Putting the executive in charge of the Islamisation process creates the possibility that some interpretations may be preferred at the cost of others. This becomes problematic given that the executive is unelected and might mix up their personal beliefs in matters of public dealing. Handing this authority to the judiciary in the form of judicial review might result in judicial law-making and other undesirable consequences. Considering these matters, it is imperative that in countries like Pakistan, where the public overwhelmingly supports the introduction of Islamic law, values of the *shari'ah* must be outlined in the Constitution, and the respective powers of each organ of the State must be precisely delineated to prevent abuse.

8. Part VII: Conclusion

The subject of whether it is conceivable and practically feasible to Islamise a constitution is therefore a fraught issue over which there has been much scholarly debate. I have argued that the State is a flexible entity which can accommodate Islamic law without undermining the sanctity of the *shari'ah* and indeed this is a means through which citizens can be represented and the judiciary and legislature can be kept in check. Constitutions therefore can be Islamised if there is widespread demand among citizens supporting such an effort. If such a consensus exists, then the State must decide the mechanism for Islamisation within the Constitution. The effects of Islamisation will depend upon the motives for enforcing it as has been discussed in the case of Pakistan. Efforts to Islamise a constitution to accumulate power and control are likely to prove futile. Islamising the constitution to have Islam as a source of guidance and code of life may lead to a different, and I would

argue more positive, outcome. Therefore, there is need to reimagine and redraft the Constitution, specifying the specific Islamic principles to be utilized and delineating the role of the relevant state bodies in charge of enforcing these values.

BOOK REVIEW:

NEW TECHNOLOGIES AND THE LAW IN WAR AND PEACE EDITED BY WILLIAM H. BOOTHBY

SHAZEEN WASEEM

Shazeen Waseem is a student of Law at the University of London. Her primary areas of interest include international law, international relations, and global politics.

The 21st century has witnessed an inexorable surge in technological advances that have revolutionised every facet of commercial, industrial, professional, academic, and daily life. In *New Technologies and the Law in War and Peace*, William Boothby endeavours to address the legal challenges posed by new technologies that have gradually percolated in wartime and peacetime. Along the discussion, the editor has illuminated the 'dual use' of technological developments, with the impetus for evolution coming from either recognised military need or anticipated commercial gains. The editor does not aim to build upon a specific legal methodology to grapple with emerging scientific developments; instead, his focus is to sketch a preliminary design for legislators, persons involved in treaty negotiations, those developing international policy and guidance, members of think tanks, NGOs and all who have an interest in regulating the products of science. This outline consists of the present international law framework and its inadequacies, the implications of those inadequacies, the likely problems to arise as the technology matures, and above all, the development of law to regulate the simultaneous application of technologies in two distinct spheres of activity:

the military on the one hand and the peacetime civilian/consumer on the other.

In the initial chapters, Boothby provides a brief overview of how the acceptability of military uses of new technologies is determined. Before proceeding to the discussion of specific technologies, Boothby probes into a detailed discussion of the comprehensive international law principles as they apply to novel military activities in armed conflict. With reference to the Brussels Declaration of 1874 and the Hague Regulations of 1899 and 1907, the author clarifies that the laws of war do not provide belligerents unconstrained power to adopt means of injuring the enemy which cause unnecessary suffering.

The discussion is not just limited to the law applicable to weapons that States may lawfully employ but also the legal rules that regulate the conduct of hostilities. The author also focuses on targeting law rules and the subsequent protection of civilians in warfare. Hence, the reader has a clear understanding that any weaponry that cannot be directed at a specific military objective and has the potential to harm civilians is prohibited by international law. The author also elucidates upon the ongoing tensions between human rights obligations and the doctrine of combat immunity which shows that the domestication of international law with specified reservations might still authorise States to misuse new scientific products as the state 'may seem fit'.

After the abridged layout, contributors to the edition separately focus on specific technologies, including cyber capabilities, highly autonomous technologies, military human enhancement, human degradation technologies, nanomaterials, naval technologies, outer space technological developments, artificial intelligence and synthetic brain technologies, and the use and

development of biometrics. For each technology, the respective author has followed a coherent structure with an initial discussion of what the technology is and its recent developments, its military and commercial use, current international law and the existing gap between its application and scientific developments, and lastly, comparison, where appropriate, between the use of technologies and subsequent application of law in peacetime and during war.

When discussing the procurement and employment of cyber warfare capabilities, Boothby draws a comparison between the findings of the Tallinn Manual 2.0 and the UN Group of Governmental Experts ('**UN GGE**') reports of 2013 and 2015. The author highlights the detailed rules in the Tallinn Manual that are applicable to the use of cyber force and to the manner in which such force may be lawfully employed in an armed conflict. The manual establishes these rules by applying widely accepted legal principles and rules relating to non-cyber activity in the cyber environment. Whereas the Tallinn Manual is specifically concerned with identifying rules of law and explaining how they may apply in the cyber context, the UN GGE solely focuses on recommended national and international action and approaches, including cooperative measures and best practices, with a view to the fostering of information and communication technology ('**ICT**') security instead of drawing a clear distinction between lawful and unlawful ICT weapons.

