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About the Centre for Human Rights

The Centre for Human Rights (CFHR), housed in Universal College Lahore (UCL), is a legal research institute that actively researches issues of human rights, and works on legal policy, due process, rule of law and criminal justice reforms in Pakistan. The Centre aims to provide legal analysis which are rights-based, human centric and aimed at enhancing the constitutional freedoms of equality and non-discrimination.

About the Human Rights Review

The Human Rights Review was conceptualized and first published in 2012 in collaboration with the American Bar Association - Rule of Law Initiative. Since then, seven volumes of the journal have been published online and in hard copy. The journal aims to promote legal scholarship and create an environment that facilitates dialogue on human rights issues and criminal justice reform in Pakistan. The journal includes contributions from both students and professionals, and has received widespread support from High Court Judges in Lahore, Human Rights Commission of Pakistan and several law firms in Pakistan.

The aim of this year's thematic edition journal is to advance the research and academic literature on barriers to women's understanding and enjoyment of their legal rights in marriage and encourage creative solutions to protect and promote marriage rights for all Pakistani women, regardless of religion.

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IN MEMORIAM

This ninth volume of the Human Rights Review is dedicated to the memory of Fatima Mehmood, who passed away peacefully on 3 October 2025.

Fatima first joined the Human Rights Review as a student Assistant Editor in 2015 for the journal's third volume, and continued in this position for the next three volumes. After graduating and completing her LLM from Harvard, Fatima returned to work at UCL and CFHR in October 2020. In pursuit of her deep interest in advancing research and academic literature in Pakistan, Fatima assumed formal management of the Review, serving as a Sub-editor for Volume VII. In this role, she guided authors on development of their manuscripts and supervised student editorial researchers and associates.

Besides being a member of the editorial team, Fatima also contributed to the journal thrice as an author:

1. '*What is and What Should Be: Child Sexual Abuse Legislation in Pakistan in Light of International Law*' (Human Rights Review, Volume III, 2015)

2. '*The Right to Health and Pakistan's Predicament*' (Human Rights Review, Volume IV, 2016)

3. '*Cyberwarfare in International Law: Constructive Interpretation of the Rome Statute and Associated Challenges*' (Human Rights Review, Volume VII, 2021)

We encourage readers to engage with her publications and benefit from her erudition and academic excellence. The Editorial Team also hopes that those who valued Fatima's work and were inspired by her scholarship — whether as students, colleagues, or readers — will continue to build upon her research, particularly in her interest areas of public international law, jurisprudence, and human rights.

All those who had the privilege of working with Fatima at the Human Rights Review remember her for her grace, strength, and distinctive intellect. We hope this volume furthers the academic rigour and critical thinking within the human rights sphere that Fatima nurtured and contributed to throughout her life.

ACKNOWLEDGMENTS

The editorial team of the Human Rights Review would like to thank the administration of Universal College Lahore, especially the Director, Dr. Sayyed Asad Hussain, and Ms. Urmana Chaudhary for their constant support throughout the process.

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EDITOR'S NOTE

The past two years have witnessed key legal developments in Pakistan, particularly within the spheres of child rights, family law, and civil rights. The evolving nature of rapid technological change, constitutional governance, and the enduring challenges of social inequality have produced a dynamic yet deeply contested legal landscape. Within this context, the Human Rights Review remains committed to cultivating thoughtful legal scholarship that engages critically with the structures that shape the protection and realisation of human rights.

Reflecting global developments, Fazila Tariq and Mariyam Qurban Bhatti review the environmental impact of Israel's War on Gaza in light of international environmental and humanitarian law. They look into the responsibility of states to limit greenhouse gas emissions during war, particularly examining the lack of accountability under the UN climate change regime for wartime emissions.

Nurayn Qasim Ali peruses case law development post-Pakistan's accession to the Hague Convention in 2016. She argues that the superior judiciary's decisions demonstrate inconsistency between personal law and Pakistan's international obligations, causing unpredictability in decisions. Nurayn calls for institutional reform and capacity building to address this predicament. Within child rights, Maryam Asad investigates Pakistan's laws, international obligations, and comparative best practices on the rights of children confined with incarcerated mothers. Laiba Khan appraises the prevalence of child sexual abuse material (CSAM) in Pakistan, reviewing the effectiveness of legal frameworks and their enforcement.

Pakistan has also witnessed key family law reforms in recent years. In this regard, Syed Muaz Shah analyses Federal Shariat Court's decisions that upheld the State's authority to legally regulate the minimum age for marriage, ruling such regulation to not be unIslamic. Jhanzaib Ahmad Khan and Khadija Zafar assess the Supreme Court of Pakistan's landmark judgment in *Tayyeba Ambareen v. Shafqat Ali Kiyani*, which advances the understanding of cruelty in marriage and discourages the abuse of restitution of conjugal rights suits by husbands. Further, Shafaq Farooq demystifies the jurisprudence on *talaq-e-tafweez*, positioning it as a key right of Muslim women.

Samra Ahmad and Misaal Noor review the legal validity of the X ban in Pakistan, which remained in place for over a year starting from the 2024 general election. They assert the need for balancing curbs on hate speech and misinformation with the freedom of expression. Salman Farrukh and Aliza Masood Reza review partisan electoral reforms and their pernicious effect on Pakistan's nascent democracy. They provide concrete recommendations for institutional safeguards in electoral law reform that strengthen the rule of law.

In addition, Tayyaba Kayani examines the legal and institutional frameworks governing medical negligence and malpractice in Pakistan. She analyses key regulatory and legal mechanisms, underscoring systemic deficiencies in accountability and enforcement, and offers comparative insights to identify reforms for strengthening patient protection.

As Pakistan continues to confront complex legal and social challenges, rigorous research and open intellectual exchange remain essential to the pursuit of justice. We hope that the discussions contained in this ninth volume of the Human Rights Review will contribute meaningfully to that endeavour and inspire further scholarship on the advancement of human rights.

The Parent Trap: Navigating International Child Abduction through Mohammad Faraaz Sheikh v. Javeria Shahani

Nurayn Qasim Ali[1]

Abstract

Can a kidnapping parent, who has been saddled with a charge of child abduction under the Hague Convention on the Civil Aspects of International Child Abduction, 1980, agitate their respective rights of hizanat or wilayat over their child? The High Court of Sindh in 'Mohammad Faraaz Sheikh v. Javeria Shahani' affirmed that even the mother of a child is prohibited from abducting the child from the father, who was holding legal custody pursuant to the orders of a US Court. The analysis proceeds in three parts. First, it distinguishes between child custody and child abduction proceedings, particularly focusing on the jurisdictional scope of the Hague Convention and the treatment of foreign custody orders. Second, it compares the 'welfare of the child' principle under Pakistani law with the 'best interests of the child' standard under the Hague Convention and evaluates how both frameworks were interpreted in Faraaz Sheikh. Third, it addresses the practical limitations of the Hague Convention in securing the return of children abducted to or from non-Contracting States and reflects on the evolving challenges of implementing international standards in Pakistan. The final section reviews Pakistan's domestic remedies and suggests reforms to improve its legal response to international child abduction.

1. Introduction

Parental kidnapping may occur in a range of circumstances, including during a subsisting marriage, though it most commonly arises where the parents are separated or facing the breakdown of their relationship. In such cases, the taking parent would typically travel to a different country with their child to establish a custodial (and guardianship, where necessary) decision in their favour. It is anticipated that such taking parent would knock on the doors of a forum most likely to decide in their favour. However, the impending question is: can a kidnapping parent who has been saddled with a charge of child abduction under the Hague Convention on the Civil Aspects of International Child Abduction, 1980 ('the Hague

[1] Nurayn Qasim Ali is currently a Judicial Law Clerk at the Supreme Court of Pakistan. She also volunteers at the Communal Hub which helps women exit prostitution through livelihood support and counselling, while also providing education, healthcare, and protection to the children of sex workers, and abandoned children and children born out of wedlock, with an aim to create a safe and secure future for them. Nurayn completed her LLB (Hons.) in 2021 from Universal College Lahore where she graduated with Second Class Honours (Upper Division).

Convention')[2] agitate their respective rights of *hizanat*[3] or *wilayat*[4] over their child? It is this very issue that was brought in 2024 before the High Court of Sindh in *Faraaz Sheikh v. Javeria Shahani*.[5]

This case involved the abduction of a five-year-old child by his mother from the United States ('US') to Pakistan, in spite of the existence of the order of the General Court of Justice, District Court Division, State of North Carolina, County of Mecklenburg ('US Court') dated 9 May 2022, granting temporary full custody of the child to the father. Pursuant to the abduction of her minor son, the mother aimed to approach the family court and obtain a decree for guardianship upon arrival in Karachi, Pakistan. Despite the child being only five years of age at the time that the judgment in the *Faraaz Sheikh* case was pronounced, and the mother's right of *hizanat* had not yet lapsed, the High Court of Sindh held that according to the Hague Convention, no one, including the mother of a child, is allowed to 'traffic' a child from a father who was holding custody pursuant to the orders of a foreign court.

This paper argues that the High Court of Sindh's analysis reveals a misapplication of the Hague Convention, particularly by failing to clearly distinguish between custody disputes and wrongful removal under an international treaty framework. The central argument advanced is that the rights of *hizanat* and *wilayat* cannot be invoked to justify a breach of a custody order validly issued by a foreign court in a Contracting State, as such removal triggers the return mechanism under the Hague Convention, not a fresh determination of custody on the merits. The High Court's reasoning misses the opportunity to properly delineate the jurisdictional function of the Hague Convention and conflates domestic principles with treaty obligations.

This paper examines how *Faraaz Sheikh* aligns with the framework of the Hague Convention and evaluates whether the respondent-mother's claim to *hizanat* can be sustained under international law. It further considers broader concerns regarding Pakistan's implementation of the Hague Convention, the clarity of its interpretation, and the ability of the judiciary to handle such cases.

The analysis proceeds in three parts. First, it distinguishes between child custody and child abduction proceedings, particularly focusing on the jurisdictional scope of the Hague Convention

[2] Convention on the Civil Aspects of International Child Abduction (1980).

[3] The term 'custody' has not been defined in Pakistani law. *Hizanat* in its literal sense translates to the 'upbringing of the child'. A mother is generally entitled to custody of her male child until he has completed seven years of age, and of her female child when she attains puberty. This reflects the general interpretation of Islamic law, though understanding of *hizanat* may vary across different schools of thought. See DF Mulla, *Principles of Mahomedan Law* (PLD Publishers 1995) para 352. Also see FA Siddiqi, 'Law of Appointment of Guardian Under the Guardians and Wards Act 1890 (Part-1)' (*Courting the Law,* 7 December 2017) <https://courtingthelaw.com/2017/12/07/commentary/law-of-appointment-of-guardian-under-the-guardian-wards-act-1890-part-i/> accessed 25 July 2025.

[4] Section 4(2) of the Guardian and Wards Act, 1890 defines a guardian as: 'a person having the care of the person of a minor or of his property, or of both his person and property.'

[5] *Mohammad Faraaz Sheikh v. Javeria Shahani*, CP No. S-678/2022.

and the treatment of foreign custody orders. Second, it compares the 'welfare of the child' principle under Pakistani law with the 'best interests of the child' standard under the Hague Convention and evaluates how both frameworks were interpreted in *Faraaz Sheikh*. Third, it addresses the practical limitations of the Hague Convention in securing the return of children abducted to or from non-Contracting States and reflects on the evolving challenges of implementing international standards in Pakistan. The final section reviews Pakistan's domestic remedies and suggests reforms to improve its legal response to international child abduction.

2. Brief Note on Custody *(Hizanat)* and Guardianship *(Wilayat)*

According to classical Islamic law, *hizanat* is a more female-oriented role while *wilayat* is a more male-oriented role. This distinction derives from the fact that there are certain responsibilities traditionally associated with mothers in caring for young children, such as feeding, cleaning, clothing and emotionally nurturing, during their tender years.[6] While many of these responsibilities can be, and are, performed by fathers as well, the distinction reflects traditional caregiving roles as historically understood in Islamic jurisprudence. On the other hand, a father is deemed the natural guardian of the person and property of his child, and is responsible for the supervision of and disciplining the child, education, maintenance, religious upbringing, medical consent, consent to marriage and future career. If the roles of a mother and a father are seen together, *hizanat* is in fact a shared right between both parents, but is simply borne by the mother due to the close relationship between women and their small children.[7]

As a general principle, the degree of preference is confined to a relationship depending upon the order of preference due to closeness of blood. Therefore, if a mother is unable or unwilling to take custody of her young child, such right devolves upon a close female relative of the mother, commonly the maternal grandmother of the child, or this responsibility passes to the child's paternal female relatives, or even the father.[8]

In Pakistan, the Guardians and Wards Act, 1890 ('GWA 1890') governs disputes and matters related to the guardianship and custody of a child, while the Family Courts Act, 1964 ('FCA 1964') sets out the procedural framework for adjudicating family law disputes. Custody under the GWA 1890 involves the right to the upbringing of a child while guardianship entails taking care of the child even in situations where the guardian does not have physical custody of the child. As per precedent, the custody of a child in its 'tender years' rests with the mother, i.e., a mother retains custody of her male child till the age of seven and a female child till she attains puberty. Thereafter, the child is handed over to the father. As the natural guardian of his child, a father is

[6] D Pearl and W Menski, *Muslim Family Law* (3rd edn, Sweet & Maxwell 1998) 411.

[7] M Zahraa and NA Malek, 'The Concept of Custody in Islamic Law' (1998) 13(2) Arab Law Quarterly 155.

[8] Mulla (n 3) para 353.

obligated to maintain the child even when the mother holds custody. This right continues notwithstanding divorce or separation. However, this is not an absolute requirement in the law and a parent may lose custody of their child if deemed 'unfit to be a guardian' under Section 19 of the GWA.[9] In the end, both the custody and guardianship of the parents are subordinate to the principle of the welfare of the child.

3. Introduction to the Hague Convention on the Civil Aspects of International Child Abduction, 1980

The Hague Convention was adopted on 24 October 1890 by the Fourteenth Session of the Hague Conference on private international law in Plenary Session, and presently maintains 103 signatories.[10] Pakistan acceded to the Hague Convention on 22 December 2016, which was then entered into effect from 1 March 2017. The Hague Convention has further been incorporated into the schedule of the FCA 1964 in an attempt to promote international collaboration with States and to bring international child abduction cases within the jurisdiction of the Family Courts in Pakistan.[11]

The Hague Convention is a jurisdictional treaty as opposed to being an extradition treaty. As clarified in Article 1, the Hague Convention's objects are *'to secure the prompt return of children wrongfully removed to or retained in any Contracting State' and 'to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.'* The key purpose is the regulation of the 'civil aspects' to preserve the *status quo ante* by promptly securing the return of illegally taken children to their State of habitual residence and allowing the judicial authorities of that State to address the merits of a custody dispute. At its core, the Hague Convention seeks to '*protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence…*'[12]

This distinction between forum and substance is emphasised in the Explanatory Report to the Hague Convention authored by Elisa Pérez-Vera; '*the Convention is not directed at establishing the person to whom custody of the child will belong at some point in the future,*' but only to restore the pre-abduction status quo by returning the child to the forum competent to make such determinations.[13]

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[9] Ibid, para 354.

[10] HCCH, 'Status Table' (2022) <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> accessed 25 July 2025.

[11] FCA 1964, Schedule, Part I, Entry 6A.

[12] Hague Convention, Preamble.

[13] E Perez-Vera, 'Explanatory Report' (1982) <https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf> accessed 25 July 2025.

Moreover, the Hague Convention is centred on cooperation between its signatories or 'Contracting States' to take all appropriate measures to secure the implementation of the objectives of the Hague Convention, as well as ensuring the expeditious return of abducted children.[14] Since the Hague Convention's provisions only apply to Contracting States, in cases where a child is abducted and illegally taken to a non-Contracting State, an aggrieved parent must initiate return proceedings within such non-Contracting State to secure the return of their child. Despite the autonomous character of the Hague Convention, the basic issues stemming from determining custody of a child and custody rights are to be found through the laws of the Contracting State itself. In this manner, the Hague Convention coexists with the laws of each Contracting State on applicable law and on the recognition and enforcement of foreign decrees.[15]

On the wrongful removal or retention of a child, the Hague Convention provides:

> *'The removal or retention of a child is considered to be wrongful where*:
>
> *a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and*
> *b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.*
>
> *The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'*[16]

Thus, abduction from the 'habitual residence' of a child not more than sixteen years of age is the criteria for determining the 'wrongful' removal or retention of a child.[17] While the Hague Convention itself is silent on the meaning of 'habitual residence', a child is said to be habitually resident in a country where they resided prior to their abduction by the kidnapping parent, without the consent of the other parent. The determining factors of habitual residence include the family, social, religious and cultural environment in which a child's life has developed, and is not

[14] Hague Convention, Article 2.

[15] Perez-Vera (n 13) 426. See also the US Department of State,'The Hague Convention on the Civil Aspects of International Child Abduction: Legal Analysis' <https://travel.state.gov/content/dam/childabduction/Legal_Analysis_of_the_Convention.pdf> accessed 25 July 2025.

[16] Hague Convention, Article 3.

[17] Hague Convention, Article 4.

contingent upon factors such as nationality or the expectations, life styles, work or plans of either parent.

In determining wrongful removal or retention, the Hague Convention prompts an assessment of 'rights of custody' (belonging to a parent whom the child is physically present with and determines the child's place of residence) and 'rights of access' (the right of a parent who does not exercise custody rights over his or her child, to take the child for a limited period of time to a place other than the child's place of habitual residence).[18]

Signatories of the Hague Convention are required to designate a Central Authority. This serves as the 'engine' for cooperation to counter the wrongful retention and removal of a child to another Contracting State.[19] Encouragingly, Pakistan has incorporated a Central Authority: The Solicitor-General of the Ministry of Law and Justice, who aids in cases of international child abduction between Pakistan and other Contracting States.[20] Additionally, Justice Miangul Hassan Aurangzeb of the Supreme Court of Pakistan currently serves as the representative of Pakistan in the International Hague Network of Judges to facilitate international judicial cooperation on cross-border child protection.[21]

The procedure for recovery is as follows: Contracting States may either apply directly to the judicial or administrative authorities of a Contracting State,[22] or submit an application either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.[23] If the Central Authority which receives an application has reason to believe that the child is in another Contracting State, it shall directly transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.[24] The Central Authority which receives an application commences judicial or administrative proceedings in

[18] MR Walsh and SW Savard, 'International Child Abduction and the Hague Convention' (2006) 6 Barry Law Review 29.

[19] Perez-Vera (n 13) 439.

[20] HCCH, 'Pakistan-Central Authority' (2023) <https://www.hcch.net/en/states/authorities/details3/?aid=1071> accessed 25 July 2025. See also Ministry of Law and Justice, Government of Pakistan, '1980 Hague Convention on Parental Child Abduction' <https://molaw.gov.pk/Detail/YmQ0YTQ4ODctMWEwZi00Y2RkLWE2ZjgtNDdkMDUzYTc2Yjhi> accessed 25 July 2025.

[21] HCCH, 'Members of the International Hague Network of Judges' (2025) <https://assets.hcch.net/docs/665b2d56-6236-4125-9352-c22bb65bc375.pdf> accessed 25 July 2025.

[22] Hague Convention, Article 29.

[23] Hague Convention, Article 8. See also the procedure for recovery of an abducted child as outlined by the Ministry of Law and Justice, Government of Pakistan <https://molaw.gov.pk/Detail/YmQ0YTQ4ODctMWEwZi00Y2RkLWE2ZjgtNDdkMDUzYTc2Yjhi> accessed 25 July 2025.

[24] Hague Convention, Article 9.

which Contracting State the child was abducted and taken to assess the elements of the application in determining return of the abducted child to his or her habitual residence through a return order. The expeditious nature of the Hague Convention aims to wrap up proceedings within six weeks, prolonging which a statement of delays shall be recorded by the Contracting State in which proceedings were initiated.[25]

4. Deconstructing Faraaz Sheikh v. Javeria Shahani

The dispute in *Faraaz Sheikh* arose from a marital breakdown between the petitioner-father and respondent-mother, who had contracted a marriage in the US and had a child born there in 2019. The couple separated in October 2021, following which a custody case was initiated in the US. During the pendency of those proceedings, and despite a temporary joint custody arrangement, the respondent mother unilaterally removed the child to Pakistan in April 2022, where she subsequently filed for guardianship and Pakistani citizenship.

A US court thereafter issued an *ex parte* order granting temporary full custody to the petitioner father and requested the Pakistani authorities to assist in the child's return.[26] The petitioner-father initiated proceedings in Pakistan, including under the Hague Convention and before the family court, which ultimately directed the child's return to the US. The matter was then placed before the High Court of Sindh to determine whether this return order could be enforced and whether the mother's claim to custody, based on her right of *hizanat*, could prevail despite allegations of abduction under the Hague Convention.

The High Court of Sindh was faced with two issues: in case it upheld the US court order which granted custody of the minor child to the petitioner-father, it would need to explain why the respondent-mother holding custody of her child as per the right of *hizanat* could be charged with having abducted her own child. Second, in the existence of abduction proceedings commenced by the petitioner-father under the Hague Convention, the High Court of Sindh would also need to clarify whether the removal by the respondent mother of her own child was wrongful as per the mandate of the Hague Convention. By treating them together, the judgment blurred the line between a Hague return proceeding and a domestic custody dispute.

The High Court of Sindh affirmed the primacy of international obligations under the Hague Convention and acknowledged that foreign custody judgments are entitled to recognition under Pakistani law, particularly where no exceptions under Section 13 of the Code of Civil Procedure

[25] Hague Convention, Article 11.

[26] Temporary physical custody refers to an arrangement in which an individual or entity assumes responsibility for the care, supervision, and decision-making authority over a child for a defined period.

('CPC') apply.[27] The Court relied on findings from US custody proceedings, including a report by the Council for Children's Rights, which concluded that the child's welfare would be jeopardised if left in the mother's care.

However, the judgment's legal reasoning reflects some conceptual ambiguity about the nature and scope of the Hague Convention. Most notably, the High Court of Sindh did not sufficiently distinguish between a return proceeding under the Hague Convention and a merits-based custody determination under Pakistani law. Instead of identifying whether a wrongful removal had occurred in the technical sense of Article 3, i.e., whether rights of custody under the law of habitual residence were breached and actively exercised, the High Court of Sindh focused primarily on welfare considerations.

This is problematic because Hague proceedings do not resolve custody, rather they determine the appropriate forum for such resolution. As Perez-Vera explains, the Hague Convention *'is not directed at establishing the person to whom custody of the child will belong at some point in the future.'* By emphasising welfare-based reasoning rather than identifying the breach of custody rights, the High Court of Sindh weakened the procedural integrity of the Hague framework. Similarly, the Court's treatment of the respondent-mother's claim to *hizanat* lacked clarity. Under the Hague Convention, personal law rights such as *hizanat* are not defences to wrongful removal. While the Court correctly noted that *hizanat* is not absolute and is subject to the child's welfare, it did not clarify that the invocation of *hizanat* is immaterial to whether a removal was wrongful under the Hague Convention.

Ultimately, the High Court of Sindh's directive to return the child was consistent with Pakistan's obligations under the Hague Convention. However, its failure to articulate the exact basis for wrongful removal, and its reliance on welfare and fitness-based reasoning leaves precedence muddy and fails to provide clear guidance on the procedural logic of Hague return proceedings.

5. Child Custody Versus Child Abduction Cases

The Hague Convention draws a distinction between child custody and child abduction. Custody disputes are merits-based proceedings that determine who should be the legal or physical guardian of the child. In contrast, abduction cases under the Hague Convention do not decide custody rights but instead determine whether a child should be returned to their State of habitual residence so that custody may be adjudicated there.[28]

[27] Section 13 of the CPC provides that a foreign judgment shall be conclusive between the parties, except in specific circumstances such as lack of jurisdiction, fraud, or breach of natural justice. In child custody and abduction cases, this provision governs the extent to which Pakistani courts will recognise and give effect to foreign custody orders, subject always to the overriding consideration of the child's welfare under domestic law.

[28] Hague Convention, Article 1

As seen above, wrongful removal, under Article 3, occurs only where the removal is in breach of custody rights under the law of the child's habitual residence, and those rights were being exercised (or would have been but for the removal) at the time. The duty to return the child only arises if these conditions are satisfied. In *Faraaz Sheikh*, although the judgment references the Hague Convention and Pakistan's treaty obligations, the High Court of Sindh treated the mother's removal as wrongful largely because of the foreign court order and allegations against her, without examining whether the father was actually *exercising* rights of custody under US law.[29]

Additionally, the judgment characterises the mother's act as 'trafficking' — a term with serious criminal implications under international and domestic law, and one that should not be casually invoked without reference to the specific legal definition. The use of such language risks mischaracterising the nature of the wrongful removal and conflating it with other forms of transnational crime.[30]

Another source of confusion in such cases relates to the role of habitual residence. Habitual residence is a threshold concept in Hague proceedings. It does not determine custody, but establishes the jurisdiction where custody should be decided. Determining a child's habitual residence involves evaluating the stability and integration of their life in a particular state, not their nationality or the parental preferences alone. Once habitual residence is established, the state of habitual residence is in a position to adjudicate custody. This is distinct from determining who has legal custody, and failure to maintain that distinction can lead to decisions that not only inadvertently violate treaty obligations but also weaken the development of jurisprudence in this area. In *Faraaz Sheikh*, the Court concluded that the minor child had been habitually resident in the US, but did not frame this as a jurisdictional basis for return. Rather, it was discussed in conjunction with the welfare analysis, thereby blurring the conceptual divide between custody and return. This reflects a broader issue in Pakistani jurisprudence on the Hague Convention: while courts may cite the Hague Convention, they often default to domestic welfare reasoning, thus sidestepping the procedural safeguards built into the treaty.

The High Court of Sindh further attempted to reinforce its position by invoking several precedents. In *Iza Nowak v. Federal Investigation Agency,* the Islamabad High Court held *'no one is allowed to abduct the minors, even though he is a father, like in this case,'* and *'Pakistani Courts have duly regarded the foreign judgments and discourage such parents, who abduct the minors from foreign*

[29] *Faraaz Sheikh* (n 5) para 10.

[30] See, for example, the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000), and the Prevention of Trafficking in Persons Act, 2018.

jurisdiction and came to Pakistan for their ill-motives'.[31] Similarly, in *Louise Anne Fairley v. Sajjad Ahmed Rana*, the respondent-father was directed to hand over custody of the child to the British High Commission to facilitate the return of the child to her place of habitual residence, with custody being restored to the petitioner-mother.[32] Reliance was also placed on *Farhat v. Umair Hanif Ghanchi*, wherein it was acknowledged that a case of parental abduction would invoke the contours of the Hague Convention in returning an abducted child to Pakistan.[33] However, in the presence of ongoing litigation for the custody of the child in a foreign jurisdiction, the principle of *forum non conveniens* would suggest that the court refrain from exercising its jurisdiction where a more appropriate forum existed to resolve the dispute. The High Court of Sindh also cited *Elizabeth Dinshaw v. Arvand M. Dinshaw*, where the abduction of a child by his own father from the US to India was deemed an 'abduction' in spite of the attempts of the respondent father to settle his child in a new environment, i.e., enrolling the child in a school in India, development of school friendships, participating in Indian culture, etc.[34]

However, in *Faraaz Sheikh*, these precedents were not integrated into a structured return-based analysis under the Hague Convention. The Court reiterated that the mother's right of *hizanat* was not absolute and subject to the child's welfare, but failed to separate this discussion from the Hague Convention's jurisdictional framework. The argument that the US custody order was unenforceable under Section 13 of the CPC was rejected, with the Court affirming the conclusiveness of the order under Section 14. Again, the emphasis fell on enforcement of a foreign judgment, not the Hague Convention's return obligation.[35]

The aim of ensuring prompt return is to restore family relationships or defend those relationships already protected in the State of the child's habitual residence, and which existed before or after any judicial decision. For example, Muslim-majority States, such as Pakistan, have their own domestic laws dealing with personal status in general and child custody, i.e., divorce, maintenance, guardianship and custody, adoption, inheritance and succession, etc. These laws are primarily founded on classical Islamic law and cannot be replaced with a generic one-size-

[31] *Iza Nowak v. Federal Investigation Agency*, WP No. 3181/2022.

[32] *Louise Anne Fairley v. Sajjad Ahmed Rana*, PLD 2007 Lahore 293.

[33] *Farhat v. Umair Hanif Ghanchi,* 2019 CLC 1311.

[34] *Elizabeth Dinshaw v. Arvand M. Dinshaw,* 1989 MLD 2209.

[35] Section 13 CPC provides that a foreign judgment is final between the parties except in certain situations, such as when the court had no authority, the decision was based on fraud, or it went against basic fairness. Section 14 CPC complements this by creating a rebuttable presumption that a foreign judgment was pronounced by a court of competent jurisdiction, placing the burden on the party challenging it to prove otherwise. This means the person who objects must show why the judgment should not be accepted. Together, the two sections make it easier to enforce foreign judgments while still allowing them to be challenged if they fail Pakistan's legal standards. In *Faraaz Sheikh*, the Court rejected the objection under Section 13 and, using Section 14, treated the US custody order as final as passed by a court of competent jurisdiction.

fits-all standard without any regard to the cultural and social aspects underlying the functioning of a State.[36]

While the result reached by the Court ordering return aligned with the Convention's objectives, its reasoning revealed a fundamental misunderstanding of the Hague framework. A Hague return proceeding is not about which parent is better suited for custody; it is about ensuring that such questions are decided by the correct forum. A custody order is not a prerequisite to seek return under the Hague Convention. Article 3 only requires that custody rights exist under the law of the habitual residence and were being exercised at the time of removal.[37] Until Pakistani courts consistently adopt this structured approach, return proceedings risk becoming *de facto* custody trials. This undermines the Hague Convention's jurisdictional integrity, weakens the reciprocal enforcement of return orders, and ultimately risks harm to the rights of children and left-behind parents.

6. 'Welfare of the Child' and 'Child's Best Interest' Principles

In returning a child to his or her country of habitual residence, the Hague Convention places the best interests of the child at the forefront. However, the Hague Convention also contains limited exceptions to prevent the return of a child to his or her place of habitual residence where it would appear to displace or adversely affect a child. Similarly, the principle of the 'welfare of the child' is employed by Pakistani Courts in determining the welfare of the child and making an order as to custody and/or guardianship, and a child may be taken away from a custodian and/or guardian where the person entrusted with the care of a child is deemed unfit.

Section 17 of the GWA 1890 deems the welfare of the child as paramount in entrusting custody and/or guardianship of a child to either of his or her parents (or any other person within the permitted degree of affinity). In considering the welfare of a child, weight is afforded to the age, sex and religion of the child, the character and capacity of the proposed guardian and his or her nearness of kin to the child. At the same time, a court assesses the wishes of a deceased parent, and any existing or previous relations of the proposed guardian with the child or his or her property. In case the child is old enough to form an intelligent preference, the court may consider that preference.[38]

[36] AG Hamid and others, 'The Applicability of the 1980 Hague Abduction Convention in Muslim Countries' (2018) 32(2) Arab Law Quarterly 99.

[37] CL Finan, 'Convention on the Rights of the Child: A Potentially Effective Remedy in Cases of International Child Abduction' (1994) 34 Santa Clara Law Review 1007.

[38] GWA, Section 17.

The superior courts have consistently refined jurisprudence relating to the 'welfare of the child'. Most recently, the Supreme Court clarified in *Shaista Habib v. Muhammad Arif Habib*,[39] that the paramount and overarching consideration in custody disputes would remain the welfare of the child to ascertain his or her best interests. The purpose of this exercise is to ensure that the determination of custody promotes the rights and wellbeing of the child. In making a determination as to custody, the overriding consideration must be to protect the child from any physical, mental or emotional injury, neglect or negligent treatment. Other factors include the upbringing, nursing and fostering of the child and extends to the emotional, personal and physical wellbeing of a child.

However, under the Hague Convention, the 'best interests of the child' principle operates in a more narrowly defined context. It presumes that a child's best interests are served by returning the child to their place of habitual residence, where courts with jurisdiction can decide long-term custody. This is why the 'best interests' analysis under the Hague Convention appears only in the context of Article 13, which sets out limited exceptions to the return obligation. Specifically, Article 13(a) allows a court to deny return if the person requesting return '*was not actually exercising the custody rights at the time of removal or had consented to or subsequently acquiesced in the removal or retention*.' Article 13(b) allows denial of return where '*there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation*.' These exceptions are intended to be '*exceptional in nature*' and '*should not lead to a substantive custody determination in the requested State*.'[40] In *Faraaz Sheikh*, the High Court of Sindh did not identify or apply these exceptions. Instead, it undertook a broad welfare inquiry and weighed the relative fitness of the parents. By rooting its decision in welfare analysis and concerns about the mother's fitness, rather than first making findings under Article 3 and then considering exceptions under Article 13, the Court failed to address allegations of domestic violence made against the father in US proceedings.[41]

Exceptions under the Hague Convention must be understood within the context of the Convention's limited purpose which is to facilitate return, not to adjudicate custody. These 'defences' to a claim of abduction are contained in Articles 20 and 13 of the Hague Convention.[42]

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[39] *Shaista Habib v. Muhammad Arif Habib*, PLD 2024 Supreme Court 629. See also *Raja Muhammad Owais v. Nazia Jabeen*, 2022 SCMR 2123.

[40] HCCH, '1980 Child Abduction Convention: Guide to Good Practice — Part VI Article 13(1)(b)' (2020) <https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf> accessed 25 July 2025.

[41] MM Bashir, 'Judicial Success of the Hague Convention in Pakistan' *The Express Tribune* (15 April 2024) <https://tribune.com.pk/story/2462606/judicial-success-of-the-hague-convention-in-pakistan> accessed 25 July 2025.

[42] JA Todd, 'The Hague Convention on the Civil Aspects of International Child Abduction: Are the Convention's Goals Being Achieved?' (1995) 2(2) Indiana Journal of Global Legal Studies 553.

First, Article 20 contains the Hague Convention's 'public policy' exception.[43] At the core of Article 20 is the refusal of the return remedy in case such return would be against the '*fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.*' However, issues arise when an Article 20 attack is against the law of the requested State (as opposed to the requesting State). While Pakistani law envisions a test for determining the best interests of the child not too far off from that enshrined under the Hague Convention, not all States maintain a similar mechanism when it comes to determining the best interests of a child, owing to different religious and cultural practices. In such instances, returning a child to their country of habitual residence without really considering whether the outcome promotes his or her best interests is in violation of the purpose of the Hague Convention and the principle of paramountcy of the best interests of the child.[44]

Second, Article 13(a) contains two separate grounds on which return may be refused: first, where the person seeking return was not actually exercising custody rights at the time of removal or retention; and second, where that person had consented to or subsequently acquiesced in the removal or retention. Both defences require close scrutiny of the facts and the law of the child's habitual residence.[45] Courts must determine whether custody rights existed and were being exercised in accordance with that State's law. This analysis can be particularly complex in Muslim-majority jurisdictions where rights such as *hizanat* or *wilayat* are exercised without formal court orders. For example, a mother may be caring for the child under Islamic law without being named a guardian by decree. Misunderstanding such systems risks misapplication of the Hague Convention's standards.[46]

At the same time, determining whether consent or acquiescence occurred involves examining conduct and communications after the removal. This is a fact-sensitive exercise. Judges must be

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[43] Article 20 of the Hague Convention states: 'The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.'

[44] R Schuz, 'The Relevance of Religious Law and Cultural Considerations in International Child Abduction Disputes' (2010) 12 Journal of Law and Family Studies 453.

[45] Article 13 of the Hague Convention states: 'Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –
a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.'

[46] Todd (n 42) 570.

mindful of how differing legal traditions may shape their interpretation of custody rights. An overreliance on cultural assumptions, such as the allocation of custody based on gender or religion of a parent, may conflict with the Hague Convention's commitment to neutrality and the child's best interests. In such cases, it is essential that judges not only take into account religious and cultural differences between Contracting States but also ensure that their application of the Hague Convention remains grounded in a consistent and objective understanding of foreign custody law.

Third, Article 13(b) is the most commonly litigated defence by far: a return may be refused if it would create a '*grave risk of psychological harm or otherwise place the child in an intolerable situation*.' A lower burden of proof is placed on the petitioning parent, who will likely claim the return of the child to an environment which he or she was acclimated to (including arguments on religious and cultural affiliations, lifestyle and education). Conversely, a higher burden of proof is placed on the taking parent who will need to establish the existence of an intolerable situation or a grave risk of psychological or physical harm awaiting a child upon his or her return to the habitual residence.[47]

However, a flaw of the Article 13(b) defence is that it fails to take into account taking parents and children who flee from cases of domestic violence. This flaw can be attributed to the scope of the Hague Convention itself: in establishing that an intolerable situation or a grave risk of psychological or physical harm awaits the child upon return, an Article 13(b) defence has the potential of opening up the summary proceedings envisioned under the Hague Convention, into a full merits inquiry.[48] The Hague Convention acts as a double-edged sword wielded by abusers in order to exercise coercive control which manifests as intimidatory litigation, financial dependence, threats, manipulation, etc., to further harass and maintain control and get their children and spouses back within their control.[49] Since it is mothers who generally are the primary custodians of their children, ordering a return under the Hague Convention appears almost discriminatory in this regard. The stringent application of Article 13(b) only seeks to further the scope of the Hague Convention — directing custody cases back to the State of habitual residence as being the most suited forum for determining custody disputes.[50]

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[47] PD Dallmann, 'The Hague Convention on Parental Child Abduction: An Analysis of Emerging Trends in Enforcement by US Courts' (1994) 5 Indiana International and Comparative Law Review 171.

[48] L Silberman, 'Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis' (1994) 28(1) Family Law Quarterly 26.

[49] Australasian Institute of Judicial Administration, *National Domestic and Family Violence Bench Book* (AIJA 2024).

[50] K Jenkins, 'The Hague Convention on International Parental Kidnapping: Still the Best Hope for Children?' (2023) 6 Cardozo International and Comparative Law Review 623, 632. See also KS Jillani, 'Hague Convention and Child Custody Battles in Pakistan' *The Friday Times* (23 July 2024) <https://thefridaytimes.com/23-Jul-2024/hague-convention-and-child-custody-battles-in-pakistan> accessed 25 July 2025.

The final exception contained in the proviso of Article 13, also referred to as the 'Child Abduction Clause', allows a court to refuse to order the return of the child, i.e., of not more than 16 years, if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. Issues arise where a child is susceptible to influence from an abducting parent in communicating his or her preferences, and for this reason the Hague Convention allows a reviewing court the flexibility to consider a child's wishes if the facts and circumstances warrant it.[51] At the same time, the wide discretion given to judges in interpreting this clause is criticised for not treating the child's preference as a mandatory requirement. This creates tension in striking a balance between maintaining the overall best interests of a child and the individual interests of a child.[52]

If viewed through the lens of *Faraaz Sheikh*, the Pakistani approach to the welfare of the child aligns with the Hague Convention's best interests principle. However, this overlap is limited. The Hague Convention presumes that a child's best interests are best served by returning them to the jurisdiction where long-term custody can be adjudicated. Pakistani courts, on the other hand, often begin and end with welfare analysis, making return conditional upon substantive evaluations of parental fitness or child preference. In light of this, courts in Pakistan must exercise greater discipline in differentiating between Hague return proceedings and domestic custody disputes. Hague cases require a focused inquiry, including first assessing wrongful removal under Article 3, then evaluating any specific exceptions under Articles 13 or 20. Only in this narrow space can the best interests principle be applied under the Hague Convention. Treating every Hague petition as a fresh custody dispute risks frustrating Pakistan's treaty obligations and creates uncertainty for children and parents alike.[53]

Although not expressly a Hague Convention case, an early example of engagement with this distinction can be found in *Sumayyah Moses v. SHO Faisalabad,* where the Lahore High Court addressed the removal of a child from South Africa to Pakistan and, while unable to apply the Hague Convention due to treaty limitations, demonstrated a clear understanding of its jurisdictional structure and return mechanism.[54] The Court's reasoning reflected an appreciation of the procedural character of Hague proceedings, even though it ultimately reverted to a welfare-based analysis under domestic law.

More recently, in *Syed Hassan Murtaza v. Mariya Bano Khan,* the Lahore High Court was confronted with the alleged wrongful removal of three minor children from Canada to Pakistan

[51] Todd (n 42) 573.

[52] Jenkins (n 50) 645.

[53] JD Morley, 'Does Pakistan Comply with the Hague Abduction Convention?' (*The Law Office of Jeremy D. Morley,* 11 March 2024) <https://www.international-divorce.com/does-pakistan-comply-with-the-hague-abduction-convention> accessed 25 July 2025.

[54] *Sumayyah Moses v. SHO Faisalabad*, PLD 2020 Lahore 716.

by their mother.[55] The father approached the Court seeking custody and the return of the children, relying on the Hague Convention. Although both Pakistan and Canada are signatories to the Convention, the Court held that the Convention could not be invoked because the two States had not accepted each other's accession. This lack of reciprocal acceptance meant that the treaty had not entered into force between them under Article 38 of the Convention. The Court went on to consider core Hague principles, including those relating to habitual residence, the concept of wrongful removal, and the structure of return proceedings, in order to assess whether the factual matrix aligned with international standards. The Court acknowledged the role of the Convention in setting expectations for how international abduction cases should be handled, even when the treaty is not formally enforceable. In doing so, it displayed a level of theoretical understanding not observed in earlier Pakistani cases.

While the matter was ultimately referred to the family court for determination under the GWA 1890, this referral was not a result of confusion between return and custody proceedings, but a procedural step in the absence of enforceable treaty obligations. The Court explicitly recognised the difference between a Hague return proceeding, where the focus is on forum and wrongful removal, and a custody determination where the child's welfare is assessed in broader terms. It relied on domestic welfare standards to justify its approach but did so with a clear understanding that this was not a Hague proceeding simply due to formal constraints.

Moreover, the Court considered allegations of fraud and misrepresentation in the proceedings initiated by the mother before the Family Court and took note of the father's temporary custody order from the Canadian courts. In doing so, the High Court signalled its willingness to account for international custody orders while grounding its jurisdictional reasoning in Pakistani law. Its discussion of foreign precedent showed a growing fluency in comparative Hague jurisprudence and an effort to bring Pakistani legal reasoning into dialogue with international standards.[56]

What sets *Syed Hassan Murtaza* apart is its careful navigation of treaty limitations alongside a careful consideration of Hague jurisprudence. Unlike *Faraaz Sheikh*, where the Court conflated personal law rights such as *hizanat* with defences to wrongful removal under Article 13, the Lahore High Court here maintained a more coherent legal framework. It applied the welfare test where appropriate, without undermining the procedural structure of the Convention. This case thus marks a shift in Pakistan's handling of international child abduction disputes. It suggests that courts are beginning to distinguish between domestic and international legal frameworks and are increasingly capable of applying the correct test in the appropriate context. While formal treaty enforcement gaps remain, this judgment signals a positive trajectory: a judiciary that is

[55] *Syed Hassan Murtaza v. Mariya Bano Khan,* PLD 2025 Lahore 207.

[56] *Office of the Children's Lawyer v. Balev*, [2018] 1 SCR 398; *In re J (a child)* (FC) [2005] UKHL 40.

striving to engage with international obligations responsibly and with an increasingly refined approach.

7. Seeking Return from Non-Contracting States

Within the context of *Faraaz Sheikh*, while both Pakistan and the US are Contracting States under the Hague Convention, a significant limitation of the Hague Convention is the large number of non-Contracting States. A parent will have no recourse under the Hague Convention not only when a child is abducted and taken to a non-Contracting State, but also when such child is habitually resident in a non-Contracting State. This was apparent in *Farhat* where the dispute involved Pakistan and the UAE, a non-Contracting State. In such a case, the petitioning parent would need to directly approach the judicial and administrative authorities of such non-Contracting State for the recovery of their child, and even then, there are no guarantees that the return of an abducted child would be prompt or expeditious. Such non-Contracting States have no obligation to reciprocate the mechanism or procedures for the return of a child to its place of habitual residence by affording similar rights to a petitioning parent, as outlined under the Hague Convention. A solution to this issue may lie in placing the onus on the Contracting State to be proactive by alerting the Central Authority of such risks. While this is not provided for under the Hague Convention, domestic Central Authorities may be able to build institutional bridges with non-Contracting States to ensure cooperation. However, such approaches would be diplomatic and discretionary rather than binding.

Another limitation of the Hague Convention is the lack of uniformity and collaboration with non-Contracting States. This especially translates into cultural and religious differences between non-Muslim and Muslim-majority States (that practise *Sharia*). While this issue did not arise in *Faraaz Sheikh* since the High Court of Sindh immediately directed the return of the minor child to the US, there is no guarantee that other Muslim-majority States ensure the same outcome. Courts in Muslim-majority States indicate a strong preference for a child to be raised by Muslim parents and in an environment that promotes Islamic values and principles and may refuse a return where a requesting State cannot guarantee the same. It is difficult to reconcile such differences where a custody dispute arises between a Muslim and a non-Muslim parent, or when the habitual residence of a child from a Muslim-majority State to a non-Muslim-majority State is being litigated upon.[57]

In 2004, the Hague Convention launched an initiative known as the 'Malta Process' in an attempt to bridge the cultural divide in kidnappings to States that apply *Sharia*, and also to improve dialogue between Contracting and non-Contracting States for the return of abducted children. Pakistan participated in the recent Malta Conference V, 'Fifth Conference on the HCCH

[57] Hamid (n 36) 115-117.

Children's Conventions as Bridges between Civil/Common Law and Islamic Law', in September 2024 represented by Manaan Omar, Focal Person on the 1980 Hague Convention at the Ministry of Law and Justice. Emphasising the best interests of the child, Pakistan contributed to the dialogue on aligning Sharia-based custody concepts with the Hague Convention's framework. While this reflects a positive step toward international cooperation, the domestic legal framework remains underdeveloped. Persistent confusion between custody and return proceedings, coupled with limited institutional capacity, continues to hamper effective implementation of the Hague Convention.[58]

8. A Review of Child Abduction Laws in Pakistan

The preceding discussion has focused on the international framework governing child abduction and its partial implementation through the Hague Convention. However, Pakistan also has a patchwork of domestic law, including both civil and criminal, that address the wrongful removal or retention of children. These laws remain relevant, especially in cases involving non-Contracting States or where the Hague Convention is misapplied or unavailable. However, owing to the archaic concept that a parent cannot essentially be a 'kidnapper' or an 'abductor', there are only limited protections that are available in the instance of child abductions:

8.1. Civil Remedies

The Family Courts of Pakistan are the primary arbitrators for determining questions of custody. A parent seeking custody and/or guardianship of a child would invoke either Section 7 (invoked by mothers seeking a guardianship certificate) or Section 25 (invoked by fathers who are already the natural guardians of their children but aim to obtain a decree as to physical custody) of the GWA. Any determination as to the custody and/or guardianship of a child is ultimately subject to the welfare of the child.[59]

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[58] HCCH, 'MALTA V: Fifth Conference on the HCCH Children's Conventions as Bridges between Civil/Common Law and Islamic Law' (2024) <https://www.hcch.net/en/publications-and-studies/details4/?pid=9048> accessed 25 July 2025.

[59] Section 7 of the GWA 1890 states: '(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made—

(a) appointing a guardian of his person or property, or both, or

(b) declaring a person to be such a guardian, the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.'

Section 25 of the GWA 1890 states: 'If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.'

The FCA 1964 governs the procedure for family law matters in Pakistan. With the addition of the Hague Convention to the Schedule of FCA 1964, family courts now have jurisdiction to hear international child abduction cases under the Convention. However, in practice, courts often revert to a welfare analysis instead of a Convention-based assessment, as seen in *Faraaz Sheikh*.

Additionally, since the subject of child protection has been devolved to the Provinces under the Constitution (Eighteenth Amendment) Act, 2010, each Province maintains its own laws relating to the care and protection of children. For example, the Punjab Destitute and Neglected Children Act, 2004 ('2004 Act') states that a person has lawful custody of a child where a Child Protection Court has made an order as to the custody of a child.[60] The 2004 Act contains the following provision which is relevant to the subject of parental kidnapping:

> '***34. Unauthorized custody.*** *If a person takes a destitute or neglected child in custody or keeps him in contravention of the provisions of this Act, he shall be punished with imprisonment for a term which may extend to five years but which shall not be less than three months and with fine which may extend to one hundred thousand rupees but which shall not be less than ten thousand rupees.*'

While Section 34 of the 2004 Act penalises 'unauthorised custody' with imprisonment and fine, this provision applies specifically to 'destitute and neglected' children as defined in Section 3 of the 2004 Act. That definition generally excludes children in the lawful custody of their parents or guardians, except in cases where they are found unfit to exercise such custody. Accordingly, Section 34 is primarily directed at non-parents assuming custody of such children and does not directly address situations of parental kidnapping.

Moreover, custody disputes increasingly arise in the context of domestic violence proceedings, where provincial protection laws authorise courts to grant temporary custody as part of broader protection orders.[61] While these laws are primarily designed to safeguard women from physical, emotional, and psychological harm, they also provide courts the power to grant interim custody of children to protect them from exposure to domestic abuse. In practice, such orders may impact ongoing or parallel custody proceedings under the GWA 1890, however, these domestic violence statutes generally lack harmonisation with family court laws, including both the GWA 1890 and the FCA 1964, and courts are left to reconcile conflicting interim reliefs through judicial discretion.

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[60] Counterparts in other federating units include the Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010; Sindh Child Protection Authority Act, 2011; Balochistan Child Protection Act, 2016; and Islamabad Capital Territory Child Protection Act 2018.

[61] Provincial laws include: the Domestic Violence (Prevention and Protection) Act, 2013 in Sindh; the Balochistan Domestic Violence (Prevention and Protection) Act, 2014; the Punjab Protection of Women Against Violence Act, 2016; and the Khyber Pakhtunkhwa Domestic Violence Against Women (Prevention and Protection) Act, 2021.

This creates a risk of inconsistent custody arrangements, particularly where allegations of abuse are contested or arise. Further, there is currently no unified mechanism for integrating protective orders issued under domestic violence statutes with final guardianship decisions.

Preventive relief may also be sought by way of interim injunctions from family courts to restrain international travel, or by invoking Pakistan's Exit Control List (ECL) regime. The Exit from Pakistan (Control) Ordinance, 1981, empowers the Ministry of Interior to prohibit individuals from leaving the country. Additionally, the Passports Act, 1974 further authorises the Ministry of Interior to impound or restrict the issuance of passports in exceptional cases. These mechanisms are often relied upon in parental abduction scenarios. However, they lack codified procedures specific to family or child-related matters and are instead governed by ministerial discretion, often in response to judicial directions rather than preventative legislation.

8.2. Criminal Remedies

The Pakistan Penal Code, 1860 ('PPC') envisions two types of kidnapping: kidnapping from Pakistan (Section 360) and kidnapping from lawful guardianship (Section 361). The punishment for such kidnapping is imprisonment for a term which may extend to seven years and the imposition of a fine.[62] However, the exception to the kidnapping provisions reveals that the punishment does not extend to a person who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose. This position was affirmed by *Majeed Ahmad v. Additional Sessions Judge*, where the Lahore High Court clarified that a father being the legal guardian of the minor child under Muhammadan Law cannot, in any case, be said to take or entice away his minor child.[63]

In *Muhammad Ashraf v. SHO*, the Court quashed kidnapping proceedings against a father, holding that the offence under Sections 361 and 363 PPC is not made out where the removal is by a natural guardian acting in good faith and without unlawful motive.[64] Likewise, in *Ahmad Nawaz v. The State*, the Lahore High Court held that even if the child is in the custody of the mother, the father retains constructive custody as the legal guardian and cannot be prosecuted for kidnapping.[65] Similarly, in *Bashir Ahmad v. The State*, the Court observed that Section 363 of the

[62] Section 360 of the PPC states: 'Whoever conveys any person beyond the limits of Pakistan without the consent of that person, or of some person legally authorised to consent on behalf of that person, is said to kidnap that person from Pakistan.'
Section 361 of the PPC states: 'Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.'