Boothby asserts that the UN GGE reports have failed to provide States with a widely accepted set of rules and that they express their propositions in rather general terms, particularly when it is recalled that those propositions only have the status of recommendations. In the author's opinion, the mere fact that certain States do not presently adopt the Tallinn approach does not

render that approach wrong. Likewise, the failure of the UN GGE to do more than just 'note' the principle of distinction does not, as such, raise questions on the applicability of the principle or the associated rules. The rules presented in the Tallinn Manual lack an adequate enforcement mechanism, which raises the question of how these rules will impact a State's domestic legislative regime in relation to cyber capabilities.

The book also enlightens the reader about potential cyber activities in the private sector by including the discussion on intellectual property theft and the *Internet of Things*, a rapidly developing feature associated with a wide range of novel consumer products. The author also makes the reader familiar with the current regulation of these matters at the European level, which can be found in the General Data Protection Regulation ('**GDPR**'). The GDPR deals with the interplay between individual rights and data protection, with notions of physical and psychological integrity and personal autonomy being recognised by the court as part of, or underlying, private life. However, it is clear from the author's discussion that it will likely always be difficult for international law to accomplish consensus between the differing approaches of States.

The book then discusses the employment of autonomous weapon systems where legality hinges upon a person being placed 'on the loop' to regulate the use of the weapon and the autonomous system's limitation on the search for targets in time and space to locations for which assessments of proportionality and other targeting law decisions can be made at the mission planning stage. The author appreciates that artificial intelligence has played an integral role in the evolution of autonomous weapon systems. In the future, the 'learning' aspect might involve the machine developing its own recognition criteria based on observations made in the battle space.

However, it is worth noting that human beings will inevitably be closely involved in acquiring and employing autonomous weapons. States, and the procurement officials they employ, are still entirely responsible for the decision to procure the technology and for the testing and evaluation that must take place before the decision to acquire new weapon systems is made. Interestingly, the book highlights the threat of cyber interference in autonomous weapons. The author explains that as computer navigation links, weapons control and guidance systems, target identification software and other systems become widely used, everything possible will need to be done to ensure that these systems remain robust against cyber interference that would render the use of such weapon systems indiscriminate.

The discussion then proceeds to the commercial use of autonomous weapons in medical surgeries and driverless cars. The author draws an analogy between commercial and military use by stating that if autonomy on the roads is seen as a safer option than driver control, it would be but a short step to apply the same logic to the use of weapon systems. The author emphasises that rather than prohibiting such technology in relation to weapons in ignorance of what it might be capable of offering, a more rational approach would be to develop and explore the potential for such technologies in weapons platforms.

However, it cannot be ignored that autonomous weapons are dangerously unpredictable in their behaviour. Complex interactions between machine learning-based algorithms and a dynamic operational context make it extremely challenging to predict the behaviour of these weapons in real-world settings. Besides, selecting individuals to target based on sensor data alone, especially through facial recognition or other biometric information, might introduce risks for selective targeting of groups based on their perceived age, gender, race, ethnicity, or religious dress. Hence, with increased proliferation,

autonomous weapons could amplify the risk of targeted violence against specific classes of individuals leading to ethnic cleansing and genocide.

In her chapter on military human enhancement, Ioana Puscas recognises that an analogous comparison between human enhancement technologies applied in peacetime and wartime may not be drawn. If used in the workplace and schools, human enhancement technology would raise immediate concerns of misuse, abuse and breach of ethics. However, warfare constitutes a distinctively different environment where 'civilian' ethical considerations are not always transferable, and operational success is the main priority.

Puscas provides the example of the United States and its development and sponsorship of human enhancement technologies via the Defense Advanced Research Projects Agency ('**DARPA**'). Enhancing digestion, improving metabolism, mitigating the effects of sleep deprivation, preventing muscle fatigue, and surviving blood loss are some areas of DARPA's endeavours in military physical enhancement. Puscas incorporates recent developments for better visualisation, including the Restoring Active Memory ('**RAM**') Program, a DARPA project under the umbrella of the BRAIN initiative. It aims to develop a wireless implantable neural interface device enabling military service members to better retrieve memories formed before an injury. While highlighting these developments, Puscas unveils the repercussions of such techniques, which can not only stimulate but can also suppress neural activity. For example, repetitive transcranial magnetic stimulation can severely disturb neurotransmitters, leading to after-effects, including seizures, abnormal endocrine responses and increases in heart rate. Puscas subtly presents her view by suggesting that the mere enhancement of a soldier's operational capabilities without more does not amount to treachery; however, the fact cannot be excluded that enhanced soldiers may commit unlawful

behaviour and that the enhancement may have contributed directly to its commission.