[63] *Majeed Ahmad v. Additional Sessions Judge*, 2022 LHC 2157.

[64] *Muhammad Ashraf v. SHO,* 2001 PCr.LJ 31.

[65] *Ahmad Nawaz v. The State,* PLD 1968 97.

PPC does not extend to acts of a father removing his child from the mother's *hizanat*, absent immoral intent.[66] Thus, although a mother has the right of *hizanat*, the fact remains that the guardianship vests in the father.[67]

Article 199(1)(b)(i) of the Constitution of the Islamic Republic of Pakistan, 1973 and Section 491 of the Code of Criminal Procedure, 1898 invoke the jurisdiction of the High Court in issuing a direction for the recovery of any person within its jurisdiction who is illegally or improperly detained in public or private custody. In the context of a custody dispute, the reasoning will be made in the interests of the child's welfare. Such proceedings are summary in nature and are aimed at providing immediate and efficacious relief to an aggrieved party. However, orders passed in such proceedings are interim in nature and are subject to the final orders of a family court exercising jurisdiction under the GWA 1890.

While the legal frameworks provided above suggest that certain remedies are available in a case of parental kidnapping, there is absolutely no legislative framework on the prevention of international child abduction by a parent, and the only framework currently in field is the Hague Convention. There is a pressing need to harmonise family law, guardianship principles, and international treaty obligations to ensure that abduction cases are addressed swiftly and consistently. In the absence of such reforms, courts may continue to conflate custody determinations with return proceedings, undermining both domestic and international legal protections for children. Despite the doctrinal confusion and inconsistent application of Hague Convention principles in recent Pakistani case law, there are signs of emerging clarity and institutional progress.

In a recent development, Musawi published a Bench Book on the Hague Convention, intended to guide judges in Pakistan on core treaty principles, which suggests a growing institutional awareness of the Hague Convention's mechanism and framework.[68] The Bench Book represents a significant step forward in domesticating the procedural and jurisdictional logic of the Hague Convention, particularly by emphasising the limited scope of Hague proceedings, the factual nature of 'habitual residence,' and the narrowness of the Article 13 exceptions. More specifically, the Bench Book clarifies that Hague return proceedings are not custody hearings and that judicial reasoning must focus on whether removal or retention was wrongful in light of custody rights under the law of the habitual residence. Used properly, the Bench Book can serve as a

[66] *Bashir Ahmad v. The State*, 1971 PCr.LJ 252.

[67] In *Mehnaz v. Judicial Magistrate*, 2008 YLR 1669, it was affirmed that a father's guardianship persists even if the child resides with the mother. In *Kausar Parveen v. The State*, PLD 2008 Lahore 533, the Lahore High Court held that parents, being natural guardians, cannot prosecute each other for kidnapping. According to *Samina Khattak v. SHO*, 2019 PCr.LJ 909, this principle extends to mothers as well and in *Sulaiman v. The State*, 1984 PCr.LJ 1988, the father's constructive custody was held to preclude criminal liability under Section 363.

[68] KY Bokhari and S Ahmad, *Hague Convention on the Civil Aspects of International Child Abduction 1980: Bench Book* (Musawi 2025).

foundational reference point for harmonising Pakistan's jurisprudence with the objectives and legal structure of the Hague Convention.

9. Conclusion

The central question posed by this paper was whether a parent, having wrongfully removed or retained a child in breach of the Hague Convention, can invoke their rights of *hizanat* or *wilayat* to justify non-return. Under the terms of the Hague Convention, the answer is no. Once the Hague Convention applies, the legality of removal or retention must be assessed under the law of the child's habitual residence and domestic personal law rights cannot be used to justify removal or retention.

Pakistan's accession to the Hague Convention in 2016 was a step toward harmonising domestic and international child protection. Yet the case law post-accession, including *Faraaz Sheikh*, reflects a judiciary still caught between the demands of personal law and the obligations of treaty law. The absence of clear boundaries and inconsistent application of the Hague Convention has led to unpredictability and, at times, incorrect outcomes.

To address this, there is a strong case for institutional reform. Pakistan should consider establishing dedicated benches within family courts to hear Hague Convention matters. These benches should consist of judges trained in private international law and Hague jurisprudence, and empowered to apply the Hague Convention's procedural safeguards uniformly. Such specialisation would ensure that judges distinguish between custody determinations and return proceedings, recognise the narrow scope of the Hague Convention's exceptions, and uphold Pakistan's international commitments without conflating them with personal law traditions.

In addition, Pakistan should continue to invest in judicial training, increase inter-agency coordination through the Central Authority, and build communication pathways with foreign courts through the Hague Judicial Network. Where assessments of a child's circumstances are necessary, these should be entrusted to qualified professionals and psychologists with recognised degrees and certifications in the relevant fields, ensuring that evaluations are informed by professional expertise. Judges, though central to adjudication, are not trained to conduct such assessments, and reliance on specialised professionals would enhance both the accuracy and the credibility of determinations. These measures, alongside fundamental clarity pertaining to the Hague Convention itself, are essential to ensuring that the best interests of the child, understood through the correct legal lens, are effectively protected.

There is a pressing need to shift the prevailing judicial narrative. This requires acknowledging that the wrongful removal or retention of a child by a parent is not merely a private family dispute to be considered only as a personal law issue or delayed until a full custody trial. It is a form of

abduction with immediate and serious consequences for the child's safety and development. Judges must move beyond viewing such cases as domestic matters and instead recognise them as urgent child protection issues where swift intervention is essential to prevent harm. This shift in perspective is critical to aligning judicial practice with the Hague Convention's purpose and ensuring that return proceedings are treated with the urgency they demand.

Ultimately, the goal of the Hague Convention is not to decide custody, but to ensure that such decisions are made by the appropriate forum: the courts of the child's habitual residence. Pakistani courts must embrace this vision and resist the temptation to domesticate what is, fundamentally, a transnational legal obligation.

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The Age of Marriage in Pakistan: An Islamic Jurisprudential Perspective from Recent Rulings of Federal Shariat Court and their Impact on Legal Landscape

Syed Muaz Shah[1]

1. Introduction

'Age is but a number' — these words are often used in context of the discussion around marriage, but it is not just a number. In some cases, it is a legal restriction which can lead to a criminal liability. Such legal considerations are primarily focused on the minimum age of marriage and just like any law they are often reflective of societal development over time influenced by culture, religious and developmental elements in a particular region. In Western legal development this has been partly driven by development of society which, though has its roots in Judeo-Christian tradition, has moved more into a scientific analysis on the matter. Even after centuries of human development sadly still the matter is not settled as different age restrictions in relation to marriage exist, depending on national and regional laws. In the United States, for example, various states have different age limits for marriage, 10 states for example do not have no age floor limit if parental guardian consent is involved,[2] others vary from 14 years old to 18 years old.[3] This article does not delve into the philosophical discussion on the arbitrary nature of the selection of the age, rather it will look into the root of the significance of how this age number is achieved and the significance of it legally speaking in context of recent case law in Pakistan.

In the Islamic tradition there are multiple factors required or rather pre-requisites to marriage of which *baligh* (puberty) is but one, often incorrectly assumed by some to be the only requirement but also factors such as *aql* (intellect) and *rushd* (discernment). This debate has been reflected not only in the tradition of the classic four Sunni schools of the Hanafi, Maliki, Shafi'i and Hanbali schools of *fiqh* but also the *Shia* schools of thought in particular the Jafiri school. This first part will explore the discussion around these schools of thought, particularly the Hanafi which is highly influential in the Pakistani legal context, to understand the dynamics of Islamic jurisprudential influence.

The second part will deal with how Pakistan's regulations around marriage have evolved over time. One key legislation that governs this arena of age restriction in marriage in Pakistan is the

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[2] Tahirih Justice Center, *Understanding State Statutes on Minimum Marriage Age and Exceptions* (2020) 2 <https://www.tahirih.org/pubs/understanding-state-statutes-on-minimum-marriage-age-and-exceptions> accessed 22 December 2025.

[3] Ibid.

Child Marriages Restraint Act, 1929.[4] Other recent provincial-level legislations will be discussed briefly, primarily that of Sindh[5] and Punjab.[6] The two key findings from the case law around these pieces of legislation are that there is a requirement of sound judgment and free consent of the parties.

Lastly the discussion will cover the effects of the Federal Shariat Court cases of *Farooq Omar Bhoja v. The State* in late 2021 and the *Ali Azhar v. Government of Sindh* in 2023, particularly in respect to the interesting Islamic law argument in favour of age restriction in marriage by the State. These decisions have led to a series of cases, including *Abdur-Razaq v. The State* and *Mumtaz Bibi v. Qasim*: both decided by the Islamabad High Court (IHC), that have emphasised that the State can restrict the age of marriage and such restriction is not contrary to Islamic law. In the end more recent updates with changes in law in Islamabad Capital Territory (ICT) and two recent judgements from IHC and Lahore High Court (LHC) post-*Bhoja* that still preserve status of *nikah* in such cases even though illegality and government's right to restrict age of marriage is acknowledged.

2. The Islamic Perspective

The classic Islamic position is important to discuss at this juncture as Islamic law plays an impactful role in Pakistan's Constitution of 1973. Though this is a topic on its own, from Article 2 declaring Islam to be the State religion to the creation of the Council of Islamic Ideology (CII), there is plenty to discuss on this matter and cannot be summarily addressed. For the relevance of the topic at hand, one of the key institutions is the Federal Shariat Court (FSC), whose purpose is to 'examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Quran and Sunnah of the Prophet Muhammad (PBUH), hereinafter referred to as the 'Injunctions of Islam.'[7] As such the FSC is empowered to entertain 'Shariah' petitions challenging existing legislation that may fall against the 'injunctions of Islam' and such powers can also be exercised by the FSC in a *suo moto* petition.[8]

3. Concept of Marriage

The Arabic term for marriage is *nikah* and this is often used in reference to verses in the Quran, but this term originated to mean sexual relations or contract to do so in pre-Islamic Arabia. Later

[4] It is interesting to note that a young Muhammad Ali Jinnah, who was then a member of British India Legislative Assembly, was the key proposer in passing this legislation on October 1, 1929 that is still in effect today in Pakistan.

[5] Sindh Child Marriage Restraint Act, 2013.

[6] Punjab Marriage Restraint Act, 2015.

[7] Constitution of Pakistan 1973, Article 203D.

[8] Ibid.

on, it was given a more chaste definition within the Islamic context to mean the marriage contract. The following verse in the Quran also illustrates the idea specific for marriage with another term:

> "*And how could you take it away after you have given yourselves to one another, and she has received a most solemn pledge (mithaqan ghaliza) from you?*" (Q 4:21)

It is well-known that marriage is a contract in Islam and the Quran calls it a 'solemn pledge' or 'strong covenant' (*mithaqan ghaliza*). This is highly suggestive that though *nikah* is used to and translated often as marriage, the institution of marriage contains the element of a pledge or contract. This point is important as we will see later on particularly when we reflect on the different perspectives that have developed from classical Islamic jurisprudence to modern Islamic jurisprudence.

As such in *Al-Hidayah*,[9] a key *Hanafi* text, *nikah* is defined '[i]n the language of the law … [as] a particular contract used for the purpose of legalizing generation [of progeny through sexual intercourse].'[10] Whereas this is more specifically ironed out in term of a 'civil contract'. In the words of Ameer Ali, 'Marriage under Muhammadan law is essentially a civil contract. Its validity depends on proposal on one side and acceptance on the other.'[11] In the famous case pre-Independence case of *Abdul Kadir v. Salima*[12] (1886) out of the Allahabad High Court Justice Mahmood observed: 'Marriage according to Muhammadan Law is not a sacrament but a civil contract. All the rights and obligations it creates arise immediately and are not dependent on any precedent such as the payment of dower by a husband to wife.' Sir Dinshah Fardunji Mulla (DF Mulla)[13] says: 'Marriage is defined to be a contract which has for its object the procreation and legalizing of children.'[14] The debate on the classical perspective in Islamic jurisprudence versus the later developed perspectives, particularly after colonial exposure, can be seen here in respect to personal laws around marriage – a secularization of thought in a way. Nonetheless, this author does take the position that a contractual nature is present and can be justified from classical sources in the Quran and Sunnah, regardless of colonial exposure to Islamic thought — though the nature of which are unique and cannot be exactly juxtaposed within the legal definitions or elements of contract law as known in Western jurisprudence as is, though some similarities can be argued, hence the unique sub-category under discussion is of importance – *nikah* as an *aqd*

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[9] *Al-Hidayah fi Sharh Bidayat al-Mubtadi* (Arabic: الهداية في شرح بداية المبتدي), commonly referred to as *al-Hidayah* (lit. 'the guidance', also sometimes spelled *Hedaya*), is a 12th-century legal manual by Burhan al-Din al-Marghinani.

[10] C Hamilton (*trans.*), *The Hedaya: Commentary on the Islamic Laws* (Premier Book House 1957) 25.

[11] A Ali, *The Personal Law of Muhammedans* (WH Allen & Co 1880) 215.

[12] Allahabad High Court (1886) *Indian Law Reporter* (8 All 149)

[13] Sir Dinshah Fardunji Mulla's magnum opus the *Principles of Mahomedan Law* is a famous and frequently cited book on Muslim personal law in Pakistan.

[14] DF Mulla, *Principles of Mahomedan Law* (16th ed. NM Tripathi 2015) para 250.

(contract). This article is not on that but for the simple argument's sake – *nikah* can and should be considered a contract in its basic definition.

As such some basic premises are described when it comes to marriage contracts, Dr. Muhammad Sharif Chaudry sums it up well in his *Women's Rights in Islam:*

> *'Every adult Muslim of sound mind can enter into a marriage contract. The contracting parties must be acting under their free will and consent. When consent to a marriage has been obtained by force or fraud, the marriage is invalid unless it is ratified. Where consent to the marriage has not been obtained, consummation will not make the marriage valid. Lunatics and minors may be validly married through their guardians*.'[15]

4. Puberty

The question of the age of majority when it comes to marriage is not specifically addressed in the Quran or Sunnah in the *nass*[16] form but there are some verses of the Quran which help us arrive at an intellectual conclusion utilizing *zahir*[17], *dalil*[18] and *mafhum*[19] analysis of the original text which are often cited by classical jurists one of which is the verse on the age of orphans coming of age, the verse states:

> "*And do not touch the substance of an orphan – save to improve it – before he comes of age (asyuddah).*" (Q 6:152)[20]

Abdullah Ibn Abbas, a cousin and close companion of the Prophet Muhammad and one of the earliest *mufassireen*[21], was of the opinion this meant eighteen years of age.[22][23] Imam Malik agreed with this opinion[24].

In another verse, the Quran states:

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[15] MS Chaudhry, *Women's Rights in Islam* (Sh. Muhammad Ashraf Publishers and Booksellers 1991) 32.

[16] Literal form and meaning – exact wording from the text of the Quran and Sunnah.

[17] Apparent meaning – the interpretation of the original text provides an apparent meaning though it may not be literal.

[18] Divergent meaning – the opposite sense of the meaning of words from which a legal rule can be extracted.

[19] Indicative meaning – a meaning that can be ascertained utilizing intellectual faculties.

[20] (Q 17:34) in similar wording.

[21] Expert in Quranic exegesis.

[22] Abdullah Ibn Abbas, *Tanwīr al-Miqbās min Tafsīr Ibn 'Abbās* (Translated by Mokrane Guezzou) (Royal Aal al-Bayt Institute for Islamic Thought 2007); numerous citations give reference to 18 years of age in various verses (12:22), (17:34), (22:5) & (40:67).

[23] M Sabreen, 'The Age of Criminal Responsibility and its Effect on Dispensation of Justice' (2017) 8 Pakistan Law Review 104.

[24] Divergent opinion also suggests Imam Malik in the absence of other proof presumes majority at 15.

> "*And test the orphans [in your charge] until they reach (bulugh un nikah) puberty for marriage; then, if you find them to be mature of mind (rushd), hand over to them their possessions; and do not consume them by wasteful spending, and in haste, ere they grow up*." (Q 4:6)

This verse indicates *baligh* (puberty) and also "mature of mind" or *rushd*. This verse is often debated between scholars to indicate that marriageable age is distinguishable from other affairs (i.e., property) and thus one can get married at the point of *bulugh un nikah* but perhaps may not be able to manage their affairs otherwise. This is a minor opinion as we have established that *nikah* is a civil contract between the parties and if we use this as a two-prong test, as modern scholars do, both of these are required for an individual to enter into a "civil contract" or *nikah*.[25]

As mentioned earlier, the Sunnah of the Prophet Muhammad is often understood in the written narrations that are often referred to as *hadith* that are a primary source of Islamic law, particularly in the Sunni tradition. Certain *hadith* specifically discuss the issue of the age of majority and our focus will be on them primarily. (1) The case of Abdullah ibn Umar, (2) The categorization of prisoners of Banu Qurayza,[26] and (3) The age of Aisha at the time of marriage to the Prophet Muhammad – each of which we will deal in details as the first two cases deal with determination of age of majority for males and the third case is specific to females.

4.1. Case of Abdullah ibn Umar

The opinion of the Shafi'i and Hanbali schools relies on the famous narration of Abdullah ibn Umar who reported that he was prevented from participating in war due to his age during the Battle of Uhud because he was considered a minor at fourteen,[27] but the following year he did participate in the Battle of the Trench when he was presumably fifteen.[28] This opinion can be considered for an indicative age of majority in Islam but the reference is related to participation in war and it can be suggested that in the previous battles the conflict was an optional engagement whereas the Battle of the Trench was a defensive conflict during a siege of Medina where it was expected that local population lend support in the defence of the city. The Shia Jafari school position is diverse, but majority of scholars suggest that it is assumed after the age of fifteen for boys using the same reference, amongst others.[29]

4.2. Prisoners of Banu Qurayza

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[25] IK Nyazee, *Outlines of Islamic Jurisprudence* (Federal Law House 1998) 113.

[26] One of the 3 Jewish tribes which rebelled in Medina breaking the pact under the Constitution of Medina.

[27] He was also presumably rejected from the Battle of Badr, the year before when he was 13.

[28] Muhammad ibn Saʿd, *Kitāb al-Ṭabaqāt al-Kabīr (The Book of the Major Classes),* (vol 4 Ta-Ha Publishers 1995).

[29] Hilli, Jaʿfar b. al-Ḥasan, *al-Sharāʾiʿ al-Islām fī masāʾil al-ḥalāl wa l-ḥarām*. Qom, Iran (1987). vol. 2 85. See also Burujirdi, Ḥusayn. *Jāmiʿ aḥādīth al-Shīʿa fī aḥkām al-sharīʿa*. Qom, Iran (1979). vol. 1 350-355.

The narration of Atiyyah al-Qurazi during the Battle with Banu Qurayza is illustrative that physical signs were considered to distinguish male adults from male minors. As both women and children were protected and only the adult males who participated in the treason were punished[30]. The males were distinguished by physical signs of hair growth in pubic regions.

Physical signs have been a reference point for some scholars aside from this historical event. Interestingly there are references for the case of females which is more apparent in the menstruation cycle's appearance. Such a method was however never truly prescribed by the scholars, particularly of the *Hanafi* school[31], when it comes to the age of marriage, rather it is only a presumptive opinion that one has entered majority. Another physical sign was *ihtilam* or nocturnal emission, which was sometimes referenced. Puberty is but one component to the requirement as *rushd* is still key to completing the prerequisite as indicated from the earlier verses in respect to orphans. Zamakshari, the famous *musfasir,* writes that at the age of *ihtilam* (nocturnal emission) a boy becomes suitable for marriage primarily because "procreation and the extending of bloodlines (*al-tanasul*)" can then occur. He suggests that one might attain this age without giving any indication of *rushd*, which he defines as "propriety in religion and intellect." In such a case, he argues eighteen years old being the age of puberty, plus an added seven in which to pass through adequate amounts of life experience for the age of twenty-five years old.[32] Another key argument and example is for a special needs person who may have obtained puberty but *rushd* is missing, here too the scholars are in agreement.

4.3. The Age of Aisha

The third case is the most controversial case of the age of marriage of Aisha to the Prophet in which the famous tradition in Bukhari states:

> '*Narrated `Aisha: that the Prophet married her when she was six years old and he consummated his marriage when she was nine years old. Hisham said: I have been informed that `Aisha remained with the Prophet for nine years (i.e. till his death).*'[33]

What is most telling is this *hadith* is not only recorded in Bukhari — the most authentic source of hadith literature by Sunnis — it is narrated by Aisha herself. This tradition was actually used by the plaintiff in the *Bhoja* case. As we will see, the FSC addresses this concern, but it should be

[30] *Sunan Abu Dawood* 4404 & *Tabaqat Ibn Saad.*

[31] KN Ahmed, *Muslim Law of Divorce* (Islamic Research Institute 1972) 913. (Citing Ibn Qudamah's *al-Mughni).*

[32] al-Zamakhsharī, Maḥmūd ibn ʿUmar, *Al-Kashshāf ʿan ḥaqāʾiq al-tanzīl wa-ʿuyūn al-aqāwīl* (Dār al-Fikr, vol 1) 500 cited by CG Baugh, 'Early Ḥanafī Thought'. Minor Marriage in Early Islamic Law (Brill 2017).

[33] *Sahih al-Bukhari* 5134

noted that reputable scholars have concluded that this one citation is not sufficient as there are others which are equally reputable by *hadith* sciences to suggest the age Aisha to be much older. Ruqaiyyah Waris Maqsood[34], Muhammad Munir[35], Asghar Ali[36], and others have extensively argued that Aisha's age at the consummation of marriage was actually eighteen to nineteen.

In addition there is a unique reference within the text of *Ibn Ishaq*'s famous Biography of the Prophet (*Siratur Rasullah)* as rendered by Ibn Hisham, which is considered unanimously by all Muslims as the key text on the biography of the Prophet since it was the very first comprehensive volume that covered the life of the Prophet Muhammad from inception of Islam until his death and has been authoritative. The passage of interest states when people were accepting Islam after the prophecy was revealed – the very first to accept amongst men was Abu Bakr, the best friend of the Prophet Muhammad, who then preached to others to join the cause and of which he preached to his family and the text lists down the earliest who accepted this message which included his elder daughter "Asma bint Abi Bakr, together with his light daughter Aisha"[37] – this is a remarkable passage as Aisha herself references on multiple occasions to the early days of Islam but this would be an impossibility if her age of marriage was to be assumed at six in the thirteenth year of the prophecy because she would not have been alive – where as she is already a "little" girl during the first year of the prophecy in this reference – clearly indicative proof that conflicts with the assumed reading of the hadith in question.

Imam Abu Hanifa fixes the age of puberty in case of boys at eighteen years and in case of girls at seventeen years, where it is assumed they have obtained puberty, whereas the assumption of *rushd* is actually much later at the age of twenty-five.[38] Presumption of puberty, most scholars agree, can be rebutted and if it is proven that a person who gains puberty has not obtained *aql* or *rushd*, "then the capacity for execution cannot be assigned to such a person. This is the view of the majority of the jurists."[39]

It should be noted here that, Imam Abu Hanifa called for the *khiyar al-bulugh* (option of puberty) which provides that a girl whose marriage was solemnised by her wali (guardian) before

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[34] Maqsood, Ruqaiyya Waris, Hazrat Aishah: A Study of Her Age at the Time of her Marriage (IPCI 1994) quoting Maulana Muhammad Farooq Khan, the famous scholar who translated the Quran into Hindi and veteran leader of Jamaat-e-Islami Hind (JIH) in India.

[35] M Munir, *The Rights of the Children in Islam: Theories, Mechanisms, Practices and Convention on the Rights of the Child* (IRD 2017) 267.

[36] AA Engineer, 'Child Marriage and Islam' *Dawn* (3 August 2012) <https://www.dawn.com/news/739311/child-marriage-and-islam> accessed 22 December 2025.

[37] A Guillaume ed., The Life of Muhammad: A Translation of Ishāq's Sīrat Rasūl Allāh (Oxford University Press 1955) 116.

[38] This is not to say that one cannot obtain marriage before as *rushd* can be identified earlier but in the event, it is in doubt - it will be assumed after 25. See Nyazee (n 25) 113.

[39] Nyazee (n 25) 111.

attaining the age of puberty, could accept or reject the marriage upon on achieving puberty or the age of *rushd*. Additionally, as such her *wali* cannot force her into marriage if she is unwilling. This was done because the *wali* does not retain the absolute authority to solemnise the marriage, but only the consent of the female does, which can only truly be given once she has obtained *aql* or *rushd*. This is important for our understanding as we shall see.

With the various opinions in Islamic law, the age of fifteen is considered the youngest age of presumption of majority. Whereas under *Hanafi* law the age of seventeen to eighteen is in fact the presumed age of majority. This is important when looking at the jurisdiction of Pakistan where the *Hanafi* school is dominant and thus this position is more prevalent in the Indian subcontinent.

5. Age of Majority in Law

Three key laws are important in understanding how the age of majority in Pakistan was defined and how various perspectives have shaped the understanding to date: (1) Majority Act, 1875; (2) the Child Marriage Restraint Act, 1929, and (3) Muslim Family Laws Ordinance, 1961 ('MFLO 1961').

Pakistan inherited the Majority Act, 1875 in its legal system from British India which provided the age of majority to be eighteen. Though this act is specifically not to be regarded in matters pertaining to "the capacity of any person to act in the following matters (namely), marriage, dower, divorce and adoption."[40] Additionally, under Section 3, the age of majority for anyone subject to a court-ordered guardianship only gains majority at age of 21. There was an effort for law reform by the Law and Justice Commission of Pakistan in 2007 for an amendment to this to make it eighteen years across the board since it was "unfair and discriminatory"[41] for those subjected to court-ordered guardianship but such an amendment has not passed to date.

It is interesting to note that the purpose of this law was stated in its preamble - "to attain more uniformity and certainty respecting the age of majority than now exists". This assumption is incorrect as puberty was presumed at the age of fifteen years in the famous *Fatawa Alamgiri* – a seventeenth-century compilation of Hanafi Islamic law that served as a comprehensive legal reference for the then Mughal empire.[42] So perhaps it can be argued that due to the lack of centralization of the Mughal empire in India, this was not effectively implemented; plus it could be argued that the Majority Act, 1875 was a religious-neutral position of the British who were referring to all people regardless of faith.

[40] Majority Act, 1875, Section 2(a).

[41] Amendment to Majority Act, 1875, Law & Justice Commission of Pakistan, Report (2007) <http://www.ljcp.gov.pk/Menu%20Items/Reports_of_LJCP/09/90.pdf> accessed 22 December 2025.

[42] SN Burhanpuri, *Al Fatawa Al Alamgiriya Fil Furu Al Hanfia Al Mulaqqab Bil Fatawa Al Hindiya*. Emperor Aurangzeb (1672), p. 93 of Vol-V.

The second major piece of legislation is the Child Marriage Restraint Act, 1929, which fixed the age of puberty for males at eighteen years and for females at fourteen years[43]. This act's origin is of interest as it was the first effort in the contemporary history of united India where women actively campaigned for legal reforms. The Women's Indian Association, National Council of Women in India, and All-India Women's Conference pushed reformed agendas to address women's rights issues.[44] The British were not accustomed to disturbing cultural practices that did not interfere with their rule, such non-interference practices dated back to the Charter of 1813 from the time period of the British East India Company (BEIC). Though much has been written about this, it is no doubt that the events of First War of Independence of 1857[45] was triggered by increased interference by the BEIC that led to the Crown directly gain control of the Indian provinces and that the Declaration of Queen Victoria in 1858 the following year was a clear indication that British policy of non-interference was to not disturb local religious beliefs and observances[46]. Hence, the matter of age of majority in marriage was delegated to the various religious communities to determine on their own; this is reflected in the Section 2(a) and (b) exemptions in the Majority Act, 1875 that was passed later on.

An American journalist, Katherine Mayo, published a damning piece about child brides of India in *Mother India*. "Using hospital records, official accounts, and personal interviews, Mayo wrote a 'pot-boiler' that shocked and titillated the American and British reading public."[47] The Government of India in order to avoid blame and international backlash recognised this issue and created a committee to explore the public attitudes and all the women organizations organised meetings, surveys, and various other activities to garner public support. Thus, the Child Marriage Restraint Act, 1929 was passed and there was wide consensus amongst women, but it was never practically implemented due to British concerns to not excite conservative elements, both Hindu and Muslim, in India who actually wanted to amend the newly passed legislation[48]. It was by all means a dead law, but after independence in 1947 Pakistan inherited it and the law is still relevant today.

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[43] Child Marriage Restraint Act, 1929, Section 2.

[44] GH Forbes, *Women in Modern India* (Cambridge University Press 1998) 72.

[45] The British refer to this as the 'Indian Rebellion' or 'The Mutiny of 1857'.

[46] It is pertinent to quote the relevant section of Queen Victoria's proclamation here: '*Firmly relying Ourselves on the truth of Christianity, and acknowledging with gratitude the solace of Religion, We disclaim alike the Right and the Desire to impose our Convictions on any of Our Subjects. We declare it to be Our Royal Will and Pleasure that none be in any wise favored, none molested or disquieted by reason of their Religious Faith or Observances; but that all shall alike enjoy the equal and impartial protection of the Law: and We do strictly charge and enjoin all those who may be in authority under Us, that they abstain from all interference with the Religious Belief or Worship of any of Our Subjects, on pain of Our highest Displeasure.*'

[47] GH Forbes (n 44) 85.

[48] PJ Nehru, *An Autobiography* (10th ed., Penguin Books India 2004).

Pakistan's first military dictator, General Ayub Khan in 1961 decided to amend the position on the age of majority in respect to marriage with the Muslim Family Laws Ordinance (MFLO), 1961. Section 12 of the MFLO 1961 fixed the minimum age for marriage by increasing the minimum age to sixteen years for females and keeping eighteen years for males, reforming a pre-independence position. The MFLO 1961 also reduced the age for criminal sanctions against a male from twenty-one years to eighteen years who violated the law by marrying an underage female.

Section 11 of the MFLO 1961 is important as eventually this empowered the provincial governments the authority to "make rules to carry into effect the purposes of this Ordinance". The spirit of this provincial empowerment was further solidified in the passage of the 18th Amendment of the Constitution of the Islamic Republic of Pakistan in 2012 that essentially devolved many powers to the provinces. As a result, shortly thereafter, Sindh Child Marriages Restraint Act, 2013 was passed in Sindh which became the first province to set the age of majority at eighteen for both sexes.[49] Shortly thereafter Punjab passed the Punjab Child Marriage Restraint (Amendment) Act, 2015 which reaffirmed the position stated in the MFLO 1961.

Though not all provinces followed suit in 2013, the Chief Minister of Khyber Pakhtunkwa rejected passing the Child Marriage Restraint (Amendment) Bill, 2013 for the reasons that such a provision will trigger a debate that has been at the core of the conservative society and more issues will arise in the province. Balochistan maintained the same position of sixteen years for females as a bill to increase the age limit has been suspended in limbo since 2014, though recently there was a decision to form a committee to address this.[50]

A bill to change the age of majority for females to eighteen years was passed by the Pakistan Senate for the jurisdiction of Islamabad Capital Territory (ICT) and Federal areas but this was initially rejected by the National Assembly in 2019 after some debate. But the law was passed in 2025 which was entitled the Islamabad Capital Territory Child Marriage Restraint Act, 2025 which limited age of marriage for eighteen for both males and females and was directly consequence of the Bhoja decision along with follow up Islamabad High Court decisions as we shall see later on.

The question of marriage being valid, regardless of violation of the law has become an interesting new legal date in 2025 with two decisions from the Islamabad High Court and Lahore High Court that essentially state that the validity of the marriage is not voided, only that there are criminal sanctions against those who facilitate and perpetrate underage marriage, this complexity has

[49] Sindh Child Marriages Restraint Act, 2013.

[50] Dawn, 'Balochistan's child marriage bill in limbo for eight years' (6 August 2022) (https://www.dawn.com/news/1703492) accessed 22 December 2025.

again thrown the issue of child marriage into light once more before the Pakistani public as we shall see.

With the Islamic position open to interpretation and the devolution of legislative power regarding family law to the provinces to determine the age of majority, it was a natural consequence that a clash was bound to happen as pressures on child marriages were always existent since pre-independence. Here is where the Federal Shariat Court has made a mark with the *Bhoja* and *Ali Azhar* decisions.

6. Repugnancy Tested in the FSC

In Pakistan's constitutional structure after the Constitution (Amendment) Order, 1980 (President's Order No. 1 of 1980) of President Zia-ul-Haq, the dynamics of how laws can be challenged changed. He introduced many changes but for our specific discussion the creation of the FSC had a major impact on how laws can be analysed in light of the Quran and *Sunnah*. Now along with the Council of Islamic Ideology (CII) which is an advisory body assisting in the development of law, the FSC was empowered as a judicial forum to determine if a law is "repugnant" to the Quran and Sunnah or not. This power was further enhanced in that the FSC became the only court within the constitution to take its "own motion" or in other words *suo moto* notice, a fact many experts forget not realizing that the original framers of the constitution never empowered the Supreme Court to entertain petitions initiated on its own as it had been for some time[51], but the FSC did, the proof of which is evident under Article 203(D)(1) which empowers the FSC:

> "*The Court may, either of <u>its own motion</u> or on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam*."

This petition became known as the "Shariah Petition" which was the main mechanism utilised by citizens to challenge the existing laws dealing with child marriage restriction. As such it should be noted that the FSC includes in its roster *Alim* judges who are also trained in Islamic jurisprudence who must sit on the bench in all Shariat Petition cases.

[51] Ironically, after this article was written, the 26th Amendment to the Constitution of the Islamic Republic of Pakistan was passed in 2024 that specifically stated under the amended Article 184(3) that 'the Supreme Court shall not make an order or give direction or make a declaration on *its own OR in the nature of suo motu exercise of jurisdiction* [and thus cannot go] beyond the contents of any application filed under this clause.' What was unstated by the original drafters of the Constitution has been reiterated in writing by the modern *Majlis-e-Shura* (Parliament).

Even before the *Bhoja* decision there were some interesting cases before the FSC that addressed the issue of age of majority. The case of *Muhammad Fayyaz v. Islamic Republic of Pakistan* in 2007 and the case of *Muhammad Aslam v. The State* in 2012 are two examples that must be explored initially.

6.1. Muhammad Fayyaz v. Islamic Republic of Pakistan (2007)

In *Fayyaz*, the Majority Act, 1875 was challenged to be "repugnant" to Islamic injunctions. Interestingly, the case was about a father who tried to claim that Section 3 of the Act forces him to maintain his son until eighteen years of age and that it is possible per Islamic provisions to suggest that the son has already attained the age of majority before then. The petitioners relied on similar citations of jurists as indicated earlier in this paper and the *hadith* on Aisha's age, all hinting that age of marriage is lower than eighteen years old.

The FSC led by Chief Justice Haziqul Khairi along with Alim Judge, Justice Dr. Muhammad Fida and Justice Salahuddin Mirza observed in *Fayyaz* that it respected the view of esteemed Islamic jurists but reference directly to the original sources of the Quran and Sunnah were important. It observed that the appearance of physical symptoms of puberty were not sufficient to determine if the person has attained maturity relying on the Q 4:6. They also observed this lack of unanimity amongst the Muslim jurists was partly due to the fact that attainment of "physical puberty vary from place to place and from person to person and no definite criteria can be specified to exactly determine who attained puberty and on which date."[52] This argument not only lowered the legal weight of the multiple jurists cited by the petitioner due to geographic and jurisdictional question being raised but allowed the court to then summarise its argument that to avoid "further controversies and complications for determination of puberty" the legislature was attempting to codify "a definite law" and that the citations of the petitioners was "general in nature" and struck down the repugnancy challenge.[53]

Though this was an important decision, the ruling was primarily discussing the repugnancy of the Majority Act, 1875, which as shown earlier did not govern the matter of the age of majority in respect to marriage and other matters. Additionally, there was a lack of discussion on addressing the Islamic arguments in favour of setting an age of majority. Both these matters were addressed in the *Bhoja* decision.

6.2. Muhammad Aslam v. The State (2012)

[52] *Muhammad Fayyaz v. Islamic Republic of Pakistan* (Sh. P. No. 6/I/2007 & Sh. P. No. 27/I/1992).
[53] Ibid.

In the *Aslam* case the matter was that of an abduction allegation and marriage of a forty-four year old male to a sixteen year old female. The petitioner's claim of *nikah* was not substantiated by proofs either in the form of a *nikahnama* or witnesses. The decision of the FSC very clearly positioned itself stating that "awareness about marriage encompasses more serious matters than mere carnal knowledge (relating to physical feelings and desires of body)." This would indicate a similar position in Islamic law as argued earlier in that physical capacity is not sufficient in and of itself. The Court confirms this further in the following part where it states: "[t]herefore, Islam places conjugal consent over the high pedestal of morality rather than carnality. Consequently, [a] consenting adult is a person who has come of age enough, and therefore responsible enough, to decide and understand the consequences of marriage."[54] Thus the Court arriving at a similar understanding of Q 4:6 cited above - that *rushd* is a requirement as well for marriage.

The court further went on to elaborate that the "consent for marriage has deeper and wider implications… Therefore, free consent for marriage does not mean just acceding to or saying 'yes' to the circumstantial or situation dictate."[55] The judgement goes beyond that and listed various considerations, which included sanity, capacity, capability to utilise the capacity, etc. A verbal *nikah* cannot be substantiated with all these gaps and therefore the requirement of a *nikahnama*[56] was essential to document this "in the interest of concerned individual, family and society"[57] at large, especially when the defendant was denying it.

The *Aslam* case added important emphasis on the age of marriage to be beyond just physical readiness for conjugal relations and that such a consent is beyond normal meanings of consent; in other words, no underage person can give consent if they have not achieved the capability of providing consent — hence marriage contract cannot theoretically be created. Though *Aslam* was vague in defining the particular minimum age for marriage, it did lend support that puberty is not the only threshold that needed to be crossed but also that of discernment and intelligence for anyone to give proper consent to a marriage contract.

7. The Bhoja Case[58]

In October 2021 the matter of the age of majority once again was brought before the FSC but this time challenging Sections 4, 5 and 6 of the Child Marriage Restraint Act, 1929, which were

[54] *Muhammad Aslam v. The State*, 2012 P.Cr.L.J 11.

[55] *Ibid.*

[56] A *nikahnama* or marriage contract in the Pakistan context is a formal written document that has been instituted since MFLO 1961 and has not had any major updates since then. The original conceptual idea was to document Islamic marriages within the State to avoid any confusion and denial of marriage rights as was particularly faced by women. Traditional Islamic law does not insist on written form but there is an indication that Quranic text encourages contracts be written Quran 2:286 – so it is not inconsistent with Islamic teachings.

[57] *Muhammad Aslam* (n 54) 17.

[58] Shariat Petition No.10/I of 2020.

impugned as they were "in contradiction with Islamic law and rules."[59] The reliance was made on various hadith from established Sunni tradition in *Sunan an-Nasa'i*, *Sahih Bukhari*[60], and *Sahih Muslim*[61]. To enumerate them all would be extensive for this paper, but the gist of the citations was reference to the marriage of Aisha to the Prophet Muhammad, as mentioned earlier, "when she was 6 years old, and consummated the marriage with her after she was 9."[62]

Justice Dr. Syed Muhammad Anwer, an *Alim* judge, observed that in the citation of *Sahih Muslim*, there were reference to two key principles: (1) "Nikah can be contracted of a minor aged girl through her wali; however, the marriage has to be consummated after the girl attains adulthood or adult age."[63] and (2) "...consummation of marriage in such [a] marriage should be made after the attainment of adulthood by the girl."[64]

Based on such principle Justice Anwer proceeded to state that the setting of the minimum age at sixteen years by the government was there to avoid the error, "to the maximum extent", of any marriage that may be consummated before the attainment of adulthood. And as such it is in line with the second principle mentioned from the hadith cited from *Sahih Muslim*.

The court also observed that the citation of the case of Aisha is unique to the "personality of the Nabi Kareem (Prophet Muhammad)" and that this is particularised to his person, citing Islamic scholar Muhammad Shafi who was commenting on Q 33:50-52 verses that deal with exclusive rights given to the Prophet Muhammad in respect to marriage.[65]

Interestingly the court then discussed the matter of *khiyar al-bulugh*. The relevancy of this principle to the rationale of the court is such that the assumed age of when this is to occur is sixteen years under normal conditions. As such this specific age limit is of key significance.

Even so the court observed that the State retains the right to restrict permissible acts in Islamic law and cited a reference to Umar ibn Al-Khattab,[66] the second Caliph of Islam who made it prohibited for Muslim males to marry outside of their faith even though the *Sharia* allowed such

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[59] *Farooq Omar Bhoja v. Federation of Pakistan,* PLD 2022 FSC 1.

[60] Hadith No. 3896.

[61] Hadith No. 3894 & 3895.

[62] *Sunan an-Nasa'i* 3255.

[63] *Bhoja* (n 59) 3

[64] Ibid.

[65] An example is within the Q 33:50 - 'Also [allowed for marriage is] a believing woman who offers herself to the Prophet [without dowry] if he is interested in marrying her—[this is] exclusively for you, not for the rest of the believers.' (Q 33:50). This is demonstrative that perhaps the case of Aisha, if we are to take the narrations on the face of it, was never meant to be a case study applied for the rest of the Muslims.

[66] In Arabic this is known as *mubah.*

marriages. With Umar representing the State, it illustrated that the State can introduce regulations from time to time for policy reasons and that it did not undermine the "*hukum (ruling) set out by Shariah*"[67] and as such the government is allowed to set a limitation.

Justice Anwer proceeded to also give reference to *Sad-uz-Zaraey*, a principle in Islamic law that illustrates that it is "a duty of the State to control, curtail or curb any act in a society, which may lead to harmful consequences to society at large or to any of its segments, no matter how minor it is."[68] Justice Anwer cited another reference from the reign of Umar where men would use the triple divorce in one sitting and then argue it is but one talaq (divorce). Such abuse led to uncertainty for women and as such Umar declared that the triple talaq will be considered as three and thus confirm the divorce as final. As such the principle of *Sad-uz-Zaraey* can be used to minimise the chance of "abuse or misuse" in the case of restricting the age of marriage because "a marriage should not be consummated before the attainment of the age of medical maturity by the girl. Setting an age of 16 years reduces the possibility of breach of this principle of Shariah to the maximum."[69]

The FSC discussed at length that there were also divergent opinions of respected Islamic jurist s that were against even the initiation of marriage of a minor including Imam Ibn-e-Shabarma, a contemporary of Imam Abu Hanifa and Qazi Abu Bakar Al-Ism and such references were readily available.[70]

The FSC also cited the importance of education and how a girl under the age of sixteen cannot reasonably be expected to have completed her education. A hidden reference to Article 25A of the Constitution can be observed where the age of sixteen is specifically mentioned in the right of education for the State to provide free education from five to sixteen. Not only did Justice Anwer cite the *hadith*: "Acquisition of knowledge is mandatory upon every Muslim"[71] as an

[67] *Bhoja* (pg. 6 of Judgment).

[68] Ibid.

[69] Ibid (pg. 7 of Judgment).

[70] Ibid. Court cited reference to Al-Mughni Ibn-e-Qudaima, Vol. 7, pp. 487 and Majmooa-i-Qawaneen-e-Islam, Vol. 1, pp. 214-215 by Dr. Tanzeel-ur-Rehman.

[71] Sunan Ibn Mājah 224.

additional Islamic reference, he specifically mentioned further references from At-Tabarani[72] and *Sahih Bukhari*[73] that specifically mentioned the education of girls.

In the end, the FSC added the argument from Maqasid Ash-Shariah (objectives of *Sharia*), an overarching principle in Islamic law that highlights the intent, objective and purpose of the *Sharia* that needs to be achieved. Such objectives have classically been defined in five key categories under the *dharuriyat,* "necessity", credit for which is given to the renowned Imam Ghazali who suggested the protection and preservation of: (1) *deen* (religion), (2) *nafs* (life), (3) *nasl* (progeny), (4) *aql* (intellect), and (5) *mal* (wealth/property), which are the fundamental objectives of Islamic law. These five categories are what the *Sharia* hopes to achieve in the various rules and regulations it imposes — essentially it is the 'spirit' of Islamic law. Though this paper is not focused on this discussion it is very pertinent to mention that the court ruled that both the threat to *nasl* (progeny) and *aql* (intellect) are seen if the age of marriage is not restricted by the State to preserve and protect young women.

Summarizing the judgment, Justice Anwer cited that multiple Islamic countries in their jurisdictions have fixed a minimum age to marriage and as such this is a practice recognised by Muslims as a whole. The petition was thus dismissed and the argument for the State to regulate the age of majority in respect of marriage was thus identified to not be repugnant to Islam, rather in conformity with established Islamic principles.

8. Post Bhoja Decision

Two key cases immediately transpired after the *Bhoja* decision which are relevant for discussion to illustrate the impact this decision had on Pakistan's legal position on the age of marriage: *Abdur-Razaq v. The State*[74] and *Mumtaz Bibi v. Qasim*[75].

In *Abdur-Razak*, the Islamabad High Court dealt with a situation of alleged abduction for the purposes of *nikah*, which was argued to be contracted. The State in turn argued that the female is a minor and cannot be reasonably assumed to give consent. In addition, there was evidence to

[72] He was a renowned Sunni theologian from the 7-8th century who traveled and wrote extensively, reference in the judgement was made to a particular saying of the Prophet Muhammad (PBUH) from his magnum opus *Al-Mu'jam al-Kabir Hadith No. 10295*. The tradition states that Abdullah ibn Masud heard the Prophet say 'Anyone who has a daughter should teach her good manners and ethics along with *knowledge and give her a good education* and out of the countless bounties God has blessed him with, he should spend on her so that she can be his shield against the Fires of Hell [On the Day of Judgement]' (*emphasis* in Judgement).

[73] The reference in the Judgement is to the fact that the topic of educating females is so important that Imam Bukhari, the premier *hadith* compiler in the Sunni tradition, has an entire chapter dedicated to education of women/girls called 'The Chapter of Imam exhorting, and advising women and teaching them' and it was observed this was at the beginning of his *magnum opus – Sahih Al-Bukhari*.

[74] *Abdur-Razaq v. The State*, Crl. Misc. No.1269-B/2021.

[75] *Mumtaz Bibi v. Qasim,* Case No. 4227 of 2021.

suggest she was coerced to give consent, whereas the petitioner argued that since she was above the age of sixteen, she could validly contract the *nikah*.

Due to the anomalies in law, the court appointed Barrister Zafarullah Khan, ASC as an *amicus curiae* to assist the court. Barrister Khan proceeded to cite the same verse Q 4:6 to suggest "not only puberty which is the criteria for granting consent but there is also requirement of being *rushd* i.e. a person being able to decide for himself and exercise good judgment."[76] He also cited *Hafiz Abdul Waheed v. Asma Jehangir* where the court opined that for a valid contract of marriage by a woman without *wali*, she is to be *sui juris* - essentially the age of 18.[77]

The Court then cited the verse Q 4:6 and the exegesis of Maulana Abul Ala Maududi in respect to it from the book *Tahfeem-ul-Quran* and concluded "not only *balughat*/puberty but also *rushd*, which is the second important criteria for a person to enter into *Nikah*."[78] The Court extensively cited the *Bhoja* case and added emphasis on the right of the State to set the minimum age of marriage and that such prerogative was within its bounds and did not violate the *hukum* of the *Sharia*. And it also cited the Islamic principle of *Sad-az-Zaraey*.[79]

In summary Justice Aamer Farooq stated "the Federal Government should intervene and legislate upon the matter to remove any anomalies as such in light of the afore-noted judgment of the Hon'ble Federal Shariat Court"[80] referring to the *Bhoja* decision. He further concluded that "there is no bar on the State to legislate upon the matter and fix the age for the said purposes as has been done by the Government of Sindh."[81] The court ruled that the defendant female was not *sui juris* at the time and hence the requirement of the *wali* is necessary, but due to existence of *nikahnama* and conflicting with the defendant's sworn statement that she was coerced, it is a matter of further inquiry.

The case of *Mumtaz Bibi* was initiated by the mother of a fifteen year old female who was abducted and married. Initial petition was dismissed by the lower court but police was ordered to produce the female before the court and the female openly stated in court she is married and unwilling to go back with her mother, the petitioner. The Islamabad High Court ordered the female to be sent to a Dar-ul-Aman (government-run shelters) and allowed the petitioner and various family members to meet her daughter under supervision of the administrator at the Dar-ul-Aman. The child was confirmed to be of 15 or 14 at the time of the alleged *nikah*.

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[76] *Abdur-Razak* (n 74) 2.
[77] PLD 2004 SC 219
[78] *Abdur-Razak* (n 74) 4.
[79] Ibid, 7.
[80] Ibid, 9.
[81] Ibid, 10.

Justice Babar Sattar in his decision in *Mumtaz Bibi* was more elaborative in the analysis arriving at the conclusion through evidence. The court observed the *Bhoja* decision "held that it was not un-Islamic for the state to determine the permissible age for entering into a contract for marriage." Since there was a dispute amongst the Islamic scholars and jurists with regard to the minimum age of marriage, such age is to be determined by the existing provisions in Pakistan with a view to "promoting Principles of Policy…"[82] Justice Babar used extensive citations from international law, including but not limited to the UNCRC as Pakistan is a party to the convention and is obligated to ensure the protection of children from exploitation.[83]

The court ruled that a child is defined as someone who has not attained the age of eighteen and any informed consent on behalf of such a person cannot be attributed to the child. And that the legal competency cannot be attributed to physical growth but rather it was defined by age. Justice Babar cited the National Commission on the Rights of Child Act, 2017 which states under Section 2(b) that "'child' means any person below the age of eighteen."[84] Additionally reference was made to the Juvenile Justice System Act, 2018 where under Section 2(b) "child" means for the purposes of this Act a person who has not attained the age of eighteen years".[85]

The court then addressed other matters of criminal liability under the Pakistan Penal Code in respect to sexual violence. Two sections are particularly focused upon, primarily Sections 375 for rape and 377A for sexual abuse, which defines sexual abuse as various sexual activities "with or without consent where age of person is less than eighteen years, is said to commit the offence of sexual abuse." As such the court concludes that any sexual act with anyone under the age of eighteen would be liable for punishment. The relevance of this to the issues around the age of majority is brought together by the judge: "The contract of marriage by its very definition is a contract whereby the parties agree to engage in sexual relations, recognised by the State and society as legitimate, for the purpose of procreation."[86] So, how can a contract for marriage with a person under the age of eighteen be deemed valid because the object of a marriage is for conjugal relations.

Though Justice Babar does not delve into the ramifications in the immediate case, the court does arrive at the conclusion that "a marriage contract involving a child under the age of 18 years is a contract prohibited by law, which, even if executed by a child, is *void ab initio*"[87] and moved to recommend the federal government to remove the ambiguity within various pieces of legislation and provide a clear minimum age of marriage. The Court ordered all marriages in the Islamabad

[82] *Mumtaz Bibi* (n 75) 17.
[83] Ibid, 24-26.
[84] Ibid, 31.
[85] Ibid, 32.
[86] Ibid, 36.
[87] Ibid, 54.

Capital Territory to adhere to the letter of the law in the ruling and ordered all marriages registered to adhere to the age of majority of eighteen years for both males and females.

9. Ali Azhar v. Government of Sindh[88]

The *Ali Azhar v. Government of Sindh* decision of the FSC in 2023, rendered by the same Justice Anwer of the *Bhoja* decision, reinforced the earlier ruling that permitted the government to set limitations on age. The case this time was a challenge to Sindh Marriage Restraint Act, 2013 which limited the age of marriage to eighteen years old for both males and females. The question before the FSC was whether such a law was repugnant to Quran and Sunnah. In *Bhoja*, the petitioners challenged the federal law that restricted girls' minimum age of marriage to sixteen years, so aside from that there was no real difference in the arguments presented to the Court. There was perhaps an assumption that a change in age limit may be a sensitivity the FSC overlooked. It did not.