Puscas also raises questions about unit morale which might crumble if enhancements are used selectively or only for some units. The introduction of enhancements could lead to acrimonious interpersonal relations and may be detrimental to the socialisation of values of respect and hierarchy within the armed forces. Puscas also casts light on the potential human rights which may be infringed, including the rights to cognitive liberty, mental privacy, mental integrity, and psychological continuity, and highlights the research of Marcello Lenca and Roberto Andorno on this subject.

In a later chapter on human degradation technologies, Harry Aitken and Hitoshi Nasu focus on three different legal regimes that apply to the use of human degradation technology as a non-lethal means of violence: the law of weapons governing specific classes of weapons, the law of targeting applicable both in international and non-international armed conflict, and human rights law applicable to law enforcement operations. Ostensibly, it may seem that any such technique is against human ethics and morality. However, Aitken and Nasu effectively establish that such treatment might not always be prohibited, as exhibited by international law. For example, the Biological Weapons Convention does not prohibit the development, production, stockpiling or acquisition of microbial or other biological agents or toxins where the types and quantities can be justified for prophylactic, protective or other peaceful purposes. Likewise, the Chemical Weapons Convention provides an exception where the use, development, production, acquisition, stockpiling or transfer of toxic chemicals is intended, inter alia, for peaceful, protective and law enforcement purposes and the types and quantities of toxic chemicals are consistent with such purposes.

In his chapter on naval technologies, Wolff Heintschel von Heinegg primarily focuses on unmanned maritime systems ('**UMS**'). Von Heinegg distinctly mentions the criteria for UMS operations in another state's territorial sea. There should be no considerable disagreement about their obligation to comply with the conditions of innocent passage. It should be similarly accepted that underwater UMS must navigate on the surface and show their flag. Von Heinegg, however, mentions that there is no agreement on the consequences of military UMS' failure to comply with those conditions. While addressing discrepancies in international law, von Heinegg clarifies that no provisions exist in the United Nations Convention on the Law of the Sea ('**UNCLOS**') or in any other treaty that explicitly address the installation of undersea systems and devices. Most of the issues concerning modern naval technologies relate to the widely undetermined legal status of UMS and undersea infrastructure. According to the author, it may be that some governments prefer legal ambiguity because they believe that it serves their best interests by providing them with a considerable margin of discretion and freedom of action. This is a well-justified point, as uncertainty in any law or its interpretation leaves States with the ultimate discretion to apply the law according to their sovereign needs.

Melissa de Zwart then delves deeper into New Space applications of space and considers the public-private partnerships that have evolved both to enable States to continue to engage in expensive space activities and now to realise the potential for commercial space uses, including communication, internet, tourism, and mining opportunities. De Zwart highlights that military and commercial applications now develop concurrently, and governments are increasingly reliant on the cost-effective and more innovative solutions

offered by New Space entrepreneurs who cut the time and costs involved in getting to space and making use of space resources.

De Zwart raises legitimate concerns regarding the UN space treaties, which appear to be outdated with their deliberately vague language, hence presenting impediments to the further development of space. New rules need to be adopted that will enable explorers, tourists, settlers and miners to go beyond the Moon to Mars. De Zwart also addresses the issues that may ripen with increased use of space, that is, the potential for conflict will inevitably become more prevalent. As commercial operators establish mines, tourist ventures, and colonies in space, it might be challenging to grapple with how to operate, defend and protect such sites. Above all, it shall also be noted that protecting intellectual property and trade secrets will remain as imperative as protecting the infrastructure and personnel associated with the operation of such facilities.

While interlinking the evolution of various scientific innovations, David P. Fidler expresses his concerns regarding synthetic brain technologies, which may be vulnerable to cyber intrusion, interference, and manipulation. Like other cyber-enabled technologies, artificial brains and brain-machine interfaces would become part of and subject to the cybersecurity problems associated with the *Internet of Things*. These concerns seem relevant to modern-day issues like the spreading of fake news and human susceptibility to misleading information, which raises widespread concerns about terrorist groups, foreign governments, and domestic politicians exploiting social media platforms for malicious ends.

In the final substantive chapter of the book, Boothby provides an insight into the evolving role of biometrics in connection with military activities, including

raids, checkpoint operations, border control, maritime interdictions, force protection and what is described as human terrain mapping. Again, Boothby draws vital linkages between biometrics and other technological advancements; there are clear linkages between biometrics and cyber operations, and biometrics will be essential to the development of autonomous anti-personnel weapon systems while artificial intelligence will be a vital element in the development of future biometric analysis tools.