In turn the court reiterated the three key arguments presented earlier in respect to *Sad-az-Zaraey*, *Maqasid ash-Shariah*, and restriction of *mubah* and added two additional Islamic jurisprudential arguments. The first of which was *rushd* (mental maturity)[89] — the court cited a verse in the Quran dealing with the importance of *rushd*:

> "And test the orphans [in your charge] until they reach a marriageable age; then, if you find them to be mature of mind, hand over to them their possessions..." (Quran 4:6)

The court explained that not only is puberty an important element but also "maturity of mind" — using this verse and classical jurisprudential opinion, the Court explained that Islamic scholars require this to be an additional element. Quoting Imam Abu Hanifa who suggested *rushd* is assumed at the age of twenty-five but can come earlier.

The court referenced another verse in the Quran:

> "Let those who don't find (financial means to) marry be chaste until Allah enriches them out of His Bounty..." (Quran 24:33)

This was done to suggest that those who do not have the financial independence to marry cannot do so as per the spirit of the Quran and Sunnah. The Court stated that young men under the age of eighteen typically cannot find meaningful work and have only completed basic education at

[88] *Ali Azhar v. Government of Sindh*, PLD 2023 FSC 265.

[89] In *Fayyaz* the court referred to this as "discernment".

that age. The court supplemented this point by quoting a *hadith* of the Prophet narrated by Ibn Masud:

> "O' young men, those among you who can support a wife should marry, for it restrains eyes (from casting evil glances) and preserves one from immorality; but he who cannot afford It should observe fast for it is a means of controlling the sexual desire."[90]

Collectively, the FSC stated this suggests that financial independence is important and necessary to marry which cannot happen under the age of eighteen. Interestingly, if we connect the dots further, we arrive at a more definitive conclusion — if *rushd* is necessary to gain financial independence over property, this will further suggest that *rushd* is a prerequisite to get married if financial means to get married is a requirement. The FSC concluded that the Government of Sindh had the authority to restrict the age of marriage accordingly and that it was not un-Islamic for it to do so. Clearly the *Ali Azhar* case bulked up the original ruling in *Bhoja* — that the state has the right to restrict the age of marriage within Islamic law.

10. ICT Child Marriage Restraint Act, 2025 & Recent Developments

On May 16th, 2025 the pending bill from November 2019 was again tabled before the National Assembly and in light of developments from the FSC and the cases in the Islamabad High Court, namely *Mumtaz Bibi*, where Justice Sattar had effectively made the age of majority eighteen years for both males and females in ICT, and the bill was passed as the Islamabad Capital Territory Child Marriage Restraint Act, 2025 (ICTCMRA 2025) setting the minimum legal age of marriage at eighteen for both boys and girls in the ICT. It is pertinent to mention that when the matter was being tabled for a vote by Parliamentarian Sharmila Farooqi of the Pakistan People's Party, she actually cited the FSC cases of *Bhoja* and *Ali Azhar* that lend support to such a law as being within Islamic legal framework – clearly indicating the impact of FSC decisions.

So not only did the *Bhoja* decision influence the two major rulings in the Islamabad High Court, both of which impacted the ongoing discussion around the topic of child marriage in ICT it had a further reaching impact in passing the ICTCMRA 2025.

Ironically it doesn't end there – two more recent cases have brought a unique legal question – what about the legitimacy of such marriage contracts *after* they have occurred as there are social ramifications for those involved. This question has been interestingly addressed by both the LHC and IHC just late 2025 – one challenging the meaning within CMRA in Punjab and the other the new ICTCMRA 2025 – both accepting that *Bhoja* gives government the right to restrict age of marriage but that the validity of such an illegal marriage is still valid and only punishable by law.

[90] *Sahih Muslim* Hadith No. 1400a, Book 16 – The Book of Marriage, Hadith 1.

In the IHC case of *Muhammad Riaz v. District & Sessions Judge (East), Islamabad & others*[91] the Court was asked specifically if the new ICTCMRA 2025 invalidates the marriage that has occurred, to this the Court took the view that it does not and that criminal sanctions can be given within the law but that it doesn't invalidate the marriage. The Court cited *Bhoja* stating that the age of marriage can be fixed by the State but that the FSC didn't state in its ruling that such marriages are invalidated. Following the Hanafi jurisprudential approach, Judge Azam Khan stated that such marriages are valid if age is fifteen or above and ICTCMRA 2025 *criminalizes* the under eighteen but doesn't *invalidate* it. The Court went on to criticize the *Mumtaz Bibi* verdict in that invalidating the marriage *ab* initio, "may give rise to grave legal and societal consequences, including but not limited to the question regarding the legitimacy of a child born out of such wedlock, severe emotional and psychological distress to the minor, potential physical harm, the real and pervasive risk of honor-based violence, and exposure to maltreatment or domestic abuse within the familial environment."[92]

Similarly, in the LHC case of *Taj-ul-Malook v. IG Punjab & others*[93] the Court relied on a similar understanding and referenced DF Mulla's seminal work *Principles of Mohammadan Law* as final authority on the matter quoting that "Puberty is presumed, in the absence of evidence, on completion of the age of fifteen years" and that this is the transition from "childhood to adulthood"[94] even though acknowledging earlier that legal competence to contract marriage also required a "sound mind" - the Court then fails to discuss that further and just give citations of older caselaw from 1970 Supreme Court and some others and summarily concludes this is the appropriate age. Again, while acknowledging *Bhoja* ruling, the Court said that the FSC "directly or impliedly [did] not render the ratio that the marriage below the age limit enshrined in the law would be void/invalid."[95] Thus making a similar judgement in *Muhammad Riaz* around the same time.

Clearly these recent cases show, illegality of underage marriage is accepted but not the invalidity of such marriages after they have occurred. Which raises the question of the impact of the declaration of illegality, is it just a criminal offense to be prosecuted for those involved and yet the civil contract remains? Such a logical conclusion is hard to conceive but judges seem to be concerned about post-judgement situation of the girls involved and the social ramifications if such marriages are declared invalid. With conflicting judgements from IHC on this matter in *Mumtaz Bibi*, an expected appeal to the Supreme Court to clarify this issue is bound. Or perhaps

[91] *Muhammad Riaz v. District & Sessions Judge (East), Islamabad,* W.P. No. 2494/2025.

[92] *Muhammad Riaz,* 17.

[93] *Taj-ul-Malook v. IG Punjab,* W.P. No. 47073/2025.

[94] Ibid.

[95] Ibid.

before the new Federal Constitutional Court under the proposed 27th Amendment announced recently – regardless clearly more legal debate is due in the near future to clarify this matter.

11. Conclusion

The journey in the subcontinent and more importantly in Pakistan to address the issue of underage child marriage has taken a new turn this decade as it can be seen in the *Bhoja* and *Ali Azhar* decisions particularly along the lines of the Islamic jurisprudence. The *Bhoja* ruling that the State has the primary authority, as per Islamic law, to set the age of majority under the Islamic principles of *Sad-az-Zaraey*, *Maqasid Ash-Shariah*, and that such a prerogative resides with the State — Islamically. Along with the understanding of the prerequisite requirements of any marriage of *rushd* for both parties and true financial independence to economically finance the marriage in *Ali Azhar* demonstrates a dynamic progression on this issue. *Bhoja*'s impact can be seen in the immediate cases before the Islamabad High Court, which has resulted in a practical change of the law itself in 2025 with the passage of the Islamabad Capital Territory Child Marriage Restraint Act, 2025. Though this has been challenged by the CII in a very summary format that does not address the FSC ruling or any of the Islamic jurisprudential reasonings. This is partly due to age old assumed orthodox position to oppose legislation in this matter as it had been from the British era of non-interference in religious belief and practices but after an initial vocal resistance, the matter has subsided of late, perhaps finally there will be acceptance at a larger and broader scale across the religious establishment. A Shariah petition was also drafted and submitted to the FSC challenging the repugnancy of the ICT law, which has now been withdrawn for unknown reasons.

The case of *Dua Zehra*[96] in 2022 has only highlighted the importance of this matter as the public continues to debate the age of majority for marriage, which has resulted in another major social issue that must be addressed - the utilization of these laws to subject both the minor boy and girl to potential criminal charges and repercussions. Not only so but the statistical reality is that most of the complaints received on underage marriage originate from parents who are dissatisfied with the marriage partner for their daughter often and sometimes even indicates the girl was attempting to flee a forced marriage scenario by the very parents who are seeking to obtain her custody back. This leads to protracted legal struggles that raise serious concerns for well-being of the girl who is tossed around between the minor husband to government shelter home to the

[96] The case is a typical example of a minor girl and boy who get married on their own without parental consent which results in a protracted legal battle using the underage marriage laws usually by the parents of the girl who wanted to marry her elsewhere but in order to avoid that scenario the girl elopes with another. This case hit the national headlines when Sindh High Court in early 2022 initially considered the marriage valid and allowed her the freedom to make her own decision to which she decided to stay with her husband in Punjab. Then after public outcry and social media pressure subsequent legal proceedings led to Dua Zehra being taken into State custody and then transferred to her parents as they were considered the best in respect to the "welfare of the minor" but then as recent of March 2025, the Court has ruled that the marriage is valid and the attempt to nullify the marriage has failed.

family who may have been subjecting the very same girl to abuse prior to the underage marriage and sometimes in some cases after the matter is settled, she is subject to further violence by same parents that eventually leads to even her death due to honour killing. Hence why the Court in *Dua Zehra* in Sindh along with *Muhammad Riaz* and *Taj-ul-Mulook,* from ICT and Punjab respectively, did not try to invalidate the marriage even though they acknowledged its illegality – though is this the appropriate solution?

The real risk to progress in this matter is that if these underage marriage cases come to the public primarily in these circumstances, then what real protections are being provided to them? Laws that are supposed to protect them are in reality laws being used to suppress them and bring about serious bodily harm, even possibly death. Perhaps, a more detailed study needs to be done on this historical use of such laws to understand the impact which is beyond the purview of this article. The real effect of the implementation of such laws is a serious social concern that needs to be explored particularly in the misapplication of the law being made in such a way that instead of achieving the objective of securing the future of young girls in Pakistan.

There may be other issues that need to be explored and questioned but as to what that age will be, we have seen changes with times and circumstances. A clear age of majority is a necessity for the proper execution of the rule of law and a much-needed overhauling of the inherited British Raj legislation that has left much confusion and undue openness to interpretation.

Age is indeed not just a number, but an effective point by which society can function in harmony within the rule of law through its various dealings, particularly on the issue of marriage — the key civil contract that holds the fabric of any society together but a more comprehensive approach is still needed in the current landscape — *Bhoja* and *Ali Azhar* decisions of the FSC have truly helped define the Islamic perspective and impacted the landscape of legal development on child marriage in Pakistan but much more needs to be done to ensure girls are safeguards from the ills of this practice within sanctity of religion and to truly effectuate a meaningful solution for their welfare.

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Shrinking Civic Space: Assessing the Legality and Impacts of Pakistan's X Ban

Samra Ahmad and Misaal Noor[1]

Abstract

On 17 February 2024, Pakistan banned the social media platform X [formerly Twitter], citing national security, maintaining public order, and preserving the integrity of the nation as reasons. X, which has become the primary news source for many citizens of Pakistan, serves as a crucial platform for acquiring information regarding national and international world order and voicing opinions on ongoing matters. The ban, which followed the National Election 2024, has grave implications for the constitutional rights and freedoms of the citizens of Pakistan. This article seeks to assess the legality of the ban stating how the Government has failed to follow due process outlined by the existing legislative framework in imposing this ban. Instead, this action is simply another tool introduced to strengthen the lawfare against an already shrinking civic space. The prohibition, coupled with draconian laws and institutions such as the proposed Punjab Defamation Act 2024 or the National Cybercrime Investigation Agency, significantly curtails the right to freedom of expression and right to information. These rights, as will be examined through various precedents, are regarded as the fundamentals of a democratic society and must not be interfered with unless absolutely necessary. This article analyses how the Government's reasoning for regulating hate speech and misinformation through this ban fails to justify the prohibition of X. It will be stressed how there needs to be a balance struck between the right to freedom of expression, information and hate speech and misinformation to ensure that the former are not stifled. By assessing the legality and impacts of the X ban, this paper offers insight into the interplay between constitutional rights and national security and emphasises on the need to uphold the rule of law and protect fundamental human rights.

1. Introduction

Social media has undoubtedly revolutionised the way communication occurs in today's world. By bridging geographical divides, it has allowed people from one corner of the world to reach out to the other. Applications like Instagram, TikTok, and X (formerly Twitter) have empowered those previously unheard of to voice out their stories. As a result of these innovative and immediate interactions, it has garnered a great number of users, with 5.07 billion users reported in April 2024. This amounts to a whopping 62.6% of the entire global population.[2]

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[2] DataReportal, 'Global Social Media Statistics', (DataReportal 2024) <https://datareportal.com/social-media-users> accessed 27 July 2024.

One of the most important functions social media, especially X, performs in today's age is that of political communication.[3] Political communication includes but is not limited to the way in which political information is communicated to the people and how the media shapes and influences the public's perception and communication of politicians.[4] In previous ages, the only way one could be a part of this communication was through mediums like the radio, the newspaper or television.[5] These channels provided one-sided communication, with those in power building their narratives while the general public had little to no say or opportunity to exchange their perspectives. Whereas, social media today allows anyone with internet access to freely share opinions and concerns through different means. Additionally, due to its immediate nature, it has allowed for an instantaneous spread of news and opinions. This is different from conventional media which may oftentimes delay reporting and be biased.

However, such rapid and often unregulated dissemination of news and opinions is not without risks. The unrestricted freedom of social media brings with it the danger of misinformation and hate speech.[6] At times, this can lead to dire consequences, as seen during the COVID-19 pandemic, the widespread circulation of fake news - falsely accusing the Chinese government of deliberately spreading the virus — triggered a drastic increase in xenophobic hate crimes against Asian individuals globally.[7]

To address risks such as these, social media governance by state authorities has surged in recent years. For instance, the Nepali government banned social media app TikTok to preserve 'social harmony' when a movement inciting anti-state sentiments gained traction.[8] The rationale, it has been observed, behind state interference is often linked with protecting the national security, national integrity or social harmony of a state. However, while addressing the risk of misinformation and hate speech is imperative, it is equally important to balance this with the right to freedom of expression and information — an aspect often overlooked by state governance. Instead, under the guise of tackling threats to 'national security and integrity', states have time and again, unduly compromised this fundamental right.

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[3] R Gibson and A Römmele, 'Changing Campaign Communications: A Party-centred Theory of Professionalised Campaigning' (2001) 6(4) Harvard International Journal of Press/Politics 31.

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[7] Human Rights Watch, 'Covid-19 Fueling Anti-Asian Racism and Xenophobia Worldwide' (Human Rights Watch, 12 May 2020) <https://www.hrw.org/news/2020/05/12/covid-19-fueling-anti-asian-racism-and-xenophobia-worldwide> accessed 26 July 2024.

[8] B Shamra, 'Nepal Is Banning TikTok Over Hate Content, Officials Say' *The New York Times* (13 November 2023) <https://www.nytimes.com/2023/11/13/world/asia/tiktok-nepal-ban.html> accessed 28 July 2024.

Pakistan, too, is not new to employing state mechanisms to regulate social media, with an earlier ban on YouTube in 2012 over 'controversial' content.[9] TikTok, too, has seen repeated bans by the State over similar concerns.[10] It is therefore not an uncommon occurrence. In the most recent attempt to tackle threats to national security, Pakistan imposed a blanket ban on social media platform X, on 17 February 2024. The reasons cited were unsurprisingly that of, 'upholding national security, maintaining public order, and preserving the integrity of our nation.'[11] However, interestingly, the timing of the ban coincided with the National Elections in Pakistan. More specifically the ban came into effect after allegations of electoral malpractice levelled by the Rawalpindi Commissioner started garnering traction on the platform.[12]

The immediate ban of X without any formal notification, coupled with its timing led to suspicions regarding the real motive behind such a ban. One common suspicion was that the ban was merely a tool employed to stifle anti-state sentiment, differing opinions and criticism. This suspicion was further solidified by the increasing actions taken by the Federal Government to regulate the digital space following the ban. The introduction of a new and rather unnecessary National Cyber Crime Investigation Agency was one example of this.[13] Similarly, the Punjab Defamation Act passed in May 2024 seemed to be based on a similar premise of attempting 'to snatch the right and freedom of speech.'[14]

All of these measures employed by the Government have grave implications for the fundamental rights of the citizens of Pakistan, especially the right to freedom of expression and information. This article thus seeks to argue how by stripping citizens of one of their biggest mediums of communication, namely X, the State is not only isolating them from the world order but further diminishing an already shrinking civic space.

2. The Importance of X

[9] 'Pakistan lifts YouTube ban after three years' *CNBC* (18 January 2016) <https://www.cnbc.com/2016/01/18/pakistan-lifts-youtube-ban-after-three-years.html> accessed 28 July 2024.

[10] Euronews, 'Which countries have banned TikTok and why?' (14 March 2024) <'https://www.euronews.com/next/2024/03/14/which-countries-have-banned-tiktok-cybersecurity-data-privacy-espionage-fears> accessed 28 July 2024.

[11] Al Jazeera, 'Pakistan Says It Blocked Social Media Platform X Over National Security' (17 April 2024) <https://www.aljazeera.com/news/2024/4/17/pakistan-says-it-blocked-social-media-platform-x-over-national-security> accessed 16 July 2024.

[12] T Naseer and A Sheikh, 'Rawalpindi commissioner says poll results 'manipulated' under his watch; ECP rejects claims' *DAWN* (17 February 2024) <https://www.dawn.com/news/1814959> accessed 16 July 2024.

[13] A Momand, 'Govt notifies new cybercrime investigation agency to tackle Peca offences' *DAWN* (3 May 2024) https://www.dawn.com/news/1831222> accessed 16 July 2024.

[14] R Bilal, 'Punjab govt urged to reconsider 'illogical, draconian' defamation bill' *DAWN* (22 May 2024) <https://www.dawn.com/news/1835023> accessed 16 July 2024.

The unlawful blanket ban on X carries pervasive effects owing to its crucial role in political communication today. The platform's micro-blogging nature permits individuals to interact with political actors without any restraints, with political candidates all over the world using it to communicate extensively with the masses worldwide.[15] Not only limited to political communication, X is also at the forefront of driving social justice movements. In the past, it has served as a medium for news dissemination, pressure building through hashtags and mobilisation for carrying out mass protests. For instance, students in South Africa pressured authorities to remove the statue of British Colonialist Rhodes, seemingly promoting institutionalised racism against black students. The students through X, recorded protests under the #RHODESMUSTFALL tag, which ultimately led to the removal of the statute.[16] Similarly, in the US, X played a major role in driving the #BlackLivesMatter movement after the incident of police brutality against George Floyd.[17] A more recent example can be seen in the reporting regarding Israel's war on Gaza. Social media platforms such as X and Instagram have allowed, to some extent, space and platforms for Palestinians to spread their reality, albeit with restrictions even on these platforms noted, in the absence of unbiased reporting by major Western news outlets.[18] These instances are a few of many which illustrate the impact of X in today's world.

In Pakistan, X performs a similar role. Pakistanis demonstrate a considerable degree of confidence in utilising the platform as a pivotal source of information to stay abreast of political and other developments within the state. Studies have found how X has been used to make informed decisions in electoral processes, with students using it as a channel to exchange ideas related to politics with their peers.[19] It has even stretched to the rural areas of Pakistan allowing for students there to stay politically and socially updated.[20] The social media app has also influenced citizens, leading them to build a narrative with regards to the political turmoil within the country.[21] For instance, in 2022, the ouster of then Prime Minister Imran Khan led to the

[15] S Ahmed and M Skoric, 'Twitter and 2013 Pakistan General Election: The Case of David 2.0 Against Goliaths' in C.G Reddick and L.A Anthopoulos (eds), Case Studies in e-Government 2.0 (Springer 2015) 139.

[16] T Bosch, 'Twitter Activism and Youth in South Africa: The Case of #RhodeMustFall' (2017) Information, Communication & Society 221.

[17] C Klein and others, 'Attention and Counter-framing in the Black Lives Matter Movement on Twitter' (2022) Humanities and Social Sciences Communications 367 <https://doi.org/10.1057/s41599-022-01384-1> accessed 28 July 2024.

[18] V Krishnan, 'Western coverage of Gaza: A textbook case of coloniser's journalism' (AlJazeera, 2 February 2024) <https://www.aljazeera.com/opinions/2024/2/2/western-coverage-of-gaza-a-textbook-case-of-colonisers-journalism > accessed 8 August 2024.

[19] A Arshad and SA Hassan, 'Role of New Media in Political Discussion and Changing Voting Behavior of University Students' (2014) 3(7) International Research Journal of Social Sciences 4.

[20] T Ahmed, A Alvi, and M Ittefaq, 'The Use of Social Media on Political Participation Among University Students: An Analysis of Survey Results from Rural Pakistan' (2019) SAGE Open <https://journals.sagepub.com/doi/full/10.1177/2158244019864484> accessed 28 July 2024.

[21] J Zaman and S Abbas, 'Twitter: A Spine in Pakistani Political Turmoil' (2022) Vol. 5(2), Pakistan Journal of International Affairs 1606.

#ImportedGovernmentNaManzoor (imported government, unacceptable) tag from X to eventually translate into mass protests across the country, impacting many.[22]

X, run by the people themselves, has uncovered news that major news outlets have been unwilling to or incapable of covering. Conventional media in Pakistan has repeatedly been accused of being a puppet building narratives or being too dismissive in covering important topics. Instances of anti-Shia violence in Parachinar are one example of this. The whole ordeal was first reported and gained traction on social media apps like X and Instagram.[23] It was only after our Foreign Office commented, not on the violence, but rather on a statement made by Iran on the violence, did established news outlets report to that extent.[24]

Therefore the role of X has evolved beyond a mere platform for exchanging tweets; it has empowered citizens in Pakistan to voice out injustices faced in the nation and form opinions accordingly. It has allowed for their right to freedom of expression and access to information to flourish, a right which is a core value in a democratic society.

3. X Ban and Article 19

The right to freedom of expression is the bedrock of democracy — a system which is driven by the decisions of the people.[25] These decisions can only be made if the people possess the right to be informed, the freedom to think and to subsequently voice out these thoughts without the fear of any repercussions. Therefore, it would not be a stretch to state that freedom of expression is the biggest distinguishing factor between a democratic and non-democratic regime.[26] It is thus also the first 'casualty under a totalitarian regime' as tyrannical regimes cannot afford the free circulation of information amongst its citizens, regulating it through strict censorship.[27] This is evidenced by countries like North Korea, where the authoritarian regime awards no freedom of

[22] Global Village Space, 'Imported Hakumat Na-manzoor' Tweeted Over Three Million Times' (11 April 2022) <https://www.globalvillagespace.com/imported-hakumat-na-manzoor-trending-on-twitter/> accessed 8 August 2024.

[23] FP Explainers, 'How did a land dispute in Pakistan snowball into a deadly Sunni-Shia class, killing nearly 50' (Firstpost. 30 July 2024) <https://www.firstpost.com/explainers/how-did-a-land-dispute-in-pakistan-snowball-into-a-deadly-sunni-shia> accessed 8 August 2024.

[24] The Express Tribune 'Pakistan dismisses Iran's remarks on Parachinar situation as 'unnecessary'' (1 August 2024) <https://tribune.com.pk/story/2484721/pakistan-dismisses-irans-remarks-on-parachinar-situation-as-unneces> accessed 8 August 2024.

[25] HL Black, *A Constitutional Faith* (New York: Knopf 1968) 45.

[26] M Elliott and K Hughes (eds), *Common Law Constitutional Rights* (Bloomsbury 2020) 116.

[27] *Attorney General v Newspaper Ltd* (No.1) [1987] 1 WLR 1248 [4].

speech to its citizens and instead maintains a stranglehold on the communication and information flow within the nation.[28]

Professor Thomas I. Emerson has based the system of freedom of expression in a democratic society on four premises.[29] He states how the freedom of expression firstly facilitates self-fulfilment, advances knowledge and discovering the truth, leads to a stable and adaptable community and lastly empowers individuals to be involved in the democratic decision-making process. From these premises alone, it becomes evident how freedom of expression is an integral value, especially in a democratic state which according to Boyle and Shah, involves the 'external communication' of 'forum internum' or the inner thoughts, beliefs and convictions of an individual.[30] This ties into what James Madison, one of the founding fathers of the United States of America, has observed about how the purpose of the freedom of expression is to empower citizens to govern themselves in a free society.[31] He believed that the people, not the government, were sovereign.

Furthermore, John Stuart Mill, a prominent academic, in his work titled *On Liberty* emphasised on the importance of defending the freedom of speech and freedom of inquiry in a democratic society even in the face of misinformation. He mentioned firstly how human error is not a defence to silencing speech. Secondly, errored statements provoke understanding over matters often ignored and thirdly, the amalgamation of truth and false is what builds a perspective, and is therefore needed to let a society flourish.[32]

Interestingly, similar sentiment to these academics is reflected in the Constitution of the Islamic Republic of Pakistan 1973 ('the Constitution').[33] The preamble of which states how 'we the people of Pakistan dedicated to the preservation of democracy achieved by the unremitting struggle of the people against oppression and tyranny.'[34] This expression thus places the onus on the people to preserve democracy, a feat which can only be achieved by the people raising their voices against tyranny and more importantly having the freedom to do so.

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[28] Amnesty International, 'North Korea: Deteriorating Human Rights Situation Calls for International Attention' (7 February 2023) <www.amnesty.org/en/latest/news/2023/02/north-korea-deteriorating-human-rights-> accessed 29 July 2024.

[29] TI Emerson, *The System of Freedom of Expression* (Random House 1970) 6 - 7.

[30] K Boyle and S Shah, 'Thought, Expression, Association and Assembly in D Moeckli, S Shah, S Sivakumaran and D Harris (eds), *International Human Rights Law* (2nd edn, OUP 2014) 229.

[31] JH Read, 'James Madison' (Free Speech Center, 5 August 2023) <https://firstamendment.mtsu.edu/article/james-madison/#:~:text=Madison%20proposed%20more%20descriptive%20First%20Amendment&text=%E2%80%9CThe%20people%20shall%20not%20be,of%20liberty%2C%20shall%20be%20inviolable> accessed 29 July 2024.

[32] John Stuart Mill, *On Liberty* (Project Gutenberg 2011) <https://www.gutenberg.org/files/34901/34901-h/34901-h.htm> accessed 20 April 2025.

[33] Constitution of Pakistan, 1973.

[34] Ibid.

This freedom is granted to the citizens of Pakistan by Article 19 of the Constitution, which reads:

> '*Every citizen shall have the right to freedom of speech and expression and there shall be freedom of the press, subject to any reasonable restrictions imposed by law* in in*terest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, [commission] or incitement to an offence.*'[35] *(emphasis added)*

From a bare reading of the article, it becomes apparent how the right to freedom of speech and expression is a fundamental right which can only be curtailed through a reasonable restriction imposed by law.[36] This Constitutional article is also a mirror image of Pakistan's international obligations existing by virtue of it being a signatory to multiple international human rights treaties. For instance, Article 19 of the Universal Declaration of Human Rights also guarantees the freedom of expression and freedom of thinking, along with the right to gather information.[37] It further goes on to state that there are no limits as to the obtaining of information. Similarly, Article 19 of the International Covenant on Civil and Political Rights ('ICCPR'), places a positive obligation on the signatories to uphold the freedom of expression and the right to access of information.[38] These laws reinforce the importance of these crucial rights, making it apparent how they are not to be interfered with unless necessary and reasonable.

The courts in Pakistan have also interpreted the rights to freedom of expression and speech in a similar manner, reiterating the importance to protect them and deeming them to 'constitute essential foundations of a democratic society.'[39] The Supreme Court of Pakistan stated how this effective and powerful right helps in actualising other fundamental freedoms and rights as well such as those of thought, life, liberty and dignity — making it much more prominent and important in a cluster of fundamental rights.[40] The right to freedom of expression has even been understood to hold precedence over other rights in the case of *Muhammad Arshad v. Federation of Pakistan*.[41] The Court termed the right to be 'the most cherished human right' which can 'forfeit the other constitutionally granted rights.'[42]

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[35] Ibid. Article 19.

[36] Ibid.

[37] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

[38] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[39] *PEMRA v ARY Digital*, PLD 2023 SC 431 [26].

[40] Ibid.

[41] *Rana Muhammad Arshad v. Federation of Pakistan*, PLD 2021 Islamabad 42.

[42] Ibid at para 6.

This sentiment is not a recent development, rather it has been present for the longest time as reflected in earlier judgements of *Masroor Ahsan v. Ardeshir Cowasjee,* which placed the right on a pedestal while appointing the judiciary as the protector of said right.[43] Similarly, the case of *Ghulam Ahmad v. Punjab Province* highlighted the importance of freedom of expression in the early stages of Pakistan, emphasising especially upon the existence of the right to political expression by citizens with regard to political parties and elections.[44] The case of *Pakistan Lawyers Forum v. Federation of Pakistan* also reiterated the value of the existence of freedom of expression within a democratic state.[45]

The right to freedom of expression is so vital that it was recently the basis for striking down a long-standing provision in Pakistan's Penal Code 1860 ('PPC'). Under Section 124-A of the PPC, sedition — meaning to express hatred, disaffection or contempt towards the government — is a criminal offence. Following the political unrest prompted by former Prime Minister Imran Khan's arrest, this provision has been rigorously utilised against the views of various civic space actors like prominent journalists Sabir Shakir and Moeed Pirzada.[46] In the past, this law was used to stifle the sentiments of various politicians like Fawad Chaudhry and Shehbaz Gill.[47]

Instead of serving its actual purpose, if it has any, the law of sedition has been used as a tool for stifling dissent. This much was acknowledged by Justice Shahid Karim in the recent case of the Lahore High Court titled *Haroon Farooq v. The Federation of Pakistan*.[48] Section 124-A of the PPC, in this case, was struck down due to being in contravention of Article 19. What is interesting is that prosecuting individuals for sedition is closely linked to the act of banning social media, more specifically X as they both serve the similar purpose of suppressing any disagreements or challenges to the ruling government. The fact that the Court very comprehensively discussed the abusive implications of the law, going as far as striking it down shows the significance of Article 19. There is no clearer indication to the weight of the freedom of expression in a democratic society than as shown by this judgement. In the words of the Court:

> *'It is time that it finds its permanent resting place and suffers the condemnation that it deserves. We live under a constitution which espouses a system of constitutional democracy*

[43] *Masroor Ahsan v. Ardeshir Cowasjee*, PLD 1998 SC 823.

[44] *Ghulam Ahmad v Punjab Province,* PLD 1976 Lahore 773.

[45] Pakistan Lawyers Forum v. Federation of Pakistan, PLD 2005 SC 719.

[46] 'Pakistan: Four journalists accused of inciting unrest' (International Federation of Journalists, 21 June 2023) <https://www.ifj.org/media-centre/news/detail/category/press-releases/article/pakistan-four-journalists-accused-of-inciting-unrest> accessed 8 August 2024.

[47] 'Sedition law' DAWN (31 March 2023) <https://www.dawn.com/news/1745119> accessed 8 August 2024.

[48] *Haroon Farooq vs. Federation of Pakistan etc*, PLD 2024 Lahore 637.

> *embellished with fundamental human rights. Section 124-A in its current form, cannot stand the critical interrogation of our Constitution and its ethos.'*[49]

Another fundamental right which is also worth consideration is the right to information, closely linked to the freedom of expression. Enshrined in Article 19-A of the Constitution, the right to information reads: 'Every citizen shall have the right to access to information in all matters of public importance subject to regulation and reasonable restriction imposed by law.'

Article 19-A broadens the horizons of the right to freedom of expression. This was mentioned in the Supreme Court case of *Nawaz Sharif v. President of Pakistan* which highlighted how the right to information is 'spelt out from the freedom of expression.'[50] Additionally, in *Watan Party & others v. Federation of Pakistan,* the Supreme Court established that 'Article 19A of the Constitution has empowered the citizens of Pakistan by making access to information a justiciable right of people.'[51] It has also been termed as a '*sine qua non* of constitutional democracy.' The right to information is especially important in the context of political communication as it allows for the public to form well-informed opinions as opposed to built-in narratives.

Having gone through the above-mentioned literature and case, it suffices to say that the rights to freedom of expression and information are fundamental values of our democratic society. These rights which, in the modern age, are being upheld ceremoniously by social media platforms as already discussed. However, it must also be noted, if used unfettered, the same freedoms can lead to the emerging risk of misinformation and hate speech. There have been an increasing number of instances which carry pervasive effects for individuals and the community alike as will be discussed later. It would therefore make sense for a State to be empowered to regulate the freedom of expression to tackle such risks. While such room for regulation has been granted in the Constitution, it clearly uses the words 'reasonable restriction' and 'imposed by law' to ensure that these rights are not unduly compromised.

4. Legality of the Ban

Against the above-mentioned backdrop, the ban on X must then be assessed on the threshold of it constituting a reasonable restriction and being 'lawful'. This section of the paper thus seeks to review the relevant provisions of law to assess whether the imposed ban is a lawful and reasonable measure capable of curtailing the freedom of expression and right to information of the citizens of Pakistan.

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[49] Ibid, para 75.

[50] *Nawaz Sharif v. President of Pakistan,* PLD 1993 SC 473 [19].

[51] *Watan Party & others v. Federation of Pakistan,* PLD 2012 SC 292.

At the outset, it must be noted there was no formal public notification for the ban imposed on 17 February 2024.[52] Moreover, the Federal Government also did not find it necessary to furnish any such notification nor any response until the matter was brought before the courts. In proceedings against the ban in the Sindh High Court, the Ministry of Interior ('MoI') furnished a notification banning the social media platform.[53] Additionally, two months after the ban, when prompted the MoI submitted the response justifying the ban in separate proceedings in the Islamabad High Court.[54] The MoI cites the reason for upholding 'national security, maintaining public order, and preserving the integrity of our nation' for imposing the ban. The MoI also adds how the ban was placed after 'careful consideration of various factors', one of which was 'confidential reports submitted by Intelligence and Security agencies in Pakistan'. However, they do not provide any further reasons, only suggesting that they may submit these reports in 'sealed envelopes' to the Court if asked.[55]

The response of the Federal Government is intriguing because it raises questions as to the nature and intensity of the threat posed by the social media app. It is not like Pakistan has previously shied away from talking about social media threats to national security which the nation has acknowledged without any challenges.[56] This factor coupled with the timing of the ban, i.e., following the claims of electoral malpractice make it all the more conspicuous. Secondly, even if this reason were to be granted weight, it still does not justify the process followed in imposing the ban for the reasons highlighted below.

4.1. Authority to Regulate Unlawful Online Content

The response submitted by the MoI makes it seem like the regulation of online content is its own prerogative. However, it must be noted that there is no law which permits the MoI to do so. Regulation of unlawful online content can be found under Section 37(1) of the Prevention of Electronic Crimes Act 2016 ('PECA') which grants an 'Authority' discretionary powers to 'remove or block or issue directions for removal' of content in the interests of the 'glory of Islam' or 'integrity, security or defence of Pakistan' with additional grounds of 'decency', 'morality or 'public order' as the rationale behind such measures.[57]

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[52] N Guramani, 'X already banned when new govt took over: Information Minister Tarar' *DAWN* (18 March 2024) <https://www.dawn.com/news/1822336> accessed 26 July 2024.

[53] F Aziz, 'The Ministry of (Dis)Information and the Ban on X' *DAWN* (25 April 2024) <https://www.dawn.com/news/1828972> accessed 28 July 2024.

[54] I Tanoli and M Asad, 'Govt told to justify or withdraw ban on X' *DAWN* (18 April 2024) <https://www.dawn.com/news/1828143/govt-told-to-justify-or-withdraw-ban-on-x> accessed 26 July 2024.

[55] F Aziz (n 53).

[56] SA Ibd, 'National Security and its Linkage with Social Media: Lessons for Pakistan' (2022) 8(2) *Journal of Security & Strategic Analysis* 80.

[57] Prevention of Electronic Crimes Act 2016, Section 37(1).

The Authority under PECA is deemed to be the Pakistan Telecommunication Authority ('PTA') by virtue of Section 2(1)(IV).[58] This would entail that the authority for banning any social media platform on grounds of unlawful online content vests solely with the PTA. However, there is no notification from the PTA regarding this ban. The notification presented in the Sindh High Court is signed by a Section Officer of the Federal Investigation Agency ('FIA') and appears to be a directive which addresses the Chairman PTA requesting 'that the social media platform i.e. "X (formerly Twitter)" may be blocked immediately till further orders.'[59]

The absence of any notification by the PTA shows how the PTA itself has not made any assessment regarding the ban and has simply followed the directive issued by the government. Under Section 8 of the Telecom Act 1996, the Federal Government may issue policy directives to PTA regarding any matter in the telecommunication sector provided they are not inconsistent with the Act or usurp the power of PTA. However, these policy directives have been interpreted differently in light of Section 37(1) of PECA. The Islamabad High Court in the case of *Bolo Bhi v. Federation of Pakistan* has held that the PTA is required to exercise powers and discretion under 37(1) independently and without any influence by the Federal Government.[60] Justice Athar Minallah expressly stated that the power to take any action under 37(1) is exclusively attributed to the PTA and how any information provided by the Federal Government cannot be treated as 'binding in the context of sub-section 1 of Section 37 [of PECA].' In reaching such a decision, the Court referenced the case of *MA Rahman v. Federation of Pakistan*, which held that 'the authority must genuinely address itself to the matter before it and must act in good faith, and have regard to all relevant considerations.'[61] The Court further concluded how the PTA is exclusively vested with the power and jurisdiction to regulate all matters relating to removing internet content. This power is independent of any Federal Government influence.[62]

Whereas the current ban appears to be imposed on a mere direction by the Federal Government signed by the section officer of the FIA. It cannot be said that the PTA put its own mind and examined the reasons for the blocking of the app on the grounds specified under Section 37(1). Therefore, in light of the law and judgement cited above, it is apparent that the arbitrary ban is without lawful authority. The proper notification should have been passed by the uninfluenced determination of PTA which has not been done so. Instead, there appears to be no notification of the PTA on this matter. Thus the ban cannot be said to have been passed by the appropriate Authority prescribed by law.

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[58] See Section 2(1)(IV) of PECA: '*"Authority" means the Pakistan Telecommunication Authority established under the Pakistan Telecommunication (Reorganisation) Act 1996 (XVII of 1996).*'

[59] F Aziz (n 53).

[60] *Bolo Bhi vs. Federation of Pakistan,* W.P No. 4994/2014 [4].

[61] *MA Rahman v. Federation of Pakistan*, 1988 SCMR 691 [14].

[62] *Bolo Bhi vs. Federation of Pakistan,* W.P No. 4994/2014 [7].

4.2. Compliance with RBUOC Rules 2021

The MoI in its response submitted to Islamabad High Court has referred to the Removal and Blocking of Unlawful Online Content (Procedure, Oversight and Safeguard) Rules 2021 ('RBUOC Rules'). It has submitted how X has not registered in Pakistan nor has it signed a MoU to abide by the regulatory laws in Pakistan. Under the RBUOC Rules, all social media giants and service providers are required to register with PTA within three months of the Rules coming into force. Additionally, they must establish a physical office located in Islamabad and employ all necessary means for data privacy and localisation under local laws.[63] X has not done so, as a result of which, X regulation does not fall within the purview of the Pakistani local laws.

What is interesting about these rules is that they were introduced in 2022 by the then ruling government under Section 37(2) of PECA which allows for the PTA to, 'with the approval of the Federal Government, prescribe rules providing for, among other matters, safeguards, transparent process and effective oversight mechanism for exercise of powers under subsection (l).'[64] However, what was initially meant to provide an oversight mechanism for the PTA, ended up granting excessive powers to the Authority not prescribed even by the parent act, PECA.[65] Resultantly, these Rules faced great backlash from the Asian Internet Coalition stating how the rules would cripple the digital economy in Pakistan.[66] It was even stated how the consultation of the Rules was done in such a manner that international companies were second-guessing their views regarding the regulatory environment in Pakistan and their willingness to operate in the country.[67]

The vires of the Rules was also questioned in a number of writ petitions in the High Courts. Reference can be made to *Muhammad Ashfaq Jutt v. Federation of Pakistan,* which explicitly asked the Federal Government to review the provisions of the Rules to bring them in conformity with the rights guaranteed under the Constitution.[68] No such review has been taken up to date and rather the Government is now using these challenged RBUOC Rules to justify their arbitrary actions which is appalling provided the fundamental rights at stake.

Another interesting thing worth noting is that even if the argument of the Ministry is given weightage in justifying the ban, it does not seem to make sense for this excuse to be put forward

[63] RBUOC Rules, Rule 7(6)(a) and (d).

[64] PECA, Section 37(2).

[65] F Aziz (n 53).

[66] The Express Tribune 'PTI Govt's Social Media Rules Will "Cripple" Digital Economy' (16 February 2020) <https://tribune.com.pk/story/2158213/govts-social-media-rules-will-cripple-digital-economy> accessed 28 July 2024.

[67] Ibid.

[68] *Muhammad Ashfaq Jutt v. Federation of Pakistan,* W.P No.3028/2020

now. The RBUOC Rules have been notified since 2021, three months after which X did not register itself with the PTA. Why is it that this reason has garnered the attention of the government now when the app is being used to voice out dissenting opinions and claims regarding electoral malpractice? It seems unreasonable that this concern is at the forefront of the Government's mind, especially considering how most politicians are still using the app through a Virtual Private Network ('VPN') to share posts. For instance, recently the Prime Minister of Pakistan faced backlash for using X to condemn the recent attack faced by Pakistani students in Kyrgyzstan.[69]

Regarding the ban being a 'reasonableness restriction', it can be stated how the assessment of reasonableness through Pakistani case law has a uniform interpretation. It can 'by no stretch of imagination mean to condemn a person/entity without any justification and without hearing.'[70] Nor can it, under the law, amount to an absolute prohibition as pointed out in the Supreme Court case of *Watan Party & others v. Federation of Pakistan*.[71] The Supreme Court in the case of *Pakistan Broadcaster Associations v. PEMRA* has laid down one test for assessing reasonableness in the context of freedom of expression.[72] The Court stated that a restriction could be reasonable, granted that it was imposed to regulate the freedom of expression of one person infringing the freedom of expression of another or 'violating their right to live a nuisance free life.'[73] This translates to the balance courts often need to strike in cases of misinformation and hate speech.

The interpretation of 'reasonableness' in assessing restrictions on freedom of expression in Pakistan is aligned with international standards under Article 19 of the ICCPR, as mentioned in the General Comment No. 34. Paragraph 22 of the Comment highlights how any restriction must strictly be confined to those that are 'provided by law', pursue a legitimate aim — such as protection of national security or public order — and must satisfy the tests of necessity and proportionality. More importantly, the restrictions cannot be justified on grounds not explicitly stated, and must be narrowly tailored preventing the restriction from being overbroad. The Comment especially warns against invoking restrictions to suppress advocacy of democracy or human rights or targeting individuals such as journalists, lawyers and human rights defenders who exercise or enable freedom of expression.

The blanket ban on X cannot be deemed to be reasonable, firstly because it has not been imposed through the correct channels proposed by the law. It is unlawful, imposed on a whim, and only attempted to be justified because of the incessant calls by civil society and then the courts. It is

[69] OpIndia Staff, 'Pakistan PM Shehbaz Sharif Slammed for Using X after His Govt Banned the Platform' (OpIndia, 24 July 2024) <https://www.opindia.com/2024/07/pakistan-pm-shehbaz-sharif-slammed-for-using-x-after-his-govt-banned-the-platform/> accessed 28 July 2024.

[70] *ARY Communications Ltd. v. Federation of Pakistan*, 2024 PLD 50 Sindh [17].

[71] *Watan Party & others v. Federation of Pakistan*, PLD 2012 SC 292.

[72] *Pakistan Broadcaster Associations v. PEMRA,* PLD 2016 SC 692.

[73] Ibid, para 18.

also unreasonable as it condemns the social media platform without any hearing even when the Global Affairs department of the platform has tried to address concerns.[74] Additionally, the fact that the ban remains in place despite clear orders of the Sindh High Court for removal, indicates the recklessness of the Federal Government regarding this arbitrary and unconstitutional measure.[75]

As it happens, with more than one year since the imposition of the ban, the Federal Government is yet to provide the legitimate reasons or the mechanism adopted in imposing the ban despite the multitude of litigation filed in courts of various provinces. For instance, the Lahore High Court, in an earlier petition titled *Huzaifa Naeem Sehgal v. Federation of Pakistan*, asked the government and PTA to explain the laws governing social media regulation and clarify PTA's regulatory authority over these platforms.[76] This petition was later clubbed with others alike and is still pending before the Lahore High Court with no concrete response being provided.[77] Instead as of April 2025, the Federal Government has been allowed a 'last chance' yet again which raises concerns regarding the role of state functionaries in dealing with issues concerning fundamental rights.[78]

5. Implications of the Ban: Shrinking Civic Space

Undoubtedly the blanket ban on X carries pervasive effects for the right to freedom of expression and information of the citizens of Pakistan. However, these damaging implications do not end there and rather manifest maliciously when seen in the bigger socio-political context. This is mainly because this ban serves as another tool for minimising an already shrinking civic space. Civic space refers to 'the set of conditions that allow civil society and individuals to organise, participate and communicate freely and without discrimination, and in doing so, influence the political and social structures around them.'[79] In recent years, there has been a drastic decrease in this civic space attributable to arbitrary actions taken by governments across the globe. This phenomenon implicates a number of rights, one of which is the freedom of expression and access

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[74] France 24, 'X Working with Pakistan govt to 'understand concerns' over ban' (18 April 2024) <https://www.france24.com/en/live-news/20240418-x-working-with-pakistan-govt-to-understand-concerns-over-b> accessed 7 August 2024.

[75] Business Recorder 'Sindh High Court orders Pakistan government to restore X in one week: lawyer' (17 April 2024)<https://www.brecorder.com/news/40298984/sindh-high-court-orders-pakistan-government-to-restore-x-in-one-week-lawyer> accessed 09 August 2024.

[76] *Huzaifa Naeem Sehgal vs. Federation of Pakista*n, W.P. No. 14616/2024.

[77] A Ibrahim, 'LHC seeks detailed response from PTA in X case' *Voicepk.net* (2 April 2024) <https://voicepk.net/2024/04/lhc-seeks-detailed-response-from-pta-in-x-case/ > accessed 20 April 2025.

[78] The Express Tribune "Govt given 'last chance' to explain X ban" (1 August 2024) <https://tribune.com.pk/story/2535535/govt-given-last-chance-to-explain-x-ban > accessed 18 April 2025.

[79] CIVICUS and Save the Children, 'Protecting Civic Space for and with Children (September 2017) 1 <https://www.civicus.org/documents/ProtectingCivicSpaceForAndWithChildren.pdf?utm > accessed 16 April 2025.

to information. This right is frequently affected by states employing measures ranging from bans on speaking out against the government, disproportionate use of defamation and censorship laws, web blackouts and blocking of various social media platforms amongst others.[80]

There have been a plethora of instances showcasing the adoption of such measures, especially in terms of blocking social media platforms. For instance, the recent escalating unrest in Bangladesh against the quota system prompted the Government to block access to all major social media platforms.[81] Similar actions were taken in Sri Lanka in 2022 when protestors defied government curfew and demanded accountability.[82] Social media platform TikTok also faced a ban in Nepal when a particular movement asking for the restoration of monarchy gained substantial traction.[83] The commonality between all these instances is the fact that the aim of the ban appears to be stifling any dissent or protest against the ruling government. The ban on social media is always placed to disrupt the flow of information against the protestors and to keep others in the dark regarding the unfolding situation. Such actions according to Michael Erbschloe 'is the handiwork of weak authoritarian states.'[84]

The phenomenon of shrinking civic space is also prevalent in Pakistan due to similar reasons. Instances of internet and network blackouts are highly common in Pakistan. The smallest of protests can lead to such measures by the State.[85] The X Ban, although pervasive for the rights of the citizens of Pakistan, is just one needle in a haystack. The Federal Government following this ban has imposed unimaginable measures and continues to do so under the guise of tackling digital terrorism. For instance, in May 2024, the Federal Government introduced a new National Cybercrime Investigation Agency ('NCCIA') despite the FIA already being empowered under a similar mandate. Commentators expressed concerns over this being a measure to police social media as the creation of such a unit was done without consulting the relevant stakeholders such as the IT sector and digital rights group.[86]

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[80] Westminster Foundation for Democracy, 'Addressing the Global Emergency of Shrinking Civic Space and How to Reclaim It: A Programming Guide' (2020) <https://www.wfd.org/sites/default/files/2021-11/Civic-space-v1-1%281%29.pdf> accessed 28 July 2024.

[81] D Somani, 'Bangladesh Bans Instagram, WhatsApp, YouTube and Other Social Media Platforms' *The Times of India* (2 August 2024) <https://timesofindia.indiatimes.com/technology/tech-news/bangladesh-bans-instagram-whatsapp-youtube-and-other-social-media-platforms/articleshow/112230314.cms> accessed 28 July 2024.

[82] D Welle, 'Sri Lanka Restricts Access to Social Media Platforms amid Protests' *DW* (4 March 2022) <https://www.dw.com/en/sri-lanka-restricts-access-to-social-media-platforms-amid-protests/a-61343824> accessed 28 July 2024.

[83] B Shamra, (n 7).

[84] M Erbschloe, *Social Media Warfare: Equal Weapons for All* (Taylor and Francis, 2017) 58.

[85] A Hashim, 'Pakistan temporarily blocks social media over potential protests' *Al Jazeera* (16 April 2021) https://www.aljazeera.com/news/2021/4/16/pakistan-temporarily-blocks-social-media-amid-anti-france-rallies accessed 6 August 2024.

[86] A Yasin, 'Rabbani Questions Creation of NCCIA' (*Thenews,* 7 May 2024) <https://www.thenews.com.pk/print/1186223-rabbani-questions-creation-of-nccia> accessed 28 July 2024.

Following the creation of the NCCIA, the Punjab Government also introduced a Punjab Defamation Bill 2024.[87] This proposed bill was termed draconian and regressive, attempting to stifle dissent and criticism.[88] The bill was targeted at journalists which is concerning, considering how Pakistan already ranks 152 out 180 with regards to journalistic freedom, with media the press being subjected to unwarranted disappearances and arrests.[89] For instance, journalist Asad Ali Toor was recently arrested for allegedly criticising the judiciary on X.[90] Similarly, famous media personality, Imran Riaz Khan was arrested by the authorities for comments made on social media platforms criticising the government and establishment in what was termed a 'relentless campaign of intimidation against the media.'[91]

The rationale behind such actions is always tackling national security threats, coupled with preserving social harmony and preventing digital terrorism. This reasoning is a widely common tactic, for instance, the United States of America has also proposed banning TikTok on suspicions of it passing State secrets to China.[92] While there is no doubt about the existence of these threats, this rationale does not seem to fly when looked at in the broader context of the Federal Government's Action. All actions taken appear to always be on a whim, imposed in the blink of an eye without any justification or reasoning elaborated upon. These threats to national security are never elaborated upon, the arrests or any drastic actions taken against civic space actors never follow due process, introduction of new laws is done without consultation of the relevant stakeholders. Perhaps these are the reasons why the actions of the Government fail to carry any legitimacy in the eyes of the citizens. Rather they are viewed as a tool for stifling an ounce of dissent and information against the injustices of the State.

These sentiments are further solidified by the actions of the Government itself. In a recent endeavour, the Federal Government is seeking to deploy an internet firewall, much like the one used in China. This adoption would curb what little free speech exists in the nation, isolating

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[87] R Bilal (n 13).

[88] 'Civil Society, Journalists reject Punjab Defamation Bill (2024)' *The Friday Times* (21 May 2024) <https://thefridaytimes.com/21-May-2024/civil-society-journalists-reject-punjab-defamation-bill-2024?utm> accessed 16 April 2025.

[89] Reporters Without Borders, 'Pakistan' <https://rsf.org/en/country/pakistan> accessed 28 July 2024.

[90] Civicus Monitor, 'Pakistan: New Government Continues Blocking the Internet and Persecuting Journalists and Activists' (25 March 2024) <https://monitor.civicus.org/explore/pakistan-new-government-continues-blocking-the-internet-and-persecuting-journalists-and-activists/> accessed 27 July 2024.

[91] Committee to Protect Journalists, 'Pakistani Journalist Imran Riaz Khan Held in Terrorism Investigation' (5 March 2024) <https://cpj.org/2024/03/pakistani-journalist-imran-riaz-khan-held-in-terrorism-investigation/> accessed 28 July 2024.

[92] H Salik and Z Iqbal, 'Social Media and National Security' *The Geopolitics* (10 September 2019) <https://thegeopolitics.com/social-media-and-national-security/> accessed 1 August 2024.

Pakistan from the rest of the world, exchanging major social media platforms for local ones.[93] Testing for such alternatives commenced with the WhatsApp alternate 'Beep' making rounds in 2023.[94] While Government officials assured that free speech will not be hindered due to such adoption, these empty promises offer little reassurance especially when China, the country with a similar firewall, ranks at 172 out of 180 on the press freedom scale.[95]

Additionally, while the X ban was deemed successful by the government, the public quickly identified a workaround by using VPNs to circumvent the restriction. However this loophole was soon targeted and attempted to be struck down by the authorities. The PTA moved in October 2024 to curtail this avenue by limiting the functionality of VPNs, going as far as securing a religious opinion from the Council of Islamic Ideology on the incompatibility of VPNs with Islamic principles to impede access to platforms such as X.[96] This attempt made it clear that the State would continue to pursue any and all avenues which could stifle online dissent. Recently in 2025, this approach has culminated in the introduction of the PECA Amendment Act 2025 which establishes a 'Digital Rights Protection Authority' to carry out rigorous monitoring of social media, enabling heightened surveillance and censorship of social media content, further shrinking civic space.[97]

Therefore, the actions of the State under the guise of curbing threats of digital terrorism appear to be tools of lawfare against civic space actors and freedom of expression. These measures, whether it be the banning of social media platforms or introducing new draconian defamation laws, all carry damaging effects to free speech. In a study titled the *Freedom of Expression Assessment Index 2020* Pakistan secured a score of 30 out of 100 on the freedom of expression index proving that the presence of the fundamental right is a mere presence within the country.[98] This was the case in 2020, imagine the state of free speech now with the introduction of such drastic measures, and its implications on the rule of law of the state.

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[93] F Aziz, 'What Kind of "Firewall"?' *DAWN* (2 August 2024) <https://www.dawn.com/news/1849512> accessed 1 August 2024.

[94] Pakistan Observer, '"Beep Pakistan": WhatsApp Alternate Messaging App Launched in Pakistan' (7 August 2023) <https://pakobserver.net/beep-pakistan-whatsapp-alternate-messaging-app-launched-in-pakistan/> accessed 3 August 2024.

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[96] M.A Sheikh,' Reports Emerge of nationwide VPN access 'restrictions,throttling' DAWN (10 November 2024) <https://www.dawn.com/news/1871473> accessed 20 April 2025.

[97] Amnesty International, Pakistan: Authorities pass bill with sweeping controls on social media (Amnesty, 24 January 2025) <https://www.amnesty.org/en/latest/news/2025/01/pakistan-authorities-pass-bill-with-sweeping-controls-on-social-media/#:~:text=The%20amendment%20Bill%20was%20presented,opposition%2C%20media%20and%20civil%20society> accessed 20 April 2025.

[98] Media Matters for Democracy, 'Pakistan Freedom of Expression Report 2020' <https://www.cpdi-pakistan.org/wp-content/uploads/2021/04/Pakistan-Freedom-of-Expression-Report-2020.pdf> accessed 4 August 2024.

6. The Way Forward

The risk of misinformation and hate speech will undoubtedly always accompany the right to freedom of expression. In recent years, this risk has been alleviated given the impact of social media. For instance, Al Jazeera uncovered a massive social media operation across Europe which was spreading a far-right narrative on immigration, Islam and Israel's war on Gaza known as the 'Qatar Plot'.[99] This operation reached at least 50 million people across X, Facebook and TikTok and ultimately led to the far-right securing majority votes in several European states by spreading anti-Muslim sentiments and false information. This is an exemplary instance of misinformation influencing the decisions of people. Misinformation has also led to violent consequences during the Brazil Elections of 2022.[100] Similar instances have been observed in Pakistan too where false and malicious smear campaigns against High Court judges have been circulated in masses to undermine the judiciary.[101] Undoubtedly then, the problem of misinformation and hate speech is one which cannot be overlooked.

However, the presence of the risk should not manifest into complete blanket bans. There is always a risk of accidents in driving a car, this has however not led to driving being banned altogether. Instead, it has been regulated by appropriate traffic laws. Similarly, misinformation and hate speech should be regulated keeping the freedom of expression and right to information in view. This balance is for the Government to strike, along with relevant stakeholders and the Courts to ensure that under the guise of regulating misinformation and hate speech, the Constitutional freedoms of the citizens are not implicated.

As a first step, the blanket ban on X must be removed. This much has been ruled by the Sindh High Court as early as April of 2024, two months after the ban.[102] At best, its usage may be regulated but that too through just regulations which do not unfairly suppress the fundamental human rights of the citizens. Nor ones which are pending reviews regarding their Constitutionality, much like the RBUOC Rules.

Outside of state regulation, the State can very well work with social media companies to help in regulating instances of misinformation and hate speech. This may be hard due to the lack of

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[99] MO Jones 'The Qatar Plot: How a covert influence campaign helped Europe's far right' *Al Jazeera* (24 July 2024 <https://www.aljazeera.com/opinions/2024/7/24/the-qatar-plot-how-a-covert-influence> accessed 8 August 2024.

[100] P Rossini, C Mont'Alverne, and A Kalogeropoulos, 'Explaining Beliefs in Electoral Misinformation in the 2022 Brazilian Election: The Role of Ideology, Political Trust, Social Media, and Messaging Apps' (2023) 4 Harvard Kennedy School Misinformation Review <https://misinforeview.hks.harvard.edu/article/explaining-beliefs-in-electoral-misinformation-in-the-2022-brazilian-election-the-role-of-ideology-political-trust-social-media-and-messaging-apps/> accessed 4 August 2024.

[101] The Express Tribune, 'Another IHC judge alleges online defamation' (7 May 2024) <https://tribune.com.pk/story/2465578/another-ihc-judge-alleges-online-defamation> accessed 7 August 2024.

[102] Business Recorder (n 67).

physical presence of X within the South Asian region. However, this has not stopped India from working with X to ban around 230,892 accounts violating policies and spreading terrorism and promoting child sexual exploitation on the platform.[103] Therefore, working with X is very much possible especially given how the platform itself has expressed its willingness to understand concerns regarding the ban.[104] Additionally, the FIA has previously monitored and blocked over 100 social media accounts promoting 'sectarianism, anti-sta--te, terrorist, and anti-Islam activities', in May 2023.[105] It therefore does not make sense for a blanket ban to be imposed when the State has and can employ alternate regulatory measures.

Outside of regulation, there is an urgent need for inoculating the masses to spot misinformation. This can be done by creating media literacy within the communities. For instance, the National Rural Support Programme ('NRSP'), launched its 'Internet Dost and Internet Zabardast' initiative to help create media literacy in rural areas of Pakistan.[106] Similar initiatives are also being taken by digital rights organisations to further sensitise the masses.[107] These actions, therefore, coupled with regulatory efforts actions taken by X itself such as introducing community notes and disclaimers can substantially help tackle the issue of misinformation and hate speech. The need of the hour, thus, is regulation in a just manner as opposed to arbitrary blockages and complete stripping away of the freedom of expression and access to information.

7. Conclusion

This paper has extensively assessed the role social media platform X plays in upholding the right to freedom of expression and information in Pakistan. This right, as has been highlighted through various literature and case law, is a distinguishing factor between a democratic and non-democratic regime. Therefore, the blocking of X carries damaging implications for this fundamental guarantee provided under the Constitution. Furthermore, this paper assessed the illegality of the ban, arguing how it is merely a tool for stifling dissent and shrinking the civic space in Pakistan and carries no lawful or reasonable justification. Instead of placing arbitrary bans and stifling the smallest dissent, the need of the hour is to strike balances through lawful

[103] 'X banned over 2 lakh accounts for policy violations in India in May' *The Economic Times* (16 June 2024) <https://economictimes.indiatimes.com/tech/technology/x-banned-over-2-lakh-accounts-for-policy-violations-in-india-in-may/articleshow/111040844.cms?from=mdr> accessed 7 August 2024.

[104] France 24 (n 66).

[105] M Azeem, '106 accounts blocked over 'anti-state' activities' *DAWN* (Islamabad, 31 May 2023) <https://www.dawn.com/news/1756983> accessed 7 August 2024.

[106] The News 'Digital Literacy Project Launched in Rural Areas' (, 26 July 2024) <https://www.thenews.com.pk/print/1213781-digital-literacy-project-launched-in-rural-areas> accessed 5 August 2024.

[107] Voice.pk, 'DRF and DC Lahore Admin sign MoU for "Hamara Internet Mahfooz Internet" Sessions' (28 October 2023) <https://voicepk.net/2023/10/digital-rights-foundation-hamara-internet/> accessed 5 August 2024.

regulation of the social media app. This, as argued, is necessary to ensure that no fundamental freedom is unduly compromised.

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The Environmental Toll of Israel's War on Gaza through the Lens of International Environmental and Humanitarian Law

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Abstract

Climate change has emerged as a major threat to Earth and all living beings. In response, the international community and organisations have sought to limit global temperature rise to 1.5°C as stipulated under the Paris Agreement, 2015. However, climate change remains a persistent concern, as international climate regimes have largely failed to address their applicability to armed conflicts. Moreover, the recent conflict in Gaza, marked by the heavy military operations conducted by the Israeli military, has not only raised several questions on the applicability of international law but also questioned the commitment of nation-states to climate action and the efficacy of international climate change regimes. At a time when the world is battling climate change and struggling to mitigate global warming, Israel's military activities have generated Greenhouse Gas (GHG) emissions comparable to the annual emissions of multiple states combined. This paper critically examines the responsibility of states to limit their GHG emissions during wartime with a specific focus on International Humanitarian Laws (IHL) and the Rome Statute. Additionally, it explores the lack of accountability under the UN climate change regime concerning wartime emissions. This paper argues for the inclusion of military-related environmental destruction within climate governance frameworks, emphasising the need for legal and policy interventions to address the climate impact of armed conflicts.

1. Introduction

A prolonged and intense conflict erupted on October 7, 2023, between Israel and Hamas, leading to extended military operations in the Gaza Strip. The hostilities have resulted in significant casualties and humanitarian concerns, with ongoing debates regarding the legal and ethical implications of the actions taken by both parties. Since then, Israel has conducted military operations in the Hamas-controlled Gaza Strip atrociously and illegally, where most experts on international law have termed it a case of genocide.[3] With over 36,000 Palestinians killed, Israel continues to attack innocent civilians with impunity, with great indifference to international human rights law and IHL. The consequences of this war on Gaza have had a clearly devastating humanitarian impact, while the environment has become a silent victim, equally affected by military escalation, if not more so.

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[3] I Adel and K Gallagher, 'Genocide in Gaza: A Call to Urgent Global Action' *Al Jazeera* (12 November 2023) <https://www.aljazeera.com/opinions/2023/11/12/genocide-in-gaza-a-call-for-urgent-global-action> accessed 25 July 2025.

Israel has employed aerial bombardment and ground invasion of Gaza as part of its military operations, which have left a major carbon footprint. The carbon emissions responsible for causing global warming, released during the first sixty days of fighting, were more than the annual carbon emissions of the twenty most climate-vulnerable nations, with 2.99% of the CO_2 emissions attributable to Israel's aerial bombardment of Gaza.[4] The total carbon emissions during this period were equivalent to 150,000 tons of burning coal.[5] These estimates only account for the first two months of the war, whereas after several months, these carbon emissions have increased manifold, escalating concerns about their long-term climate impact. Apart from the climate consequences and greenhouse gas emissions, Israel's war on Gaza has revealed a major threat to the environment, leading to the violation of International Environmental Law (IEL), IHL, and International Human Rights Law. This study seeks to explore the gaps within the existing legal frameworks and examine their implications for environmental protection.

The purpose of this research is to highlight the climate and environmental impact of the ongoing war between the two states and analyse Israel's responsibility under IHL and IEL as the aggressor. This paper will assess the climate and environmental impact of the conflict and analyse legal frameworks, including the Geneva Convention, the Rome Statute, the United Nations Framework Convention on Climate Change (UNFCCC), and the Paris Agreement, among others. The main aim of this paper is to propose the establishment of responsibility under international law for creating climate and environmental catastrophes during wartime, including criminal responsibility and reparations.

This paper addresses the longstanding conflict between Israel and Palestine and the history of war between the two states. The climate impact assessment of the conflict is necessary to gauge the amount of damage already done or sought to be done to the environment. Therefore, this paper would delve deep into the nuances of the current impact of greenhouse gas emissions and its implication for the future. Further, this paper's main purpose is to address the gaps within international legal frameworks; thus it would go through the IEL regime, IHL, human rights law, and the Rome Statute to assess room for criminal responsibility under international law for destroying the environment.

2. Contextualising the History of Conflict

The conflict between Israel and Gaza did not start on 7th October 2023; rather it has been going

[4] N Lakhani, 'Emissions from Israel's war in Gaza have 'immense' effect on climate catastrophe' The Guardian (9 January 2024) <https://www.theguardian.com/world/2024/jan/09/emissions-gaza-israel-hamas-war-climate-change> accessed 25 July 2025.

[5] B Neimark and others, 'A Multi-temporal Snapshot of Greenhouse Gas Emissions from Israel Gaza Conflict' (2023) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4855947> accessed 25 July 2025.

on for the past seventy-seven years.[6] In the past, on different occasions, Israel has carried out attacks on the Gaza Strip; however, they were short-lived, with the longest fifty-day assault in 2014.[7] The climate impact of past assaults as compared to the current attacks is negligible, which may be one of the reasons why these did not have the force of triggering discourse on climate and conflict. The recent Conference of the Parties to the UNFCCC (Conference Of the Parties 28) in Dubai included climate change and conflict on UNFCCC's agenda and discussed the gaps that exist in military emission reporting.[8] But UNFCCC's reporting mechanism is also entirely voluntary, demonstrating weaknesses in the system. As Benjamin Neimark said, 'Militaries are exempt from reporting. It's like we are all living in a world where tailpipe emissions from an F-35 are carbon-free and don't count'.[9] Lack of reporting mechanisms or voluntary reporting entail that states can choose not to report their carbon emissions, leading to gaps in data collection and collective responsibility.[10]

Over 1.9 million people have been forcibly displaced and face life-threatening food and water shortages.[11] The Guardian reported '*[o]live groves and farms have been reduced to packed earth; soil and groundwater have been contaminated by munitions and toxins; the sea is choked with sewage and waste; the air polluted by smoke and particulate matter*'.[12] Apart from widespread environmental damage, the carbon emissions caused by military aircraft and bombs were estimated to be 281,315 tCO_2e during the first two months.[13] Whereas carbon emissions from United States (US) cargo

[6] M Haddad and A Chugtai, 'Israel-Palestine Conflict: A brief History in Maps and Charts' *Al Jazeera* (27 November 2023) <https://www.aljazeera.com/news/2023/11/27/palestine-and-israel-brief-history-maps-and-charts> accessed 25 July 2025.

[7] Ibid.

[8] United Nations Climate Change, 'COP 28 Agreement Signals "Beginning of the End" of the Fossil Fuel Era' (2023) <https://unfccc.int/news/cop28-agreement-signals-beginning-of-the-end-of-the-fossil-fuel-era> accessed 25 July 2025.

[9] HR Hapgood, 'Jet Fuel, Bombs, and Concrete: The 60 Million Tonnes of Carbon Generated by Israel's War on Gaza' EuroNews (7 June 2024) <https://www.euronews.com/green/2024/06/07/jet-fuel-bombs-and-concrete-the-60-million-tonnes-of-carbon-generated-by-israels-war-on-ga> accessed 25 July 2025.

[10] M Deursen and A Gupta, 'Is Enhanced Transparency the "Backbone" of the Paris Agreement? A Critical Assessment' (2024) 14(1) Transnational Environmental Law <https://www.cambridge.org/core/journals/transnational-environmental-law/article/is-enhanced-transparency-the-backbone-of-the-paris-agreement-a-critical-assessment/036F6F4E782B395118AA8C9A71C23A94> accessed 25 July 2025.

[11] UNRWA, 'UNRWA Situation Report #167 on the Humanitarian Crisis in the Gaza Strip and the West Bank, Including East Jerusalem' (2025) <https://www.unrwa.org/resources/reports/unrwa-situation-report-167-situation-gaza-strip-and-west-bank-including-east-jerusalem> accessed 25 July 2025.

[12] K Ahmed, D Gayle, and A Mousa, 'Ecocide in Gaza: Does the Scale of Environmental Destruction Amount to a War Crime?' *The Guardian* (29 March 2024) <https://www.theguardian.com/environment/2024/mar/29/gaza-israel-palestinian-war-ecocide-environmental-destruction-pollution-rome-statute-war-crimes-aoe> accessed 25 July 2025.

[13] tCO_2e stands for 'tonnes of CO_2 equivalent'. There are different gases that contribute to global warming and have different warming impacts, therefore they are converted into their CO_2 equivalent to get a more accurate picture of total emissions. Global Warming Potential Metric provides a standardised unit for comparing the warming potential of different gases to carbon dioxide (CO_2), which has a GWP of 1. Gases like methane (CH_4) and nitrous oxide (N_2O) have higher GWPs due to their greater heat-trapping capabilities. GWP measures the heat-trapping capacity of greenhouse gases over a specific time horizon, usually 100 years. It helps us gauge the total emissions based on these

flights used to transport military equipment to Israel were calculated to be 133,000 tCO_2e.[14] These emissions are more than the annual carbon emissions of about 135 states, revealing a gruesome picture.

While the world is battling with global warming and struggling to limit temperature rise to 1.5°C, it is absolutely necessary that States limit their annual carbon emissions to meet the goals listed in the Paris Agreement and ancillary legal frameworks. Global warming threatens the very existence of this planet and presents significant challenges to the environment and human health. The World Health Organisation has predicted 250,000 additional deaths annually due to human-induced climate change.[15] Global climate emergency and the war on Gaza have exposed the failure and hypocrisy of international environmental institutions, as the contradiction between these two incidents is stark. For instance, COP has not only failed to hold states accountable in terms of their military emissions, but it has also served as a bridge between Israel and other states to sign agreements pertaining to 'Eco-Normalisation'.[16] Moreover, the appointment of Sultan Al-Jaber (Chief Executive of Abu Dhabi National Oil company) as the head of COP28 indicates the intention of UAE to use COP as a tool to promote their Oil and Gas Companies.[17] On one hand, global leaders and advocates of climate change call for immediate action while failing to hold accountable those who are committing crimes against the climate and environment with impunity.

3. Climate Impact of War: Historical Perspective

Wars have always been a part of human history, but with the advancement of technology and use of advanced weapons including nuclear weapons, the impact of war is not limited to conflict areas. In the 21st century, an armed conflict is extended to economic, social, environmental, and political spheres.[18] With the world's average surface temperature rising by 1.2°C above pre-industrial level and the world facing extreme environmental and climatic conditions, the earth

factors. See South Coast Climate Dashboard <https://www.scclimate.com.au/glossary/tco%C2%B2e/> accessed 25 July 2025.

[14] B Neimark and others (n 5).

[15] World Health Organisation 'Climate Change' (2023) <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health> accessed 25 July 2025.

[16] M Shqair, 'Cop28: "Eco-normalisation" Goes Ahead in Dubai Despite Israeli War Crimes' Middle East Eye (2023) <https://www.middleeasteye.net/opinion/israel-uae-cop-28-eco-normalisation-despite-war-crimes> accessed 25 July 2025.

[17] Ibid.

[18] SR Freeland, 'Addressing the Intentional Destruction of the Environment During Warfare Under the Rome Statute of the International Criminal Court"' (2015) Doctoral Thesis, Maastricht University <https://doi.org/10.26481/dis.20150610sf> accessed 25 July 2025.

cannot afford conflicts where carbon emissions go unnoticed and unaccounted for.[19] Intense storms like cyclone Biporjoy, on-going droughts in American-Southwest and wildfires in Australia, California, and Amazon rainforest are signs that the planet is going towards irreparable environmental destruction.

Throughout history, the environment has been a silent victim in times of war, with little to no accountability for crimes committed against the environment. From atomic bombings of Hiroshima and Nagasaki during World War II resulting in massive loss of life and environmental damage to Operation Ranch Hand during the Vietnam War, the world has gotten used to widespread environmental destruction.[20] During the Gulf War, hundreds of Kuwaiti oil wells were set on fire by the Iraqi forces and oil was spilled in the ocean.[21] In fact, the oil fires from the Gulf War contributed more than 2% of global CO_2 emissions.[22] During the conflicts in Rwanda and former Yugoslavia, the aggressors destroyed the environment and used it as a tool of war.[23] In the Sudanese conflict, the forces have poisoned vital water wells and drinking water installations. These events may seem like war-winning tactics; however, apart from being inhumane, these tactics have had a devastating impact on the environment and climate.

Climate change is not only affecting ecosystems but also human health and economies. Oceans are getting acidified due to CO_2 absorption and marine ecosystems are endangered. Many marine species are getting affected particularly species with calcium carbonate shells or skeletons like corals, mollusks and planktons. As the temperature of the sea rises, coral bleaching is increasing which further impacts biodiversity.[24] With melting ice caps and glaciers, global sea levels have arisen by approximately 20 centimeters, and it is accelerating with increasing GHG emissions. That's the reason why drastic flooding has become more frequent. The risk of loss of biodiversity is also at a threatening level. According to estimates by the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), 1 million species are at risk of extinction.

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[19] R Warren and others, 'Risks Associated with Global Warming of 1.5 to 4 °C Above Pre-industrial Levels in Human and Natural Systems in Six Countries' (2024) 177 Climatic Change <https://doi.org/10.1007/s10584-023-03646-6> accessed 25 July 2025.

[20] It has been estimated that Operation Ranch Hand destroyed 8% of Vietnam's croplands, 14% of its forests, and 50% of its swamp areas: EFJ Yuzon, 'Deliberate Environmental Modification Through the Use of Chemical and Biological Weapons: "Greening" the Environmental Laws of Armed Conflict to Establish an Environmentally Protective Regime' (1996) 11(5) American University Journal of International Law and Policy 793, 795–6.

[21] MA Drumbl, 'Accountability for Property Crimes and Environmental War Crimes: Prosecution, Litigation, and Development' (2009) International Center for Transitional Justice, Washington and Lee University School of Law <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1202&context=wlufac> accessed 25 July 2025.

[22] Conflict and Environment Observatory, 'How Does War Contribute to Climate Change?' (14 June 2021) <https://ceobs.org/how-does-war-contribute-to-climate-change/#easy-footnote-1-5547> accessed 25 July 2025.

[23] Ibid.

[24] A Willige, 'What Causes Coral Bleaching, and How Can We Stop It?' World Economic Forum (29 May 2024) <https://www.weforum.org/agenda/2024/05/coral-reef-bleaching-global-warming/> accessed 25 July 2025.

It is high time to understand that humans do not afford the luxury of waging wars for the sake of territorial or political gains. The rules of war (jus in bello) should be respected, and the loopholes in IHL, such as its failure to regulate GHG emissions in armed conflicts, should be addressed effectively. In recent history, different wars have taken their part in increased GHG emissions. World War II initiated one of the largest industrial mobilisations, which had the effect of triggering climate change and global temperature rise.

4. Climate Impact Assessment

To understand the climate impact of Israel's war on Gaza, it is necessary to comprehend the true meaning of the term. Climate refers to the 'weather conditions prevailing in an area in general or over a long period of time'.[25] CO_2 emissions have a direct bearing on the climate and global warming is attributable to growing carbon emissions at a global level.[26] In these circumstances, when states should be making a collective effort to limit carbon emissions, Israel is bombing Gaza persistently, producing massive carbon emissions with impunity.

The emissions from bombs, artillery, and rockets used in the conflict reveal a major carbon footprint. As per the study done by Neimark and others, the CO_2 emissions are equivalent to the output of approximately seventy-five coal-fired power plants operating for a year.[27] These estimates, if viewed over a span of 7 months, would approximately be equal to 984,602.5.[28] Total carbon pollution from Qasam rockets fired by Hamas was at least 713 tonnes of CO_2e. Total emissions associated with Israel's bombardment were initially estimated at 12,000 tonnes of CO_2e, which could rise to 13,600 tonnes based on the emission factor of 136kgCO_2e.[29]

As per Klerk & others, militaries have a complex supply chain that comprises a large proportion

[25] World Meteorological Organisation, 'What is Climate' <https://wmo.int/topics/climate#:~:text=Climate%20is%20the%20average%20weather,to%20determine%20the%20average%20climate.&text=The%20global%20mean%20near%2Dsurface,above%20the%201850%2D1900%20average> accessed 25 July 2025.

[26] VSW Tsang, 'Establishing State Responsibility in Mitigating Climate Change under Customary International Law' (2021) LLM Essays and Theses <https://scholarship.law.columbia.edu/llm_essays_theses/1> accessed 25 July 2024.

[27] This has been emphasised in the study done by B Neimark and others (n 5). The same has also been reported in Jerusalem Post: MJ Hoffman, 'Climate Crisis on Gaza Battlefield: CO2 Emissions Surge from Israel Hamas War' *The Jerusalem Post* (15 January 2024) <Climate crisis: CO2 emissions surge from Israel-Hamas war in Gaza - The Jerusalem Post> accessed 25 July 2025.

[28] The study done by Neimark has been based on two months of emissions. Values calculated in the first two months and multiplied over a span of 7 months give an approximate value of emissions over this time. However, these are only estimations, and based on the intensity of the bombing and ground invasion, the emission factors could increase or decrease.

[29] B Neimark and others (n 5).

of a military's total GHG emissions.[30] Military emissions include both military tech sector and wide supply chains such as IT, telecommunication, facility management and maintenance, construction, waste etc.[31] These emission factors result in the estimation of total GHG emissions. These estimates reveal the massive military capacity of Israel and the heavy artillery used as compared to Hamas. This certainly raises questions about Israel's climate responsibility under IEL and whether or not such an act may be punishable as a war crime in the current state of affairs.

There is a correlation between IEL and IHL, which would be explored in detail in the later sections of this paper; but IHL, namely the Additional Protocol I to the Geneva Convention and the Rome Statute, specifically make reference to the natural environment and prohibition against its intentional or expected destruction.[32] In addition, the Rome Statute of 1998 recognises widespread, long-term and severe damage to the environment in violation of the principle of proportionality as a war crime.[33] Since GHG emissions have a long-term impact on the environment, which is the leading cause of global warming (driver of natural catastrophes such as floods, wildfires, cyclones, earthquakes, etc.), it certainly has a causal connection with the war crimes under the Rome Statute.

Fighter jets and cargo flights have consumed approximately 57.8 million litres of jet fuel, resulting in carbon emissions of 120,840 tonnes (based on a fuel consumption rate of 3,600 litres per hour for F-16 jets).[34] Cargo flights from the US specifically have contributed an additional 133,000 tonnes of CO_2 equivalent (tCO_2e) emissions due to their fuel consumption during delivery operations.[35] Tanks and infantry fighting vehicles (IFVs) have consumed 2,097,600 litres of fuel during ground operations, producing 5,600 tonnes of CO_2 equivalent (tCO_2e) emissions. The construction and maintenance of the Gaza Metro and Israel's Iron Wall have generated emissions of approximately 176,000 tonnes of CO_2 equivalent (tCO_2e) due to the substantial concrete and steel usage involved. The reconstruction efforts following the extensive damage to infrastructure have resulted in an estimated 30 million tonnes of CO_2 equivalent emissions.[36] This includes

[30] E Kinney and others, 'How Increasing Global Military Expenditure Threatens SDG 13 on Climate Action' (Conflict and Environment Observatory, Working Paper, May 2025) <https://ceobs.org/how-increasing-global-military-expenditure-threatens-sdg-13-on-climate-action/> accessed 25 July 2025

[31] Conflict and Environment Observatory, 'A Framework for Military Greenhouse Gas Emissions Reporting' (2022) <https://ceobs.org/report-a-framework-for-military-greenhouse-gas-emissions-reporting/> accessed 25 July 2025.

[32] International Committee of the Red Cross, 'Environment and Warfare' (27 September 2023) <https://www.icrc.org/en/law-and-policy/environment-and-warfare> accessed 25 July 2025.

[33] Ibid

[34] MJ Hoffman (n 27).

[35] Ibid.

[36] D Bailey, E Rivault, and D Palumbo, 'Nearly 100,000 Buildings May Be Damaged, Satellite Images Show' BBC (2023) <https://www.bbc.com/news/world-middle-east-67565872> accessed 25 July 2025.

emissions from rebuilding destroyed buildings, roads, and utilities.[37]

The current estimates of the carbon footprint in Gaza left as a result of Israel's constant bombardment depict a harrowing image. These estimates could be even more so because Israel, like many other nations, does not report its military carbon emissions under the UNFCCC's reporting mechanism. The Nationally Determined Contributions (NDCs) submitted under the Paris Agreement by Israel state that it has an unconditional absolute GHG emissions reduction goal for 2030 of 27% relative to 2015 and an unconditional absolute GHG emissions reduction goal for 2050 of 85% relative to 2015.[38] While these figures meet the formal criteria under the Paris Agreement, they fail to reflect Israel's full emissions profile, most notably by omitting military-related emissions, which have increased dramatically during the ongoing Gaza conflict. Where NDCs are part of a mandatory mechanism under the Paris Agreement, Israel's double standards, or rather the inefficacy of the climate change regime, are revealed when the NDC does not address its military emissions or the GHGs being produced by its long-term conflict with Palestine. The climate cost of war is substantial and systemic**,** not incidental. Thus, the major portion of carbon emissions is left out by Israel with no apparent procedure to rectify this situation. All this is further exacerbated by the fact that Israel's NDC post-Gaza war remains absent.

Each party is required by Article 4 of the Paris Agreement to submit NDCs that account for emissions across the economy and represent its highest possible ambition.[39] The NDC for Israel claims coverage for the entire economy, but excludes its military-industrial activities, a significant and expanding source of emissions.[40] Article 4.4, which requires developed nations to lead with economy-wide absolute emission reduction targets, is compromised by this. In reality, Israel has chosen a compliance-based front that conceals important gaps.[41] Article 2.1(a) of the Paris Agreement, which commits parties to pursue pathways aligned with limiting warming to 1.5°C, may be violated by this selective reporting, which is a form of environmental exceptionalism. The exclusion of military emissions from the Paris framework is another systemic flaw in Israel's NDC. This loophole allows countries to make public commitments to climate goals while secretly increasing militarised activities that significantly increase greenhouse gas emissions. By remaining silent about the militarised aspects of state conduct, the climate regime permits wars, occupations, and sieges to continue unchallenged in the discourse surrounding climate change.

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[37] B Neimark and others (n 5).

[38] UNFCCC, 'Update of Israel's Nationally Determined Contribution under the Paris Agreement' (29 July 2021) <https://unfccc.int/sites/default/files/NDC/2022-06/NDC%20update%20as%20submitted%20to%20the%20UNFCCC.docx> accessed 25 July 2025.

[39] Centre for Climate Engagement, 'Public International Law and Climate Change' (February 2024) <https://climatehughes.org/law-and-climate-atlas/public-international-law-and-climate-change/> accessed 25 July 2025.

[40] UNFCCC, 'Paris Agreement' <https://unfccc.int/sites/default/files/english_paris_agreement.pdf> accessed 25 July 2025.

[41] Ibid.

Apart from a major carbon footprint, the environmental devastation by Israel's military actions in Gaza is extensive and severe. Environmental Devastation includes destruction of ecosystems as a result of pollution, industrial exploitation, and deforestation, including forests, water bodies, and biodiversity[42]. Climate disruption includes things like rising sea levels, global warming, and extreme weather brought on by greenhouse gas emissions and unsustainable development. Air, water, and soil pollution is mostly caused by industrial discharge, car emissions, agricultural chemical use, and inadequate waste management. Loss of biodiversity is a result of ecological imbalance, species exploitation, and habitat destruction.[43] The excessive use of limited natural resources, including freshwater, arable land, forests, and fossil fuels, is known as resource depletion. Public health crises, caused by exposure to pollutants and environmental toxins, particularly in densely populated or economically marginalised areas. Socio-economic collapse, including loss of livelihoods, displacement due to land degradation or climate disasters and economic instability tied to environmental collapse.

Satellite imagery shows that approximately 38 to 48% of tree covered farmland has been destroyed, including olive grove and vital agricultural areas reduced to barren earth.[44] Almost 60% of buildings have been affected, leaving behind hazardous materials and debris. The situation is further compounded by contamination of soil and groundwater, which are polluted through munitions and toxins.[45] When asbestos containing buildings and rubble are demolished, and that too on a very large scale, it contaminates soil and groundwater. The asbestos fibres of these buildings and rubble is carcinogenic — that is, a substance that can cause cancer in living tissues. When humans in these affected areas inhale or ingest these carcinogenic fibres through water, air or food, they get exposed to health hazards. The study of National Library of Medicine, has found that asbestos fibres in groundwater near mines and industrial areas is a serious contaminant of water and soil.[46] Bombs, missiles, and shells — which are heavily used in Gaza — contain heavy metals like lead, mercury, chromium, and cadmium. When such weapons explode, these heavy metal particles disperse into the soil and water. This creates a serious food safety threat and poses a health hazard. Moreover, Volatile Organic Compounds (VOCs) used in fuels and solvents are also common groundwater contaminants. VOCs can cause cancer, birth defects, neurological issues and other health issues.[47] Airstrikes, bombing, and shelling of buildings and

[42] I Ali and A Rahman, 'Environmental Degradation: Causes, Effects and Solutions' (2024) 6(3) International Journal for Multidisciplinary Research <https://www.ijfmr.com/uploads/V6I30566.pdf> accessed 25 July 2025.

[43] Ibid.

[44] K Ahmed, D Gayle, and A Mousa (n 12).

[45] Ibid.

[46] GZ Macher, A Torma, and D Beke, 'Examining the Environmental Ramifications of Asbestos Fiber Movement Through the Water-Soil Continuum: A Review' (2025) 22(4) International Journal of Environmental Research and Public Health 505.

[47] R Yadav and P Pandey, 'A Review on Volatile Organic Compounds (VOCs) as Environmental Pollutants: Fate and Distribution' (2018) 4(2) International Journal of Plant and Environment 14.

industrial infrastructures can cause fires. And when material like plastics, rubber, solvents, and fuel burn, they release VOCs into the atmosphere.

Additionally, sewage and waste pollute the sea due to the displacement of millions of people who do not have access to clean and hygienic sewerage systems. Constant bombing, evacuation notices and tension make people flee conflict, so it is natural for temporary shelters to quickly become overcrowded. When these shelters, such as refugee camps, are overcrowded and lack adequate sanitation facilities, sewage systems often collapse under the strain. According to Yale Environment 360, the unavailability of functioning drains and treatment facilities caused solid waste to accumulate and consequently break down sewage systems in Gaza.[48] Mass displacement following bombardment has also knocked out sewage treatment, causing raw sewage to flood land and sea systems. The result is widespread pollution of water sources and public spaces.[49]

Burning of waste and accidental explosions release particulate matter and toxic gases into the atmosphere. It rapidly causes respiratory issues, asthma, and cardiovascular diseases.[50] Other than that, when sewage system collapses, it causes water contamination which leads to several diarrheal diseases,[51] such as cholera, typhoid, dysentery, hepatitis A, and other infections.[52] Soil pollution reduces agricultural productivity, and when crops are contaminated by leaked sewage, heavy metals, or pathogens through soil, water, and food interactions, the resulting produce not only lacks essential nutrients but also carries harmful toxins. According to the International Committee of the Red Cross (ICRC), international environmental laws are breached by the destruction of sewage and waste systems.[53] Principle 24 of the 1992 Rio Declaration states that, '*In times of armed conflict, warfare shall be conducted in compliance with International Law protecting the environment*'.[54] Similarly, the Stockholm Declaration (1972) states that protecting the environment must be part of armed conflicts.[55] International Humanitarian law is against the destruction of

[48] F Pearce, 'As War Halts, the Environmental Devastation in Gaza Runs Deep' Yale Environment 360 (6 February 2025) <https://e360.yale.edu/features/gaza-war-environment> accessed 25 July 2025.

[49] Ibid.

[50] World Health Organisation, 'Ambient (Outdoor) Air Pollution' (24 October 2024) <https://www.who.int/news-room/fact-sheets/detail/ambient-(outdoor)-air-quality-and-health> accessed 25 July 2025.

[51] J Wolf and others, 'Assessing the Impact of Drinking Water and Sanitation on Diarrhoeal Disease in Low- and Middle-Income Settings: Systematic Review and Meta-Regression' (2014) 19(8) Tropical Medicine and International Health 928.

[52] S Prüss-Ustün and others, 'Preventing Disease through Healthy Environments: A Global Assessment of the Burden of Disease from Environmental Risks' (2016) World Health Organisation <https://iris.who.int/bitstream/handle/10665/204585/9789241565196_eng.pdf> accessed 25 July 2025.

[53] M Talhami and M Zeitoun, 'The Impact of Attacks on Urban Services II: Reverberating Effects of Damage to Water and Wastewater Systems on Infectious Disease' (2022) 102(915) International Review of the Red Cross 1293.

[54] Rio Declaration on Environment and Development (adopted 14 June 1992) UN Doc A/CONF.151/26 (Vol I) principle 24

[55] Declaration of the United Nations Conference on the Human Environment (adopted 16 June 1972) <https://docs.un.org/en/A/CONF.48/14/Rev.1> accessed 25 July 2025.

civilian infrastructure, especially under frameworks like the Emerging Principles on Environment in Armed Conflict (PERAC). According to Principle 9, the state is responsible for reparations for the damage caused by war to the environment. UNEP, UN security council bodies, and scholars such as Saeed Bagheri have categorised environmental damage to Gaza as war crimes under Article 8(2)(b)(iv) of the Rome Statute.[56] Though the International Criminal Court's (ICC) jurisdiction remains contested, the Rome Statute provides an important legal framework, setting benchmarks for how international law addresses environmental protection during armed conflict.

Sewage is considered civilian infrastructure under IHL, and destruction of such infrastructure is a violation of Article 54(2) of Additional Protocol 1.[57] Moreover, because sewage or waste systems are vital for human survival and its destruction can cause different diseases and health hazards, it is considered a serious transboundary environmental harm under IEL. Even though Israel is not a party to the Rome Statute, it still triggers responsibility under the principle of ecocide. The principle of ecocide considers states that are not party to certain treaties and laws still responsible for their gross actions on a large scale, such as environmental harm in Gaza. The principle was developed after the Gulf War of 1991.

The humanitarian crisis in Gaza is distressing, but the accompanying environmental and ecological consequences have underscored the failure of the international community and its institutions to safeguard the basic human rights of Gazans. Therefore, the present conflict raises key questions regarding the effectiveness of international law and international institutions, and their commitment to protect not just human rights but the environment as well.

5. International Legal Frameworks

As climate change became unavoidable, finding a solution became inevitable. Thus, the United Nations adopted a climate change regime, comprising mainly the UNFCCC (1992), the Kyoto Protocol (1997), and the Paris Agreement (2015).[58] These documents collectively make states responsible for their GHG emissions and provide goals to limit global temperature rise to 1.5^{o}C.

The ongoing conflict between Israel and Gaza has revealed a major flaw in the UN climate change

[56] S Bagheri, 'The Legal Limits to the Destruction of Natural Resources in Non-International Armed Conflicts: Applying International Humanitarian Law' (2023) 105 International Review of the Red Cross 882.

[57] Article 54(2), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977).

[58] S Schiele, 'International Environmental regimes and their Treaties' in *Evolution of International Environmental Regimes: The Case of Climate Change* (Cambridge University Press 2014) 11.

regime: these instruments do not clearly address their application during armed conflict.[59] With the wide-scale destruction of Gaza's environment and the large carbon footprint, Israel must bear some responsibility under international law. The application of IHL in these circumstances is clear, but IHL does not specifically address the issue of climate change. Per Edith Pezzot, to maintain the efficacy of the UN climate regime, it must not only apply to peacetime but also during war.[60] Climate change requires long-term goals that must be adhered to in order to limit its effects. But if climate change regimes become ineffective during armed conflict, it could potentially undo the progress made, weakening the efficacy of this regime, along with having catastrophic results for the planet and all beings. Thus, regulation of such large-scale GHG emissions during armed conflict is necessary to ensure goals of the Paris Agreement are met.

The International Law Commission's Draft Principles on the Protection of the Environment in Relation to Armed Conflicts (ILC Draft Principles) establish a framework for applying the UN climate change regime to armed conflicts, emphasising environmental protection before, during, and after conflicts, including in occupied territories.[61] The ILC's draft principles lay out a basic framework and guidelines that should be followed in terms of environmental protection during an armed conflict. Draft Principle 13 pertains to general protection of the environment during armed conflict, where the use of methods and means of warfare that are intended or may be expected to cause widespread, long-term, and severe damage to the environment is prohibited.[62]

Supported by legal precedents like the International Court of Justice's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, these principles stress the importance of prioritising environmental concerns alongside national security interests.[63] Given the global impact of climate change and the significant carbon emissions associated with armed conflicts, applying the UN climate change regime during all circumstances, including occupations, is essential to ensure that states uphold environmental obligations and mitigate the environmental impacts of conflicts on affected territories and populations.[64]

The current Israel-Palestine conflict is unquestionably an international armed conflict regulated under the IHL. Within the IHL framework, the Geneva Conventions introduced two articles in 1977, namely Articles 35 and 55, prohibiting warfare that may cause '*widespread, long-term and*

[59] E Pezzot, 'IHL in the Era of Climate Change: The Application of UN Climate Change Regime to Belligerent Occupation' (2023) 923 International Review of the Red Cross <https://international-review.icrc.org/articles/ihl-in-the-era-of-climate-change-923> accessed 25 July 2025.

[60] Ibid.

[61] International Law Commission, 'Draft Articles on the Protection of the Environment in Relation to Armed Conflicts' (2022) <https://legal.un.org/ilc/texts/instruments/english/draft_articles/8_7_2022.pdf> accessed 25 July 2025.

[62] Ibid.

[63] Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) (1996) ICJ Rep 226 (General List No 95), 8 July 1996.

[64] E Pezzot (n 59).

severe damage to the natural environment'.[65] Per the ICRC, the concept of the natural environment should be understood in the widest sense to cover the biological environment in which a population is living.[66] It does not consist merely of the objects indispensable to survival mentioned in Article 54 (protection of objects indispensable to the survival of the civilian population), but also includes forests as well as fauna, flora, and other biological or climatic elements.[67] Protection of the natural environment must also be understood to include climate change, because the GHG emissions produced by Israel's aerial bombing and ground invasion would inevitably result in increased global temperature, further affecting the natural environment, including human beings, flora and fauna.[68] Thus, GHG emissions are the root cause of environmental degradation, thereby limiting them is equivalent to protecting the natural environment.

Before delving further into Articles 35 and 55 of the Additional Protocol I, it is necessary to explore the kind of crime being allegedly committed by Israel. Where there are allegations of genocide in Gaza, Israel is also putatively committing an ecocide. The term 'ecocide' means destruction of the natural environemnt and is taken as the environmental counterpart of genocide.[69] It was coined in 1972 during the United Nations Conference on Human Environment in Stockholm.[70] The Swedish Prime Minister described the United States' use of harmful chemicals to wilfully destroy crops and defoliate forests during the Vietnam War as ecocide.[71] Taken in general terms, ecocide is the destruction of the natural environment wilfully, deliberately and negligently. Some widely recognised examples include the Kuwaiti Oil Spills,

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[65] Commentary on Article 55: Protection of the Natural Environment, in Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (International Committee of the Red Cross and Martinus Nijhoff, Geneva, 1987) 661.

[66] Ibid.

[67] Attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population is prohibited as per Article 54 of the Additional Protocol. This refers to prohibition of starvation of the Civilian population. Article 54(2) prohibits attacks against objects *'for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive'*. Therefore the law does not only prohibit the starvation of civilians in terms of food but also makes it a point to refer to the natural environment as an indispensable feature of the human experience, enforcing a prohibition on its destruction would not only prevent the civilian population but also help minimise the impact of the conflict. International Committee of the Red Cross, 'Rule 54 — Attacks against Objects Indispensable to the Survival of the Civilian Population' (Customary IHL Database) <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule54> accessed 25 July 2025.

[68] Intergovernmental Panel on Climate Change, Climate Change 2021: The Physical Science Basis — Working Group I Contribution to the Sixth Assessment Report, Chapter 2, Changing State of the Climate System (2021).

[69] T Kausar, 'International Environmental Crime: Concept, Scope and Possibility' (2019) 1 Pakistan Law Review 104.

[70] B Rani, 'Ecocide in Pakistan: Comparing the Feasibility of a Domestic Ecocide Law to International Law' (2024) 8 RSIL Law Review 72.

[71] Ibid.

2016 Guatemala's release of insecticides into the river and Deepwater Horizon Oil Spills in 2010.[72]

The proposition that Israel is committing ecocide in Gaza and that it should be treated and recognised as a war crime finds its footing in the pure law theory of criminal law. A commission of a crime simply requires two elements: the physical element (actus reus) and the mental element (mens rea/intention).[73] The physical element or damage would constitute widespread damage to the environment which has long-lasting impacts. For instance, as quoted in the previous sections, the oil spills during the Gulf War contributed more than 2% of the world's CO_2 emissions. This clearly constitutes widespread and long-lasting damage to the environment. The more obvious example of atomic bombings of Hiroshima and Nagasaki provides an insight into the physical aspect of damage, as since use of atomic bombs in 1945 up until now, the effects of radiation have disrupted the natural balance of things, affecting both plants and animals.[74] The damage attributable must be wide enough to constitute ecocide. As far as Israel is concerned, there is clear and indisputable evidence of carpet bombing, destroyed buildings, plants, animals, water supplies, and other objects indispensable to the survival of the civilian population.[75] And as evidenced in the earlier parts of this paper, the widespread release of CO_2 in the environment would be devastating for the generations ahead, thereby constituting long-term and widespread physical damage to the environment.

As for the mental element, it is necessary to attach a lower standard to it and include not only intention, but also recklessness, negligence, foreseeability, and objective tests that would help in determining the culpability for a crime of ecocide.[76] Ecocide must be based on the principle of strict liability rather than intentions of the warring parties, as it would eliminate the requirement for intention, thereby acting as a deterrent due to the certainty of punishment.[77] The pattern of attacks in Gaza indicates conduct that has resulted in severe environmental harm alongside humanitarian suffering. These outcomes suggest a level of deliberation. In the present circumstances, and based on available evidence, it may be argued that the elements of ecocide are met, with indications of the requisite mental element.

The interplay between IHL and the crime of ecocide helps us develop an understanding of the ongoing assault on Gaza. Articles 55 and 35 of the Additional Protocol I also prohibit warfare that

[72] Ibid.

[73] T Kausar (n 69).

[74] BA Ali and AS Jassim, 'History of the Impact of Radiation on the Environment: Hiroshima Bomb' (2024) 583 E3S Web of Conferences 04015 <https://doi.org/10.1051/e3sconf/202458304015> accessed 25 July 2025.

[75] Palestinian Centre for Human Rights, 'Escalating Genocide: Israeli Forces Launch Deadly Carpet Bombing, Killing Dozens and Crippling Gaza's European Hospital' (14 May 2025) <https://pchrgaza.org/escalating-genocide-israeli-forces-launch-deadly-carpet-bombing-killing-dozens-and-crippling-gazas-european-hospital/> accessed 25 July 2025.

[76] Ibid.

[77] J Atwal, 'Ecocide and the Rome Statute: a New Leaf in International Criminal Law' (2024) UNSW Law Journal Student Series 1 <https://classic.austlii.edu.au/au/journals/UNSWLawJlStuS/2024/1.html> accessed 25 July 2025.

may cause widespread, long-term and severe damage to the natural environment. Therefore, in order to give effect to the crime of ecocide under the IHL and prosecute Israel, violation of Articles 35 and 55 can be made basis for prosecution. There are nonetheless certain limitations. For instance, the words 'widespread', 'long-term' and 'severe' are not defined. In the context of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), 'widespread' should be several hundred kilometers.[78] 'Long-term' can be determined in terms of months or years or decades. Whereas 'severe' means, '*serious or significant disruption or harm to human life, natural and economic resources or other assets*.'[79] Once again, in order to appreciate the interplay between the crime of ecocide and IHL, the element of physical damage is satisfied if these articles are violated under the IHL and should be enough to trigger prosecution for a crime of ecocide under the Rome Statute.

6. A Potential War Crime

The world is presently striving to keep global warming below 2°C in order to avert a catastrophic humanitarian crisis driven by human-induced climate change. Consequently, it is necessary to recognise the severity of environmental damage caused by environmental crimes sooner rather than later. The Rome Statute recognises four major crimes that the ICC can prosecute. These include genocide, crimes against humanity, crimes of aggression, and war crimes.[80] The present regime under the Rome Statute has a limited scope for prosecuting crimes against the environment, and that may present challenges to holding Israel liable.

Article 8(2)(b)(iv) of the Rome Statute provides that it is a war crime to intentionally launch an excessive attack knowing that it will cause widespread, long-term and severe damage to the natural environment.[81] The Geneva Conventions require that warring parties do not use methods of warfare that cause 'widespread, long-term and severe damage to the natural environment'.[82] Even though article 8(2)(b)(iv) falls under war crimes, the threshold for proving the same is fairly high along with the actus reus being relatively vague. As the terms 'widespread', 'long-term', and 'severe damage' have not been defined, ENMOD can serve as a basis for quantifying damage

[78] I Rekrut, 'Environmental Destruction in Conflict: Broadening Accountability in War' (Humanitarian Law & Policy Blog, 20 March 2025) <https://blogs.icrc.org/law-and-policy/2025/03/20/environmental-destruction-in-conflict-broadening-accountability-in-war/> accessed 25 July 2025.

[79] Ibid.

[80] R Pereira, 'After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation: Towards an International Crime of Ecocide?' (2020) 31 Criminal Law Forum 179.

[81] Article 8(2)(b)(iv) provides that 'war crimes' includes: 'Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.'

[82] Article 35, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I); Article 55, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I).

done to the environment. However, quantifying environmental damage is complex because its impacts are not always immediate or direct. Such damage can be categorised into two types: direct and indirect.[83] Direct damage arises as an immediate consequence of a harmful activity, while indirect damage refers to the longer-term deterioration of environmental goods and services that results from those initial impacts.[84] Therefore, the current regime of quantifiable threshold for damage is not only flawed but would provide the perpetrators a loophole to escape.

Since environmental damage and widespread CO_2 emissions and their effects would be felt over the course of decades, the definitions provided in ENMOD are insufficient. A significant reform is needed to address the limits of existing provisions. Further, it is necessary to adopt an environment centric approach and consider it as the real victim. Israel bears responsibility not only for immediate and direct harm causing loss of life, livelihoods, food, and water, but also for long-term environmental damage, such as the accumulation of large volumes of CO_2 in the atmosphere, which leads to indirect ecological consequences. It is not necessary that the harm must be affecting the civilian population directly. Rather, as per the ICC in *Prosecutor v Zdravko Tolimir*, even though the actus reus for such crimes requires widespread harm, victims of the underlying crime do not have to be civilians.[85]

The mental element or mens rea forms an essential part of a criminal activity, and the threshold for intent is set relatively high in Article 8(2)(b)(iv). It requires that the damage must be 'clearly excessive in relation to the military advantage anticipated'.[86] The clear anticipation is the problematic part, as it purportedly gives the perpetrators permission or a free pass if they had miscalculated the situation or if the damage was a result of negligence.[87] Additionally, Article 8(2)(b)(iv) attaches the additional requirement that the person must intend to cause widespread, long-term, and severe damage. These, when read conjunctively, give the idea that a person would only be held accountable if a) they had knowledge of the attack causing widespread, long-term, and severe damage; b) consciously decided that the attack was disproportionate; and c) knew that the attack was clearly excessive and yielded little military advantage.[88] Therefore, multiple roadblocks arise in prosecuting a crime under Article 8(2)(b)(iv) of the Rome Statute, which requires reconsideration.