Throughout their discussions, contributors to the book have followed a realistic approach by developing their narrative around the notion that all technologies advance together, not necessarily at the same rate or at the same time across all fields, and that it is this dynamic of development in different technologies that provides the realistic context against which change in one particular area must be considered. Readers of this book shall have a clear idea that these developments cannot be viewed in isolation and that subsequent developments in international law shall be in compliance with the combined effect of these interactions. The authors have not only successfully established the use of these technologies in wartime and peacetime but have concurrently addressed the fine distinctions in the application of international law regarding these technologies when used in different spheres of commercial and military activities.

In his concluding remarks, Boothby has left many threads for readers to join to create their own map of understanding. Boothby has not rendered any decision of international law as wrong or right, nor has he been supportive of either interpretation of international law as consisting of a 'whole' or as comprising a 'mixture' of regimes. Undoubtedly, international law is an amalgamation of fragmented, self-contained, isolated; and single, unified

systems. However, how its application must be embarked upon is left to every reader's analysis of international law and its unified fragments.

CASE COMMENT:

RAJA MUHAMMAD OWAIS v. MST. NAZIA JABEEN AND OTHERS

NIMRA MANSOOR

After completing her undergraduate degree in History from the University of Oxford (Magdalen College), Nimra is currently interning at RSIL and her interest lies in the balance between business and law, and how corporations are adjusting to the ever evolving legal world, particularly with reference to climate change goals.

1. INTRODUCTION

On the 5th of October 2022, the Supreme Court of Pakistan issued a judgment in *Raja Muhammad Owais v. Mst. Nazia Jabeen*,[381] declaring that a woman's second marriage does not disqualify her from the right to custody of her children. The Petitioner, the father, filed this case against the Respondent, the mother, impugning a prior judgment of the Rawalpindi Bench of the Lahore High Court in favour of the mother retaining custody. This case is of great significance as it contradicts the disqualification of a mother's right to custody after a second marriage, and instead reaffirms that this right cannot be taken away on this basis alone. This disqualification was customary practice, as highlighted in the judgment that 'the general rule is that the mother on contracting a second marriage forfeits her right of custody.'[382] However, this case establishes precedent that a woman's second marriage cannot be a stand-

[381] 2022 SCP 29

[382] Paragraph 6, 2022 SCP 29

alone reason for the disqualification of her right to custody, and that the welfare of the children[383] is the main consideration in determining which parent maintains primary custody.

2. BRIEF OVERVIEW OF THE FACTS

The Petitioner and Respondent were married and had four children: Faizan Ullah Raja, Rabia Awais, Ayesha Awais, and Ummama Awais. At the time of the Supreme Court judgment, their ages were 8 years, 13 years, 16 years and 17 years respectively. On the 30th of January 2017, the parties dissolved their marriage, after which the Respondent filed an application for custody on the 8th of November 2017 under the Guardians and Wards Act, 1890. She disclosed that she had re-married, although the judgment does not mention when the second marriage took place. On the 15th of November 2017, two of the children left the father's home of their own free will to move in with the mother.

Subsequently, the Respondent moved an application under sections 22-A/22-B of the Code of Criminal Procedure, 1898 (Cr.P.C.) seeking a direction to refrain the Petitioner from harassing her family members, which was disposed of by an Additional Sessions Judge. The Senior Civil Judge accepted her application for custody of the children and awarded a judgment in favour of the Respondent on the 25th of April 2019. This judgment was disputed by the Petitioner, who challenged the decision made by the Senior Civil Judge in the Appellate Court. The judgment by the Senior Civil Judge was set aside, and the Appellate Court awarded custody to the Petitioner on the 8th of

383 'Children/child' and 'minor' will be used interchangeably.

November 2019. The Respondent assailed the judgment through Writ Petition No.3800 of 2019, whereby the High Court restored the initial judgment of the Senior Civil Judge that granted custody to the Respondent. Thereafter, the Petitioner sought an appeal in the Supreme Court.

3. MAIN ISSUES

The Petitioner claimed that the mother had lost her right to custody since she had remarried, whereas he did not.[384] Furthermore, he contended that the man the Respondent had married already had another wife and four sons. The sons were between the ages of 20-24, whereas the Petitioner's daughters were between the ages of 13-17. Because of this, the Petitioner alleged that it was inappropriate for his daughters to live with a stepfather and stepbrothers, as they would be living with *na-mehram* men (i.e., within prohibited degrees of affinity under Islamic law).[385] Furthermore, the Petitioner stated that he would be better suited for custody due to his financial position and would thus be able to provide for his children. Moreover, his family members, including his mother, brother, and sister-in-law, all resided with him and were able to help care for the children in the Respondent's absence.[386]