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[83] M Nyka, 'Crime Against the Natural Environment — Ecocide — from the Perspective of International Law' (2023) 6 Eastern European Journal of Transnational Relations 9 <https://eejtr.uwb.edu.pl/article/view/669> accessed 25 July 2025.

[84] Ibid.

[85] *Prosecutor v. Zdravko Tolimir* (Appeal Judgement) IT-05-88/2-A (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber) (2015) <https://www.icty.org/x/cases/tolimir/acjug/en/150408_judgement.pdf> accessed 25 July 2025.

[86] Article 8(2)(b)(iv), Rome Statute of the International Criminal Court.

[87] I Rekrut (n 78).

[88] Y Zhang, 'International Criminal Law: Should Ecocide Become the Fifth Core International Crime?' (2025) 4(2) Studies in Law and Justice 50.

The insufficiency of the Rome Statute is complemented by the inefficacy of the climate regime, which has altogether failed to address climate change during war. The threshold set by the Rome Statute for prosecution of an environmental war crime must be lowered, and strict liability must be proposed.[89] It is necessary that this strict liability is complemented by the climate regime, which should set a maximum threshold for military carbon emissions during peacetime and especially during war.[90] Militaries are more GHG intensive than the civilian infrastructure. For instance, if the US military industry was a country, it would be in the top 50 carbon emitters in the world.[91] Therefore, if there are to be meaningful cuts in military emissions, there is a dire need for a formal legal regime that sets a maximum threshold for militaries both during the war and peacetime, in order to maintain the global temperature rise at 1.5 degrees Celsius.

It is a well-known principle of international law that 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.[92] The Permanent Court of International Justice in the Chorzow factory case addressed damage to environmental goods, including food and natural resources.[93] Though this approach is somewhat effective in making good the losses suffered by the environment, reparation is not enough in case of Gaza. Criminal responsibility for environmental damage is also necessary as the damage done to the environment and the excessive amounts of CO_2 released in the atmosphere would have severe consequences for future generations. As hospitals, schools, refugee camps, industrial sites, and other buildings in the Gaza Strip are razed to the ground, GHG emissions arise not only from their destruction but also from the eventual process of rebuilding the city.

In such circumstances, where states do not take their responsibility seriously, international criminal law must come into play along with IEL. To say that IEL is only applicable during peacetime would be counterintuitive, thus, its applicability must be ensured during war. GHG emissions that surpass a certain threshold during an armed conflict must be prosecuted as a war crime, because future generations would suffer if this impunity continues and states such as Israel are allowed to pollute the environment without any accountability. As far as reparations or compensation for environmental damage is concerned, it would not help in limiting the global rise in temperature; rather add to the GHG emissions through rebuilding the infrastructure. As

[89] T Kausar (n 69).

[90] B Neimark and others, 'Confronting Military Greenhouse Gas Emissions' (2024) <https://www.qmul.ac.uk/sbm/media/sbm/documents/Confronting-military-greenhouse-gas-emissions,-Neimark-et-el,-Interactive-policy-brief-(2024)-[Digital].pdf> accessed 25 July 2025.

[91] Ibid.

[92] *Case Concerning the Factory at Chorzów (Germany v Poland)* (1928) PCIJ Series A No 17.

[93] J Harrison, 'Significant International Environmental Law Cases: 2017-2018' (2018) 30 Journal of Environmental Law 527.

emphasised in the International Court of Justice's advisory opinion, environmental concerns must be addressed alongside national security.[94] Hence, where a state exceeds the threshold or causes widespread damage to the natural environment resulting in significant climate damage, it must be prosecuted at the ICC.

7. Conclusion

The ongoing conflict in Gaza has highlighted the critical need for accountability and adherence to IHL and the Rome Statute. Israel is not a party to these legal frameworks, but it bears responsibility to ensure the protection of civilians, infrastructure, and the environment during armed conflicts. Despite Israel not being a State Party to the Rome Statute, the ICC may still exercise jurisdiction over acts committed by Israeli nationals within the territory of a State Party, that is, occupied Palestinian territories. In 2021, the ICC's Pre-Trial Chamber I affirmed that the Court's territorial jurisdiction extends to the occupied Palestinian territories, including the West Bank, East Jerusalem, and the Gaza Strip, on the basis of Palestine's accession to the Rome Statute in 2015.[95] This decision establishes a legal foundation for investigating and potentially prosecuting crimes committed by Israeli officials or military actors within these territories, even if Israel itself does not recognise the Court.

Crucially, under Article 12(2)(a) of the Rome Statute, jurisdiction may be triggered when the conduct in question occurs on the territory of a State Party, regardless of the nationality of the alleged perpetrator. The transborder nature of many environmentally harmful acts will expose non-party states to the ICC's jurisdiction if impacts of their decisions materialise on the territory of a State Party, such as excessive pollution.[96] Therefore, should credible evidence support allegations of emerging environmental crimes such as ecocide, the ICC could exercise jurisdiction over Israeli actions in Gaza. This legal framework underscores the potential for accountability based not on state consent, but on the territorial effects and cross-border harm inflicted within ICC's jurisdiction.

The devastating environmental impact of the conflict in Gaza, including significant carbon emissions from military operations, destruction of agricultural lands, and pollution of air and water, underscores the urgency of addressing environmental concerns in conflict zones. The

[94] Ibid. The Court acknowledges that the environment is not an abstraction but a living space essential for human well-being, including future generations. It warns that nuclear weapons 'could constitute a catastrophe for the environment'. It confirms that the fundamental principles of IHL — distinction, proportionality, and unnecessary suffering — apply to nuclear weapons just as they do to conventional weapons. It establishes that environmental protection is not peripheral, but a mainstream legal obligation, even in conflict-related use of weapons.

[95] *Situation in the State of Palestine* (Decision on the Prosecution Request pursuant to Article 19(3) of the Statute), ICC-01/18-143, 5 February 2021.

[96] A Greene, 'The Campaign to Make Ecocide an International Crime' (2019) 30(3) Fordham Environmental Law Review 1.

principles outlined in the ILC Draft Principles provide a valuable guide for integrating environmental protection into the laws of war. Israel's actions must be evaluated within the framework of IHL and the Rome Statute to hold accountable those responsible for violations and to prevent future harm to both human life and the environment. Upholding these legal standards is crucial not only for justice and accountability but also for fostering sustainable peace and protecting the planet for future generations.

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Rights and Status of Children Confined with Female Prisoners in Pakistan

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Abstract

The grave situation of prisoners in Pakistan is widely acknowledged and well-documented. However, when mothers face imprisonment in the current regressive prison systems, the impact extends beyond their own selves. Children, with no fault of their own, have to accompany their mothers and have to face the same harsh realities of prisons where they are effectively 'institutionalized in state care.' United Nations Office on Drugs and Crime (UNODC) research indicates that children of incarcerated parents face a higher risk of future imprisonment. This raises critical questions about how female prisoners with children should be treated and, more importantly, how those children's needs should be met. On one hand, separating these children from their mothers causes emotional harm, while, on the other hand, keeping them in prison exposes them to a harsh, punitive environment that can adversely affect their psychological well-being. This paper analyzes this dilemma by examining national and international laws regarding the rights of children of incarcerated mothers in Pakistan. Moreover, the paper also provides comparative insight from the courts of United Kingdom (UK) and South Africa, and outlines recommendations for reformation.

1. Introduction

The situation of female prisoners in Pakistan is gruesome enough; however, for mothers in prison, the impact of imprisonment goes beyond themselves. The children accompanying their incarcerated mothers in prison are 'institutionalized in state care' and are considered 'secondary victims' because such children spend their 'formative' years in jail. This not only affects their intellectual development but also their emotional growth. A report prepared by the Ministry of Human Rights ('MoHR') reflected that most children born in prisons are developmentally delayed compared to children born and raised outside prisons.[2] The research by the United Nations Office on Drugs and Crime ('UNODC') on women in prison states that the children of imprisoned parents are at a greater risk of being incarcerated themselves.[3] Hence, the question arises of how to treat female prisoners with children, and more importantly, how to take care of children accompanying their mothers in the prison environment.

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[2] Ministry of Human Rights Pakistan, 'Plight of Women in Pakistan's Prison Report' (2020) <https://www.mohr.gov.pk/SiteImage/Misc/files/Prison%20Report_acknowledgment.pdf> accessed 17 September 2025.

[3] UNODC, 'Handbook on Women and Imprisonment' (2014) <https://www.unodc.org/documents/justice-and-prison-reform/women_and_imprisonment_-_2nd_edition.pdf> accessed 17 September 2025.

On one hand, separating the children from their mothers can result in emotional and developmental abuse. On the other hand, keeping them in prison may not provide an adequate environment for their full growth because of the 'harsh, punitive environment' of prison, which can lead to a detrimental psychological impact on children.[4] At the same time, it is important to note that the existing prison facilities have been designed to cater to male prisoners only. However, with the recent increase in female prisoners, along with the rise in incarcerated mothers with children, there is a lack of gender-specific facilities for women that caters to gender-specific needs like pregnancy and nursing.[5] Keeping this in view, this article analyses the national and international laws that cater to the rights of children of convict mothers and identify gaps that exist therein. It also reviews how courts in jurisdictions like the United Kingdom (UK) and South Africa have addressed this issue. The discussion also focuses on assessing the effectiveness of laws, or their inability thereof, with detailed recommendations at the end.

2. Impact of Prison on Children

Children incarcerated with their parents suffer psychologically as a result of the harsh prison environment, which has no infrastructure or facilities for leisure and recreational activities for these children.[6] The atmosphere is gloomy, and it hampers the mental alertness of children who are locked up inside a prison with their mothers. Research published in the American Psychological Association bulletin has shown that parental incarceration is associated with higher risks of antisocial behavior, disrupted attachment, and other psychological issues in children.[7] They face the risk of adopting anti-social behaviour, developing depersonalization, and becoming secondary victims.[8] It is often argued that such children might be safer inside the prison than on the streets. However, this argument only overlooks the impact of prison on children's mental health. It ignores the importance of healthy brain development for the children and the environment required for it. A child on the streets learns many things which reform his behaviour, while a child growing up in prison surroundings never learns favourable skills. This very analysis is highlighted in a report by the Legal Aid Office Committee for the Welfare of Prisoners where the researchers compared children under five raised on the streets with those

[4] Ministry of Human Rights Pakistan (n 2) 20.

[5] R Tahir, 'Mothers in Prison' (16 November 2024) *Dawn* <https://www.dawn.com/news/1872715#:~:text=Children%20living%20with%20incarcerated%20parents,intellectual%20growth%20and%20emotional%20development.> accessed 17 September 2025.

[6] A Martynowicz, 'Children of Imprisoned Parents' The Danish Institute for Human Rights (2011) <https://childrenofprisoners.eu/wp-content/uploads/2019/02/Full-report-Children-of-Imprisoned-parents.pdf> accessed 17 September 2025.

[7] J Murray, DP Farrington, and I Sekol, 'Children's antisocial behavior, mental health, drug use, and educational performance after parental incarceration: A systematic review and meta-analysis' (2012) 138(2) American Psychological Association Bulletin 175 <https://psycnet.apa.org/fulltext/2012-00399-001.pdf> accessed 17 February 2026.

[8] J Murray and L Murray, 'Parental incarceration, attachment and child psychopathology' (2010) 12(4) Attachment & Human Development 289.

growing up in prison. They found that the latter exhibited extreme antisocial behaviour and could not complete a sentence in their local language.[9] It highlights the devastating nature of the prison environment which suggests, howsoever cruelly, that raising children on the streets might be better than raising them inside prison. The reason being that the prison system embodies inhumane treatment and remains reform-starved.

Healthy parental attachment holds core value in a child's healthy development. However, if this attachment is threatened from an early age, it can leave permanent marks. Joseph Murray, in his research, pointed out how parental incarceration can cause anti-social behaviours in children by threatening their attachment security. These are the factors that increase the risk of child psychopathology.[10] However, there is minimal research available in the context of Pakistan that analyses child psychology at this level. One study conducted in KPK looked at the general physical and mental health of children imprisoned with their incarcerated mothers. The results found that the children were 'suffering from physical problems in the degraded environment of the jails in the shape of eye burning and sight, dermatological issues like scabies and itching, asthma, muscular pains, rickets, bodily growth in view of ill-nutrient foods, irritation in conversation, insomnia and overall immunization-related issues at sampled jails. They also faced mental disorders like depression, anxiety, attention-deficit, loneliness, agonized state of future, apart from imbalanced personality like behavioural problems in the shape of aggression and disrespect.'[11]

In a qualitative study conducted in the prisons of Khyber Pakhtunkhwa ('KPK'), the researchers analyzed the prison conditions for children and incarcerated mothers. The study poses the limitation of using a relatively small sample size. Regardless, the results depict the jarring state of prison for children and incarcerated mothers. The study revealed the 'humiliating treatment [of children and incarcerated mothers, where] besides being provided with contaminated water and unhygienic food, non-availability of basic hygienic facilities, the faulty ventilation in the washrooms causing foul smell in the residential hall, and even in entire cells. Cockroaches, rats, insects, bedbugs, centipedes, and irregular arrangement of disinfecting the toilets and residential places coupled with their inconveniences.'[12] Such evidence highlights how structural neglect and substandard facilities exacerbate the psychological harm experienced by children living behind bars, raising serious concerns about standards of treatment.

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[9] HE Zahid, R Rais, and N Khan, 'A Glimpse into the Lives of Babies Behind Bars' (Legal Aid Office 2015) <https://www.lao.org.pk/wp-content/uploads/2019/03/Babies-Behind-Bars.pdf> accessed 17 September 2025.

[10] J Murray and L Murray (n 8)

[11] A Ullah and N Muhammad, 'Physical and Mental Health of the Children with Incarcerated Mothers in Khyber Pakhtunkhwa, Pakistan: A Sociological Analysis' (2023) 7(2) Journal of Positive School Psychology 933.

[12] A Ullah and N Muhammad, 'Unhygienic Environment to Children with Incarcerated Mothers in Selected Jails of Khyber Pakhtunkhwa, Pakistan' (2023) 2(3) CARC Research in Social Science 112.

Another empirical study conducted in Adiala Jail, Rawalpindi highlighted that 'the imprisonment of mothers leads to a negative effect on children's socialization and their personality development,' especially when there is a lack of professional staff. Incarcerated or imprisoned mothers are stigmatized as 'flawed mothers' because of their perceived inability to take care of their children. Even after release, both the mothers and the children face financial and emotional instability in the form of unemployment, poverty, humiliation, and embarrassment.[13]

These conditions arise not due to the absence of laws, but due to the lack of implementation of the existing laws. The suffering of children inside prisons is not an accident of legal oversight. It is the result of systemic indifference and administrative apathy. As the next section will reveal, the law, although in its minimal form, recognizes the children's and mothers' right to health, safety, security, and dignity. However, what is missing is the enforcement mechanism that translates these rights into reality.

3. National Legislation

In Pakistan, there is no proper law that talks about the rights of children accompanying their mothers in prison. The existing laws, such as the Pakistan Prison Rules 1978 ('PPR'), only cater to infants. These rules cover the rights of all prisoners, including pregnant women and convict mothers who come to jail with their children. As the focus of this article is the rights of children of incarcerated women, this discussion will focus on those provisions that relate specifically to children living with their mothers in prison.

Rule 326 of PPR allows female prisoners to keep their children with them until they reach age six.[14] Although the law puts an age limit on children's stay in prison, the practice is the opposite. At times, it is seen that children reaching the age of ten or twelve years still remain with their mothers in prison. The reason being these children rarely have anyone to take care of them outside of the prison. Because of a lack of any proper guardian or caretaker, they have to stay in jail with their mothers.[15]

Rules 328[16] and 520[17] deal with diet and clothing. They appear to be consistent with international guidelines and establish the responsibility of the superintendent to provide children and infants

[13] AK Mirza and MB Khan, 'Life of Children in Prison: Vulnerabilities and Challenges' (2022) 42(2) Pakistan Journal of Social Sciences.

[14] Pakistan Prison Rules, 1978, Rule 326.

[15] HE Zahid, R Rais, and N Khan (n 9).

[16] Pakistan Prison Rules, 1978, Rule 328.

[17] Pakistan Prison Rules, 1978, Rule 520.

with adequate diet and clothing.[18] Further, PPR provides detailed guidelines on the diet of nursing mothers. For instance, Rule 487 on 'Extra Diet for Nursing Mothers' states that nursing mothers shall be provided with '467 gr. of milk and 29 gr. of sugar daily'[19] in addition to their usual diet, until the child reaches the age of one year. Contrary to these rules of PPR, studies on the nutritional composition of diet across different prisons in Pakistan show that the diet of women and their children is not sufficiently nutritious.[20] It lacks enough protein, iron, and calcium, which are essential for their healthy growth.[21] Moreover, according to a report submitted by the Legal Aid Office ('LAO'), prison officials usually do not provide adequate clothing for incarcerated mothers and their children. As a result, they have to arrange it through their relatives or rely on non-governmental organizations for support.[22]

Apart from basic necessities of food and clothing, these children also have a right to proper education. Education is not only crucial during the formative years of a child but also a fundamental right under Article 25-A of the Constitution of Pakistan. However, no rules and regulations are available to provide this right to the children of incarcerated mothers. The only provision that is available in PPR is the mandate for the education of adult and juvenile inmates/prisoners. The relevant rules are Rule 298 on 'Education',[23] Rule 301 on 'Treatment of Juveniles in Prison other than the Borstal Institution',[24] and Rule 679 on 'Education up to Primary Standard'.[25] These rules direct the authorities to provide education facilities, i.e., teachers, books, and a well-stocked library for education up to the primary standard for every illiterate prisoner. However, since the children bound to stay in prisons with their incarcerated mothers are not legally prisoners or inmates, these rules do not apply to them. Hence, there is no system available to provide education to these children. In practice, even inmates rarely benefit from these provisions because of a lack of institutional priority towards this issue. Talking about implementation of this policy for children of incarcerated parents thus becomes highly improbable. According to the data collected by LAO in Sindh, no regular teacher is designated to educate prisoners despite the budget being allocated to these prisons. This lack of educational infrastructure also affects the children living with incarcerated mothers, who often have to rely on their mothers or other prisoners for education. Despite that, the scope of education remains limited to religious studies and rarely expands to other disciplines.[26]

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[18] Pakistan Prison Rules, 1978, Rule 1190(2).

[19] Pakistan Prison Rules, 1978, Rule 487.

[20] IA Khattak and others, 'Prisoners Women and Children – From Nutritional Perspective' (2008) 24(1) Sarhad Journal of Agriculture 125.

[21] Ibid (n 11).

[22] Ibid.

[23] Pakistan Prison Rules, 1978, Rule 298.

[24] Pakistan Prison Rules, 1978, Rule 301.

[25] Pakistan Prison Rules, 1978, Rule 679.

[26] Ibid (n 11).

Furthermore, the academic researcher, Abdullah Khoso, highlighted in his paper that young boys, just above the age of six, imprisoned with their incarcerated mothers are often sent to the male juvenile section of the prison where they suffer from the persistent risk of getting abused by the juvenile and adult male prisoners. There is no set mechanism for monitoring such abuse and exploitation. Prison officials have often claimed to provide separate education facilities to inmates according to their age groups, but these claims are rarely seen in practice.[27]

In cases where children cannot be kept with their mothers, for instance under Rule 327 of PPR on 'Cases in Which a Child Cannot be Kept in Prison',[28] the superintendent must inform the District Magistrate about the residential address of the prisoner and he shall arrange for the proper care of the child. If the relatives are unwilling to look after the child, the District Magistrate shall admit the child to a healthy nursery.

Moreover, the Constitution of the Islamic Republic of Pakistan provides guidance in enacting special provisions on the rights of women and children under Article 25. However, there is minimal effort that has been made to deal with the issues of safety, survival, and development of children as well as the health and safety of women prisoners. This situation becomes even more alarming when we look at the data provided by MoHR. Annex C of the said report reveals that Baluchistan has zero female-only prisons, Gilgit Baltistan prison has zero female doctors and medical staff, Punjab prisons have zero psychologists, and all provinces have zero alternative sentencing measures for women.[29] The same report, which came out in 2020, provides a plethora of recommendations and directives on addressing issues related to staff training, reducing the under-trial prison population, alternative sentencing, combating issues of mental health, recommendations for provincial law amendments, and strengthening education and rehabilitation programs. However, serious questions remain regarding the implementation of these recommendations.

According to Abdullah Khoso, in 2006, the Minister of Education and Literacy of Sindh issued a directive to the Executive District Officer during her visit to appoint female teachers to educate minor children. His follow-up revealed that the directive had not been implemented.[30] Even today, research studies have shown that the state of education for children of incarcerated mothers is inadequate.[31] In cases where directives have been issued, implementing those

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[27] A Khoso, 'Babies and Children Living with Women Prisoners in Pakistan' (2015) International Association of Youth and Family Judges and Magistrates <https://www.academia.edu/8429360> accessed 17 September 2025.

[28] Pakistan Prison Rules, 1978, Rule 327.

[29] Ibid (n 2).

[30] Ibid (n 27).

[31] T Rani, M Ilyas, and S Parveen, 'State of Educational Rights of Inmate Dependent Children: A Case Study of Prisons in Khyber Pakhtunkhwa, Pakistan' (2022) 4(2) Journal of Law and Social Studies 286.

directives rarely follows suit. Child protection is a provincial subject, and the acts enacted for the protection of the rights of children are silent on the rights of children of incarcerated mothers.[32]

4. International Framework

From an international perspective, the main international instruments that cater to children living with their convict mothers are the UN Convention on the Rights of the Child ('UNCRC'), UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ('Bangkok Rules'), and the Standard Minimum Rules for Non-custodial Measures ('Tokyo Rules'). Pakistan ratified the UNCRC on 12 November 1990, thereby accepting legally binding obligations to give effect to its provisions. In contrast, the Bangkok Rules and the Tokyo Rules are non-binding 'soft-law' standards, which, although not creating enforceable duties, serve as persuasive guidance for Pakistan in shaping the legal and policy framework.

Like Pakistani national laws, these rules and principles do not provide provisions on food rationing or clothing. Instead, they set out guidelines for safeguarding children's overall health, environment, and development, which are the standards most critical for children living in prisons. Central to these rules and principles is the 'best interest of the child' that can be taken as a comprehensive parameter for enhancing national legislation. This section provides a detailed analysis of the relevant international standards concerning the rights of children to assess how they may be applied in the context of Pakistan, with a view to bridging the gap between national and international standards.

4.1. United Nations Convention on the Rights of Children ('UNCRC')

Although UNCRC does not mention any specific provision highlighting the rights of children living in prison with their mothers,[33] the rights that are already mentioned in the convention can be extended to such situations. For instance, Article 3(1) states that the best interest of the child should be sought while doing any social, administrative, or legal work. It emphasizes the importance of keeping the children at the centre of laws, rules, and policies that directly affect them. Article 9 of the UNCRC states that children must be kept with their parents and should not be separated without their will. Article 12 protects children's freedom of expression by stating that children should be free to express their views in all matters affecting them, and those views should be 'given due weight in accordance with the age and maturity of the child'. These provisions serve as a reminder that if children are living with their mothers in prison, they should be provided an opportunity to voice their opinions about their treatment in prison. Article 18(2)

[32] See, for example, Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010; Sindh Child Protection Authority Act, 2011; Balochistan Child Protection Act, 2016; Islamabad Capital Territory Child Protection Rules, 2021.

[33] Children of Prisoners Europe, 'Introduction to Child's Rights' (7 February 2019) <https://childrenofprisoners.eu/introduction-to-childs-rights/> accessed 17 September 2025.

of UNCRC ensures that the development of institutions and services remains integral to the development of children. Similarly, Article 19 provides protective measures for children, emphasizing that they should be protected from neglect, abuse, violence, and maltreatment, which can be extended to the rights and freedoms of children of imprisoned mothers.[34] The above-mentioned provisions can be taken as a blueprint to develop comprehensive national policies, laws, and rules pertaining to children living in prison with their incarcerated mothers. It can be done with the help of both legislative initiatives and judicial rulings.

4.2. UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ('Bangkok Rules')

The Bangkok Rules constitute a key set of international standards for addressing rights of women and children in places of detention.[35] The section that caters to pregnant women, breastfeeding mothers, and incarcerated mothers with children states that the prison should provide them a 'safe environment' and 'regular exercise opportunities'. It also states that the 'medical and nutritional' needs of all such women must be met, even if a woman has given birth and the child is not with her.[36] The most relevant rules to the discussion at hand are Rules 49 to 52. These rules state that the children living in prison with their mothers shall never be treated as prisoners; instead, their stay should be based on their best interest.[37] To ensure that children are developing a healthy bond with their mothers, they should be allowed to spend as much time with them.[38] For their physical health, the rules state that their 'development shall be monitored by specialists', and their upbringing environment should not differ from that of a child living outside of the prison.[39] The overarching themes that these provisions talk about are absent in Pakistan's legislation. Although the national laws on the rights of children of convict mothers provide recommendations on food and clothing, they seldom talk about the environment in which such children should be brought up.

Moreover, Rule 2(2) allows the 'women with caretaking responsibilities' to make necessary accommodations for their children. They must be allowed 'reasonable suspension' from detention for the sake of the best interest of the child. With regards to facilities, Rule 42 states that gender-specific arrangements should be made in the prison for pregnant women and women with children, for instance, facilities for nursing, childcare, psychological or physical support, and appropriate programs and services. Going a step forward, the Bangkok Rules amiably provide a

[34] The other law is Article 82 of Geneva Convention IV, which provides the interned members of the same family should be resided together.

[35] The Bangkok Rules 2011.

[36] Ibid (n 27).

[37] The Bangkok Rules 2011, Rule 49.

[38] The Bangkok Rules 2011, Rule 50.

[39] The Bangkok Rules 2011, Rule 51.

mechanism for the separation of children from their incarcerated mothers. It states that the separation of the child and the mother should not be done unless alternative measures have been taken. Furthermore, under Rule 52(1), Bangkok Rules assert that decisions regarding separation of a child from its mother should be based on individual assessment and keeping in mind the best interest of the child. Despite the separation, the mothers should be given maximum opportunities to meet their children.[40] The approach in PPR Rule 326 diverges from Bangkok Rules as it imposes a fixed age limit of six years without centring the child's welfare or needs. Nevertheless, the Bangkok Rules acknowledge a limitation common to international standards, i.e., there is no consensus among countries on the age of the children till which they should remain with their mother. This question is often left for the national legislation to answer.[41]

A close analysis of Bangkok Rules and UNCRC reveals that welfare and best interest of the child remain at the core of their provisions, a principle that is given significant importance by the Pakistani courts in cases involving children. It can be argued that judicially, we are on the right track because there are countless judgments that focus on 'welfare of the minor'. The only limitation is that 'welfare of the minor' is often looked at in family cases only, especially those dealing with the parental custody of children. There is a lack of expansion of this core principle to cases involving the caretaking of children of incarcerated mothers, mainly because such cases appear seldom in courts. At the same time, legislation seems to be silent on this subject, and there appear to be no official measures to address this issue.

4.3. UN Standard Minimum Rules for Non-custodial Measures ('Tokyo Rules')

The Tokyo Rules provide a collection of fundamental principles designed to encourage the adoption of non-custodial measures, community engagement in criminal justice, and a sense of responsibility among offenders.[42] They are pertinent to women who have been deprived of their liberty because many of their offences are minor in nature and do not warrant incarceration. For instance, Rule 17 states that public participation should be encouraged because it significantly improves the ties between the offender, family, and community. It also serves as an opportunity to safeguard society. For this, the participation of volunteers can be encouraged under Rule 19. The role of the volunteers should be to promote ties between the offenders and the community and should also provide them with counselling and support. To take this initiative a step further, the Tokyo Rules recommend under Rule 20 that the government and non-government organizations should research and plan improvements in the non-custodial treatment of

[40] The Bangkok Rules 2011, Rule 52.

[41] Ibid (n 27).

[42] The Tokyo Rules 1990 (United Nations Standard Minimum Rules for Non-Custodial Measures).

offenders. Moreover, they should work toward policy reform and program development under Rule 21.

These recommendations and rules can serve as crucial guidelines for countries like Pakistan. Their implementation can significantly improve prison reforms and can change the lives of children stuck in prison with their mothers. The following section examines how these standards may contribute to bridging the gap between national and international standards.

5. Bridging the Gap Between National and International Standards

According to the data provided by the National Commission of Human Rights ('NCHR') and Justice Project Pakistan ('JPP'), there has been a 2.8% increase in female prisoners since 2023.[43] Out of this percentage, 73.41% are under-trial prisoners. This is an appalling majority of female prisoners who have not even been sentenced yet, but have to stay in prison. The impact of this significant number cannot be taken away from the children who are in jail with their under-trial mothers. This goes entirely against Rule 2(2) of the Bangkok Rules that allows for 'reasonable suspension' from detention for the sake of the best interest of the child. Combating this issue requires legislative and policy reform, as well as the placement of adequate and appropriate non-custodial measures.

In light of the Tokyo Rules, one way to implement non-custodial measures is to engage community and non-state actors. The state can benefit from public-private partnerships to combat gaps in the prison reform system. In the case at hand, under-trial female prisoners with children can be sent to special Dar-ul-Aman or shelter homes for 'custody, control, care, cure, correction, and community readjustment'[44] of under-trial women and children. In addition, pilot interventions such as partnerships with universities and schools, as well as NGOs and legal-aid groups could support tutoring, counselling or bail/probation assistance as part of non-custodial measures. This way, the government can share the financial and regulatory burden, a seemingly ever-present challenge, with private organizations and institutions to better the situation. It will ensure that children accompanying their under-trial mothers are separated from the isolating and stigmatizing environment of a prison, in accordance with Articles 18 and 19 of the UNCRC.

Furthermore, in case of sentencing, the female convicts should be allocated to prisons closer to their homes in light of their caretaking responsibilities. The Sindh government has followed the Bangkok Rules in this regard and has added several provisions in the Sindh Prisons and Corrective Services Act 2019 that cater to the well-being of women. For instance, Rule 746 states

[43] National Commission for Human Rights, 'Pakistan's Prison Landscape: Trends, Data, and Developments in 2024' (2025) <https://nchr.gov.pk/wp-content/uploads/2025/01/Prison-Data-Report-2024_NCHR-x-NAPA-x-JPP.pdf> accessed 17 September 2025.

[44] Ibid (n 2).

that attention should be given to the physical and psychological needs of the women when making a decision about their detention. It further states that women should be allocated to prisons closer to their homes. Similarly, Rules 747 and 748 provide measures for screening women for their mental and physical health, as well as actions relating to childbirth. Other provinces should also follow this lead and amend their legislation to introduce humane laws catering to the safety and care of children and incarcerated mothers.

For the children accompanying their mothers in prison, Rule 326 of PPR should be highly regulated and checked in accordance with the Bangkok Rules to ensure that separation of a child from their mothers is only carried out in the best interest of the child. In case the child does not have a family or a guardian outside of prison, they should be separated only when alternate shelter and care arrangements have been secured.[45] Such separation must be guided by a careful assessment of the child's best interests and coordinated through a referral process between prisons, child protection units, child rights organizations such as UNICEF, and vetted shelters to guarantee that appropriate standards of care are met. At the same time, authorities must ensure that children do not have to stay in prison beyond the appropriate age to ensure their emotional and psychological development is not affected by the isolated prison environment.

Lastly, to introduce a functioning governance system, 'socio-legal counselling cells' should be placed in prisons and other regulatory institutions along with strengthening inter-departmental cooperation 'between the prison departments, the provincial health authorities, as well as the welfare and social officers and psychiatrists.' The counselling cells can be 'managed by volunteers from a designated law school,[46] school of social work, or a non-governmental voluntary agency'. Involving student bodies for incentives like course credits, legal aid clinics, co-curricular activities recognition, and community service hours could also help sustain volunteer engagement.[47]

It is important to note that there may be challenges in implementing these recommendations, including budget constraints, limited trained personnel, bureaucratic overlap, and resistance from prison staff concerned about security and control. Responsibility for such initiatives should not rest solely with the Prison Department; provincial Social Welfare Departments, Women Development Departments, Child Protection Bureaus, and Health Departments would need to coordinate to ensure a holistic approach. Budget and capacity constraints could be mitigated

[45] Ibid (n 33).

[46] Lahore University of Management Sciences (LUMS) has inaugurated its LUMS Law Clinic. It is a student-led public service initiative to support marginalised communities through legal engagement under the supervision of qualified lawyers. This will give students a rare opportunity to apply their legal knowledge and receive course credit in lieu of that. It aims to support pro-bono services including legal representation in family and bail matters, and the provision of legal literacy sessions in prisons. See, Press Release, 'LUMS Law Clinic Launched: Bridging Legal Education with Public Service' (2025) < https://propakistani.pk/2025/05/06/lums-law-clinic-launched-bridging-legal-education-with-public-service> accessed 17 September 2025.

[47] Ibid (n 2).

through pilot programmes, phased implementation, and engagement with non-state actors, while staff resistance can be reduced through sensitization training. Clear monitoring and evaluation frameworks and inter-departmental coordination would help manage bureaucratic overlap and gradually institutionalize reforms.

6. In Case of Other Jurisdictions

For a deeper analysis of the issue at hand, this section examines judicial rulings from jurisdictions like South Africa and the United Kingdom ('UK'). Both these jurisdictions have developed progressive legislation regarding prison reforms and the rights of children. While Pakistan's domestic laws acknowledge the rights of children confined with their mothers, there are few judicial precedents to follow. Meanwhile, the rulings of courts from South Africa and the UK offer more developed approaches to determining welfare of children of incarcerated mothers, providing useful insights for the potential for reform in Pakistan.

6.1. South Africa

In *M v. The State*, the South African Constitutional Court suspended the sentence of a mother by looking at the best interest of her children.[48] The Court held that the best interest of the child must be of paramount consideration in all the judgments that affect them, and it is in the best interest of the minor children that they receive basic care under the supervision of their mother. Balancing the welfare of the children against the seriousness of the mother's offence, the Court observed that if the mother were to be imprisoned, then the children would lose maternal and emotional support and their home and community. Not only that, their school routines and transportation will be disrupted, and they may be separated from their siblings. All these factors have a severe influence on a child's development. The Constitutional Court cited Article 30(1) of the African Charter on the Rights and Welfare of the Child which expressly deals with 'children of imprisoned mothers' and noted that expectant mothers as well as mothers of infants and young children should be given special treatment by the State parties in cases of being accused or found guilty of any penal law.[49] The state parties should always give preference to non-custodial sentences when sentencing such mothers and establish special alternative confinement institutions for holding such mothers. Moreover, it provides that a state should ensure that a child is not imprisoned with their mother. By drawing on the Charter, the Court aligned its interpretation of domestic sentencing principles in line with South Africa's broader regional human rights obligations.

6.2. United Kingdom

[48] *M v. The State* [2008] (3) SA 232 (CC) 261.

[49] African Charter on the Rights and Welfare of the Child, Article 30(1).

Just like South Africa, there have been several cases in the UK that deal with the sentencing of primary caretakers of minor children. Implementing the Children Act 1989 and the European Convention on Human Rights ('ECHR'), there are several examples where the UK courts have given utmost importance to the well-being of the minors and have ruled that the same is not to be compromised while sentencing their mothers. Section 6 of the Human Rights Act 1998 ('HRA') mandates public bodies, including courts, to comply with the ECHR. It goes on to say that any act of a public figure that is inconsistent with the ECHR is unlawful.[50]

In *Regina v. Mills,* the Court of Appeal held that in the case of an accused mother who is the sole support of young children, the judge must bear in mind the consequences to those children, specifically when their only familial support is being taken away.[51] In light of this, the Court of Appeal dismissed the mother's prison sentence and ruled that even community service at that time was inappropriate, which could have been feasible if the initial imprisonment order had not been given.

Furthermore, in *ZH (Tanzania) v Secretary of State for the Home Department,* the UK Supreme Court held that in light of Article 3(1) of the UNCRC, the court's primary consideration in such cases should be the best interests of the child.[52] In another case of *R v. Petherick,* the Court of Appeal emphasized that even though there is no standard or normative adjustment for minor children, full weight must be given to the children's best interest as it is a distinct consideration.[53]

However, one might argue that pardoning a convict merely on the grounds of caretaking responsibility confronts us with a paradox that questions the core of the justice system, such that society can fulfil its obligation to serve retribution while ensuring that fundamental rights of children of incarcerated parents are not infringed. The answer to this question can be found in the legal philosophy of H.L.A. Hart. [54] Hart states in his book The Concept of Law that there are primary rules that impose duties on the members of a society. He calls these rules static and identifies them as a defect. To remedy this defect, Hart, a British legal philosopher and one of the most influential legal theorists of legal positivism, sets out primary and secondary rules. Primary rules outline the law and consequences of breaking the law. Hart argues that for a legal system to be viable, it has to acknowledge human limitations. For that, we require secondary rules. In this context, the secondary rules, such as the rules of recognition, change, and adjudication, are of significance as they nudge the legal theorists and professionals to look beyond static legislative

[50] R Epstein, 'Sentencing Mothers: the Rights of the Child and Duties of the Criminal Courts' (2013) 8(2) Journal of the Academy of Social Science 130.

[51] *Regina v. Mills* [2002] 2 Cr App R(S) 52.

[52] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4.

[53] *R v. Petherick* [2012] EWCA Crim 2214.

[54] See, also, Hart, H.L.A., *The Concept of Law* (OUP 2012).

rules. Hart states that the union of both primary and secondary rules allows a multi-layered relationship between law, coercion, and morality. The benefit it provides is that such an approach considers human behaviour and vulnerabilities, and assists in evolving the primary rules.

For example, 'rule of adjudication' allows a judge to exercise discretion and consider human vulnerabilities to resolve a complex matter. Hart points out that in a complex society, this rule becomes essential to remedy the 'inefficiencies' of a legal system with only static primary rules. In doing so, 'rules of recognition' – the 'ultimate' rule – provides support to the rules of adjudication because, via rules of recognition, the validity of other rules of the system is assessed.'[55] If this idea is placed in the context of balancing the rights of children of incarcerated mothers against the seriousness of their offence, then Hart would argue that the law is not just about sanctions but also about accommodating vulnerabilities. In that sense, protecting the fundamental rights of vulnerable children becomes just as important as serving justice. To reconcile these two contrasting concepts, a balanced approach is preferred, which has been asserted and taken by the courts of the UK.

In the case of *R (P and Q) v. Secretary of State for the Home Department,* the Court of Appeal held that the right to respect family life under Article 8 of the ECHR is attracted in cases of criminal sentencing of the parents of minors.[56] Since the act of separating young children from their parents is very serious, the state must provide adequate justification to interfere with this right. The reason is that a pressing social need should exist, or that there should be a pursuit of a legitimate aim. Emphasizing this, Lord Philips opined that '…the sentencing court is bound ... to carry out the balancing exercise ... before deciding that the seriousness of the offence justifies the separation of mother and child. If the court does not have sufficient information about the likely consequences of the compulsory separation, it must [acquire that information], in compliance with its obligations under section 6(1) [of HRA].'[57] It shows that the courts in the UK have conducted a balancing exercise where the rights of the children, especially young ones, are weighed against the seriousness of the offence. This judgement established a judicial rule that the courts must acquire information about the dependent children of the convict parent and exercise a balance between Article 8 of the ECHR and the seriousness of the offence of the mother.[58]

The Court of Appeal reinforced this reasoning in *R v. Bishop,* where it was previously held by the trial court that the criminals must never think that their children provide them with some sort of licence to commit crimes and stay out of prison. In passing this verdict, the trial court failed to investigate the condition of the children. Later, the Court of Appeal overturned the trial court's

[55] WC Starr, 'Law and Morality in H. L. A. Hart's Legal Philosophy' 1984 67(4) Marquette Law Review 673.

[56] *R v. Secretary of State for the Home Department* [2001] EWCA Civ 1151.

[57] Ibid.

[58] Ibid.

opinion by deeming it as inappropriate under Article 8 of ECHR on the grounds that a balancing exercise was not done and the duty put on public bodies under Section 6 of HRA was not fulfilled. Hence, the Court of Appeal reduced the sentence of the convict parent in light of his caretaking responsibilities.[59]

7. Comparison with the Courts of Pakistan

In Pakistan, we do find some references of the case laws where the courts have talked about the rights of children of imprisoned mothers. However, these judgements come with their own limitations. An essential case in this regard is *Ghulam Sakina v. The State,* where the Lahore High Court ruled that 'they shall protect/watch the welfare of the suckling babies and minor children detained in jails just like real mothers. Needless to add, the courts enjoy unlimited powers in this regard.'[60] It displays that the courts have the power to issue directives to the prison department to improve the situation of children living in prison with their mothers. But this judgment does not add a nuanced discussion to the topic and does not make a case for non-custodial measures for incarcerated mothers with suckling babies.

However, another judgment recognizes this issue. In *Zarina Khan v. The State,* the Lahore High Court ruled that 'it is better to err in releasing a female accused carrying a suckling baby on bail than in remanding her child along with her to jail during trial.'[61] Although an admirable stance, again, the judgment does not stress the necessity of alternative sentencing options for convicted mothers. Moreover, these judgements only talk about the rights of suckling babies, and not minors who have to stay in prison with their mothers.

Despite the fact that these judgements highlight the importance of the welfare of children, Pakistan needs more nuanced and sensitized precedents on this subject. Currently, Pakistan is still following the colonial laws and practices. The prison system is a colonial inheritance that was designed for male prisoners. Even the architectural design of prisons, which is the same as the colonial era, is 'inadequate in fulfilling their contemporary expected functions.' Besides, the environment of prisons is considered 'conducive for the cultivation of criminal behaviour'.[62] In this, the reformist approach has taken a back seat. Further, with the increase in female prisoners, a gender-specific perspective is missing from both practice and legislation and calls for a reassessment of the laws. In Pakistan, women are the primary caretakers of children. But, the 'laws are rooted in colonial-era practices and a retributive approach, lacking sufficient focus on

[59] *R v. Bishop* [2011] EWCA Crim 1446.

[60] *Ghulam Sakina v. The State*, 1991 PCr.LJ 1316.

[61] *Zarina Khan v. The State*, 1991 MLD 518.

[62] Ibid (n 6).

the rehabilitation and welfare of incarcerated mothers and their innocent children.'[63] JPP published a policy brief in collaboration with Canada Funds for Local Initiatives, which highlights the disparity of women facing the same corrective measures as men. Although it is in the context of 'war on drugs', the policy brief nonetheless identifies the lack of acknowledgement of 'distinct vulnerabilities and needs of incarcerated women'. Incarcerated women, who are usually illiterate, unaware of their legal rights, and hopeless of the legal system, are more prone to exploitation. Moreover, they are often survivors of domestic violence and sexual abuse. Surviving from these 'traumas necessitates more extensive psycho-social support for women compared to men.'[64] Among all this, incarcerated mothers 'experience a lack of access to fair trial due to the apathy of prison authorities who actively impede their ability to communicate with their legal representatives.'[65] Therefore, it is imperative that Pakistan looks in other directions to bring gender-specific policies, laws, and prison reforms. Along with that, the 'balancing exercise' practised in the UK provides guidance for Pakistani courts and legislation. It provides a sophisticated approach which can be expanded in the context of incarcerated mothers based in Pakistan i.e., maintaining a 'balancing exercise' between the rights of children, seriousness of the offence of the mother, the social responsibility expected of women in Pakistan, economic disadvantage, and any preceding trauma of domestic violence or sexual abuse. This balance can be achieved only if alternative means of punishment and sentencing are available. Hence, there is a dire need for Pakistan to actively reform the punishment system by introducing and implementing non-custodial measures.

8. Conclusion

The situation of children and mothers in prison is devastating, which calls for immediate action. In many cases, the children live with their mothers even beyond the legally sanctioned age limit, i.e., six years, and are left unchecked. There is a lack of recreational activities in jails, which hampers the mental development of children.[66] Therefore, the prisons must be equipped with play areas for children and toddlers. Moreover, it is evident that the prison system needs significant improvement in its hygiene, treatment of prisoners, and cultivating a reforming environment. The prison staff needs to be trained and sensitized about the mental health issues and psychological impact of prison on children and mothers. They also need to be familiar with the national and international laws and practices related to the rights of children of incarcerated mothers so they can implement them effectively. A more ideal approach is the arrangement and

[63] Ibid (n 4).

[64] Justice Project Pakistan, 'Gender Impact of CNSA 1997: Structural Vulnerabilities and Paths to Reform' (2025) <https://jpp.org.pk/wp-content/uploads/2025/03/JPP-CFLI-Policy-Brief_Gender-and-CNSA.pdf> accessed 17 September 2025

[65] Ibid (n 6).

[66] Ibid (n 10).

initiation of non-government institutions like Dar-ul-Aman[67] or shelter homes near prisons for children whose parents are in jail, shifting from the concept of putting children of incarcerated parents in orphanages. The approach of these institutions shall reflect Article 9 of the UNCRC, Bangkok Rules, Tokyo Rules, and children's rights under the Constitution of Pakistan. Further, the Home Department of every province must equip prisons with proper education facilities as per the standard of any school outside the prison. Additionally, Article 25 of the Constitution allows the state to make provisions for the protection of women and children.[68] Therefore, it should be put to good use by drafting, passing, and enacting comprehensive laws, rules, and policies allowing alternate sentencing measures for female prisoners with children, along with a provision of speedy trials in such cases.

To make non-custodial measures a reality, the Tokyo Rules can provide comprehensive guidelines on treating children of female offenders. All provincial child protection laws must be amended with special provisions consistent with the aforementioned laws to protect the vulnerable group of children confined in prisons. Pakistan can also take guidance from its neighbouring country, India, which has formulated a 'National Policy for Children' and 'Scheme for Financial Sustenance, Education and Welfare of Children', which consider children as a 'supremely important' section of society and irrespective of the status of their parents' confinement, the growth and welfare of children is given substantial importance.[69] Under this policy framework, the Government of India provides financial support and other welfare activities for children who are left alone after the incarceration of one or both of their parents. Along with that, precedents of South Africa and the UK provide a guideline for judicial rules and how courts should handle cases involving children. In short, Pakistan can follow best global practices and set a strong precedent for itself in improving the lives of incarcerated mothers and their children by focusing on their welfare, nourishment, and development.

[67] Government-run women's shelter home system designed to provide protection and rehabilitation for women.

[68] Constitution of Pakistan, Article 25.

[69] M Pipania, 'Children of Prisoners: Their Rights and obligations on the State' (2015) <https://lexjuralaw.wordpress.com/2021/01/05/children-of-prisoners-their-rights-and-obligations-on-the-state> accessed 17 September 2025.

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Democracy on the Line: Rethinking Electoral Law Reforms in a Partisan Parliament

Salman Farrukh and Aliza Masood Reza[1]

Abstract

The Elections Act, 2017 emerged as a significant legislative effort by the Parliament of Pakistan, consolidating eight disparate electoral statutes into a single framework under its authority derived from Article 222 of the Constitution, read with Entry 41 of the Federal Legislative List. Despite its foundational importance, the Act has since been subjected to frequent amendments, often driven by partisan motives rather than democratic consensus. Part I of this paper examines how successive ruling parties have leveraged parliamentary mechanisms to enact electoral reforms in a divisive and politically expedient manner, frequently bypassing established parliamentary norms, particularly the consultative role of parliamentary committees. These practices raise concerns about the long-term effects on democratic institutions, fundamental rights, and federal balance. Part II explores the special constitutional character of electoral laws. Although the Constitution does not expressly establish a hierarchy of norms, the paper argues that electoral laws occupy a uniquely entrenched position. Drawing comparative insights from other jurisdictions, it contends that the 2017 Act, which effectively sets the rules of democratic engagement, should not be subject to frequent or partisan alteration through ordinary legislative means. Part III advances the argument that the legislative power under Article 222 belongs to Parliament as a whole, not to the ruling party of the day. It emphasises the constitutional role of political parties as public institutions and advocates for a culture of consensus in electoral lawmaking, reflective of Parliament's representative function. Part IV assesses the constitutional safeguards intended to restrain unilateral electoral amendments—namely, the 'subject to the Constitution' and 'abridgement' clauses under Article 222, as well as judicial review under Article 184(3). The paper argues that these safeguards have proven insufficient in curbing politically motivated reforms. The absence of consensus-based lawmaking has heightened tensions between constitutional institutions, notably the Supreme Court and the Election Commission of Pakistan, with destabilizing effects on democratic governance and institutional legitimacy. Finally, Part V offers conclusions and policy recommendations, including the potential use of referendums

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and constitutional amendments as more democratic and durable alternatives for reforming electoral laws in Pakistan, aimed at strengthening the rule of law and the integrity of the democratic process.

Introduction

Legislating on election laws in Pakistan is a purely federal subject, and this is clearly stated in Article 222 of the Constitution read with Entry 41 of the Federal Legislative List (FLL). The Elections Act 2017 (in this paper referred to as 'Act') is perhaps one of the most important by-products of Parliament's prerogative in this regard. It consolidated the scattered election laws into a single yet comprehensive statute, and a total of about eight different laws were merged into one Act.[23] However, ever since the consolidation, the law has been subjected to frequent amendments by successive Parliaments. From a strictly theoretical perspective, there is no bar to Parliament's law-making authority in regard to amending election laws.[4] In fact, the essence of Article 222 makes it an enabling provision of the Constitution, and it leaves the field open for the Parliament to tweak the Act irrespective of the frequency. After all, major political parties often also give reference to implementation and reforms in electoral laws as part of their election campaigns and manifestos.[56] Therefore, in this strict sense, any attempts at electoral reforms should be perceived as nothing but a fulfillment of political parties' electoral promises. Moreover, the consolidation of piecemeal legislation was a complicated legislative exercise, leaving a broader margin of errors to be fixed through amendments by the Parliament. This rationale is plausible in letter, but in spirit, the picture is starker, worrisome and does not seem to substantiate a hypothesis of 'fixing' the Act with purely reformative intentions.

Before any substantial discussion on the patterns followed by successive Parliaments in amending the Act, it is worth going a little back in history and scrutinising the processes adopted at the birth of the Act in the first place. The Parliamentary Committee on Electoral Reforms (PCER) – comprising government and opposition members of the time – [7] took almost three years between 2014 and 2017 to finalise the draft bill of the Act. Yet, the Bill was passed by the National

[2]These include: The Electoral Rolls Act 1974; The Delimitation of Constituencies Act 1974; The Senate Elections Act 1975; The Representation of the People Act 1976; The Election Commission Order 2002; The Conduct of General Elections Order 2002; The Political Parties Order 2002; and The Allocation of Symbols Order 2002.

[3] PILDAT, *Consolidating Democracy in Pakistan, Background Paper, The Elections Act 2017 – An Overview* (February 2018) <https://pildat.org/wp-content/uploads/2018/05/TheElectionsAct2017_AnOverview.pdf> accessed 17 September 20205.

[4] The only bar under Article 222 is that any such law shall not abridge the rights of Chief Election Commissioner or the Election Commission of Pakistan.

[5] Pakistan People's Party Parliamentarians' (PPPP), *Election Manifesto 2024* (2024) s. 4.4 <*https://insaf.pk/sites/default/files/PTI%20Election%20Manifesto%202024.pdf*> accessed 17 September 20205.

[6] Pakistan Tehreek-e-Insaf, *Election Manifesto 2024 (2024) s 13* <*https://insaf.pk/sites/default/files/PTI%20Election%20Manifesto%202024.pdf*> accessed 17 September 2025.

[7] News Desk, 'Major Reforms Approved Elections Bill 2017' *The Express Tribune* (Kharachi, 21 July 2017) <*https://tribune.com.pk/story/1463135/major-reforms-approved-elections-bill-2017*> accessed 17 September 2025.

Assembly (NA), apparently in violation of the one-fourth quorum requirement in the Constitution,[8] with only 50 out of 340 members being present in the lower house at that time. Speaking on the occasion, the opposition leader had stated, *'I feel myself ashamed on seeing the situation in the House. Only a couple of ministers out of 53 cabinet members are present.'*[9] Further, records suggest that approximately a hundred proposed amendments to the Bill – largely coming from opposition benches of the time – were rejected by the government of the day back in 2017. This included amendments which time proved to be contentious in future on crucial issues such as biometric verification of voters and giving overseas citizens the right to vote[10] This context is important since it reflects a serious lack of consensus among the political stakeholders at a time when the mass exercise of consolidating electoral laws was being carried out. Although this is not a hypothesis this paper proposes, yet it is fairly evident that such a glaring lack of consensus among political stakeholders may very well be the foundation of the subsequent disagreements over the electoral 'reforms'.

Nevertheless, the Act went through Parliament in August 2017, and the General Elections of 2018 were also held under the same law. Apart from the controversies surrounding the 2018 Elections, the Act has, ever since, remained an object of actual and proposed legislative changes by successive Parliaments. The changes have pertained to issues such as the eligibility of disqualified members of Parliament to head a party,[11] number of judges for election tribunals,[12] [13] holding of Senate elections,[14] electronic voting machines (EVMs), delimitation of constituencies, electoral rolls, the appointment of electoral staff,[15] and changes to the number of members on a bench at the ECP.[16] Further, during this time, Parliament also legislated twice on the right of overseas

[8]Constitution of the Islamic Republic of Pakistan 1973, art 55(2).

[9]Muhammad Anis, 'Election Reforms Bill 2017 Passed by NA' *The News International* (Islamabad, 22 August 2017) <*https://www.thenews.com.pk/print/225349-Election-Reforms-Bill-2017-passed-by-NA*> accessed 17 September 2025.

[10] *Ibid.*

[11] Q Tanoli, 'NA Rejects Bill Barring Disqualified Person Holding Party Chief Post' *The Express Tribune* (Islamabad, 21 November 2017) <https://tribune.com.pk/story/1564574/na-rejects-bill-barring-disqualified-person-holding-party-chief-post?utm> accessed 17 September 2025.

[12]AW Chaudhry, 'Federal Cabinet Approves Amendment in Election Act 2017' *Geo.tv* (Islamabad, 19 July 2018) <https://www.geo.tv/latest/203945-federal-cabinet-approves-amendment-in-election-act-2017> accessed 17 September 2025.

[13] Elections (Amendment) Act 2019 (Pakistan) <*https://www.na.gov.pk/uploads/documents/1551707989_769.pdf*> accessed 17 September 2025.

[14] News Desk, 'President Alvi Signs Off on Ordinance to Hold Senate Polls through Open Vote' *Dawn* (Islamabad, 6 February 2021) <https://www.dawn.com/news/1605837> accessed 17 September 2025.

[15] Dawn, 'NA Panel Clears Bill to Amend Elections Act' *Dawn* (Islamabad, 9 June 2021) <https://www.dawn.com/news/1628304> accessed 17 September 2025.

[16] Elections (Amendment) Act 2019 (Pakistan), s 2 <https://na.gov.pk/uploads/documents/1552385546_295.pdf> accessed 17 September 2025.

Pakistanis to cast their vote.[17] [18] As a major move, Parliament also reversed the lifetime disqualification under Article 62 of the Constitution in the aftermath of the Panama Papers case.[19] Moreover, Parliament also passed a law bestowing the unilateral power of announcing elections to the ECP,[20] as well as granting unprecedented powers to a caretaker government via an amendment to the Act.[21] In response to the Supreme Court's verdict on reserved seats,[22] the government passed a law regarding the independent candidates' mobility into political parties as well as the formula to determine reserved seats for non-Muslims and women in Parliament, with retrospective effect. Numerically, the Act has been amended on at least thirteen occasions, often in a divisive manner. The following sections of the paper elaborates the troubling aspects of such frequent changes to the election laws in more detail.

1. Part I: Political Maneuvers in Guise of Electoral Reforms

As mentioned earlier, it is needless to mention that Parliament did not transgress its constitutional authority in amending the Act on any of the abovementioned occasions. However, the ways in which an overwhelming majority of amendments have been brought to the Act indicate that such manoeuvers may have been politically motivated, making the notion of bringing a 'reform' rather questionable. The word 'reform' is subject to wide and subjective interpretations in the academic quarters, and there is no objective definition for it in an academic sense.[23] Normatively, a reform is a 'proposed or actual change that at least some people claim will be for the better'.[24] However, such claims of 'betterment' through 'reforms' often seem to have been driven by interests vested in political gain. Academics admit that self-interest is often the rationale behind many electoral reforms,[25] and Pakistan seems to be no exception to the general rule. As Samuel Issacharoff observes in *Fragile Democracies*, dominant political actors in transitional or fragile democracies often exploit formal legal mechanisms—particularly electoral laws—not to enhance democratic participation but to consolidate their own political power. Such reforms, while procedurally

[17] BR Web Desk, 'Joint Session of Parliament Passes Bill on Use of EVMs' *Business Recorder* (Islamabad, 17 November 2021) <https://www.brecorder.com/news/40133967> accessed 17 September 2025.

[18] IA. Khan, 'Elections, NAB Amendment Bills Sail Through Joint Sitting of Parliament' *Dawn* (Islamabad, 10 June 2022) <https://www.dawn.com/news/1694022> accessed 17 September 2025.

[19] W Ahmed, 'Lifelong Disqualification Comes to an End' *The Express Tribune* (Islamabad, 26 June 2023) <https://tribune.com.pk/story/2423654/lifelong-disqualification-comes-to-an-end> accessed 17 September 2025.

[20] N Guramani, 'Senate Approves Bill Allowing ECP to Unilaterally Announce Election Dates' *Dawn* (Islamabad, 16 June 2023) <https://www.dawn.com/news/1760067> accessed 17 September 2025.

[21] N Guramani, 'Election Act Amended to Grant Additional Powers to Interim Set-Up' *Dawn* (Islamabad, 26 July 2023) <https://www.dawn.com/news/1766930> accessed 17 September 2025.

[22] *Civil Appeals No. 333 and 334 of 2024* (Pakistan), <https://www.supremecourt.gov.pk/downloads_judgements/c.a._333_2024_mv.pdf> accessed 17 September 2025.

[23] Richard L. Hasen, 'What is Election "Reform" and Why Do Many Americans Want It' in *Election Reform: Past, Present, and Future, Oxford Handbook on Election Laws (forthcoming).*

[24] Daniel Hays Lowenstein et al, *Election Laws: Cases and Materials* (7th edn, 2022) 3.

[25] Lowenstein et al (n 18) pt II, 'Who Reforms and How?'

valid, frequently serve exclusionary or self-serving purposes and risk hollowing out the substance of democratic governance. The pattern in Pakistan, where electoral laws have been repeatedly altered by successive governments in a partisan manner, reflects this broader concern.[26]

A majority of changes to the Act have attracted criticism from the parliamentary opposition of the relevant times. The actual and proposed amendments have been partisan in their effect, almost always creating a divide among the political stakeholders. A glaring example of this was seen when two successive Parliaments, in less than a year's span, had first enacted and then reversed the law allowing use of EVMs and giving overseas Pakistanis the right to vote in elections.[27] These tweaks in the electoral laws were also odd because of the timings and legislative procedures followed for their adoption. Several other amendments to the Act were made within less than one year in the run-up to the elections.[28] Drawing from the recommendations of the Venice Commission (VC), the advisory body of the Council of Europe on constitutional matters, no changes to fundamental elements of election laws should be made in less than one year before an election as a matter of best practice; and even if this were to happen anyway, the old rules should be applied to the elections immediately following that.[29] The general principle behind this, according to the VC, is to prevent the incumbent from making politically lucrative changes to the rules of elections that put the opposition parties at a disadvantage.

Apart from timings, the said amendments were not made only through parliamentary statutes, but on one occasion in 2021, the President promulgated an Ordinance on the issue of open voting for Senate elections.[30] It is worth noting that prior to the promulgation of the aforementioned Ordinance, the same Bill was rejected by a majority in the NA under the same party's rule. Therefore, the said Presidential Ordinance was perceived to be in violation of the will of majority representatives of the public. Apart from that, on one occasion, the caretaker government also made an amendment regarding election tribunals.[31]

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[26] Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (CUP 2015) 77.

[27] See nn 8, 9 and 10.

[28] Elections (Amendment) Act 2017 (Pakistan) (eligibility of a disqualified member to hold party premiership) (November 2017); Elections (Amendment) Act 2023 (Pakistan) (ending lifetime disqualification and empowering ECP to unilaterally announce election date) (June 2023); Elections (Amendment) Act 2023 (Pakistan) (giving increased powers to caretaker government) (July 2023).

[29] *Venice Commission, The Code of Good Practice in Electoral Matters* (CDL-AD (2002) 023rev, item II.2.B).

[30] Elections (Amendment) Ordinance 2021 (Pakistan) (allowing open vote in Senate elections, subject to Supreme Court advisory verdict).

[31] See n 6.

The governments have had to make the use of joint sittings of the parliament to pass crucial election laws on at least three occasions,[32] which indicates a serious lack of parliamentary consensus. It is needless to mention that joint sittings are neither unconstitutional nor unusual in Pakistan's parliamentary norms.[33] However, these instances reflect that Parliament has had serious difficulties in passing election-related legislation on occasions when they did not enjoy a majority in either of the Houses and were not able to achieve the support of their political counterparts.

Other than the above, some amendments to the Act have allegedly been made without consensus in the PCER as well as other concerned committees in Parliament.[34] Again, neither the Constitution nor any law declares consensus in the PCER or other committees as a prerequisite for passing a legislation in Parliament. However, in a parliamentary democracy, committees perform the tasks of the brain, hands, ears and eyes of the Parliament and ensure transparency and accountability.[35] Scholars in the field have argued that parliamentary committees are the 'political nerve ends'.[36] The Constitution does not give any express reference to PCER – or most other committees for that matter. Yet, the importance of committees can be gauged from the fact that it gives the same privileges to members of committees so constituted as it gives to the members of the Parliament, including the freedom of speech and indemnity from various liabilities.[37] Moreover, the Constitution empowers Parliament to prescribe 'punishments' for those who refuse to give evidence or produce documents before committees.[38] Hence, these committees are constitutional bodies in their very nature, equivalent to 'mini parliaments'.[39] A blatant disregard for consensus-building forums like the PCER, in turn, carries the potential of weakening the legitimacy of the Parliament.

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[32] BR Web Desk, 'Joint Session of Parliament Passes Bill on Use of EVMs' *Business Recorder* (Islamabad, 17 November 2021) <https://www.brecorder.com/news/40133967> accessed 17 September 2025; Nadir Guramani, 'Elections, NAB Amendment Bills Sail Through Joint Sitting of Parliament' *Dawn* (Islamabad, 10 June 2022) <https://www.dawn.com/news/1694022> accessed 17 September 2025; Nadir Guramani, 'Election Act Amended to Grant Additional Powers to Interim Set-Up' *Dawn* (Islamabad, 26 July 2023) <https://www.dawn.com/news/1766930> accessed 17 September 2025.

[33] Constitution of Pakistan 1973, art 71(3) (allowing that a Bill rejected by a House may be put before a Joint Sitting of Parliament on request of the House where the Bill originated).

[34] 'NA Rejects Bill Barring Disqualified Person from Holding Party Chief Post' *The Express Tribune* (Islamabad, 21 November 2017) <https://tribune.com.pk/story/1564574/na-rejects-bill-barring-disqualified-person-holding-party-chief-post> accessed 19 September 2025; 'NA Passes Bill on Use of EVMs, Voting Right for Overseas Pakistanis' *Dawn* (Karachi, 8 June 2021) <https://www.dawn.com/news/1628304> accessed 19 September 2025; 'PTI Threatens to Boycott Parliamentary Committee on Electoral Reforms' *Dawn* (Karachi, 12 April 2023) <https://www.dawn.com/news/1747395> accessed 19 September 2025; 'PPP Objects to Amendments in Elections Act' *Dawn* (Karachi, 20 July 2023) <https://www.dawn.com/news/1766930> accessed 19 September 2025.

[35] A Tasleem, *Preliminary Research on Parliamentary Committees* (Manzil Pakistan, Oxford University Press 2013).

[36] R Raza, *Pakistan in Perspective, 1947–1997* (illustrated, reprint, revised edn, Oxford University Press 2009).

[37] Constitution of Pakistan 1973, art 66(2).

[38] Entry 42, Federal Legislative List, Schedule 3, Constitution of Pakistan 1973.

[39] FS Cheema, *Public Sector Financial Accountability: The Role of Public Accounts Committee in Pakistan* (Islamabad, ecosai-circular-spring-issue-2020-16.cdr 2020).

Furthermore, it may be argued that political parties bring their own reform agendas and that they have the full democratic right to implement them. Moreover, it is very rare for Members of Parliament to vote against Bills brought by their party, including those concerning electoral matters. In fact, Article 63A determines the flow of the Constitution and encourages parliamentarians to toe the party's policies in Parliament in crucial matters.[40] This is not unique to Pakistan, but a general characteristic of parliamentary democracies.[41] Therefore, in the scheme of our Constitution, there is little room for government parliamentarians to dissent on any 'reform'-oriented Bills. When perpetuated, each political party goes by the same logic, creating a cycle of bringing so-called electoral 'reforms', without glimmers of a real consensus among political stakeholders.

1.1. 'Deconstitutionalisation' of Electoral Laws through Colourable Legislation

The electoral norms in Pakistan are entrenched at both constitutional and statutory levels. This creates a grey area between the Constitution and the Act. The purpose of including the fundamental principles of the electoral system in the Constitution, or as Grishin terms it, the 'constitutionalisation' of electoral norms,[42] is to build safeguards against frequent changes, since constitutional amendments require a qualified majority as opposed to ordinary legislation requiring a simple majority in most jurisdictions.[43] The table below gives relevant constitutional provisions with corresponding sections from the Act.

Theme	Constitutional provision	Corresponding section in Elections Act 2017
Regulation of political parties	Articles 17 and 63A(a)	Sections 200 to213
Elections on reserved seats	Articles 51(2) and 106(2)	Section 104
Elections for local governments	Articles 140A, 219(d) and 222(f)	–
Chief Election Commissioner (CEC) including Acting CEC	Articles 213 and 217	Section 1(x)

[40] Constitution of Pakistan 1973, art 63A (rendering a parliamentarian disqualified only if they vote or abstain against party directions on election of Prime Minister or Chief Minister, vote of confidence or no confidence, a money bill, or constitutional amendment bill).

[41] MR Kerbel and JK White, *American Political Parties: Why They Formed, How They Function, and Where They're Headed* (University Press of Kansas 2023) <https://doi.org/10.1353/book.101031> accessed 17 September 2025.

[42] NV Grishin, 'Constitutionalization of Electoral Politics' (2020) 1(3) *Electoral Politics* 1, 'Abstract' <http://electoralpolitics.org/en/articles/konstitutsionalizatsiia-izbiratelnoi-sistemy/#references> accessed 17 September 2025.

[43] Office for Democratic Institutions and Human Rights, *Guidelines for Reviewing a Legal Framework for Elections* (1st edn, pp 4–5) <https://eos.cartercenter.org/uploads/document_file/path/384/OSCE_ODIHR_Legal_Framework_EN.pdf> accessed 17 September 2025.

Composition of CEC	Article 218	Section 3(2)[44]
Electoral rolls	Articles 219(a) and 222(2)	Sections 23 to 49
Conduct of elections for Parliament and Provincial Assemblies	Articles 219(a), 219(d) and 222(d)	Sections 50 to 103
Conduct of elections for Senate	Article 219(b)	Sections 105 to 131
Assistance to the ECP	Article 220	Sections 5 and 222(2)
Appointment of staff of Election Commission of Pakistan (ECP)	Article 221	Section 6(2)
Delimitation of constituencies	Article 222(b)	Sections 17 to 22
Corrupt practices and offences related to elections	Articles 222(e) and 218(3)	Sections 8 and 167 to 199
Elections petitions and tribunals	Articles 225 and 222(d)	Sections 139 to 166
Secrecy of voting	Article 226	Sections 81 and 122(6)

The table above gives a glimpse of the overlapping between provisions of the Constitution and the Act. Hence, there have been numerous occasions where contentious amendments to the Act were in tension, if not outright violation, of the provisions of the Constitution. Recently, Parliament amended the Act to include a clarifying provision regarding lifetime disqualification under Article 62(1)(f).[45] The provision set the duration of disqualification for a person at five years, against an earlier interpretation of the Supreme Court under Article 62(1)(f), which had imposed a permanent bar on such persons from holding public office.[46]

Although the amending Act was upheld by the majority of the Supreme Court, Justice Yahya Afridi, while dissenting with the majority stated: '*. . . Stipulating a maximum period of five years would require a constitutional amendment, rather than introducing it through ordinary legislation. It is imperative that a provision introduced through ordinary legislation cannot supersede the clear mandate provided in the Constitution. . . A change in law through simple legislation was not enough, rather an amendment in the Constitution was required. . .* '[47]

In another instance, the issue of the holding of Senate elections through a secret ballot came before the apex court through a Presidential reference. In the Presidential Reference,[48] the question was whether ordinary legislation, in lieu of a constitutional amendment, was sufficient to hold elections for members in the Senate through a secret ballot. The Supreme Court's opinion was

[44] Although this section deals with the 'procedure' of the Commission, it effectively sets out the composition of the Commission in relation to its proceedings.

[45] Elections (Amendment) Act 2023 (Pakistan) (amending s 232(2) of the Elections Act 2017).

[46] *Samiullah Baloch and others v Abdul Karim Nousherwani and others* PLD 2018 SC 405.

[47] See n 39, paras 30–31.

[48] *Reference No. 1 of 2020* (Pakistan, Supreme Court, advisory jurisdiction under art 186) <https://www.supremecourt.gov.pk/downloads_judgements/reference_1_2020.pdf> accessed 17 September 2025.

sought on whether the condition of a secret ballot, as per Article 226, was applied to such elections held 'under' the Constitution and not those held under the Elections Act 2017 – Senate elections being one of them.

In the abovementioned reference, the Attorney General, as well Advocate Generals of Islamabad Capital Territory (ICT), Punjab, Khyber Pakhtunkhwa (KP) and Balochistan, supported the amendment to the Act allowing the open ballot in Senate elections in the interest of 'transparency'. They argued that Parliament was competent under Article 222 to enact such legislation; however, the Advocate General of Sindh, as well as other parties, contested such arguments.[49] They argued that in order for Senate elections to be held through a secret vote, a constitutional amendment was required instead of an amendment to Section 122(6) of the Elections Act 2017.[50] Eventually, the Supreme Court, in its advisory jurisdiction, established that the term 'all elections' under Article 226 encompassed the elections for the members of the Senate, and hence, the amendment to the Elections Act 2017 allowing for open voting was not in line with Article 226.

In a narrow sense, such legislation may be classified as 'colorable legislation', as articulated by the Supreme Court in the *Federation of Pakistan v. Shaukat Ali Mian* case. In the said case, the Supreme Court ruled that any legislation by a legislature lacking legislative power, or subject to constitutional prohibition, is considered colourable legislation.[51] The concept of colourable legislation was also discussed in Justice Muhammad Ali Mazhar's dissenting note in the case regarding the vires of retrospectivity of Supreme Court (Practice and Procedure) Act 2023, although he had upheld the latter's constitutionality.[52]

The objective of embedding election norms and the structuration of legislation within constitutional text is to stabilise the electoral system and protect it from alterations based on vested interests.[53] Modern constitutionalism provides a wide range of space for regulatory norms in the Constitution, and electoral norms are among them; however, the same has 'blurred' the distinction between the Constitution and ordinary laws.[54]

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[49] See n 64, paras 14–25.

[50] *Elections (Amendment) Ordinance 2021* (Pakistan).

[51] *Federation of Pakistan v Shaukat Ali Mian* PLD 1999 SC 1026.

[52] *Constitution Petitions Nos 6, 8, 10–10, 18–20 and 33 of 2023* (Pakistan, Supreme Court) (noting that Justice Mazhar stated that the doctrine of colorable legislation was not applicable as he was among the majority that upheld the overall constitutionality of the Act) <https://www.supremecourt.gov.pk/downloads_judgements/const.p._6_2023_dt_05_01_2023.pdf> accessed 17 September 2025.

[53] See n 59, 'Abstract'.

[54] *Ibid*.

Here, it is not to cast doubts on the intentions of the Parliament. Moreover, the Constitution is not interpreted only in the courts but also by the other branches of the state.[55] However, when the ruling parties start to attach a subjective and politically beneficial meaning to constitutional provisions through ordinary legislation, the harmony between the two is jeopardised by potential exploitation of the platform of Parliament.

During the interpretation of the provisions of the Constitution with regard to electoral laws, an interesting point is the use of different terms in different Articles of the Constitution related to electoral laws. Articles 219 and 225, which deal with the duties of ECP and election disputes respectively, allow changes in law specifically through an 'Act of Parliament', but Article 222 states that 'subject to Constitution', Parliament may 'by law' provide for allocation of seats, delimitation, electoral rolls, election disputes and corrupt practices and 'all other matters necessary for the due constitution of the two Houses'. In this respect, the word 'law', instead of 'Act of Parliament', used in Article 222 suggests that certain matters may require an amendment to the Constitution instead of through ordinary law.[56] Moreover, the contents of Article 222 involve certain matters (such as the allocation of seats and delimitation of constituencies) that obviously require an amendment to the Constitution[57], needing a two-third majority in Parliament. The phrase 'by law' is used on several instances in the Constitution, but on at least one instance in Article 1 of the Constitution, the implied meaning is that it requires an amendment to the Constitution.[58] If this assumption is applied to Article 222(f) stating '*all other matters for the due constitution of the two Houses, Provincial Assemblies and the local governments*,' a wide range of issues may require a constitutional amendment instead of an ordinary 'Act of Parliament'.

It is needless to mention, at the cost of repetition, that Parliament may very well not be violating any constitutional provision while passing amendments to the Act on most occasions. This is true because the term 'by law' includes an ordinary Act of Parliament, an Ordinance, rules, regulations, or any other instrument having a force of law. However, as highlighted above, it has been expressed by the courts, as well as political parties, that ordinary legislation is not always sufficient, and instead a constitutional amendment is often required.

It may be argued that on the flipside, ordinary legislation allows flexibility for future governments, especially those lacking a two-third majority, to do away with 'bad' electoral

[55] NK Katyal, 'Legislative Constitutional Interpretation' (2000) 50 *Duke LJ* 1335.

[56] It is true that even an amendment to the Constitution is enacted through an "Act of Parliament." However, generally, an Act of Parliament is used for ordinary legislation requiring a simple majority rather than the two-thirds majority needed for constitutional amendments, and the Constitution does not treat a constitutional amendment as a separate form of legislation.

[57] Constitution of Pakistan 1973, art 51 (dealing with the number and allocation of seats in Parliament).

[58] Constitution of Pakistan 1973, art 1 (dealing with the territories of Pakistan, including the provinces and Islamabad Capital Territory; requiring amendment in case of the formation of new provinces).

legislation and bring about 'reform'. However, as discussed above, such reforms have mostly been motivated by self-interest instead of the public good as such, the fate of which is eventually determined by the courts. On the other hand, Constitutional amendments enjoy immunity from being questioned by the courts on any grounds 'whatsoever'.[59] The Supreme Court, through a 17-member bench, has also reiterated that Pakistan does not have any equivalent of a "basic structure".[60] Therefore, Parliament is left with little excuse to argue that bringing electoral reforms through Constitutional amendments can still be struck down by the Courts. On the other hand, ordinary legislation is always susceptible to constitutional review under Article 184(3), often bringing judicial and legislative branches head-to-head.

Mark Tushnet – a prominent constitutional scholar – explains this as "constitutional hardball" and argues that certain changes under the guise of constitutional authority may not appear as 'unconstitutional' in themselves, and that they remain defensible under constitutional doctrines. However, he maintains that such attempts are nevertheless questionable since they play with substantive principles, politically benefitting those in power.[61]

1.2. Federalism Concerns

In a recent opinion,[62] one of the Justices of the Supreme Court had termed the 18th Amendment as a "constitutional watershed" in the democratic history of Pakistan. This was said to be so because it devolved powers to the provinces, leading towards greater self-government exercised by constituent units.

However, our federal structure in the Constitution does not require a provincial legislature's consent even in amending the Constitution,[63] let alone electoral laws. The distribution of legislative powers among Parliament and Provincial Assemblies is fairly clear. Articles 141 and 142 give a very clear picture of the federal structure, empowering Parliament to make laws on subject matters enumerated in the federal legislative list – elections being one of the items therein. It is practically true that the parties in charge of Parliament often have representation in Provincial

[59] Constitution of Pakistan 1973, art 239(5).

[60] *District Bar Association (Rawalpindi) v Federation of Pakistan* PLD 2015 SC 401 (pertaining to the 21st Amendment, decided by a 17-member full bench). For a detailed discussion, see Rao Imran Habib, 'The Basic Structure of the Constitution of Pakistan and Judicial Review of Legislative Actions: A Historical and Analytical Review' (2020) 6(1) *Journal of Historical Studies* 91–103 <https://jhs.bzu.edu.pk/upload/vol%20I-%2020_6.%20Article%20Rao%20Imran%20Judicial%20Review%20JHS.pdf_36.pdf> accessed 17 September 2025.

[61] *Mark Tushnet, Constitutional Hardball (Georgetown University Law Center, Public Law and Legal Theory, Working Paper No 451960).*

[62] Justice Yahya Afridi, dissenting opinion in *Civil Appeal No 981 of 2018* (Pakistan, Supreme Court) para 10 <https://www.supremecourt.gov.pk/downloads_judgements/c.a._981_2018_25032024.pd f> accessed 17 September 2025.

[63] Note that the provincial legislature's two-thirds majority is required where its territorial limits are being altered.

Assemblies too. However, this may not always be the case. It has happened on numerous occasions that different parties rule at federal and provincial levels. Therefore, there is no Constitutional obligation upon Parliament to seek the approval of the provincial legislature in any formal manner while amending election laws. Except for the Senate, which of course cannot replace the provincial legislature, there is no formal requirement of taking the provinces' consent under Article 222 while amending election laws. Nevertheless, most importantly, the election laws legislated by Parliament will be equally applicable to the elections in provinces, which certainly poses risks for federalism as discussed towards the end of this section. Moreover, the tribunals for determining the disputes related to elections, both at federal and provincial levels, are also formed and regulated by the Parliament.[64]

Furthermore, Article 219(e) also gives a wide range of powers to Parliament to determine the functions of the ECP.[65] Although the provincial members of the ECP give a sense of wider representation of the provinces in the electoral apparatus, that does not seem to be the case in reality. The appointment of the provincial members of the ECP is also done by the Parliamentary Committee in a similar manner to the appointment of the Chief Election Commissioner (CEC).[66] Therefore, despite enjoying constitutionally protected tenure, the provincial members of the ECP are also selected by the Parliament, and provincial legislatures seem to have no say in this. Likewise, the Parliament has the ultimate authority to make laws on determining the procedure for the ECP to decide election disputes arising out of provincial elections.[67] In this sense, the ECP is entirely a federal body, and Parliament determines the fate of electoral laws applicable in provinces.

The Pakistan Bureau of Statistics (PBS), an institution tasked with counting the population of the country, is also a federal body since 'census' is one of the federal subjects in the Constitution.[68] Among other socio-economic benefits attached to demographic strength, one of the most crucial aspects attached with census results is the allocation of seats in the NA.[69] The provincial representation exists on the Census Advisory Committee as well as the Council of Common Interests (CCI).[70] However, the role of the CCI has been restricted to the census alone, and not to

[64] The Constitution of Pakistan, art 225

[65] While referring to the duties of ECP, the said provision says, 'such other functions as may be specified by an Act of Majlis-e-Shoora (Parliament)'

[66] Constitution of Pakistan 1973, art 218(1)(b); see also arts 213(2A)–(2B) (provincial members of the Election Commission are appointed by the President in the same manner as the Chief Election Commissioner, with three names submitted by both the Prime Minister and the Leader of the Opposition to the Parliamentary Committee).

[67] Constitution of Pakistan 1973, art 225.

[68] Constitution of Pakistan 1973, Part II, Federal Legislative List, entry 9.

[69] Constitution of Pakistan 1973, art 51 (mandating amendment of the Constitution after each census to delimit constituencies and apportion National Assembly seats to each province).

[70] Constitution of Pakistan 1973, arts 153–154.

electoral reforms in general.[71] Even with regard to the issue of census, the provincial political parties have raised serious objections to the federal government in regard to the undercounting of the provincial population in the digital census.[72] [73]

On the other hand, the Indian Constitution is more devolutionary in this respect. Article 246 of the Indian Constitution, read in conjunction with Entry 37 of the 'State List', allows the state legislature to make election laws 'subject to the provisions of any law made by the Parliament'. However, it is true that the Indian Parliament is entitled to make election laws with respect to Parliament itself as well as the State List in 'national interest',[74] which undermines the states' true power of legislating on electoral issues. Similarly, the US Constitution also gives at least some limited powers to the states to regulate electoral laws.[75] The US Supreme Court has also interpreted this clause in a broad manner in favor of state legislatures in an important constitutional case.[76]

However, the above is not the case under Pakistan's Constitution. Under such a constitutional design, it appears to be a greater political responsibility upon the Parliament to either practice self-restraint or garner a greater consensus from provincial stakeholders while amending election laws. The party that takes control of Parliament through numerical majority can dictate the election rules for the provincial electorate. And such a risk can neither be averted (and in fact may be exacerbated) if electoral reforms lying in grey areas are brought through Constitutional amendment instead of ordinary legislation. Hence, it is of vital importance for Parliament to bring electoral reforms more responsively, regardless of the pathway, and with greater consensus among political stakeholders – particularly those in provinces for the reasons mentioned above. Any undesired changes or venturous amendments vis-à-vis electoral norms may actually change the shape of the Constitution itself in the future.

1.3. Fundamental Rights at Stake

Electoral laws inevitably intersect with several fundamental rights guaranteed by the Constitution. In a recent judgement, the Supreme Court of Pakistan stated, '*In the democratic process, individuals exercise their right to vote . . . The rights involved are not only of those participating in the elections, but also of the public . . . In exercise of these fundamental rights, citizens shape their destiny*

[71] Constitution of Pakistan 1973, Part I, Federal Legislative List (elections); Part II, Federal Legislative List (census). The jurisdiction of the Council of Common Interests extends only to Part II and does not cover Part I.

[72] Shahbaz Rana, 'Centre rejects 'flawed census' claims by Sindh' *The Express Tribune* (31 August 2017) <https://tribune.com.pk/story/1495434/centre-rejects-flawed-census-claims-sindh> accessed 19 September 2025.

[73] News Desk, 'PPP terms 'Digital Census' as fake, far bigger damage to Sindh' *Associated Press of Pakistan* (22 August 2023) <https://www.app.com.pk/domestic/ppp-terms-digital-census-as-fake-far-bigger-damage-to-sindh/> accessed 19 September 2025.

[74] Constitution of India 1950, art 249.

[75] US Constitution, art I, § 4, cl 1.

[76] Smiley v Holm, 285 U.S. 355 (1932).

. . . '[77] In the similar judgement, the Supreme Court had declared the right to vote as a fundamental right while calling it a part of 'political justice'.[78]

On another occasion, the Supreme Court ruled that election laws must be interpreted in a way that a participatory approach is adopted and the fundamental rights of the people are not compromised.[79] Similarly, in a dispute regarding delimitation of constituencies for the February 2024 election, the Supreme Court declared that delaying elections would *'undermine democracy and adversely affect the fundamental right to vote and form a political government of millions of voters'*.[80] The wisdom of the Supreme Court's verdicts helps us realise the importance of the electoral system in a functioning democracy. This serves as the reminder to Parliament and other authorities that any law that deals with electoral rules requires special caution. Where it is the duty of the judges to be the guardians of the Constitution, Parliament remains pivotal in the advancement of democracy and fundamental rights. More often than not, any significant change or 'reform' in election laws is likely to be a matter of public importance with an impact on fundamental rights. Hence, there is a greater probability of such issues landing in the Supreme Court for the ultimate decision, as the interests of the public at large are involved.[81] This has been the case on several occasions, especially in relation to overseas' right to vote, use of EVMs, lifetime disqualification of contestants – all of which will be discussed in more detail later in this paper.

Although Articles 184(3) and 199 of the Constitution are placed as a natural mechanism to keep the self-motivated changes to electoral laws in check, this ultimately leads to judicialisation of politics. As explained earlier, such reforms are often partisan and lack wider support from the broader spectrum of political forces. Hence, one way or the other, it inevitably drags the Constitutional into determining the fate of such changes in electoral rules, which, for the ruling party, is always a 'political' question.

2. Part II: The Extraordinary Nature and Constitutionalisation of Electoral Norms

2.1. Hierarchy of Legal Norms

In the preceding sections, I have argued for a clear distinction to be made between the Constitution and ordinary legislation, with the latter being inferior to the former. However, the

[77] Civil Petition Nos. 150 & 152 of 2024 (Pakistan Supreme Court, 29 January 2024) paras 1–2 <https://www.supremecourt.gov.pk/downloads_judgements/c.p._150_2024_3012024.pdf> accessed 19 September 2025.

[78] Constitution of Pakistan 1973, Preamble; art 17(2) (use of the phrase 'political justice').

[79] Nasir Iqbal, 'SC allows Parvez Elahi, four others to contest polls' *Dawn* (27 January 2024) <https://www.dawn.com/news/1808998> accessed 19 September 2025.

[80] Civil Petition No. 4305 of 2023 (Pakistan Supreme Court, 18 December 2023) paras 1–3 <https://www.supremecourt.gov.pk/downloads_judgements/c.p._4305_2023.pdf> accessed 19 September 2025.

[81] Constitution of Pakistan 1973, art 184(3) (defining the original jurisdiction of the Supreme Court).

primary question this section analyses is whether or not any hierarchy within different categories of ordinary legislation/statutes exists. The answer is that there is no express hierarchy of subject matters or categorisation of statutes as such within our Constitution.

The hierarchy among the sources of law is said to have originated from the work of Hans Kelsen.[82] In the latter's words, '*the legal order is not a system of coordinated norms of equal level, but a hierarchy of different levels of legal norms*'.[83] It is fairly evident that our Constitution is that one instrument on the top, from which the entire legal system flows. That is perhaps why the punishment of high treason is only attracted by the abrogation of the Constitution and no other piece of legislation.[84]

However, the Constitution does mention different categories, other than itself, of legal norms including, the Act of Parliament,[85] Ordinance,[86] 'law'[87] and rules of procedure.[88] Most of the terminologies for making a legally binding norm are self-explanatory. However, two unique aspects of our Constitution are the terms 'by law' and 'Act of Parliament'. In the normative sense, the latter only covers an ordinary statute requiring simple majority in the Parliament while the former encompasses a Constitutional amendment under its purview. Nonetheless, there is no express hierarchy of laws in our Constitution except that a Constitutional amendment requires a qualified majority.

For the sake of discussion, some other jurisdictions do, however, have such an express hierarchy. For example, the Constitution of Hungary has a special category of legislation called the 'cardinal Acts'. Such cardinal Acts, among other sources of law such as Acts, government decrees, and prime ministerial decrees, require the '*adoption and amendment of which requires the vote of two-thirds votes of National Assembly present*'.[89] The Hungarian Fundamental Law (or Constitution) lays down a range of subject areas – such as nationality, freedom of the press, and right to religious freedoms – which also includes the operation of political parties and electoral campaigns for elections in their NA which are dealt by cardinal Acts.[90] It is true that even the Hungarian Fundamental Law

[82] Lóránt Csink, Balázs Schanda, and András Zs. Varga (eds), *The Basic Law of Hungary: A First Commentary*(Clarus Press 2012).

[83] Hans Kelsen, *Pure Theory of Law* (University of California Press 1967) 221.

[84] Constitution of Pakistan 1973, art 6.

[85] Ibid, arts 27(1), 48(7), 75(3)–(4), 143, 168(3A), 219(e).

[86] Ibid, arts 89, 128.

[87] Ibid, arts 1(3), 87(2), 98, 138, 144(1), 151(2), 222, 251(3), 253(1), 270(1).

[88] Ibid, arts 53(3), 66(1), 67(1), 154(5), 191, 202, 231.

[89] Fundamental Law of Hungary (2011), art T(4).

[90] Ibid, arts VIII(4), IX(3), 2.

does not provide a hierarchy of sources of law, yet it is clear through a close reading of Fundamental Law that the cardinal Acts are at the top of all other legislations.[91]

In the context of the US, Ernest Young, in his seminal work 'The Constitution Outside the Constitution', presents a thought experiment and argues that we should focus on the functions of the Constitution instead of its form alone.[92] He opines that many statutes, in effect, play a similar role as the Constitution despite not being entrenched within it; and he calls them 'constitutive material', and argues that many of the salient features of the Constitution are outside the canonical text and hence are relevant to statutory construction.[93]

The example of the United Kingdom, despite not having one single 'written' constitution, still offers us valuable tools to decipher the hierarchy of legislation. In 2003, the Queen's Bench, in a landmark judgement, ruled that a constitutional statute was such that *'conditions the legal relationship between citizen and State in some general, overarching manner or enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights'*.[94] Academics have inferred that such a definition entails that judges distinguish the constitutional statute from ordinary ones based on the subject matter.[95] Other scholars argue that fundamental or constitutional statutes embody or generate higher-order principles.[96] In the UK, Representation of the People Act 1832, among several other statutes, is considered to be one such statute that holds constitutional importance and hence is protected from the principle of implied repeal.[97]

In Moldovan Constitution, for instance, the concept of 'organic' law exists, which stands higher in the hierarchy than the ordinary statute but lower than the Constitution, and the electoral system is governed by organic law.[98] Our Constitution does not have any sort of a Hungarian counterpart of a 'cardinal Act', nor is it anything like the UK, where there is no single, consolidated, and codified constitution. Similarly, the Romanian Constitution also has this

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[91] Lóránt Csink, Balázs Schanda and András Zs. Varga (eds), *The Basic Law of Hungary: A First Commentary* (National Institute of Public Administration 2012) ch 5.2.

[92] Ernest A Young, 'The Constitution Outside the Constitution' (2007–2008) 117 *Yale L.J.* 408.

[93] Ibid.

[94] Thoburn v Sunderland City Council [2002] EWHC 195 (Admin), [2003] QB 151.

[95]Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37(2) *Oxford Journal of Legal Studies* 461, 461–81, "Subject Matter" <https://doi.org/10.1093/ojls/gqw030> accessed 19 September 2025 (accessed via SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2743936).

[96] David Jenkins, 'Common Law Declarations of Unconstitutionality' (2009) 7 *International Journal of Constitutional Law* 183, 201.

[97] See above n 87.

[98] Constitution of the Republic of Moldova (2016) art 72(3)(a) <https://www.constituteproject.org/constitution/Moldova_2016> accessed 19 September 2025.

category of 'organic law', and the electoral system in this case is likewise governed by organic law.[99]

Certainly, Pakistan's Constitution is a detailed document compared to the Hungarian 'core constitution'.[100] In the case of Pakistan, however, the only instance where a qualified majority is required in Pakistan's legislative system is for the impeachment of the President and for an amendment to the Constitution.[101] The examples of Hungary, UK and the US given above provide some logical understanding of the Constitution and its interplay with statutory laws, especially in the context of electoral matters.

One has to agree that the Hungarian model of Cardinal Acts carries the unnecessary risk of entrenching norms at the constitutional level, which may also bind the future Parliaments and disallow the flexibility required to change rules on any given subject, let alone elections. Moreover, amending the Constitution too often can permanently change the shape of any canonical document. However, the foundation of the arguments in this paper lies in the assumptions that political actors do not attempt to override constitutional provisions in matters that fall under the 'grey' areas, as mentioned above, and that political stakeholders must indulge in consensus-building exercises, at least to the extent of bringing reforms to the electoral laws.

2.2. Election Laws as 'Subjects' and 'Predicates'

Among other things, one of the indicators for assessing the importance of a particular area of law is to see how well it is constitutionalised – in other words, how does the constitution address it. Quantitatively, the word 'election' is mentioned as many as 117 times in the Constitution.[102] As Grishin N.V. points out, this may be divided into two sub-categories: subjects and predicates.[103] He distinguishes between the two and argues that if something is mentioned as a predicate, it is not described in a comprehensive or direct manner. However, he argues that if election laws are discussed as a subject, there will be direct reference to them, often in the form of standalone articles.

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[99] Constitution of Romania (2003) art 73(3)(a) <https://www.constituteproject.org/constitution/Romania_2003.pdf> accessed 19 September 2025.

[100] András Zs. Varga, 'A mag-alkotmány védelmében' ('In the Defence of the Concept of Core Constitution') (2011/2) *Pózmóny Law Working Papers* <http://www.plwp.iak.ppke.hu/hu/muhelytanulmanyok/20111/9-20112.html > accessed 19 September 2025.

[101] Constitution of Pakistan 1973, arts 47(8), 239(1) (note: for impeachment a two-thirds majority is required in a joint sitting of Parliament, whereas for a constitutional amendment a two-thirds majority is required in both Houses: National Assembly and Senate).

[102] Constitution of Pakistan 1973, arts 41–275.

[103] Nikolai V Grishin, 'Electoral Institutions as Subjects and Predicates in Constitutional Text' (2020) 1(3) *Electoral Politics* <http://electoralpolitics.org/en/articles/konstitutsionalizatsiia-izbiratelnoi-sistemy/#references> accessed 19 September 2025.

In Pakistan's context, the entire Chapter 2 of Part VIII of the Constitution deals with elections as the sole subject of discussion. In this sense, there are as many as five standalone articles in the Constitution that specifically focus on election laws.[104] The specialised articles on electoral system and laws indicate that the Constitution gives extraordinary importance to electoral and laws rules. Research shows that, unlike Pakistan's Constitution, this is not the case with the majority of the constitutions, as they discuss elections as a predicate – i.e., in relation to another phenomenon.[105]

Moreover, Pakistan's Constitution contains information regarding all key aspects of the electoral process, including voting rights, voting age, electoral formula, delimitation of constituencies, an electoral management body (EMB), dispute resolution mechanism, territorial distribution of constituencies, as well as voter registration.[106] Except for the Indian and Mexican constitutions, the respective constitutions of the G20 countries lag far behind in constitutionalisation of the above-mentioned aspects of electoral processes.[107] Therefore, as discussed above, Pakistan's Constitution places special importance upon stability by entrenching and controlling almost all major aspects of electoral regulation; and as discussed in Part I(c), the deep entrenchment of electoral norms in Constitution requires special caution on part of Parliament to keep ordinary legislation in line with the constitutional levers. Contrarily, the risks of deconstitutionalisation of the electoral regime are increased, making the democratic structure unstable, with all the natural consequences that it may follow.

Considering the importance of electoral laws in the Constitution, the following section explains the role of political parties with regard to a deeper understanding of the importance of electoral laws and their impact on the constitutional design and the state of democracy.

3. Part III: Role of Political Parties in our Constitutional Scheme

Political parties are central to our constitutional arrangements.[108] A single political party, or a set of political parties, become the driving force of democracy in any country, let alone Pakistan. In our context, as explained above, Article 222 of the Constitution is a special provision. It essentially

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[104] Constitution of Pakistan 1973, arts 222–226.

[105] See above n 18.

[106] Constitution of Pakistan 1973, arts 48, 51, 91, 106, 106(3)(a), 213–221, 219, 222, 225 (for voting rights, voting age and territorial distribution of constituencies: arts 51 and 106; for electoral formula/form of government: arts 48 and 91; for delimitation of constituencies: arts 106(3)(a) and 222; for Election Management Body: arts 213–221; for electoral disputes: art 225; for voter registration: art 219).

[107] See above n 92, Table 1, 'Elections in G20 Constitutions'.

[108] Vernon Bogdanor, 'The Constitution and the Party System in the Twentieth Century' (2004) 57(4) *Parliamentary Affairs*718, cited in Tom Ginsburg, Aziz Huq and Tarunabh Khaitan, 'The Comparative Constitutional Design of Elections, Parties and Voting'.

allows the Parliament to make and change electoral laws. However, by virtue of this article, Parliament is also entrusted to regulate such rules as can decide the fate of future Parliaments.

Within the framework of our Constitution, the first and foremost is the right of citizens to form, or be a member of, a political party as an association.[109] The other angle requires us to look at the role of political parties in the broader canvas of parliamentary politics as a whole. For this, Article 63A is indicative of the importance of political parties in controlling the choices of the representatives of people in the Parliament.[110] The same is true for political parties' prerogative to nominate members for reserved seats based on the principle of proportional representation.[111]

The Supreme Court has emphasised, '*The legitimacy of governance, future policies, legislation and public trust in the representative institutions exclusively depends on the integrity of the electoral process and institutions*'.[112] In another judgement, the Supreme Court stated that political parties were the primary actors in our system of parliamentary democracy and that political parties were the bedrock on which democracy rested.[113] The aforementioned remarks of the Supreme Court were predicated upon a landmark judgement in the Benazir Bhutto case, in which it was established: '*They [political parties] are a group victorious at a general election which becomes the government. . . Political parties are institutions of very great importance under our form of government. They are, in fact, the effective instrumentalities by which the will of people may be made vocal and enactment of laws in accordance therewith made possible . . . they are now regarded as inseparable from, if not essential to, a republican form of government*'.[114]

In light of the above, political parties hold a special place in a representative form of government. One might argue that political parties were justified in bringing their own manifestoes and agendas, as democracy was all about the '*competitive struggle between parties that gave full meaning and effect to the process of elections*'.[115] In this context, the political parties' legal significance has increased, and they have essentially become an 'arm of the state' and public utilities, as opposed to mere private association of private persons, since they perform public and democratic

[109] Constitution of Pakistan 1973, art 17.

[110] Ibid, art 17 (defining the conditions for defecting from a political party, which renders a parliamentarian disqualified from membership of Parliament).

[111] Constitution of Pakistan 1973, arts 51, 106 (for the National Assembly and Provincial Assemblies, respectively).

[112] Justice Athar Minallah, *Civil Appeal No 333 of 2024*, para 2 <https://www.supremecourt.gov.pk/downloads_judgements/c.a._333_2024_25062024.pdf> accessed 19 September 2025.

[113] Constitution Petition No 2 of 2022, Short Order, para 1, 21 <https://www.supremecourt.gov.pk/downloads_judgements/const.p._2_2022_14102022.pdf> accessed 19 September 2025.

[114] *Benazir Bhutto v Federation of Pakistan* [1988] PLD SC 416, 515–20.

[115] See above n 107, 52.

functions.[116] The following section highlights the importance of such consensus-building exercises in a democracy that rests on conventions on democratic values, even in the absence of strict needs for it.

3.1. De Jure Rules versus De Facto Values

Once the competition or 'struggle' culminates with the conduct of elections, the victorious group gets to decide the rules of the future competitive games, i.e. the next election(s) through its legislative powers. Hence, perhaps the most sustainable way of keeping the powers of the victorious group in check is its active engagement with opposition parties in the Parliament and to collectively decide the rules by which the next game will be played. Since engaging opposition parties while initiating electoral reforms – through constitutional amendment or ordinary legislation – is not a constitutional requirement, the ruling party(ies) may not feel an incentive to garner consensus through engagement with opposition forces. As Tarunabh Khaitan argues in his theory of moderated parliamentarism, the sustainability of parliamentary democracies hinges not only on their formal structures but also on their internal cultures of deliberation and power-sharing.[117] In contexts where the Constitution permits majoritarian control over sensitive matters (such as electoral laws), Khaitan emphasises the need for a normative commitment to inclusive and consensus-based lawmaking, especially by ruling parties. This reflects a deeper responsibility upon political actors to practise restraint, even when they are not formally compelled to do so by the constitutional text. However, political parties play a role in promoting the constitution's endurance as they particularly have a longer time horizon than particular leaders.[118] This is especially relevant to such states that have federalised regimes.[119]

One example of this is the de jure requirement of a two-third majority to amend our Constitution. This is a natural impetus to garner consensus among political forces, especially when a single party does not have the required majority. However, there are many important areas, like making electoral laws, in which a qualified majority is not required yet which can have far-reaching consequences on the political landscape. A government may make its 'transient' turn to perpetuate its rule, retain office and squirrel from being challenged in elections.[120] The Constitution leaves a lot of discretion to the Parliament to make electoral laws, and the Elections Act 2017 contains a wide range of regulations concerning electoral processes.

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[116] Richard Gauja, 'Political Parties: Private Associations or Public Utilities?' in *Comparative Election Law Handbook*(2020) 177–92.

[117] Tarunabh Khaitan, 'Balancing Accountability and Effectiveness: A Case for Moderated Parliamentarism' (2020) 38(3) *Oxford Journal of Legal Studies* 764.

[118] Tom Ginsburg, Aziz Huq and Tarunabh Khaitan, 'Introduction: The Comparative Constitutional Design of Elections, Parties and Voting', 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4729810> accessed 19 September 2025.

[119] Ibid 4.

[120] Ibid, 11.

Therefore, even in areas where a Constitutional amendment is not needed, political parties ought to engender a de facto entrenchment of a consensus-based approach for electoral reforms as a matter of political practice.[121] Take the example of voting through EVMs for that matter. As mentioned above, successive governments have legislated on the issue, allowing and then disabling it.[122] The discourse on the use of EVMs did not quite revolve around the question whether Parliament needed a constitutional amendment for this or not. Instead, it was a political question with far-reaching consequences for the credibility of elections, with two differing points of view. A similar contention was raised over the right of overseas Pakistanis to vote in the elections.[123] According to official statistics, there are as many as 9 million overseas Pakistanis at present,[124] who may have had a significant impact on the final outcomes of any elections. In this case as well, it was not really questioned whether the Parliament could enfranchise the overseas voters through ordinary legislation or not – because it could do that through ordinary legislation. Allowing and then reversing the decision on the use of EVMs was largely done on the recommendations of the Election Commission of Pakistan (ECP).[125]

The above mentioned examples emphasise the magnitude of impact that a government's electoral 'reform' may have on the political situation of the country. Hence, it becomes the political responsibility of the ruling party(ies) to consult the parliamentary stakeholders so that their trust in democracy is retained, with the utmost trust that they may get a chance to come from government if they win future elections. This is also the reason why institutions like Free and Fair Election Network (FAFEN) have in the past warned against electoral reforms without consensus, stating that without larger political consensus, the legitimacy of future elections may become questionable and cause instability in democratic consolidation in Pakistan.[126] Interestingly, FAFEN had recommended that such consultation should be done within Parliament and across

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[121] Ibid, 9.

[122] 'Disallowing' does not mean that it is prohibited. However, as per s 103, the ECP 'may' conduct pilot projects for utilisation of electronic voting machines and biometric verification systems only in by-elections, and not general elections. Nonetheless, voting in Pakistan continues to take place through manual procedures. To read more on this, see above n 30.

[123] This is covered under s 94 of the *Elections Act 2017*, and at present, it does not give a general right to overseas Pakistanis to vote through electronic means. Instead, the ECP 'may' conduct pilot projects for the voting of overseas Pakistanis. For more details, see above nn 15–16.

[124] Overseas Pakistanis Foundation, 'Services' <https://www.opf.org.pk/#:~:text=Services&text=There%20are%20approximately%209%20million%20Overseas%20Pakistanis%20living%20around%20the%20globe> accessed 19 September 2025.

[125] Election Commission of Pakistan, *Report on EVM & Overseas Voting*, 70 <https://ecp.gov.pk/storage/files/2/reports/EVM%20&%20OV%20Final%20Report.pdf> accessed 19 September 2025. Also see, Election Commission of Pakistan, *Report on Electoral Recommendations*, 7 <https://ecp.gov.pk/storage/files/1/report3.pdf> accessed 19 September 2025.