The Respondent confirmed that she had indeed remarried, and her husband did have another family.[387] However, she clarified that the families lived in separate homes, and that the husband only visited the Respondent in her

384 Paragraph 3, 2022 SCP 29
385 Ibid
386 Ibid
387 Paragraph 4, 2022 SCP 29

home.[388] Moreover, the Respondent stated that she runs a successful private school and is thus financially independent. Most importantly, the Respondent's children testified as witnesses before the Senior Civil Judge and the Appellate Court that they would like to continue living with their mother.[389]

In deciding for the Respondent, the High Court relied on the mother's financial independence, her education, and the children's desire to live with their mother. The High Court found that it was in the best interests of the children for all four of them to live together with their mother, the Respondent. The Petitioner contested this based on the remarriage of the mother, which he alleged to be grounds for automatic disqualification for custody. It is pertinent to examine the applicable legal framework to the claims made by both parties in the dispute to determine what factors influence the decision of which party maintains custody of their children.

4. THE APPLICABLE LEGAL FRAMEWORK

The Supreme Court has continuously emphasised the welfare of the minors as the paramount factor in custody cases. In fact, even if the parents agree on custody arrangements, courts can decide against such arrangements if they believe that the child's welfare is not protected.[390] In this judgment, the Supreme Court clearly states that the welfare of children is not a 'mathematical' calculation, but rather depends on many factors.

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388 Ibid

389 Ibid

390 Taj Bibi v Khuda Bakhsh PLD 1988 Pesh 57; Tahira v A. D. J. Rawalpindi 1990 SCMR 852.

In custody cases, courts often render inconsistent judgments due to differing legal frameworks. In Pakistan, the Guardians and Wards Act, 1890, is the primary legislation under which custody cases are decided. However, such cases are also determined with reference to Islamic law, with judges incorporating principles from Muslim personal law into their decisions. Judgments are also guided by the United Nations Convention on the Rights of the Child (UNCRC) although this is not a primary source of law as far as the domestic legal framework is concerned, it is a useful point of reference for the construction of certain principles, such as the welfare of the child. The consolidation of the myriad of laws relating to the rights of children is required to ensure that the best interests of the minor are protected.

The Guardians and Wards Act, 1890

The Guardians and Wards Act, 1890 governs disputes regarding child custody. According to section 17 of the Guardians and Wards Act, the welfare of the child is given paramount importance. It is to be noted that 'welfare' has not been defined in the Act, which gives courts the discretion to determine what constitutes 'welfare' according to each case's individual circumstances. In this judgment, welfare is defined as a consideration of all factors, including 'the parents' ability to provide for the child including physical and emotional needs', their ability to provide medical care, and their 'ability to provide a safe secure home where the quality of the relationship between the child and each parent is comforting for the child.'[391] Hence, if a child is well-settled with his/her mother, changing this arrangement can decidedly disturb the welfare of the child.

[391] 2022 SCP 29

Moreover, section 17 of the Guardians and Wards Act takes into consideration the preference of the minor if they are old enough to state it intelligently. In this case, the children have actively voiced their desire to live with the mother, which is a relevant factor when assessing welfare. However, this is not a mandatory consideration for the courts.

Nevertheless, this Act has many deficiencies. Firstly, it fails to differentiate between 'custody and 'guardianship'. Custody refers to the bringing up, nursing, or fostering of the child, and taking care of the child's emotional and personal affairs on a daily basis. Guardianship refers to the power to effect legal transactions of the child.[392] Unlike guardianship, in custody, the child must live with the custodian.[393] Pakistani courts consider custody to be a kind of guardianship. Traditionally, custody belongs to the mother, while guardianship of property and marriage belong to the father. However, there have been cases in which guardianship of marriage and property are both awarded to the mother if the welfare of the child demands so. Generally, a mother has the right to custody of her son until the age of seven, and the daughter until she reaches puberty.

Islamic Law

[392] Muhammad Mustafā Shalabī, Ahkām-al-Usra fil Islām (Dār-al-Nahdah Al-_Arabīyah 1973) 736; Mahdi Zahraa and Normi A. Malik, _The Concept of Custody in Islamic Law' (1998) 13(2) Arab Law Quarterly 156, 157

[393] Dr. Mudasra Sabeen, 'Law on the Custody of Children in Pakistan: Past, Present and Future' 73, <https://sahsol.lums.edu.pk/sites/default/files/law_on_the_custody.pdf>

According to Islamic Law, a woman is entitled to custody as long as she does not re-marry.[394] Tradition states that the Prophet (pbuh) said to a woman demanding custody: 'thou hast a right in the child prior to that of thy husband, so long as thou dost not marry with a stranger.' It means that the mother will be given priority for custody unless she has remarried.[395]

Despite this general rule, a mother's remarriage alone is not sufficient to determine what is best for the child's welfare. In *Muhammad Bashir v Ghulam Fatima,*[396] the Lahore High Court observed that a mother's disqualification upon remarriage is not based on the Quran. Since the rules of custody are not provided by the Quran or the Sunnah, courts are able to make decisions that deviate from textbooks on Islamic law, as the rules given by these textbooks are not uniform. Hence, courts may depart from the rules if the child's welfare is being affected.