[126] Free and Fair Election Network (FAFEN), 'FAFEN Warns Against Electoral Reforms Sans Consensus' (12 September 2021) <https://tribune.com.pk/story/2319826/fafen-warns-against-electoral-reforms-sans-consensus> accessed 19 September 2025.

provincial legislatures, which furthers our point related to rising federalist concerns vis-à-vis electoral reforms. On another occasion, FAFEN had also recommended forming a cross-chamber, multi-party parliamentary committee with representation from both Houses for the purpose of electoral reforms.[127]

3.2. Parliament's Representative Function

Parliament is interchangeably called a 'legislature' i.e. the institution that is to make laws applicable across a territory or area. However, law-making is not the only function that Parliament is to perform in democratic settings. Another important function of the Parliament is the representation of the people and serving as an arena for resolving differences within the state, since it represents a broad range of interests.[128] Parliament is an institution through which the collective will of the majority of the society is expressed, and not just of the parliamentary majority itself.[129] This echoes Khaitan's view that, for parliamentary democracy to function effectively, the majority must exercise its power with restraint and seek to include minority voices as part of its democratic responsibility.[130]

Therefore, at any given point in time, the Parliament is also the ultimate political institution, inherently affected by the behaviour of political parties and their actions. That is also the reason why the office of the Leader of Opposition is a constitutional one, while other key functions performed by members from the opposition benches are entrenched in the Constitution.[131] Most importantly, the appointment of Chief Election Commissioner (CEC) and other members of the Election Commission of Pakistan (ECP) contains a constitutional requirement for the prime minister to consult with the leader of opposition.[132] Even in the case of disagreement between the prime minister and the leader of the opposition, the matter goes to a committee comprising equal members from the treasury and opposition benches.[133]

The purpose of constitutionally entrenching the role of the opposition, particularly in appointing the CEC and constitutional courts' judges, is telling. Our constitutional fabric encourages an

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[127] Free and Fair Election Network (FAFEN), 'FAFEN Urges Political Consensus on Critical Electoral Reforms Ahead of General Elections' (ANFREL, 2023) <https://anfrel.org/fafen-urges-political-consensus-on-critical-electoral-reforms-ahead-of-general-elections/> accessed 19 September 2025.

[128] Hassan A Saliu and Abulrasheed A Muhammad, 'Exploring the Parliament' (2009) 14 *African Journal of International Affairs and Development* 140, Introduction.

[129] A. A. Popova, 'Problems of Formation of the Parliament as a Political Institute' (2020) 4 *Sociopolitical Sciences* 22–31.

[130] Tarunabh Khaitan, 'Balancing Accountability and Effectiveness: A Case for Moderated Parliamentarism' (2020) 38(3) *Oxford Journal of Legal Studies* 764.

[131] Constitution of Pakistan 1973, arts 175A(10), 224 (dealing with the appointment of judges of the Supreme Court and High Courts, and the appointment of the caretaker Prime Minister, respectively).

[132] Constitution of Pakistan 1973, art 213(2A).

[133] Ibid, arts 213(2A)–(2B).

active role for the opposition forces in parliamentary affairs. The inclusion of members from opposition benches in other committees is also a practice of our Parliament which needs to be furthered.

4. Part IV: Constitutional Checks on the Unbridled Powers of Parliament

It is true that the Constitution does contain self-regulatory provisions with regard to keeping a check on Parliament's powers under Article 222 read with Entry 41. Some of the checks include the 'subject to constitution' clause, the 'abridgement' clause, as well as the general powers of the Supreme Court under Article 184(3) and the High Courts under Article 199 of the Constitution. The following sections discuss each of these and assess whether these are sufficient, and what are the consequences of each.

4.1. 'Subject to Constitution' Clause

This clause, although, is used on several occasions in the Constitutional text, two of the most important clauses for our concern include Articles 141, 142 and 222. If these provisions are read, the Parliament is given the authority to legislate upon matters contained in the federal legislative list, including electoral laws. However, in all three provisions of the Constitution, the 'subject to Constitution' clause serves to restrict and curtail the unfettered powers of the Parliament.

The courts have delivered several judgments on the meaning and interpretation of this clause. For example, the Lahore High Court (LHC) has ruled that this provision under Article 142 was to curtail the power of the legislature.[134] The Supreme Court has previously stated that the phrase 'subject to' are not mere descriptive words, but impose conditions and obligations.[135] However, the Supreme Court has also ruled that the words 'subject to Constitution', of course, do not render the power of Parliament under Article 222 subservient to other provisions of the Constitution.[136] The Sindh High Court (SHC) stated that this phrase means that such provisions must be interpreted in a manner that brings them into conformity with other provisions.[137]

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[134] *LPG Association of Pakistan v Federation of Pakistan* (LHC WP No 9518/2009, 2020) [1.4] < https://sys.lhc.gov.pk/appjudgments/2020LHC2274.pdf> accessed 19 September 2025.

[135] *Dada Soap Factory Limited v Commissioner of Income Tax, Central Zone B, Karachi* (1987) 2 *PTD* 420, cited in *Constitution Petitions No. 6–8, 10–12, 18–20, and 33 of 2023* (SC Pakistan, 5 January 2023) para 9 <https://www.supremecourt.gov.pk/downloads_judgements/const.p._6_2023_dt_05_01_2023.pdf> accessed 19 September 2025.

[136] *Lahore Development Authority D.G and Others v Ms. Imrana Tiwana and Others* (2015) 2 *SCMR* 1339, cited in *Civil Appeals No. 125-K to 131-K of 2016* (SC Pakistan, 5 January 2016) paras 52–53 <https://www.supremecourt.gov.pk/downloads_judgements/c.a._125_k_2016.pdf> accessed 19 September 2025.

[137] *Irfan Hussain Halai & Others v Federation of Pakistan* (C.P. No. D-4942/2022 & Others, SHC Karachi, 30 December 2022) para 2 <https://caselaw.shc.gov.pk/caselaw/view-file/MTc2MzY4Y2Ztcy1kYzgz> accessed 19 September 2025.

The above-mentioned illustrates two simple things: (1) this 'subject to Constitution' provision places some extra requirements on the legislature which must be taken into account; however, (2) this does not mean that this provision undermines Parliament's law-making powers at the same time. Truly, it is vague, complex and highly contextual. Hence, it is concluded that this provision can be interpreted in a variety of ways by the brilliant legal minds available to each major political party, potentially keeping this provision a moot point in the overall scheme of 'reforms'.

4.2. 'Abridgement' Clause

Another distinct feature of Article 222 is its 'abridgement clause' which states; *'But no law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission under this Part'*. This clause perhaps gives a constitutional guarantee to those charged with holding elections *'honestly, justly and fairly'*.[138] However, the ECP has in the past raised concerns that its powers have been curtailed, contrary to the spirit of Article 222.[139] These concerns include those related to the right of overseas Pakistanis to vote without reserved seats in Parliament, the use of EVMs without addressing technical difficulties, and shifting of responsibility of electoral rolls from ECP to NADRA, among others. This implies that not only does Parliament need to take opposition members into confidence, but also extend these consensus-building measures to other institutions such as ECP for a fair and transparent election. On some occasions, the ECP's recommendations have not been duly considered by the relevant parliamentary committees,[140] suggesting a trend that this control clause in Article 222, alone, is not enough.

The inadequacy of such constitutional safeguards reflects a broader institutional vulnerability common to fragile democracies. As Samuel Issacharoff observes, in emerging or transitional democracies, formal legal protections alone are often insufficient to prevent dominant political actors from manipulating democratic processes for partisan advantage. Electoral commissions and courts must function not merely as passive administrators, but as robust, independent counterweights capable of resisting partisan overreach.[141] In Pakistan's context, the repeated sidelining of the ECP recommendations, combined with a pattern of legislating without bipartisan support, reflects precisely the kind of institutional weakness that Issacharoff warns against.

4.3. Articles 184(3) and Article 199

[138] Constitution of Pakistan 1973, art 218(3).

[139] Fahd Husain, 'ECP Alarmed at 28 Clauses of Electoral Reforms Bill' *Dawn* (16 June 2021) <https://www.dawn.com/news/1629570> accessed 19 September 2025.

[140] Ibid.

[141] Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press 2015) 77.

These provisions of the Constitution deal with the original jurisdiction of the Supreme Court and the High Courts respectively. It is needless to mention that the constitutional courts have the jurisdiction to declare a particular law ultra vires, and it would not be a novel practice for political parties to take their disputes to the courts. However, this naturally results in the judicialisation of politics, often attracting the criticism that courts are 'activist' in their behaviour. Therefore, it is important for the political institution, i.e. Parliament, to create internal mechanisms for building consensus within itself and with other constitutional stakeholders, such as the ECP, rather than resorting to the courts.

5. Part V: Conclusion and Recommendations

This paper has attempted to draw the attention of Parliament to the nature of its powers in relation to making electoral laws and 'reforming' them under the umbrella of Article 222. However, the paper has highlighted a pattern of tweaks to the Elections Act 2017 by successive Parliaments, almost always disgruntling the opposition of the day. Further, this paper has laid down a detailed analysis of the importance of electoral norms entrenched in our Constitution through standalone Articles and how they regulate almost all key aspects of electoral processes that are then further elaborated in the Elections Act 2017. The transient areas between the Constitution and the 2017 Act leave a wide space for the ruling party(ies) and provide numerous avenues for manoeuvre.

However, for a sustainable democratic order, it is important for the ruling forces to keep the balance between the two and opt for the most appropriate way of bringing about changes to electoral rules. For that matter, this paper has given several examples from select jurisdictions that hold the subject of electoral norms at a higher pedestal in their respective Constitutions considering the impact it may have on democracy and the fate of the Constitution itself. To this end, the paper has examined the functions of Parliament and the role of political parties as public utilities and arms of the state, rather than viewing them merely as private associations. Accordingly, this paper proposes that Parliament should strengthen its internal consensus-building apparatus, particularly by revitalising parliamentary committees and ensuring the involvement of all relevant stakeholders.

The paper has also highlighted the risks that a lack of consensus poses to federalism and to the fundamental rights of the people. Internal checks and balances on Parliament's powers will fall short of adequacy if Parliament lacks the resolve to frame election rules through broad consensus. Without such resolve, the democratic order risks being weakened rather than consolidated.

5.1. Recommendations for Democratic and Institutional Safeguards in Electoral Lawmaking

In light of the analysis presented throughout this paper, it is evident that electoral lawmaking in Pakistan demands a more inclusive, consensus-driven approach that reflects both the spirit and structure of constitutional democracy. The following recommendations aim to strengthen institutional legitimacy, safeguard democratic principles, and build public trust in the electoral process.

5.1.1. *Convening a Constitutional Convention for Electoral Reform*

First, the paper recommends that Pakistan's political leadership organise a Constitutional Convention or All-Parties Conference focused solely on electoral reform. Such a gathering, while not formally required by the Constitution, would carry immense symbolic and substantive value. As scholars of constitutional theory argue, a constitution's legitimacy does not stem solely from its text but is continually renewed through the collective will of its political community (Khaitan, *Moderated Parliamentarism*, 2023). Electoral law, in particular, should be grounded in such collective political understanding to command lasting legitimacy.

5.1.2. *Strengthening Parliamentary Committees and Internal Deliberation*

Parliament must revitalise the functioning of its relevant committees, such as the Parliamentary Committee on Electoral Reforms (PCER), ensuring the inclusion of opposition voices and meaningful deliberation on proposed amendments. As has been argued, parliamentary committees are the 'nerve endings' of legislatures and play a critical role in ensuring transparency, accountability, and consensus-building in legislative processes (Flinders, *The Politics of Accountability*, 2001). Their marginalization in past electoral reforms undermines democratic deliberation and must be corrected.

5.1.3. *Quorum Reform for Electoral Legislation*

While the Constitution under Article 55(2) sets a quorum threshold of one-fourth for parliamentary proceedings, this may be insufficient for significant electoral legislation. The paper proposes that Parliament consider amending the Constitution to require a two-thirds quorum for the passage of key electoral laws — mirroring the supermajority required for constitutional amendments under Article 239(4). This would act as a structural safeguard against narrow partisan control over foundational democratic rules.

5.1.4. *Enhancing Provincial Participation in Electoral Reforms*

Electoral reforms have often had implications for federal dynamics, particularly concerning the census and delimitation. To strengthen the federal nature of Pakistan's constitutional order, the paper recommends a constitutional amendment to Article 239(4), requiring that constitutional

amendments affecting electoral matters be ratified by a majority of provincial assemblies. Even for reforms enacted through ordinary legislation, establishing formal or informal consultation mechanisms with provincial representatives is vital for democratic legitimacy and national cohesion.

5.1.5. *Broadening Representation in the Election Commission*

In a similar vein, appointments to the Election Commission of Pakistan (ECP), including the Chief Election Commissioner and Members, should reflect greater provincial participation. Given the ECP's central role in conducting elections 'honestly, justly, and fairly' (Article 218(3) of the Constitution), increasing provincial involvement in appointments would enhance the Commission's independence and public trust in its neutrality.

5.1.6. *Entrenching the Right to Vote as a Fundamental Right*

Currently, the right to vote exists primarily as a statutory right under the Elections Act 2017. To elevate its constitutional status and protect it from arbitrary abridgement, the paper recommends explicitly recognizing the right to vote either as a standalone fundamental right or as an express part of Article 17 (freedom of association and political participation). This recommendation echoes broader democratic theory, which holds that franchise rights should be constitutionally entrenched to prevent erosion through ordinary legislation (Issacharoff, *Fragile Democracies*, 2015).

5.1.7. *Seeking Judicial or Expert Opinion in Cases of Ambiguity*

Where the line between constitutional and statutory regulation of electoral matters is unclear — such as on issues such as overseas voting or use of EVMs — the government must seek legal clarity before proceeding. In such cases, consultation with legal experts, the Attorney General of Pakistan, or even a reference to the Supreme Court under Article 186 may be warranted. This cautious approach will reduce the risk of conflict between constitutional institutions and prevent the politicisation of electoral law.

5.1.8. *Referenda on Contentious Electoral Reforms*

For electoral reforms that are controversial or foundational, the Prime Minister may consider invoking Article 48(6) of the Constitution to hold a referendum. While referenda are rare in Pakistan's political history, they offer a democratic mechanism for seeking public approval on high-stakes electoral changes and could help restore trust in the system.

5.1.9. *Addressing Census and Delimitation Concerns*

The federal government and Parliament must also address longstanding grievances related to the census methodology and constituency delimitation. These are not merely technical matters but deeply political issues shaping electoral representation. Unless these concerns — especially those raised by regional parties — are addressed, future elections risk being seen as illegitimate, weakening both the ECP and the broader democratic framework.

5.1.10. *Avoiding Electoral Law Changes Close to General Elections*

Finally, consistent with the best practices recommended by the Venice Commission, the government should refrain from introducing significant changes to electoral laws within one year of a general election. The principle behind this recommendation is to prevent ruling parties from altering election rules in their own favour on the eve of polling, which undermines public trust and electoral fairness (Venice Commission, *Code of Good Practice in Electoral Matters*, 2002). In cases where changes are unavoidable, the Commission suggests that the previous rules should apply to the upcoming elections to ensure predictability and fairness.

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Medical Negligence and Malpractice: Surveying the Landscape in Pakistan

Tayyaba Kayani[1]

1. Introduction

Medical negligence in Pakistan, following the English model, falls within the category of torts. It would be useful to lay down the definition that describes medical negligence as '*when a doctor omits to do what a reasonable doctor would do, or performs an act which a prudent and reasonable practitioner would refrain from doing and as a result of which some damage is done to the patient*'.[2] In the sense of torts, three conditions determine if a doctor is medically negligent: (i) the existence of a duty of care, (ii) the breach of that duty, and (iii) harm to the patient because of that breach. Negligence may arise during diagnosis, the provision of advice, or treatment.[3]

Medical malpractice is defined as '*any act or omission by a physician during treatment of a patient that deviates from accepted norms of practice in the medical community and causes an injury to the patient. Medical malpractice is a specific subset of tort law that deals with professional negligence*'.[4]

Medical negligence and malpractice, on a macro level, spur a debate within the human rights framework as they ultimately infringe the fundamental right to health. Although Pakistan does not have a constitutionally guaranteed right to health, it is acknowledged under Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[5] which explicitly puts forth that the States who are a party to this Convention are cognisant of the right to enjoy '*highest attainable standard of physical and mental health*'.[6] Medical negligence directly infringes this right.[7] Pakistan is a signatory to ICESCR. Despite the right to health not being explicitly recognised in Pakistan's Constitution, it is judicially accepted to be encapsulated within the ambit of right to life and right to dignity (Articles 9 and 14 of Pakistan's Constitution, respectively).[8]

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[2] J Adinma, 'Litigations and the Obstetrician in Clinical Practice' (2016) 6(2) Annals of Medical and Health Sciences Research <https://www.amhsr.org/articles/litigations-and-the-obstetrician-in-clinical-practice.pdf> accessed 25 July 2025.

[3] Ibid.

[4] BS Bal, 'An Introduction to Medical Malpractice in the United States' (2009) 467(2) Clinical Orthopaedics and Related Research <https://pmc.ncbi.nlm.nih.gov/articles/PMC2628513/> accessed 25 July 2025.

[5] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

[6] Ibid, Article 12.1.

[7] S Khanam and AP Rubina, 'Medical Negligence and Liability: A Perspective from Violation of International Human Rights Law' (2023) 18(2) WJARR <https://wjarr.com/sites/default/files/WJARR-2023-0767.pdf> accessed 25 July 2025.

[8] *Getz Pharma (Pvt) Ltd. v. Federation of Pakistan*, PLD 2017 Sindh High Court 157.

Despite efforts to improve medical health services and mitigate instances of negligence and malpractice at the provincial and federal level, deficiencies in the system persist which this paper attempts to unravel. The inhumane and atrocious cases of malpractice and negligence that have been evident in Pakistan- besides raising concerns on the violation of rights- also probe a deeper enquiry into the subject matter and the legal landscape governing it. This paper takes a two-pronged approach where the first section describes relevant institutional and legal mechanisms available for addressing medical negligence and malpractice in Pakistan. Firstly, the relevant institutional and legal mechanisms available for addressing medical negligence and malpractice in Pakistan are described section 2 onwards. These include the institutional mechanisms like Provincial Healthcare Commissions, Federal Regulatory Bodies like PMDC, and legal frameworks like Pakistan Penal Code, Consumer Protection Acts, and Civil suits. The specific legislative provisions will be looked at and their applicability elaborated upon through caselaw. Moreover, the interplay of special and general laws for negligence, conflicts with immunity clause in Healthcare Commission Acts, and potential contraventions with Article 13 of the Constitution in cases of criminal proceedings will also be addressed in the first section which are important to be analyzed as they could be potentially used to the detriment of victims.

Secondly, the paper examines the deficiencies within the legal and institutional frameworks section 4 onwards. It also provides a cross-jurisdictional comparison to identify good practices. Some of the issues pinpointed are: i) the minimal awareness around malpractice and medical ethics generally due to the lack of importance that medical curriculum gives it, ii) the narrow time limit that exists for victims to file a claim from knowledge of cause of action, iii) the healthcare databases do not have annual reports so there is lack of transparency and problem areas cannot be pinpointed, iv) the Minimum Service Delivery Standards may not be able to be implemented in true spirit, v) the non-negligible applicability of vicarious liability in Pakistan and the non-invocation of *res ipsa loquitur* in medical negligence cases. These are a few amongst the host of issues that this paper has shed light at, and it would not be wrong to say that the system itself is fraught with complications and in need of an overhaul on multiple levels.

2. Institutional and Legal Frameworks for Addressing Negligence and Malpractice Claims

2.1. Provincial Healthcare Commissions

The Eighteenth Amendment to the Constitution in 2010 devolved the subject of health to the provinces.[9] This devolution ensured decentralisation, with provincial governments entrusted

[9] The Constitution (Eighteenth Amendment) Act, 2010.

with supervision and regulation of health services.[10] This puts into perspective why different provinces have their own legal frameworks and enforcement mechanisms. In light of this amendment, it would be crucial to explain the provincial Healthcare Commission Acts that came about and the provisions that relate to medical negligence and malpractice specifically.

2.1.1. *Punjab*

The Punjab Healthcare Commission Act, 2010 (PHCA 2010) was enacted to enhance the quality of healthcare services and covers sections on registration, licensing, medical negligence, accreditation, inspection, and specifies functions of the Commission. The PHCA 2010 has a very brief section on medical negligence.[11] Section 19 deals with medical negligence and states that a healthcare provider can be convicted of medical negligence on grounds of either not being equipped with human resource and equipment that it claims to have, or that they fail to exercise reasonable competence in their professed skills. The section excludes recognised and known complications of a medical treatment from the ambit of negligence. Chapter V of the PHCA 2010 deals with inspection and enforcement, and states that the Commission may assign an inspection team.[12]

One of the functions of this inspection team is to also look into cases of maladministration and malpractice against a healthcare establishment. A closer look at the wording reveals that it is discretionary and not stringent per se and Chapter V does not dig to instances of negligence, keeping the ambit restricted to licences, apparatuses, equipment, and complaints. Section 23(2) states that an aggrieved person can file a complaint to the Commission against a medical practitioner and the time frame is sixty days which runs from the date of knowledge of cause of action. This is a procedural rigidity as the complaint would otherwise be time-barred.

Regulation 4 of the Punjab Healthcare Commission Complaint Management Regulations, 2014, states that the aggrieved person has to first make a complaint to concerned Healthcare Establishment and if it is not addressed by them, then they may approach the Commission. Nonetheless, the Commission may take notice of complaints of malpractice or failure in services from any source.[13]

2.1.2. *Sindh*

[10] J Aziz and others, 'The COVID-19 Law and Policy Challenge: Inter-Provincial Coordination and Planning on Healthcare in Pakistan' (2020) 4 RSIL Law Review 63.

[11] Section 19, PHCA 2010.

[12] Section 22, PHCA 2010.

[13] Punjab Healthcare Commission Complaint Management Regulations, 2014, Regulation 4.

The wording in Sindh Healthcare Commission Act, 2013 (SHCA 2013) differs from PHCA 2010. Whilst both PHCA 2010 and SHCA 2013 define medical negligence similarly, Section 19(1)(b) of SHCA 2013 is slightly more nuanced. Though Section 19 of PHCA 2010 focuses on a healthcare provider failing to exercise his skill *'with reasonable competence*', Section 19(1)(b) of the SHCA 2013 looks at a healthcare provider failing to exercise his skill '*with minimum service delivery standard prescribed by government competence*'.[14] The role of minimum service delivery standards in the healthcare sector is mentioned at Section 2 of this paper, along with the impediments in their implementation.

Both PHCA 2010 and SHCA 2013 state that contravening provisions of the respective acts, rules, or regulations would lead to a fine of up to five hundred thousand.[15]

2.1.3. *Balochistan*

The Balochistan Healthcare Commission Act, 2019 (BHCA 2019) holds a medical practitioner guilty for medical negligence in a similar way to the SHCA 2013. However, Section 22(3) states that a fine shall be imposed once found guilty subsequent to investigation.[16] There is no prescribed amount for a fine for contravention of any provision of the BHCA 2019 like there is for Punjab and Sindh. Section 4(e) mentions how the Commission can inquire and investigate into maladministration, malpractice, and failures in provision of healthcare services.

2.1.4. *Khyber Pakhtunkhwa*

Section 13(3) of the Khyber Pakhtunkhwa Healthcare Commission Act, 2015 (KPHCA 2015) explicitly states that the Commission shall investigate in a transparent manner, the complaints relating to quality of health services or system and medical negligence. Similarly, Section 6(g) states that the power of the Commission is also to enquire and investigate into maladministration, malpractice, and failures in the provision of private healthcare services. The KPHCA 2015 is different from PHCA 2010 and SHCA 2013 that explicitly mention the grounds on which a medical practitioner can be found guilty of medical negligence. Without a laid out definition in KPHCA 2015 of what makes a practitioner culpable of negligence, there can be a gap in accountability for the medical practitioner.

2.1.5. *Islamabad Capital Territory*

[14] SHCA 2013, Section 19(1)(b).

[15] PHCA 2010, Section 28(1); SHCA 2013, Section 28(1).

[16] Balochistan Healthcare Commission Act, 2019.

The Islamabad Healthcare Regulation Act, 2018 (IHRA 2018) established the Islamabad Healthcare Regulatory Authority. Section 33 of IHRA 2018 empowers the Authority to investigate complaints relating to healthcare establishment, healthcare professional, healthcare services, and medical negligence. In *Dr. Saiqa Yousaf v. The State*, the Islamabad High Court noted that medical negligence is not a crime under IHRA, explaining the regulatory nature of IHRA.[17] This depicts a difference in legislative blueprint from the Provincial Healthcare Commissions which have laid out criteria of what constitutes medical negligence.

Pursuant to the Healthcare Commission Acts for Punjab, Sindh, Balochistan, and KP, Complaint Regulations were also notified. Their scope extends to medical negligence and malpractice. The differences in wording for these regulations are explored in section 3 of this paper, and how they subsequently impact access to justice and accountability for practitioners.

2.2. Constitutional Jurisdiction of the High Court — Can It Direct the Commissions?

Dr. Naik Parveen v. District Co-Ordination Officer concerned the question whether a high court could direct the Punjab Healthcare Commission to conduct inquiry regarding a doctor.[18] In interpreting Section 4(7)(d) of the PHCA 2010, the Lahore High Court held in the affirmative, noting that it is the legislature's intention to dissuade negligence and omission on the part of doctors.[19]

Additionally, Section 4(9) of the Punjab Healthcare Commission Complaint Management Regulations, 2014, states that where a complaint is made on a motion by the High Court, it shall be dealt with in the same way that it is directly made to the Commission. Adding more to this, a perusal of PHCA 2010 shows that the wording of Section 4(7)(C) and (d) is 'shall', i.e., the Commission shall on a reference by Government of Punjab or a motion of Supreme Court or Lahore Court undertake investigation into maladministration and malpractice. Thus, the investigation is mandatory. Whereas, for section 4(7)(a) and (b), the wording of 'may' provides discretion, i.e., Commission may on a complaint by an aggrieved person/healthcare provider look into allegations of maladministration/malpractice.

However, the wording of Section 6 of the SHCA 2013 is 'may', i.e., the Commission may on a complaint by aggrieved person/service provider, or reference by Government, or motion of Supreme or High Court. This is a fine distinction from PHCA 2010, and does not make it

[17] *Dr. Saiqa Yousaf v. The State*, 2024 PCr.LJ. 1852.

[18] *Dr. Naik Parveen v. District Co-ordination Officer, Multan*, 2017 CLC 1150.

[19] Ibid, para 19.

obligatory on Sindh Healthcare Commission to mandatorily undertake investigation in case of malpractice.

No such section exists in KPHCA 2015 or IHRA 2018. This indicates that the PHCA 2010 is more nuanced in comparison to Islamabad, Khyber Pakhtunkhwa, and Sindh, by making it mandatory to undertake an enquiry and providing a stronger avenue for victims to seek relief.

2.3. Federal Level

Section 9(2)(k) of the Pakistan Medical and Dental Council Act, 2022 (PMDCA 2022) empowers the Pakistan Medical and Dental Council to hear and decide complaints against licences of practitioners culpable of professional negligence and misconduct. Section 44 of PMDCA 2022 deals with removal of names from the register by the Council, of any registered medical practitioner or dentist who has been convicted by a disciplinary committee for professional negligence. The wording of this section states that the Council has discretion to direct the registrar. Clause 2 provides that the names can be restored, and lastly a claim of professional negligence has to initially be established before a disciplinary committee. This depicts a structured approach, lending much weightage to the disciplinary committee's findings.

The PMDCA 2022 repealed the Pakistan Medical Commission Act, 2020 (PMCA 2020). Section 44 of the PMDCA 2022 uses broader language compared to Section 32 of PMCA 2020. Section 32 of the repealed PMCA 2020 provides for disciplinary action on findings of a medical tribunal or by the relevant authority. Whereas Section 44 of the PMDCA 2022 states that the Council may remove the name of a practitioner convicted by the disciplinary committee or any court of law. So, the wording 'any court of law' expands the horizon. In terms of fraudulent registration, the PMCA 2020 provided a stringent criminal penalty of imprisonment extending to three years. But the PMDCA 2022 reduces it to six months.

2.4 Consumer Protection Laws — Civil Remedy

Medical services are also dealt under Consumer Protection Laws, which include the i) Islamabad Consumers Protection Act, 1995, ii) Khyber Pakhtunkhwa Consumers Protection Act, 1997, iii) Balochistan Consumer Protection Act, 2003, iv) Punjab Consumer Protection Act, 2005, and v) Sindh Consumer Protection Act, 2014.

For Punjab and Sindh, the definition of 'services' includes provision of facilities, advice, or assistance, which can comprise medical services as well.[20] Some of the above Acts provide for liability arising out of faulty or defective services and state that the provider of the services shall

[20] Section 2(k), Punjab Consumer Protection Act 2005; Section 2(q), Sindh Consumer Protection Act 2014.

be liable to the consumer for damages that have been 'proximately' caused by those services that led to damage. None of the Consumer Protection Acts define negligence. Putting it into perspective, damages can be sought if causation is established. It is unclear what threshold of damage caused by those defective services can entitle a litigant to pursue a claim. Whilst the Healthcare Commission Acts exclude recognised and known complications from the ambit of negligence, the vaguely worded liability arising from defective services in the Consumer Protection Acts could potentially open the gateway for bringing a claim from something which is a known complication. Differences within the wording of the provincial Consumer Protection Acts are mentioned below, their relevance to deal with medical negligence compared across provinces, and a deeper discussion of whether medical negligence should be covered under these Acts is given in section 3 of this paper.

Islamabad Consumers Protection Act, 1995 does not have a section for faulty services like Sindh and Punjab. But Balochistan, KP and Islamabad do have a section for a Council that promotes rights of consumers against 'unfair trade practice' which governs goods as well as services.[21]

The regulation of medical services in consumer courts has been decided by superior courts. For Punjab, in *Dr. Riaz Qadeer Khan v. Presiding Officer District Consumer Court*, the question before the Lahore High Court was whether Consumer Courts were competent to grant damages with respect to medical negligence or did Punjab Healthcare Commission possess exclusive jurisdiction.[22] It was decided that the solely relevant forum is Punjab Healthcare Commission for investigation into allegations of malpractice as it is entrusted with improvement of healthcare services and service providers. The Consumer Court does not possess jurisdiction and special laws are favoured over general ones.[23]

This judgement effectively rules out one remedy for litigants and shapes the landscape for those seeking redress in consumer courts. Whilst providing clarity on the appropriate forum and granting the commission with exclusive jurisdiction, it could also prove to be helpful as those situated within the Commission would be better equipped with medical expertise and specialty. It also depicts the judicial attitude of treating negligence and malpractice within the same umbrella.

In *Dr. Muhammad Asif Osawala v. Qamar-un-Nisa Hakro*, the Sindh High Court ruled that the SHCA 2013 predates the Sindh Consumer Protection Act, 2014, and whilst enacting the latter, the Provincial Assembly acknowledged the provisions of SHCA 2013. So, if 'services' in Sindh

[21] Section 8, Balochistan Consumers Protection Act, 2003; Section 8 Khyber Pakhtunkhwa Consumers Protection Act, 1997; Section 8, Islamabad Consumers Protection Act 1995.

[22] *Dr. Riaz Qadeer Khan v. Presiding Officer, District Consumer Court, Sargodha*, PLD 2019 Lahore High Court 429.

[23] Ibid.

Consumer Protection Act, 2014 also encapsulate medical services then it is deemed to be an additional remedy.[24]

Further, in a recent 2024 judgement, the Peshawar High Court ruled that Consumer Protection Court does not have the jurisdiction to try complaints of medical malpractice and negligence.[25] Section 19 of KPHCA 2015 has lent immunity.

Thus, differences exist on whether medical negligence can be pursued under the consumer protection ambit in Punjab, KP, and Sindh, with the former two taking away power from consumer courts and making Healthcare Commissions the relevant forum for negligence and malpractice. For Sindh, it is deemed an additional remedy. A broader debate on whether medical services should be encompassed within the domain of Consumer Protection Acts is given at section 5 of this paper.

3. Civil/Criminal Suits for Medical Negligence

Civil suits are mostly brought into the picture in negligence cases when damages are claimed. In *Mariam Sajjad v. Dr. Rasool Ahmed Chaudhary*, the Lahore High Court ruled that the Punjab Healthcare Commission does not possess the jurisdiction to endow damages to an aggrieved person, which can only be granted by a civil court if the case is proved and the PHCA 2010 does not debar an aggrieved person from doing the same.[26] This case reiterates the point that Healthcare Commissions are not empowered to grant damages and only civil litigation has to be resorted to.

It is important to understand the interplay between general laws and special enactments like PMDCA 2022 at the federal level, as they impact a litigant's recourse in cases of negligence. In case of conflict between general law and special enactment, the *Shifa International Hospitals Ltd v. PMDC* puts into perspective the procedural route. In this case, the Islamabad High Court held that special enactments hold precedence over general laws and without first resorting to special law, criminal proceedings cannot begin.[27] Therefore, once the Pakistan Medical and Dental Council has ruled that a practitioner is culpable of negligence and professional misconduct, criminal and civil proceedings can be initiated. Therefore, first resort is to PMDCA 2022, as it is a special enactment before availing the remedy that general enactments offer.

[24] *Dr. Muhammad Asif Osawala v. Qamar-un-Nisa Hakro*, PLD 2022 Sindh 430.

[25] *Dr. Niamat Ullah v. Izaz Khan,* CM No 693-P/2021 (Peshawar High Court)

[26] *Mariam Sajjad v. Dr. Rasool Ahmed Chaudhary*, 2024 LHC 205.

[27] *Shifa International Hospitals Ltd v. PMDC*, 2011 CLC 463.

There are two pertinent concerns that need to be dispelled as they have been a cause of contention for litigants pursuing negligence claims and could potentially sway liability from healthcare practitioners. The first is whether the existence of immunity clauses in Healthcare Commission Acts bars further prosecution and the second is whether criminal proceedings can be initiated in the view of the concept of double jeopardy.

3.1. Immunity Clause — A Shield for Healthcare Professionals?

The existence of immunity clauses in the Healthcare Commission Acts serves the purpose of preventing excessive litigation against health professionals. The wording bars legal proceedings pertaining to healthcare services except those under the Act.[28] A bare reading of these immunity clauses could mislead one into thinking these are absolute shields against further litigation, and have been invoked by defendants. But case law suggests this immunity is qualified.

In *Dr. Nafeesa Saleem v. Justice of Peace,* the defendant relied on the immunity clause under Section 29 of the PHCA 2010.[29] The Lahore High Court held that Section 29 is qualified to the extent of Section 26(2). The Court ruled that Section 26(2) should be widely construed and *'It confers sufficient authority on the Commission to prosecute a healthcare service provider under the criminal law, if the circumstances are grave, for medical negligence, maladministration and malpractice*'. This demonstrates the superior courts' willingness to ensure accountability and enables an entryway to more serious legal repercussions for negligent healthcare professionals when circumstances necessitate. This judgement essentially helps resolve any conflicts that could arise due to a literal interpretation of Section 29. It ensures a balance between specialised control and wider legal relief, bolstering access to justice for the victims.

The immunity clause in SHCA 2013 was relied on by the petitioners in *Dr. Sheeraz-ur-Rehman v. Province of Sindh,* and it would be useful here to mention some key takeaways as they are crucial in explaining the judicial approach.[30] The Sindh High Court ruled that confining an aggrieved person's remedy only to the extent of lodging a complaint under the Commission and receiving five hundred thousand rupees would not be fair.[31]

This shows a non-rigid approach by the courts towards interpreting the immunity clauses, as they are cognisant that mere financial compensation is not always commensurate. The Court further stated that the Commission's powers are basically supervisory and are primarily envisioned to check infringements which at the most could be equated to civil liability. The

[28] Section 29, Punjab Healthcare Commission Act, 2010.

[29] *Dr. Nafeesa Saleem v. Justice of Peace/Additional Sessions Judge, Multan*, PLD 2022 Lahore High Court 18.

[30] *Dr. Sheeraz-ur-Rehman v. Province of Sindh*, 2020 CLC 2037.

[31] Ibid, para 10.

blueprint of SHCA 2013 indicates that it is supplementary to other laws on the subject and is neither overriding or replacing them.[32]

Additionally, the judgement is important as it confirms that criminal prosecution is not barred. But in light of the legal threshold of 'gross' negligence, the Court noted that '*if any case of medical negligence as defined in the Act or in some other laws in force for the time being is reported to a police station and an FIR is registered, the Investigation Officer shall first after formal investigation needed to get acquaintance with facts of the case refer the matter to the Commission for enquiry, which shall treat such reference as a complaint under section 4(2)(6) of the Act and proceed accordingly*'.[33] This two-step procedure can be exhausting for the victims specifically if there are any backlogs on the Commission's part as there is no defined time limit in the wording of SHCA 2013 to respond to this complaint. Nevertheless, in light of this case, the immunity clauses do not confer blanket protection nor do they bar further prosecution. As the *Dr. Sheeraz-ur-Rehman* case indicates, the Commission's role is supervisory.

3.2. Criminal proceedings After Commission's Proceedings — Double Jeopardy?

Article 13 of Pakistan's Constitution protects individuals from being prosecuted for the same offence twice which essentially entails prevention from double jeopardy. This point was raised in *Naseem Akhtar v. ex officio Justice of Peace*: whether registration of a criminal case after proceedings under PHCA 2010 would amount to double jeopardy.[34] The Lahore High Court held that the proceedings under PHCA 2010 do not fall within the criminal ambit and the Act serves as a means of ascertaining negligence of the healthcare practitioner.

The Court noted that prosecution refers to trial followed by a judgement, whereas the proceedings before Commission do not fall within that ambit and recourse to criminal remedies is available for victims who wish to pursue a claim on grounds of medical negligence. Therefore, the case is pivotal in establishing that criminal proceedings can be initiated even if proceedings are faced before the Commission.

However, in Pakistan, criminal proceedings are initiated at a later stage and litigation is not the first recourse. This presents a slightly different practice from other jurisdictions like the United Kingdom, where doctors who are acquitted of criminal charges can nonetheless undergo 'fitness to practice' proceedings by the General Medical Council. A guide by the General Medical Council states that the double jeopardy rule is not applicable to regulatory proceedings and the same

[32] Ibid, para 11.

[33] Ibid, para 16.

[34] *Naseem Akhtar v. Ex-Officio Justice of Peace*, PLD 2018 Lahore High Court 903.

substantive matter can be brought to the Regulator's purview.[35] In Pakistan, the regulatory proceedings under respective Healthcare Commission precede the criminal proceedings, acting as a precursor to litigation.

3.3. Pakistan Penal Code

The paper shall now undertake a closer look at the penal provisions governing medical negligence and malpractice claims. Under the Pakistan Penal Code, 1860 (PPC 1860), there is no explicit provision applicable to medical negligence, however, the ambit of section 302, 318, 321, and 322 can apply. Section 302 deals with punishment for *qatl-i-amd*, which is defined in section 300 as intentional murder. Section 318 deals with *qatl-i-khata*, which is unintentional death by mistake of act or mistake of fact. Section 321 deals with *qatl-bis-sabab*, which is unintentional death by an unlawful act. Section 322 deals with punishment for *qatl-bis-sabab.*

3.3.1. *Section 302*

In *Naseem Akhtar v. ex-Officio Justice of Peace*,[36] the applicability of Section 302 was deliberated upon. In this case, the hospital staff in Gujranwala were negligent towards a patient suffering from abdominal pain who ultimately passed away. The Lahore High Court ruled that for a case to fall within the ambit of Section 302, it has to be proven '*beyond any shred of ambiguity that the accused was having intention and knowledge to cause the death of deceased*'.[37] Thus, the Court's interpretation provides a safety net for medical practitioners from prosecution under Section 302 for medical negligence. The case is also critical in setting out the criteria for initiation of criminal proceedings in medical negligence cases. The Lahore High Court held that it is pertinent to prove that death was due to gross negligence or recklessness.[38]

Section 302 is primarily intent-based with a high evidentiary threshold, therefore, it is reasonable to examine Section 318 and 321 of PPC 1860 as their wording is negligence based.

3.3.2. *Section 318*

[35] General Medical Council, 'Guidance for Case Examiners on Police Cases Resulting in Acquittal, Decision Not to Prosecute or Discontinuance of Proceedings' (2014) <https://www.gmc-uk.org/-/media/documents/dc5585-guidance-for-case-examiners-on-police-cases-resulting-in-acquittal-decision-not-to-p-75989622.pdf> accessed 25 July 2025.

[36] *Naseem Akhtar* (n 34).

[37] Ibid, para 7.

[38] Ibid.

As mentioned in *Dr. Nafeesa Saleem v. Justice of Peace*,[39] the PPC 1860 does not have any specific section that pertains to cases of criminal medical negligence. However, Sections 318 and 321 of PPC 1860 are attracted in cases where medical negligence leads to the death of a patient. In *Muhammad Aslam v. Dr Imtiaz Ali Mughal*, the Sindh High Court ruled that for Section 318 to apply it is vital to establish that the doctors, whilst performing their duty, were negligent to such an extent that their conduct could be equated to criminal negligence, which entails a '*gross and culpable neglect or failure to exercise all the reasonable and proper care…*'.[40] The case lays the standard and puts forth the idea that offence of *qatl-e-khata* under Section 318 is only committed if the accused acted with gross negligence.[41]

The standards of proof naturally vary in criminal and civil suits, with the former being substantially higher. In the same judgement, the Sindh High Court cited an Indian Supreme Court case, wherein it was ruled that merely not giving proper care and precaution can entail a civil liability but for it to go a notch ahead to constitute as criminal liability, there has to be a high degree of negligence on the practitioner's part — a mental state which is 'totally apathetic'.[42]

The Sindh High Court noted that the word 'gross' is not used in Section 304A of Indian Penal Code, but it is an established proposition that the recklessness or negligence has to be gross. Whilst the meaning of gross is not defined, in the Court's view the cited Indian cases give perspective on what constitutes as gross. It is important to note that if the standard of 'totally apathetic', as mentioned by the Indian Supreme Court and cited by the Sindh High Court, is followed by courts in Pakistan, there is greater leeway for accused healthcare practitioners.

The *Dr. Sheeraz-ur-Rehman* case sheds further light on the standard for interpreting gross negligence.[43] The Sindh High Court stated that a doctor would not be held criminally liable unless the negligence pointed to '*such disregard for life and safety of his patient as to amount to a crime*'. The nature of medical cases is highly individualised with varying safety standards so gross negligence for an oncologist would be different from gross negligence for an obstetrician. But the common thread would be that the patient's life and safety is disregarded. Putting this into perspective, the Indian and Pakistani standards of 'gross' seem to be on the same footing, i.e., 'totally apathetic' and 'disregard for life and safety' have the same connotation.

[39] *Dr. Nafeesa Saleem* (n 29).

[40] *Muhammad Aslam v. Dr. Imtiaz Ali Mughal*, PLD 2010 Karachi 134.

[41] Ibid, para 10.

[42] Ibid, para 8

[43] *Dr. Sheeraz-ur-Rehman* (n 30)

Additionally, as case law suggests, even though gross negligence has been set as a benchmark for criminal proceedings in Sections 302 and 318, the former is harder to prove on account of the element of intention.

3.3.3. *Sections 321 and 322*

Section 321 of the PPC 1860 relates to *qatal-bis-sabab* — death that is caused by an unlawful act without intention to cause death or harm. This may apply to medical negligence cases. Whoever commits *qatl-bis-sabab* is liable to *diyat* (compensation) as laid out in Section 322 of the PPC 1860, which lays out punishment for the offence.

In *Lady Doctor Getman Alla alias Aliya Wahab v. The State*, a First Information Report (FIR) was registered and the petitioner was indicted under Section 322 on the grounds that she had negligently dealt with a patient during her delivery, due to which she and the child died.[44] One of the main questions before the Court was to assess the status of the FIR in light of Section 33 of KPHCA 2015, which provides for the Act's overriding effect. The complainant resorted to criminal proceedings before utilising the remedy under KPHCA 2015. The Peshawar High Court ruled that in case of conflict between special law and general law, the former holds force. Accordingly, the proper forum was not utilised and the FIR was found to be lodged without legal authority.[45] Therefore, remedy under Section 322 is yet again qualified to the extent that the Commission refers matters after having dealt with the complaint. The judgement clarifies that proceedings under special laws must precede criminal proceedings.

Similarly, in *Dr. Khair Muhammad Sahowal v. Province of Sindh*, the respondents had lodged an FIR under Section 322 of PPC 1860 against petitioners on account of criminal negligence leading to death of respondent's brother.[46] The Sindh High Court ruled that if death is caused due to criminal negligence, it would certainly attract Section 322. However, Sindh Healthcare Commission is the forum that shall determine if there is any medical negligence on part of the petitioners.[47] The results of investigation by the Commission would then be transmitted to trial court, and until then the trial was suspended.

This case reiterates the notion that a criminal remedy is also available but only after taking the route of approaching the Commission first. Criminal liability under Section 322 is procedurally intertwined with regulatory mechanisms. Before criminal prosecution can proceed, the concerned healthcare commission has to determine medical negligence through a civil standard. Hence, civil

[44] *Lady Doctor Getman Alla alias Aliya Wahab v. The State*, WP No. 744-M/2023 (Peshawar High Court).

[45] Ibid

[46] *Dr. Khair Muhammad Sahowal v. Province of Sindh*, 2022 YLR 63.

[47] Ibid, para 8.

liability acts as precursor for criminal accountability, enabling procedural safeguards for practitioners. The implications of routing criminal complaints through healthcare commissions would ensure that the claim is backed with medical expertise and evidence before it proceeds to litigation. It may protect healthcare practitioners, as they are less likely to face frivolous litigation, as some claims may not be made out at the commission level and struck out as baseless. At the same time, this two-pronged process might delay justice for victims.

4. What are the Loopholes? Is the Healthcare System Lagging Behind?

4.1. Effectiveness of Healthcare Commissions and PMDC

4.1.1. *Outdated Databases, and Lack of Reporting and Transparency*

Punjab Healthcare Commission's database has annual reports which are publicly available for all years, but other provincial commissions do not maintain regular records. Khyber Pakhtunkhwa Healthcare Commission reports that it received 1,642 complaints in 2022-23, and 1,470 were resolved.[48] However, Khyber Pakhtunkhwa's Healthcare Commission does not have any statistics prior to 2022 so there is no data to trace how claims were being processed and there is only one annual report available at the time of writing this paper.

Section 34(1) of the SHCA 2013 explicitly provides that the Commission shall, within ninety days from end of financial year, prepare a report on the activities and performance of the Commission, submit a copy of the report to the Government and make it available for the public.[49] Despite this, the reports are not publicly available.

Unlike Punjab, Sindh, and KP, Balochistan Healthcare Commission does not have its own official website. There are no annual reports available publicly, but unlike SHCA 2013, there is no statutory requirement for annual reports to be made public. The complete unavailability of reports hinders transparency and identification of problem areas for development.

Similarly, there are no annual reports on the Pakistan Medical and Dental Council website to track any progress of how the Council is running, nor are there any set strategic goals to measure how effectively the institution is running.

4.1.2. *Comparison with NHS*

[48] Khyber Pakhtunkhwa Healthcare Commission, 'Annual Report 2022-23' (2023) <https://hcc.kp.gov.pk/wp-content/uploads/2023/11/Annual-Report-.pdf> accessed 25 July 2025.

[49] Section 34(1), Sindh Healthcare Commission Act, 2013.

Looking towards international best practices, it would be useful to draw a comparison with the United Kingdom's (UK) National Health Service (NHS) Resolution. NHS Resolution is an arm's length body of the Department of Health and Social Care that handles medical negligence and non-clinical claims against the NHS. It has updated annual reports and accounts on their website.

Their recent 2023-24 report indicates that clinical negligence claims have risen by 3% to those in 2022-2023 with the top four areas being emergency medicine, obstetrics, orthopaedic surgery, and general surgery, with obstetrics accounting for 57% of clinical claims by value and 13% by volume.[50] The 2023-24 report also mentions that the volume of claims entering litigation were reduced by 81% which is a key achievement against the three-year strategic priorities set by the NHS Resolution.[51] These reports, besides serving the purpose of public disclosure, are important for tracking internal progress and there is a need to adopt such mechanisms domestically as well. Defined strategic priorities like those set by the NHS serve as a benchmark against which a healthcare system can track its progress and one that continually strives to be patient-centric. This type of transparency is extremely pivotal to a healthcare system because it provides insight into problem areas and consequently, there is scope for improvement.

4.2. Differences in Complaint Management Regulations

Khyber Pakhtunkhwa Healthcare Commission (Complaints Management) Regulations, 2022 mentions the scope of complaints at Regulation 6, which encapsulates medical negligence (including criminal negligence) along with maladministration and malpractice. Regulation 13(3) provides the penalties in case of negligence, including criminal negligence; the establishment as well as the service provider would have to pay a fine of up to one million rupees. The penalty also mentions compensation to the aggrieved person which would not be less than the quantum of damage caused. Similarly, cases of maladministration, malpractice, or failure to provide services entail a fine up to one million and compensation.[52] Neither the Punjab Healthcare Commission's Complaint Management Regulations, 2014,[53] nor the Commission Regulations, 2017 of the Sindh Healthcare Commission explicitly provides for fines in cases of medical negligence like the Khyber Pakhtunkhwa Regulations do.[54]

Additionally, the Khyber Pakhtunkhwa regulations have a holistic section of what comprises maladministration and malpractice, but it does not have a clause on failure to take informed

[50] NHS Resolution, 'Annual Report and Accounts 2023/24' (2024) <https://resolution.nhs.uk/wp-content/uploads/2024/07/NHS-Resolution-Annual-report-and-accounts_23-24_Access-1.pdf> accessed 23 August 2024.

[51] Ibid.

[52] Khyber Pakhtunkhwa Healthcare Commission (Complaints Management) Regulations 2022.

[53] Punjab Healthcare Commission Complaint Management Regulations 2014.

[54] Sindh Healthcare Commission, The Commission Regulations, 2017.

consent, which is explicitly mentioned in Punjab Healthcare Regulations. Thus, unconsented surgeries would constitute malpractice in one province but not the other.

4.3. Minimum Service Delivery Standards and Enforcement Issues

The Minimum Service Delivery Standards (MSDS) provide guidelines on elements that need to be present in establishments, and these have been developed after an extensive review of national and international best practices. MSDS exist for Islamabad Capital Territory, Khyber Pakhtunkhwa, Punjab, and Sindh

> *'The MSDS define a set of the benchmarks for minimum level of mandatory services that a Healthcare Establishment (HCE) is responsible to achieve and patients have a right to expect. It entails a package of yardsticks essential for all types and Categories of the Healthcare Establishments'*.[55]

The Punjab Healthcare Commission has issued MSDS that are available on its website, but the PHCA 2010 in Section 19 — which deals with medical negligence — does not mandate compliance with these like the SHCA 2013 does. The MSDS were approved in 2017, however, PHCA 2010 has not been amended to obligate compliance with these in respect of medical negligence. The Balochistan and Sindh healthcare commission acts even mention a lack of compliance with MSDS to fall within the ambit of negligence. The role of MSDS cannot be downplayed as Punjab Healthcare Commission has made a licence for healthcare establishment contingent on MSDS requirements being met. But there is a gap in legislative intent and knowledge of these MSDS amongst healthcare professionals along with logistical impediments to their compliance.

Dr Attiya Mubarak observes that the maternal mortality ratio could be substantially decreased by fully implementing the MSDS for midwifery and family planning services as a major number of complaints received by commissions pertain to medical negligence in gynae.[56] One can envision that if MSDS are complied with, malpractice, negligence, professional misconduct, and maladministration could substantially decrease as a benchmark standard of services would be attained. But healthcare professionals are unaware of these. In a study conducted on the knowledge, attitude, and practice of healthcare service providers on MSDS with 264 Healthcare Service Providers (HCSP) — of which 128 HCSP were from Basic Health Units and 136 were from

[55] Punjab Healthcare Commission, 'Clinical Governance' (*Punjab Healthcare Commission*) <https://os.phc.org.pk/catI_HCE.aspx> accessed 21 August 2024.