By making use of *ijtihad*, the process of deriving the laws of the *shari'ah* (Islamic law) from its sources, courts can incorporate principles of the *shari'ah* when exercising discretion in custody cases. There has been much criticism of courts performing *ijtihad* as judges are not considered competent *mujtahids* i.e., they do not possess the qualifications necessary for performing *ijtihad*. However, Justice (R.) Tanzil-ur-Rahman stated that although courts are not equipped to perform *ijtihad*, they can substitute one rule of Islamic law with

394 DF Mullah, Principles of Muhammadan Law, Para 354: "either a mother nor any other female relative mentioned is entitled to the custody of an infant, if she marries a person not related to the infant within the prohibited degrees."

395 Charles Hamilton (trs), The Hedāya: A Commentary on the Islamic Laws (Kitab Bhavan 1870) 138; Abī Dā'ud Sulaimān b. Al-Ash_ath b. Ishāq Al-Uzrī Al-Sajistānī, Mukhtasar Sunan Abī Da'ud (Dar-al-Ma_rafah 1980) 3:185.

396 PLD 1953 Lahore 73

another.[397] For instance, the rule of a mother losing her right to custody upon remarriage can be substituted with the rule of giving paramount consideration to a child's welfare. If a contradiction is presented, the latter rule can be implemented. Therefore, the welfare of the child takes precedence, even according to Islamic law, where this rule of substitution can be validly exercised.

Another condition for custodianship is that the custodian should be *mahram* (i.e., not within prohibited degrees of affinity) to the child. If the mother retains custody, she should not be married to a person who is a stranger to the child, especially if this child is female, since the second husband comes within prohibited degrees of affinity to the daughter. In this particular case, the Petitioner's emphasis on the second marriage being with someone who is *na-mahram* man founds his claim, with regard to the second marriage disqualifying the mother of her right to custody. His argument is furthered by the Respondent's husband and sons being *na-mahram* to his daughters.

The position on the choice of the child is also not consistent across courts. According to the *Hanafi* school of Islamic jurisprudence, a minor does not have the right to choose between parents for the purposes of custody. However, some courts consider the minor's choice. In *Mst Aisha v Manzoor Hussain,*[398] the Supreme Court held that the minor is not the best judge for his/her own welfare, and that their choice will only be considered if it is in the child's best interest. Hence, a child's preference is given due importance,

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397 Tanzil-ur-Rahman, A Code of Muslim Personal Law (Hamdard Academy1978) 744-745; Abdul Ghafur Muslim, _Islamisation of Laws in Pakistan: Problems and Prospects' in H. S. Bhatia (ed), Studies in Islamic Law, Religion and Society (Deep and Deep Publications 1996) 146

398 PLD 1985 SC 436

and can be an important factor that contributes to determining where the child's welfare lies.

The UN Convention on the Rights of the Child (UNCRC)

The UNCRC was ratified by Pakistan in 1990, initially with reservations. It is material to the case since its articles are used as guiding principles to assess the welfare of children in custody cases. The UNCRC recognises that a child should grow up in 'an environment of love, happiness and understanding.'[399] Similarly, Article 3 establishes that a child's welfare is to be placed above all by courts of law, a consideration incorporated into this judgment.

Article 7 of the UNCRC provides that every child has the right to be cared for by their parents, and Article 9 requires that in the case of separation between the parents, the child should remain in contact with both parents unless either one can cause harm.[400] This article is a critical one, since defining 'harm' is challenging. In this case, the Petitioner considered it 'unacceptable' for his daughters to live with a *na-mahram* stepfather, but failed to prove any tangible 'harm'. The Court thus found this concern to be unfounded and decided that it is for the welfare of the children to remain with their mother.

Article 12 of the UNCRC states that a child capable of forming their own view should be given 'due weightage.'[401] This is an essential guiding factor, since it allows courts to recognise a child's care and comfort when determining measures in the interests of the child's welfare. While it cannot

[399] Paragraph 8, 2022 SCP 29
[400] Ibid
[401] Paragraph 8, 2022 SCP 29

be the sole determining factor, it is one that should be given importance, especially if the child's entire living arrangement is subject to change. In the case of a remarriage, the new environment which the child will adjust to must be re-assessed to ensure that the welfare and interest of the child is prioritized,[402] making the child's opinion becomes even more crucial. The Supreme Court judgment authored by Justice Malik highlights that a second marriage cannot become a standalone reason for disqualification, especially when the minors' preference too dictates comfort with the Respondent. However, the welfare of the child is not necessarily the same as what the child may choose. Similarly, a child's best interest may not align with their preference of custodian. For that reason, article 12 is not absolute, and has to be weighed alongside other factors determining welfare. Hence, the minor's choice is an important factor, but not a determinant one.

5. SIMILAR CASES

5.1. Custody Despite Remarriage

The present judgment contributes to existing jurisprudence on a mother's right to custody despite her remarriage. In *Mst. Hifsa Naseer v ADJ Gujar Khan,*[403] the Lahore High Court awarded custody to the mother despite her remarriage. The case was fought between the paternal grandmother and the mother, since the father had no interest in raising the child. In this case, it was decided that the welfare of the child would better be served with the mother rather than the grandmother. However, it is to be noted that this was a case that did not involve the presence of the father, and hence the disqualification

[402] Ibid

[403] PLD 2017 Lahore 153

according to Islamic law was not applicable. Hence, this case establishes the mother's right to retain custody, but is not strictly relevant due to the father's lack of involvement.

Similarly, in *Amar Elahi v Rashida Akhtar,*[404] the Lahore High Court decided that a mother's remarriage does not disqualify her from the right of custody. Rather, she only loses her preferential right, the principle of granting the mother custody over others, and as such other factors to decide welfare have to be weighed. The same was decided in the case of *Muhammad Siddique v. Lahore High Court*,[405] wherein it was decided that the general rule of a mother's second marriage disqualifying her from her right of custody is not absolute.

Moreover, in *Shabana Naz v. Muhammad Saleem*,[406] it was stated that there is no substitute for a mother of the minor child. Hence, there was no obligation to follow the rule of custody forfeiture in the case of remarriage[407] when the child's welfare is not in line.

In the above cases, it is evident that if a child's welfare is best served under the mother's custody, then her remarriage does not disqualify her from the position. The general opposition presented for forfeiture of custody in case of remarriage is deemed to be less significant than the child's welfare, which is paramount in Islamic law, and has to be protected strictly.

[404] PLD 1955 Lah 412
[405] PLD 2003 SC 887
[406] 2014 SCMR 343
[407] DF Mullah, Muhammadan Law, Para 354

5.2. Minor's Choice:

The role of the minor's choice in custody cases has also been dealt with by the Pakistani courts, though less extensively. In *Uzma Wahid v Guardians Judge*,[408] the Lahore High Court awarded custody of two minor daughters to the father, despite his second marriage. This was due to the children's attachment to him, giving importance to the minor's choice (in accordance to the Guardians and Wards Act). This establishes that if able to voice views, the minor's perspective is to be given importance. It is to be noted that this decision may have been influenced by the fact that this concerned the father's second marriage, as opposed to the mother's.

In other cases, the courts have dismissed the minor's position on the matter. In *Abdul Razzaque v Dr. Rehana Shaheen,*[409] the Karachi High Court decided that the minors are unfit to decide where their welfare lies. The custody case was between the paternal grandparents and the mother. While the children showed their disinclination towards the mother, the court gave the custody to her regardless, stating that children can be influenced by elders. Hence, a minor's perspective is given significance only when it is in line with the child's welfare. While it contributes to the decision, other factors have to be considered as well. Since the minor's choice is not a determinant factor, there is a lack of jurisprudence on the matter.

6. ANALYSIS

[408] 1989 MLD 3064

[409] PLD 2005 Kar 610

The Supreme Court's judgment in *Raja Muhammad Owais v Mst. Nazia Jabeen* has created much discussion. This landmark case has brought forward more clarity and finality to the issue of allowing a mother to retain custody of her children despite remarriage, so long as the child's welfare is in residing with the mother. While there have been previous Supreme Court judgments that set this precedent, this case has upheld and reaffirmed it.

The significance of this judgment is two-fold. Primarily, it is a decision that establishes that a mother's remarriage is not an adequate, sole basis for disqualification. More important than that is the minor's welfare, which is reinforced by the first point. Even the rule of forfeiture of custody in case of remarriage is trumped by a child's welfare, and all factors have to be considered in light of that. As summed up by Asma Sajid writing for ProPakistani, this judgment reinforces the importance given to a child's welfare above all.[410]

Furthermore, no absolute rules should exist in custody cases except for the paramount importance of child welfare being above all, as is established by courts. In an article by Business Recorder, it was argued that "more often than not, the father gets the custody without due consideration to particular circumstances of a case, which is unfair not only to a mother but also children of a broken marriage," and goes on to state that, "few can quarrel with the

[410] Asma Sajid, 'Mother's Second Marriage Cannot Stop her from Getting Custody' (2022) ProPakistani <https://propakistani.pk/2022/10/26/mothers-2nd-marriage-cannot-stop-her-from-getting-custody-of-children-sc/amp/?fbclid=IwAR3jWRipi-Ql2tkgSh8h1yvH8cG9e8eFcX2j8kUSCq2iRJOl6N8iTQMONlI>

fact that no one can give unconditional love to a child like a mother."[411] While a father getting custody without consideration of factors is right to be challenged, the latter statement seems problematic. Mothers are often better equipped as caretakers when children are of tender age, but that does not mean that all mothers will be better suited for retaining custody of the children.[412] The welfare of a child is determined by several factors, including the ability to provide financially and emotionally. The environment of the living arrangement needs to be one of comfort. In some cases, it will be in the best interest of the child to reside with the father, and decisions have been awarded in favour of the father as custodian wherein the minors were attached to said father, such as *Uzma Wahid v Guardians Judge*.[413]

Moreover, the value of the minor's choice in this judgment is significant. If a child is able to intelligently express a preference, their preference should be considered to determine the comfort of a child with either parent. For this reason, the testimonies before the Senior Civil Judge and the Appellate Court of the children involved in this case are pivotal. The consideration of the minor's choice coincides with the UNCRC's Article 12. It is to be noted that it is within the discretion of the courts to make use of the UNCRC's principles, even if they are not in line with Islamic law, since a child's opinion is unmentioned in Islamic law. As a party to the UNCRC, Pakistan is obliged to incorporate the principles of the UNCRC in its legislation as well as in the interpretation of all obligations pertaining to the rights of children, especially when determining their welfare in custody cases. In this case, Justice Ayesha

[411] 'SC on Child Custody Battles' (2022) Business Recorder < https://www.brecorder.com/news/40205659/sc-on-child-custody-battles>

[412] Bashir Ahmad v Rehana Umar 1976 SCMR 28

[413] 1989 MLD 3064

Malik's judgment giving weightage to the 'desire as expressed by the children' is an important factor. This is of particular importance because Ummama Awais and Ayesha Awais left their father's home to reside with their mother, a relevant factor according to the Court (although not the sole one). Hence, the minor's choice should not be an absolute one, since it may be in line with the child's welfare. However, if other factors pointing towards welfare and stability are aligned with the minor's choice, it should be taken as a confirmation that the welfare of the child is indeed in residing with the desired parent.

It is understandable that the father's major reservations were with his daughters living with *na-mahram* men, including a stepfather and stepbrothers. However, the Respondent had a separate home for her children, and that lessens the impact of his concern substantially. Although the frequency of the visits made by the husband of the Respondent are not mentioned, it is clear that the children are comfortably and actively residing with the mother in her home. Moreover, there is no mention of the stepbrothers living in close proximity to the children, thereby reducing the concerns even further. If the living arrangement was different, whereby the stepfather and stepbrothers were living together with the Respondent and her two daughters, the outcome of this judgment may have been different as their *na-mahram* status would be a more material factor.

A significant outcome of the judgment is regarding a woman's right to re-marry. In cases where women have children from a previous marriage, they prefer to lead single lives if the alternative is to lose custody of their

children.[414] This discourages women from re-marrying, while in most cases men tend to re-marry and can exercise this inherent right. This case allows women to exercise their right to re-marry while retaining custody of their children, as long as the welfare of the child aligns with the new living arrangement. It is a positive step in rectifying the taboo that prevents women from re-marrying, as there is no automatic disqualification from custody.

7. CONCLUSION

The judgment written by the Honourable Justice Ayesha Malik is commendable and allows women to exercise their right of re-marriage while retaining custody of her children. According to this judgment, a woman's second marriage cannot be the sole reason for disqualification of her right to custody, especially since the welfare of a child is measured by multiple factors. Indeed, no two cases are exactly the same; each case has to be individually assessed on its individual circumstances to see what would be in the best interest of the child. This case reinforces that a child's welfare is of overriding importance, and that a mother' remarriage does not necessitate her removal from guardianship, since the child's welfare may still be to remain with her.

To sum up, the concept of welfare is all-arching, and includes the child's physical, mental, and emotional well-being. It is essential to put a child's interest first, and besides that, no absolute rule should be applied. While settled rules matter, the judge must consider each case individually. As the

[414] 'Progressive Custody Laws' (2022) The Nation <https://www.nation.com.pk/26-Oct-2022/progressive-custody-laws?version=amp&fbclid=IwAR0NMuTOY2pP_UbMalkWPgpDzA_AFxbZGaClqfoisKqsCTRfE29d9px_mh8>>

judgment states, there is 'no mathematical solution' to such cases. Thus, the significance of this judgment lies both in its substantive ruling, i.e., allowing remarried mothers to retain custody of their children, as well as the methodology used by the judges to reach their final decision.