[56] Punjab Healthcare Commission, 'Orientation Seminar on Service Delivery Standards for Midwifery/Family Planning Services' (*Punjab Healthcare Commission*, 31 August 2021) <https://os.phc.org.pk/newsFrm.aspx> accessed 25 July 2025.

Rural Health Centres — the results study indicate that 95.5% had poor knowledge and 94.7% had poor practice of MSDS.[57]

With such dismal statistics, it is no shock that healthcare and safety of patients is at risk. Moreover, the paper stated that Punjab Healthcare Commission trained only two service providers on MSDS in their orientation programme. Possibly, one solution would be to incorporate service delivery standards in the medical curriculum.[58] Despite the Punjab Health Sector Strategy 2019-2028 setting out the aim of implementing MSDS at all levels of the healthcare system, the dearth of knowledge and practice around MSDS is a key flaw in the healthcare system.[59] It also contravenes Pakistan's international obligations under Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), that is, the right to attain the highest standard of health. But healthcare service providers in Pakistan are failing to meet even the minimum service delivery standards.

4.4. Lack of Emphasis on Medical Ethics

Section 43(3) of PMDCA 2022 states that every registered medical practitioner or dental practitioner shall comply with the Code of Medical Ethics. Moreover, Section 44 of PMDCA 2022 provides that the Council may direct the registrar to remove from the register the name of any registered medical practitioner/dentist who has been convicted by the Council or any court of law '*of any such offence as implies in the opinion of the Council a defect of character defined in the code of ethics of practice*'. Significant discretion here rests with the Council.

In a study conducted on house officers at Medicine, Surgery, and Gynaecology and Obstetrics Ward from December 2020 until June 2021 indicated that out of 227 officers, 59% had not even read the PMDC code of medical ethics. The writers attribute this to inadequate emphasis on medical ethics in medical curriculum.[60]

It would not be wrong to contend that one of the underlying issues leading to negligence and malpractice is not only the lack of abidance to core ethical standards but also being unaware of them. A study at a teaching hospital in Karachi tested respondents' knowledge regarding negligence and malpractice. 56% considered a procedure without consent as a form of

[57] S ur Rehman and others, 'Knowledge Attitude and Practices of Healthcare Service Providers About Minimum Service Delivery Standards' (2022) 5(8) Pakistan BioMedical Journal 41 <https://www.pakistanbmj.com/journal/index.php/pbmj/article/view/737> accessed 25 July 2025.

[58] Ibid, 41-44.

[59] Government of Punjab, 'Punjab Health Sector Strategy 2019-2028' <https://phkh.nhsrc.pk/sites/default/files/2021-06/Health%20Sector%20Strategy%20Punjab%202019-2028.pdf> accessed 25 July 2025.

[60] I Aleem and others 'Practice of Medical Ethics among House Officers at Tertiary Care Hospital in Karachi' (2021) 16(3) PJNS <https://ecommons.aku.edu/cgi/viewcontent.cgi?article=1531&context=pjns> accessed 25 July 2025.

malpractice. Further, 69% of respondents were not aware of the complete definition of malpractice. The authors attribute the lack of knowledge partially to the dearth of sufficient emphasis on professional and ethical behaviour in the undergraduate medical curriculum.[61] The statistics depict a larger problem — an obliviousness to a patient's right to dignity. Medical ethics needs to be prioritised at the curriculum level in order to raise awareness and instill a level of empathy and concern amongst practitioners, to ensure that patients are seen as humans, not objects of study or a means for financial gains; ultimately reducing cases of malpractice and negligence.

4.5. Damages in Negligence Cases — Ahead but Insufficient

As the case of *Mariam Sajjad v. Prof. Dr. Rasool Ahmed Chaudhary* shows, Punjab Healthcare Commission can look into allegations of malpractice, but it is not equipped with the jurisdiction to grant damages and they can only be granted by a civil court.[62] The judgement has been a guiding stone in determining how a claim for damages is granted by the court. It provides for reasonable and fair monetary compensation for injury, small amount for pain and suffering, loss of amenity, medical expenses, loss of earning, pecuniary loss, pain, suffering, and non pecuniary loss.[63] This is a progressive recognition, as several jurisdictions, including India and Mexico do not grant damages for pain and suffering that come within the ambit of non-economic injuries.[64] The discussion would be incomplete without unpacking the concept of non-economic damages. Giving a brief overview, '*non-economic damages may include pain, emotional anguish, humiliation, reputational damage, loss of enjoyment of activities, or worsening of prior injuries. In some states, they are referred to as pain and suffering*'.[65]

Pakistan, whilst being ahead in the domain of non-economic damages, does not take into account punitive damages in lawsuits. The notion of punitive damages exists in malpractice lawsuits in the United States, the purpose of which is to hold guilty medical professionals and create deterrence.[66] In *Baker v Sadick*, a breast reduction surgery resulted in severe post-surgery infection, consequently leading to tissue necrosis that entailed plastic surgery. Punitive damages

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[61] A Sheikh and others, 'Malpractice awareness among surgeons at a teaching hospital in Pakistan' (2012) 6 Patient Safety in Surgery <https://pssjournal.biomedcentral.com/articles/10.1186/1754-9493-6-26> accessed 25 July 2025.

[62] *Mariam Sajjad* (n 26) para 12.

[63] Ibid.

[64] N Cortez, 'A Medical Malpractice Model for Developing Countries' (2011) 4 Drexel Law Review <https://scholar.smu.edu/cgi/viewcontent.cgi?params=/context/law_faculty/article/1126/&path_info=NathanCortezAMedicalMalpr.pdf> accessed 25 July 2025.

[65] Justia, 'Non-Economic Damages in Personal Injury Lawsuits' <https://www.justia.com/injury/negligence-theory/non-economic-damages/> accessed 25 July 2025.

[66] Justia, 'Damages in Medical Malpractice Lawsuits' <https://www.justia.com/injury/medical-malpractice/damages-in-medical-malpractice-cases/> accessed 25 July 2025.

amounting to $300,000 were awarded.[67] However, as things stand right now, the threshold for grant of punitive damages is set fairly high in Pennsylvania and they are to be awarded when the practitioner's actions indicate complete willful disregard. Examples of conduct that entails grant of punitive damages is: intentional misconduct, conscious disregard, fraud, or deception.[68] Pakistan is far behind in the ambit of punitive damages in negligence and malpractice, and can consider introducing punitive damages to act as a deterrent against medical negligence and malpractice.

5. Inclusion of Medical Services in Consumer Protection Acts

At section 2.4 above, Consumer Protection Acts have been discussed – raising the question whether medical services should be included under their ambit. The short answer is no. Comparing the matter across jurisdictions provides some guidance in this regard. In an Indian case of *Bar of Indian Lawyers v. DK Gandhi PS National Institute of Communicable Diseases*, it was stated that the services rendered by professionals cannot be comparable to either businessmen or traders.[69] The Punjab Consumer Protection Act, 2005 along with Sindh Consumer Protection Act, 2014 broadly includes medical, legal, and engineering services within their ambit. But the sensitivity of the medical profession should not be disregarded, as doctors deal with matters of human life and the stakes are significantly higher compared to those for lawyers and engineers. In the UK, neither the Consumer Protection Act, 1987, nor the Consumer Rights Act, 2015, deal with medical services. Instead they have a specialised forum: the NHS Resolution, which manages negligence claims.

In light of this comparative analysis, it can be contended that provinces need to revisit the decision to include medical services under their consumer protection acts' ambit. Medical services logically do not hold a place under consumer courts, rather they need to be regulated by their defined forums. KP and Punjab have effectively adopted this model, but challenging medical services before consumer courts needs to be entirely discarded.

Furthermore, in *Shifa International Hospital Ltd v. Hajira Bibi*, the Islamabad High Court noted that the sole distinction between the Islamabad Consumer Protection Act, 1995 and PMDC Ordinance, 1962, as well as PMDC Regulations was compensation, which can only be given in the ambit of consumer law as PMDC Ordinance and Regulations are silent to that extent. However, the legal foundations have since changed when the judgement was rendered in 2018, as Section 9(s) of the

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[67] *Baker v Sadick* 162 Cal. App. 3g 618, 208 Cal. Rptr. 676 (1984).

[68] Matzus Law, 'Can Punitive Damages be awarded in any Negligence Case?' *(Matzus Law)* < https://www.matzuslaw.com/can-punitive-damages-be-awarded-in-any-negligence-case/> accessed 25 July 2025.

[69] The Economic Times India, '1995 Judgement Bringing Doctors Under Consumer Protection Act Requires Reconsideration: SC' (2024) <https://health.economictimes.indiatimes.com/news/policy/1995-judgement-bringing-doctors-under-consumer-protection-act-requires-reconsideration-sc/110135307> accessed 25 July 2025.

PMDCA 2022 empowers the Council to impose fair compensation in addition to existing penalties. This removes the need for consumer courts to be the exclusive forum for relief. This strengthens the argument that medical services need to be dissociated from the consumer protection acts' domain.

6. Narrow Time Limit to File a Complaint from Knowledge of Cause of Action

Section 7 of the Punjab Complaint Management Regulations, states that Punjab Healthcare Commission shall not entertain a complaint if it is time-barred under Section 23(2) of the PHCA 2010. Section 23(2) provides the time frame for a complaint to be within sixty days from the date of knowledge of cause of action against a healthcare establishment or service provider. Section 23(4) of the SHCA 2014 provides the time to be no more than thirty days from which the aggrieved person noticed the alleged matter.

Two issues arise with this time limit. Firstly, there is no reason why both Commissions have a different time limit to bring a claim. Secondly, the time frame for bringing forth a complaint is extremely narrow. Making a cross-jurisdictional comparison, the Indian National Medical Commission Act of 2019 states at Section 30 that the State Government shall take necessary steps to establish a State Medical Council and where the State has conferred powers on State Medical Council to take any disciplinary action against a registered medical practitioner, it shall do so in line with the regulations made under the Act. Accordingly, at Regulation 38 in the National Medical Commission Registered Medical Practitioner (Professional Conduct) Regulations, it is mentioned that the aggrieved person can file a complaint to the State Medical Council within two years from the cause of action.[70] Therefore, in light of India's example, the unreasonably short limitation period in Pakistan needs to be revisited as well so that complaints on merit are not rejected merely because they were time barred. These kinds of procedural limitations should not be overly rigid as they can impact access to justice for the victims.

7. Applicability of Res Ipsa Loquitur and Vicarious Liability in Pakistan

Res ipsa loquitur is a doctrine commonly invoked in medical negligence which shifts the argument on negligence on to the defendant who is required to explain how the matter in hand could have come about in the absence of negligence.[71] This doctrine is not excessively invoked in Pakistan. However, in a suit for damages and compensation for medical malpractice, its applicability formula was brought up.

[70] National Medical Commission Registered Medical Practitioner (Professional Conduct) Regulations 2023.

[71] MJ Powers, NH Harris, and A Barton, *Clinical Negligence* (4th edn, Bloomsbury Professional 2008).

> *'This doctrine applies firstly, when the things that inflicted the damage was under the sole management and control of the respondent and secondly, that occurrence is such that it would not have happened without negligence and thirdly, that there must be no evidence as to why or how the occurrence took place'.* [72]

Res ipsa loquitur is mostly employed in cases that are dealt under the Fatal Accidents Act in Pakistan as seen in a case where the plaintiff's son passed away because of electric shock after coming in contact with an energised electric pole that should have been insulated adequately.[73] This was also the case in *Razia Khatoon v. Province of NWFP*, which involved death due to rash and negligent driving.[74]

Comparing the applicability of this across jurisdictions, *res ipsa loquitor* is usually invoked in negligence cases in the US, where foreign body is discovered. In *Schorlmer v. Reyes*, a sponge was left in the patient's abdomen during surgery for removal of ovary.[75] However, the case also established the idea that this is only a rule of evidence and does not absolve the requirement of proving negligence and proximate cause.[76] Nonetheless, it can be used in cases of medical negligence in Pakistan as well where a foreign body is left in the patient negligently, as it enables the plaintiffs to come up with a case in the absence of direct evidence, reducing the evidentiary threshold.

Pakistan hardly has any cases on vicarious liability in the medical negligence ambit. It was brought to light in *Sikandar Shah v. Dr. Nargis Shami*, where it was held that administration of the hospital is also accountable for the negligence of the doctors, staff, or other employees, as it had come on record that no pre- and post-operation care was extended to the deceased.[77] The Court stated that neither side could evade responsibility, meaning neither the medical practitioner could shift his responsibility upon the administration in case of an unfortunate event nor the hospital could absolve itself of accountability by pinning the responsibility upon the doctors.

In terms of international best practices, the NHS Trusts and Health Authorities in the UK are vicariously liable for negligent acts and omissions of their employees that also comprises doctors, nurses, and clinicians. This vicarious liability has led to a policy known as 'NHS

[72] *Alam Ara v. Dr. Shaista Tariq*, 2013 MLD 743.

[73] *Kaneez Begum v. Karachi Electric Supply Corporation*, 2001 CLC 875.

[74] *Razia Khatoon v. Province of NWFP*, 2002 MLD 539.

[75] *Schorlemer v. Reyes*, 974 S.W.2d 141 (Tex. App. 1998).

[76] Ibid.

[77] *Sikandar Shah v. Dr. Nargis Shami*, 2014 MLD 149, para 10.

indemnification'.[78] NHS Indemnity applies where a negligent healthcare professional was either working under a contract of employment and even if not under a contract of employment per se, was contracted to an NHS body that provides services. Within the scope of expenses are encapsulated legal and administrative costs of defending/settling, plaintiffs costs, and damages.[79]

The introduction of vicarious liability in the ambit of medical negligence in Pakistan would entail financial burdens, subsequently making them more cognisant of the employees they hire as they would be indirectly accountable too. Institutional responsibility has far reaching ramifications as hospitals would be prompted to set in place rigorous standards and oversight, instilling a level of responsibility that is crucial to paving the way for a system that prioritises safety of patients.

8. Other Gaps

The Gilgit Baltistan Medical and Health Institutions Act, 2016 does not have any provision on medical negligence nor medical complaints. Additionally, no healthcare commission exists. The lack of a regulatory framework significantly impacts access to justice for those who wish to file a complaint on grounds of medical negligence and malpractice.

Further, Section 51 of the PMDCA 2022, states that all regulations made pursuant to the repealed Act, i.e., Pakistan Medical Commission Act, 2020 stand repealed. This means that the Pakistan Medical Commission (Enforcement) Regulations, 2021, which were made in exercise of the powers conferred by Section 40 of the Pakistan Medical Commission Act, 2020 are no longer enforceable. However, no enforcement regulations have been made pursuant to PMDCA 2022. This indicates a vacuum in enforcement of the successor Act.

9. Conclusion

This paper shed light on the institutional and legal frameworks relevant for bringing a claim for medical negligence and malpractice. Whilst forums exist, the system itself is fraught with issues like lack of emphasis and knowledge on medical ethics, discrepancies in regulations, procedural rigidities such as narrow time limits to file a claim, the scanty implementation of MSDS, vicarious liability not being invoked, and the lack of punitive damages. The paper identifies good practices internationally as a point of comparison such as the holistic annual reports and transparent system of the NHS, punitive damages in medical lawsuits in the US, wider time limit to file

[78] F Dayan and others, 'Holding Healthcare Accountable: A Solution to Mitigate Medical Malpractice in Pakistan' (2020) 4(3) International Journal of Human and Health Sciences <https://www.semanticscholar.org/reader/7affb6f1ee63fdefe4e1f04e0cd62252e2bbd9b5> accessed 25 July 2025.

[79] NHS Resolution, 'Arrangements for Clinical Negligence Claims in the NHS' (2018) <https://resolution.nhs.uk/wp-content/uploads/2018/10/NHS-Indemnity.pdf> accessed 25 July 2025.

complaints from knowledge of cause of action as is the case in India, and the application of vicarious liability in the UK.

As Pakistan is lagging behind on several levels within the healthcare sector, a cross-jurisdictional comparison can provide insight to practices that bolster access to justice. The paper proposes changes, but it is beyond its scope to suggest extensive reforms. This includes a greater emphasis on medical ethics in the medical curriculum. Change can only begin at grassroots level - potentially being possible if institutions prioritise medical ethics to ensure a patient's agency and autonomy along with their right to attain the highest standard of health as envisioned in ICESCR. Additionally, there is a need to lay out strategic priorities for institutions and yearly published reports for the public to measure progress against these priorities.

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Jurisprudence on Talaq-e-Tafweez: A Mode of Dissolution of Muslim Marriage

Shafaq Farooq[1]

Abstract

Muslim women in Pakistan have recourse to a form of dissolution of marriage other than the usual court process - khula. That very form is called talaq-e-tafweez. This article tends to explore the concept of talaq-e-tafweez, a form of dissolution of a marriage contract. An in-depth study of jurisprudence on talaq-e-tafweez has been taken into account while digging into the existing practices of dissolving marriage via talaq-e-tafweez i.e., delegating the right of divorce to the wife at the time of nikah or even afterwards during the nuptial agreement. A detailed analysis with help of precedents has been made in order to indulge into the discussion of whether talaq-e-tafweez is revocable right or not. It includes a discussion on all the applicable legislation pertaining to deal with delegation of the right to divorce under Sharia. Also provides a fruitful comparative analysis of how this concept is being practiced in different jurisdictions around the globe and how this concept has been interpreted by courts in Pakistan. The article also elucidates on whether a woman can retain her dower if she exercises talaq-e-tafweez. Moreover, reasons including but not limited to those mentioned, shall be discussed at length, why it is beneficial for women to seek delegation of right to divorce (e.g., less costly, saves time, dower retained, no recourse to courts). The importance of delegated divorce for women and what issues it can help resolve in marriage for women have also been highlighted. Furthermore, the steps of pronouncing talaq-e-tafweez and the procedure of execution of divorce deed have been thoroughly explained with the help of judicial precedents.

1. Introduction

Multiple forms of dissolution of a Muslim marriage exist under Islamic law.[2] In Pakistan, a husband's unilateral right to divorce is referred to as *talaq*. But divorce can also be affected by mutual consent — khula or mubara'at — according to the terms of contract between the parties.[3] Other recognised means and modes of dissolution of a marriage contract includes illa, zihar, li'an,

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[2] L Khalid, 'The Methodology of Divorce' *The News International* (2 February 2016) <https://www.thenews.com.pk/magazine/you/95302-The-methodology-of-divorce> accessed 22 December 2025.

[3] DF Mulla, *Principles of Mahomedan Law* (PLD Publishers 1995) 312.

talaq-e-tafweez, contingent / conditional and judicial divorce.[4] Amongst all the forms of dissolution of marriage, this paper focuses on talaq-e-tafweez.

Under Islamic law, the husband enjoys unilateral power to divorce his wife.[5] He may also delegate the power of pronouncing divorce to his wife.[6] This delegation of right to divorce can be made to the wife or to a third person either absolutely or conditionally, and either for a particular period or permanently.[7] The person to whom the power is thus delegated may pronounce the divorce accordingly and such divorce is known as talaq-e-tafweez.[8] The word 'tafweez' literally means delegation / to delegate.[9]

The option of delegation — tafweez by the husband to the wife — confers on the woman the power to divorce herself.[10] The right to divorce so delegated refers to the notion of dissolution of the marriage contract in the form of talaq by husband to the wife.[11] As per existing jurisprudence, tafweez is of the following three kinds: i) Ikhtiar, giving wife the authority to divorce herself; ii) Amr-ba-yed, leaving the matter in her own hand; and iii) Mashiat, giving her the option to do what she likes. All these, when analysed strictly, resolve themselves into one, leaving the option to the wife to dissolve the marriage contract in the way she prefers after the right to divorce has been delegated to her by the husband.[12]

The concept of talaq-e-tafweez has been recognised by all Muslim schools of thought except the Fiqh-e-Jaferia.[13] In this Fiqh, such delegation of power to the wife is not permissible. In their point of view, which equally holds an authentic juristic opinion, the divorce becomes effective only when it is uttered by a husband in presence of witnesses.[14]

Sunni jurists interpret the following Quranic verse to mean that a woman can be delegated the right of divorce and that she may exercise it at her discretion.[15] Meanwhile, others construe the

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[4] AAA Fyzee, *Outlines of Muhammadan Law* (2008) 163

[5] RK Wilson, *Anglo-Muhammadan Law* (edn. VI, 1908) 254.

[6] 1995 PLD 187.

[7] 2013 CLC 1625.

[8] Ibid.

[9] Mulla (n 4).

[10] S Omar, 'Dissolution of Marriage: Practices, Laws and Islamic Teachings' (2007) 4(1) Policy Perspectives 91.

[11] N Baillie, *Digest of Mahomedan Law* (1980) 19.

[12] 2013 CLC 1625.

[13] SHM al-Hasni, *Tareekh Fiqh-e-Jafri* (2018) 124.

[14] Ibid.

[15] M Munir, 'Stipulations in a Muslim Marriage Contract with Special Reference to Talaq Al-Tafwid Provisions in Pakistan' (2006) 12 Yearbook of Islamic and Middle Eastern Law 243.

verse below in its literal meaning, which does not devolve the power of divorce to a woman but instead gives her the 'option' since it mentions that if they — Prophet's wives, do not want to live with him, he could divorce them.[16]

> *"O Prophet! Say to your wives: If you desire the life of this world, and its glitter, then come! I will make a provision for you and set you free in a handsome manner (divorce)" (33:28)*

Muslim schools of thought differ in respect of talaq-e-tafweez, therefore, it falls under the category of Muslim personal law.[17] It is important to mention that when a woman is given the right of talaq-e-tafweez by her husband, she can exercise this power and repudiate marriage herself, under the law of her sect. Meaning thereby, if she belongs to Sunni sect, the suni law will apply to her case and if she belongs to Shia or other sect the law peculiar to that sect shall apply to the person of that sect and whenever a notice of such delegated power of divorce is given to the Chairman, he is under the duty of law to constitute Arbitration Council and initiate proceedings in the same manner and mode as it is for talaq.[18]

Talaq-e-tafweez is not an automatic right of a wedded woman and has to be delegated by the husband to the wife under Clause 18 of the Nikahnama.[19] For a woman to be able to effectively use this right, there should be a clear expression of words delegating the right explicitly either in yes or no, without any ambiguity.[20] Conclusively, the Nikah Khawans / ulemas are bound not to use evasive entries against Clause 18 to avoid critical situations.[21]

2. Applicable Laws

The following statutes provide the legal framework for dissolution of Muslim marriages in Pakistan: i) Dissolution of Muslim Marriage Act, 1939; ii) Muslim Family Laws Ordinance, 1961; and iii) Family Courts Act, 1964.

Amongst the above-mentioned laws, Section 8 of the Muslim Family Law Ordinance (MFLO), 1961, specifically deals with talaq-e-tafweez. It provides the wife the prerogative to divorce

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[16] Ibn Hajar Al-Asqalani, *Fath al-Bari* (Vol. 9, 1997) 303.

[17] B Puri, 'Muslim Personal Law: Questions of Reform and Uniformity be Delinked' (1985) 20(23) Economic and Political Weekly 987.

[18] 1995 PLD 187.

[19] 2010 YLR 1632.

[20] Ibid

[21] HH Khan and A Khan, 'Women's Rights and the Nikah Nama in Pakistan' (2019) <https://www.cerp.org.pk/updata/files/files/41_20200504004625.pdf> accessed 22 December 2025.

herself whenever she desires to do so after delegation of right to divorce by the husband. The Section 8 of MFLO provides:

> *'8. Dissolution of marriage otherwise than by talaq. – Where the right to divorce has been duly delegated to the wife and she wishes to exercise that right, or where any of the parties to a marriage wishes to dissolves the marriage otherwise than by talaq, the provisions of section 7 shall, mutatis mutandis and so far, as applicable, apply.'*

3. Talaq-e-tafweez: An Irrevocable Right

Once the right to divorce has been delegated to the wife by the husband, at the time of marriage or even later during the marriage, this right becomes irrevocable / absolute.[22] Meaning thereby that the right cannot be repudiated.[23] The same point of law has repeatedly been quoted in various judgments. For example, in the case of *Qambar Murtaza Bokhari v. Zainab Bashir,* it was held that according to the Muhammadan law, once a person to whom the power of divorce is delegated, the power so delegated becomes irrevocable and this will operate as talaq of the wife by husband.[24]

In this context, in *Umer Naseem v. Additional District and Sessions Judge Lahore,* it was held that once the power to divorce is delegated, the power becomes irrevocable.[25] Similarly, in the case of *Khawaja Muhammad Shoaib v. Nazim Union Council*, it was held that the right to divorce once granted cannot unilaterally be revoked.[26]

Furthermore, in *Khawar Iqbal v. Federation of Pakistan,* it was recommended therein that the right of pronouncement of divorce by the wife granted to her by the husband in the marriage contract or after the marriage at any time is technically called Tafveez and is accepted as lawful by all Muslim jurists except those belonging to Fiqh-e-Jaferia.[27] Tafweez (delegation) may be granted and exercised by the wife on certain conditions, but if no conditions are mentioned it is taken as an unconditional right.[28] If the husband at the time of marriage or at any time during the married

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[22] L Carroll, 'Talaq-i-Tafwid and Stipulations in a Muslim Marriage Contract: Important Means of Protecting the Position of the South Asian Muslim Wife' (1982) 16(2) Modern Asian Studies 277.

[23] L Khalid (n 2).

[24] 1995 PLD 187; 2013 CLC 1625.

[25] 2016 CLC 117.

[26] 2010 YLR 1 (Lahore HC).

[27] 2013 MLD 1711 (Federal Shariat Court).

[28] Ibid.

life says to his wife that you can divorce yourself whenever you like, this right of the wife becomes absolute for the whole of her life.[29]

4. Difference between Khula and Talaq-e-Tafweez

Talaq-e-tafweez and Khula are two different concepts under the domain of family law.[30] When the power of talaq is transferred to the wife it is known as talaq-e-tafweez, and upon such delegation, the wife gets the prerogative to divorce herself unilaterally, whenever she wants to end the marriage contract.[31] Whereas in khula the parties agree to separate by way of consent usually upon terms such as the wife agreeing to repay her *Mehr* (dower) to the husband upon him agreeing to grant talaq.[32]

To elucidate further, it is worth-mentioning that in the case of *Sajid Hussain Tanoli v. Nadia Khattak*, it was held that talaq-e-tafweez is a delegated right, therefore, it cannot be termed as khula by making the wife liable to return her dower.[33]

There is much difference between the prayer of khula and the exercise of delegated right of divorce. Under talaq-e-tafweez, the wife can repudiate marriage herself, while in the former, the wife has to seek dissolution of marriage from the Court.[34]

5. Pronouncement of Talaq-e-Tafweez and Procedure of Execution

Divorce is a sensitive issue which cannot be finalised verbally since verbal divorce has no legal value and a divorce is only finalised after completion of due process.[35] Talaq-e-tafweez is either delegated unconditionally to the wife or with certain contingencies.[36] In both circumstances, if

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[29] Ibid.

[30] M Ansari, 'Know the three practiced modes of talaq (divorce) amongst Muslims' (The Bridge Chronicle, 22 August 2017) <https://www.thebridgechronicle.com/pune/know-three-practiced-modes-%E2%80%98talaq%E2%80%99-divorce-amongst-muslims-4667> accessed 22 December 2025.

[31] S Patel, 'Talaq, Khula, Faskh and Tafweedh: The different methods of Islamic separation – Part 1' (Lexis Nexis, 10 November 2014) <https://www.familylaw.co.uk/news_and_comment/talaq-khula-faskh-tafweedh-the-different-methods-of-islamic-separation-part-1> accessed 22 December 2025.

[32] S Patel, 'Khula – the Islamic non-fault divorce' (Lexis Nexis, 31 July 2014) <https://www.familylaw.co.uk/news_and_comment/khula-the-islamic-non-fault-divorce> accessed 22 December 2025.

[33] 2013 CLC 1625 (Peshawar HC)

[34] Ibid.

[35] S Baloch, 'Verbal divorce has no legal value, SC tells petitioner' *Dawn* (13 March 2018) <https://www.dawn.com/news/1394998> accessed 22 December 2025.

[36] 1995 PLD 187 (Lahore HC)

the right to divorce has been delegated, a formal pronouncement of talaq is necessary for divorce to operate as talaq of the wife by husband.[37]

The next step after the pronouncement of divorce by the wife - if she has been given the delegated right of divorce, the wife sends a notice of divorce to the concerned Arbitration Council which primarily tries to hold reconciliation between the spouses. Upon failure to do so, the Chairman of the Arbitration Council issues a 'Certificate of Effectiveness of Talaq' after expiry of 90 days from the date of filing of the written notice of divorce by the wife.[38]

The wife exercising her delegated right to divorce has to file the notice in the Union Council within whose jurisdiction the wife herself resides, or where the husband resides or where the nikah was registered.[39] Once after filing of notice in the Union Council, after expiry of 90 days, the marriage becomes void unless revoked by either of the spouses.[40] To further elaborate, in the case of *Khawar Iqbal vs Nadia Khan and others*, it was observed that where the wife exercises the right of divorce delegated to her, the provisions of Section 7 of the Muslim Family Laws Ordinance, 1961 would apply mutatis mutandis as provided under Section 8 of the Ordinance.[41] No formal mode for exercise of the right of talaq-e-tafweez exists and the only requirement is that a notice in writing must be given to the Chairman of the Arbitration Council about exercise of the right to divorce.[42]

Moreover, in the case of *Mehnaz Mehboob vs Ishtiaq ur Rashid*, it was observed that divorce once pronounced, would be effective after a period of 90 days, unless it is revoked by the husband or by the wife exercising her right of talaq-i-tafweez.[43] The same principle was upheld in the case of *Shema Farooq v. Chairman Union Committee*, where it was held that talaq ipso facto becomes effective on expiry of 90 days of the receipt of notice of talaq-e-tafweez under s. 7 of the Muslim Family Law Ordinance, 1961.[44]

6. Importance of Delegated Right to Divorce

[37] Ibid

[38] 2018 CLC 1125 (Islamabad HC)

[39] 2010 YLR 1 (Lahore HC)

[40] 2007 CLC 1009 (Lahore HC)

[41] 2011 PLD 265 (Lahore HC)

[42] Ibid

[43] 2006 YLR 335 (Lahore HC)

[44] 1996 CLC 673 (Lahore HC)

Women have been historically marginalised.[45] But certain rights granted under Islam seek to empower women and uplift their status. For example, when a Muslim woman enters into a marriage contract, it is obligatory for the man (husband) to give his wife a mutually agreed amount in the form of her *mehr*, in order to give her a sense of financial security and independence.[46] Similarly, it is notable to mention that Islam has given women the right to divorce, which is delegated to her by husband with his free will and consent.[47] Such delegation of right to divorce is termed as talaq-e-tafweez and empowers a Muslim woman to opt out of an unhappy union.[48]

6.1. Wife's Dower Retained

One prime advantage that the wife gets as a result of delegation of right to divorce is that she does not have to let go of her right to dower.[49] Instead, quite fortunately, this mode of dissolution of marriage allows the woman to retain her Haq Mehr (dower), which on the contrary is not granted when a woman seeks khula.[50]

6.2. Serves as a Check on the Husband

Talaq-e-Tafweez serves as a check on man who refuses to maintain her wife in the appropriate manner, one who neglects his children / wife, or is away for a very long period of time without providing his wife with the finances required for the maintenance, and the one who does not agree to give khula or divorce to his wife at any cost.[51]

6.3. Costs and Time

Another benefit of talaq-e-tafweez is that it facilitates a woman in exercising her right and saves her from getting entangled in legal and procedural formalities in approaching different forums and Courts of law for redressal of her grievance. As the concept of talaq-e-tafweez refers to the

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[45] K Hazel and K Kleyman, 'Gender and sex inequalities: Implications and resistance' (2020) 48(4) Journal of Prevention and Intervention 281.

[46] N Ali, 'Ladies, you can divorce your husbands' *Daily Times* (23 September 2019) <https://dailytimes.com.pk/471235/it-is-a-morning-and-afternoon-story-about-right-to-divorce-delegated-to-women/> accessed 22 December 2025.

[47] L Nishtar, 'Women's Rights Under Family Law' *The Express Tribune* (14 July 2018) <https://tribune.com.pk/story/1757432/womens-rights-family-law> accessed 22 December 2025.

[48] Noor ul Ain Ali (n 47).

[49] 2013 CLC 1625 (Peshawar HC).

[50] 2016 CLC Note 117 (Lahore HC).

[51] 2013 MLD 1711 (Federal Shariat Court).

notion of dissolution of a marriage without resorting to courts, it is therefore less costly than other means i.e., judicial divorce, khula etc.

A very common perception often endorsed by the general public is that dissolving marriage is a lengthy and costly procedure. Therefore, a vast number of women, despite being unhappy in their marriage, prefer not to seek talaq / khula from the Court because they feel that dissolving marriage would take a lot of time, would require hefty sums of money and would cause unwanted hassle. However, it is worth-mentioning that talaq-e-tafweez as a form of dissolution of Muslim marriage is not only less costly but also saves time, since it does not require intervention of Court and the woman can herself repudiate the marriage.[52]

7. Challenges in Exercise of Right of Talaq-e-Tafweez:

The right of talaq-e-tafweez has been granted by Islam to Muslim women with the consent of her husband in order to provide her protection in her legitimate contract of marriage. However, such right has been consistently misconstrued and denied for the below mentioned reasons. Therefore, challenges in exercise of right of talaq-e-tafweez along with possible solutions have been highlighted as under:

7.1. Lack of Awareness Amongst Nikah Khawans

The lack of awareness in the Nikah Khawans i.e., one who solemnises a nikah, about the delegated right to divorce and its implementation is the biggest barrier faced by women towards exercising their right of talaq-e-tafweez.[53] In the nikahnama, the chief right of a married woman pertains to the right to divorce, which is routinely omitted by moulvis / Nikah Khawans without consulting the bride and her family.[54]

7.2. Intervention of Union Councils

There have been multiple cases wherein the Union Councils have deliberately intervened on the issue of validity of the delegated right to divorce, notwithstanding the fact that they do not have such authority under the law. In the case of *Mehnaz Mehboob v. Ishtiaq ur Rashid*, it was observed that the Chairman is duty bound to constitute Arbitration Council and he has no right to declare

[52] S Omar (n 11).

[53] HH Khan and A Khan (n 22)

[54] H Fareed and M Ovais, 'Decoding: The Nikahnama' *The Express Tribune* (23 February 2015) <https://tribune.com.pk/story/841016/decoding-the-nikahnama> accessed 22 December 2025.

right of divorce through Tafweez as un-Islamic, unlawful and against Injunctions of Qur'an and Sunnah.[55]

Moreover, in the case of *Nazir Fatima v. Nazim Union Council,* one of the conditions of marriage between parties was that the husband had delegated the right of divorce to the wife. The wife in exercise of said right pronounced divorce upon herself and a notice was sent to concerned Nazim (chairperson) of the Union Council.[56] However, the Nazim informed the wife that the husband was not ready to pronounce divorce and sent the case to Family Court. It was held that the Union Council's Nazim was oblivious of his legal position as right of divorce could be lawfully delegated by husband to wife.[57] In this regard, another case is *Shema Farooq v. Chairman Union Committee*, in which it was further clarified that the Arbitration Council has no authority to decide on the law or merits of the case.[58] Instead their legal duty is solely to try and bring about reconciliation between the parties to the marriage contract, and not to declare delegation of right to divorce to be a concept repugnant to Islamic injunctions.[59]

7.3. Inconsistent Statements within the Nikahnama

Inconsistent statements within the nikahnama creates hurdles in the enforcement of the delegated right to divorce.[60] For example, in the case of *Ali Abbas Khan v. Palwasha Khan*, the Court refused to interpret the words, *'sharai haqooq hasil hay"* (rights granted by Shariah will apply) in Clause 18 of the nikahnama as sufficient for delegating the right to divorce to the wife.[61] Moreover, in *Abdul Haseeb v. Chairman Arbitration Council,* it was held that right to divorce is not a Sharai right of a wedded woman and must be delegated explicitly to the wife in Clause 18 of nikahnama in clear words.[62]

7.4. Provisions Crossed without Consulting Bride

In Pakistan, it is quite unfortunate that a common practice exists according to which the male members of the family including father, brother etc. cancels the provisions in Clause 18 of the nikahnama without consulting the bride at the time of marriage.[63] The option of talaq-e-tafweez

[55] 2006 YLR 335 (Lahore HC).

[56] 2004 PLD 77 (Lahore HC).

[57] Ibid.

[58] 1996 CLC 673 (Lahore HC).

[59] 2005 PLD 358 (Sindh HC).

[60] AJ Butt, 'Reforming the Procedure of Nikah Proceedings in Pakistan' (2021) 8 LUMS Law Journal 81.

[61] 2010 YLR 1632 (Islamabad HC).

[62] 2000 CLC 202 (Lahore HC).

[63] L Khalid (n 2)

is rarely availed by women, mostly due to ignorance in properly reading the nikahnama and also for the reason that it is considered a bad omen to talk about modes and means of dissolving marriage at the beginning of a marital life.[64]

8. Possible Solutions to Overcome Challenges Faced by Women in Exercise of Talaq-e-Tafweez

Firstly, it is important that awareness campaigns must be organised from time to time, at different levels i.e., in schools, colleges, universities and the Government for public at large, in order to educate every sector of society especially those who are directly involved in the process of solemnizing a marriage contract - the Nikah Khawans.

Secondly, in today's time, in the presence of a number of precedents and in light of current trends / practices being followed, it is evident that Union Councils are exploiting their legal powers to make decisions. Hence, it is the pressing need of time that nazims of Union Councils should not only be educated about the permissibility of talaq-e-tafweez but also needs to be educated about their legal capacity or directive i.e., make attempt to bring about reconciliation between the parties to marriage contract.

Thirdly, it is to be understood that talaq-e-tafweez is not a Shari right of a married woman and has to be delegated by the husband to the wife under Clause 18 of the Nikahnama.[65] Therefore, there should be a clear expression of words delegating the right to divorce explicitly either in yes or no. The Nikah Khawan who conducts the nikah should not use evasive entries against Clause 18 to avoid critical situations in the course of exercise of such right.

9. Comparative Analysis of Talaq-e-Tafweez in Different Jurisdictions

Different countries around the globe practice the concept of talaq-e-tafweez within their own jurisdictions. It is a well-recognised form of dissolving the marriage contract in a relatively less stressed, easier and quicker manner.[66] Following countries have been analysed to draw a comparative analysis:

9.1. Singapore

[64] R Zakaria, 'Marriage and Exit' *Dawn* (21 November 2018) <https://www.dawn.com/news/1446900> accessed 22 December 2025.

[65] 2010 YLR 1632 (Islamabad HC).

[66] Yakare-Oule Jansen, 'Muslim Brides and the Ghost of Shari'a: Have the Recent Law Reforms in Egypt, Tunisia and Morocco Improved Women's Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make it Stick?' (2007) 5 Northwestern Journal of International Human Rights 187.

In Singapore, regardless of the fact, there is no specific legislation dealing with provisions of talaq-e-tafweez - as a form of dissolution of marriage, there have been cases in which this concept of delegation of right to divorce has been practiced in family cases.[67]

For example, a case was reported in Singapore Syariah Appeal Reports (SSAR) as *AQ v AR*, in which the parties married each other in 2009. Later, due to problems the wife decided to leave her matrimonial home and applied for a divorce from the husband. The court decided that the marriage will be dissolved by the husband's pronouncement of talaq al-tafwid.[68] In this case, the husband specifically pronounced 'I hereby authorise my wife to divorce herself by one talaq'. The wife, on the other hand, pronounced 'I accept the authorisation given by my husband to divorce myself. I hereby divorce myself from my husband with one talaq'.[69]

Similarly, in the case of *Hosairi bin Kalil v. Zaliha bt Othman*, the divorce was affected by talaq al-tafwid after the husband agreed to transfer the right to divorce to the wife.[70] Again, in this case the wife said 'I accept the authorisation given by my husband to divorce myself. I hereby divorce myself from my husband with one talaq'.

9.2. Bangladesh

In Bangladesh, the concept of delegation of right to divorce to the wife i.e., talaq-i-tafwid is quite common and has been practiced for a long time.[71] Like other South Asian women, Bangladeshi women have been into abusive marriages which made them realise that it is important for them to be given the power to nullify or repudiate the nuptial contract whenever escape is the only option left to them.[72] Therefore, women rightly started demanding delegation of the right to divorce in Clause 18 of their nikahnama, specifically dealing with talaq-i-tafwid.[73] Case laws on the subject matter refer to the notion that the right to divorce once delegated becomes irrevocable and can be exercised in absence of husband and witnesses.

[67] MI Mehmood and NA Malek, 'A Study of Talaq Al-Tafwid in Islamic Law and Contemporary Legislations: Should Malaysia Follow Suit?' (2019) 4 Shariah Law Reports <http://irep.iium.edu.my/89016/> accessed 22 December 2025.

[68] 2012 6 SSAR 235.

[69] Ibid.

[70] 2009 2 SSAR 187.

[71] S Khanum, 'Talaq-i-Tafwid and Its Application in Context of Bangladesh: An Analytical Approach' (2016) 21 IOSR Journal of Humanities and Social Science 34.

[72] N Ameen, *Wife Abuse in Bangladesh: An Unrecognized Offence* (2005) 70-78.

[73] S Khanum (n 72)

For example, in the case of *Aklima Khatun v. Mahibur Rahman,* it was held that the right to divorce may be delegated absolutely or conditionally and it may be for once only or for a lifetime (permanently).[74] Moreover, in the case of *Tahazzad Hussain Sikdar v. Hossneara Begum,* it was observed that once the right to divorce has been delegated, the wife can exercise her right of talaq-i-tafwid and the pronouncement of talaq by wife does not need to be in presence of husband or witnesses.[75]

9.3. Egypt

Egyptian legal practice recognises the following three forms of dissolution of marriage: i) dissolution at the demand of husband (talaq); ii) wife-initiated judicial divorce (tatliq); iii) divorce by agreement.[76]

This third form of dissolution of marriage is divided into two categories: i) delegated repudiation, in which the husband delegates the right of repudiation / divorce to his wife (tafwid al-talaq); ii) divorce by mutual consent (khul).[77]

The Qadri Pasha Code after codification in 1875, in its Article 260 provided that the husband can delegate to his wife the right to divorce.[78] In Egypt, even though the right of tafwid al-tallq was considered acceptable by the Sharia Courts in medieval Cairo during the 19th century, it is worth noting that the concept of delegated repudiation was less practiced as compared to the concept of khul.[79]

As Egypt evolved into a modern state, there was a need to revise laws and set practices that empower women and therefore, the Courts started giving more importance to the right of the wife to repudiate marriage via delegation of right by husband.[80]

9.4. India

[74] 1963 PLD 602 (Dhaka HC).

[75] 1967 PLD 421 (Dhaka HC); 1965 PLD 274 (Dhaka HC).

[76] N Sonneveld, 'Divorce Reform in Egypt and Morocco: Men and Women Navigating Rights and Duties' (2019) 26 Islamic Law and Society 149.

[77] Ibid

[78] L Abu-Odeh, 'Modernizing Muslim Family Law: The Case of Egypt' (2004) 37 Vanderbilt Journal of Transnational Law 1043.

[79] R Shaham, 'Judicial Divorce at the Wife's Initiative: The Sharia Courts of Egypt, 1920-1955' (1994) 1(2) Islamic Law and Society 217.

[80] L Abu-Odeh (n 79).

In India, talaq-e-tafweez is not an alien concept and has been practiced for more than decades now.[81] It is safe to say that women in India are aware of their right to divorce, delegated to them by their husbands at the time of marriage or afterwards during marriage. There have been multiple cases where women themselves took the initiative to end their toxic marriages via exercising their right of talaq-e-tafweez.[82] In the case *Baffatu Bibi v. S.K Abdur Salim*, it was held that the husband can authorise his wife to divorce herself and the wife can clearly exercise her delegated right.[83]

In *Sainuddin v. Latifunnessa Bibi,* the husband had a post-nuptial agreement in which it was written that if he would marry a second woman, the right to divorce would be delegated to his wife.[84] The husband subsequently did marry another woman and the wife divorced herself in accordance with the agreement.[85]

Moreover, in *Saifuddin Sekh v. Soneka Bibi*, an ante-nuptial agreement arose, where a man's third wife stipulated that if he ever brought any of his other two wives to live in the same house she shared with him - without her consent, she would automatically gain the right to exercise the delegated power of divorce.[86] The court accepted this provision since it did not, in any way, serve as an impediment to the marital relations between husband and his wives and viewed it as one to ensure peace and domestic happiness.[87]

10. Conclusion

Conclusively, the concept of talaq-e-tafweez stems from Qur'an, meaning that talaq-e-tafweez originates from the original source of Shari'a i.e., the Quran and the Sunnah. It is considered a viable means of dissolving marriage because it helps the husband and wife in ending their nuptial agreement in a dignified manner. In a country like Pakistan where patriarchy dominates, it is important for every woman to read her nikahnama at the time of marriage and vigilantly ask for her delegated right to divorce.

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[81] M Wajihuddin, 'Talaq, the way women want it' *The Times of India* (30 August 2009) <https://timesofindia.indiatimes.com/india/talaq-the-way-women-want-it/articleshow/4949987.cms> accessed 30 August 2023.

[82] P Agarwal, 'Meet Muslim women who divorced their husbands' *The Times of India* (1 July 2018) <https://timesofindia.indiatimes.com/city/bareilly/meet-muslim-women-who-divorced-their-husbands-using-little-known-provision-of-talaq-e-tafweez/articleshow/64810069.cms> accessed 30 August 2023

[83] 1950 AIR 304 (Calcutta).

[84] 1918 ILR 141 (Calcutta).

[85] Ibid.

[86] 1955 AIR 153 (Assam).

[87] Ibid.

Delegation of right to divorce to women is also important because such right once delegated — either conditionally or absolutely, becomes irrevocable and saves women from lengthy, daunting court procedures of seeking divorce for repudiating marriage. Another prime benefit of exercising talaq-e-tafweez is that the wife can retain her dower even after dissolving the marriage contract upon her will and does not have to let go of her dower. Therefore, it is a pressing need of time that every woman should be taught about her marital rights including talaq-e-tafweez, which provides a sense of security, protection and most importantly gives her the freedom to escape an abusive or toxic relationship whenever she so desires.

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Cruelty in Matrimonial Relationships: A Legal Analysis of 'Tayyeba Ambareen v. Shafqat Ali Kiyani'

Khadija Zafar & Jhanzaib Ahmad Khan[1]

Abstract

The landmark judgment of Tayyeba Ambareen v. Shafqat Ali Kiyani (2023 SCMR 246) by the Supreme Court of Pakistan represents a significant jurisprudential development in addressing cruelty within matrimonial relationships under the Dissolution of Muslim Marriages Act, 1939. This article provides a comprehensive legal analysis of the decision, which redefines cruelty to encompass psychological harm, including coercive financial control, and false allegations of infidelity. The ruling also recognizes the harmful role of two fairly common legal practices in dissolution of marriage cases: the unilateral conversion of statutory divorce petitions into khula decrees—which unjustly compels women to forfeit their dower rights—and the strategic misuse of restitution of conjugal rights (RCR) suits by husbands to prolong litigation and evade financial obligations. While the judgment marks a progressive step toward gender-sensitive adjudication, this article argues that its impact remains constrained by systemic barriers. Persistent judicial biases, the absence of clear evidentiary standards for proving psychological cruelty, and procedural loopholes in family courts continue to hinder women's access to justice. Drawing on comparative jurisprudence, the analysis highlights how similar jurisdictions have implemented legislative reforms and judicial training to address parallel challenges. The article underscores the urgent need for Pakistan to bridge the gap between legal doctrine and practical enforcement. Recommendations include amending the Family Courts Act to prevent coercive khula conversions, introducing gender-sensitive judicial training, and imposing stricter scrutiny of RCR petitions to curb their misuse. Without these reforms, the progressive potential of Tayyeba Ambareen risks being diluted by entrenched patriarchal norms and procedural inefficiencies. Ultimately, this case note emphasises that substantive gender justice requires not only landmark rulings but also institutional accountability and culturally contextualized legal safeguards.

Keywords: Matrimonial cruelty, psychological harm, Tayyeba Ambareen, DMMA 1939, restitution of conjugal rights, khula, gender justice

1. Introduction

Cruelty in matrimonial relationships remains one of the most complex and pressing issues in Pakistani family law. While the Dissolution of Muslim Marriages Act (DMMA), 1939 provides statutory grounds for divorce,[2] judicial interpretation of what constitutes cruelty—particularly

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

psychological harm—has varied widely across courts. This inconsistency has created a system where women seeking relief from abusive marriages often face procedural hurdles and patriarchal biases.

The Supreme Court of Pakistan's landmark 2023 decision in *Tayyeba Ambareen v. Shafqat Ali Kiyani* (2023 SCMR 246)[3] represents a watershed moment in this legal landscape. Authored by Justice Muhammad Ali Mazhar, the judgment has three critical outcomes: Firstly, it establishes clear standards for proving mental cruelty under section 2(viii)(a) of the DMMA. Secondly, it condemns the common practice of unilaterally converting dissolution petitions (filed on cruelty grounds) into *khula* cases—a practice that forces women to forfeit their dower rights. Thirdly, it addresses the troubling misuse of restitution of conjugal rights (RCR) petitions by husbands seeking to evade financial obligations rather than reconcile.

While the *Tayyeba* Ambareen decision makes significant jurisprudential advances, its real-world impact potential will be analysed through a preliminary review of key systemic issues: (1) the lack of clear guidelines for assessing psychological harm, (2) persistent judicial biases in favor of khula conversions, and (3) procedural loopholes that enable weaponization of RCR petitions. In addition, select comparative jurisprudence will be identified from neighboring countries to showcase better practices for transforming Court's progressive reasoning into ground realities.

2. Case Background and Procedural History

The *Tayyeba Ambareen* case was filed by a woman, seeking a suit for dissolution of marriage on the ground of cruelty under Section 2(viii)(a) of the DMMA,[4] as well as recovery of dower amount, dowry articles, medical expenses and maintenance for herself and her minor daughter. As noted in the Supreme Court judgment,[5] the husband began demanding money for household expenses within a week of marriage, later escalating to coercive control over the wife's salary – requiring her to deposit earnings into a joint account and restricting access to her own funds.[6] Most egregiously, as recorded in the Family Court evidence,[7] the husband had publicly accused his wife of infidelity, referencing their child's paternity during the pregnancy and simultaneously neglected his pregnant wife's medical and financial needs, forcing her to rely on parental support for delivery expenses. The Family Court rightly recognized these acts as constituting cruelty under DMMA, particularly noting the husband's 'calculated pattern of humiliation'.[8] However, the High Court committed a grave procedural injustice by unilaterally converting the dissolution decree into khula under section 10(4) of the Family Courts Act (FCA) 1964 – a move the Supreme

[3] *Tayyeba Ambareen v Shafqat Ali Kiyani* [2023] SCMR 246 (SC).

[4] DMMA 1939, s 2(viii)(a).

[5] *Tayyeba Ambareen v Shafqat Ali Kiyani* [2023] SCMR 246 (SC), para 3.

[6] *Ibid* para 15.

[7] *Ibid* para 7.

[8] *Ibid* para 9.

Court later condemned as 'legally untenable'.[9] The conversion of the dissolution decree had severe implications, including financial repercussions such as ordering the wife to repay 5 tolas of dower (approx. PKR 1.2 million at 2023 rates), effectively punishing the victim while ignoring protections under section 5 of the DMMA. The Supreme Court's reversal[10] not only restored the original decree but established vital safeguards against such judicial overreach for future cases.

3. Legal Framework Involved

'Marriage (*nikah*) is defined to be a contract which has for its object the procreation and the legalizing of children.'[11] Like any other civil contract, a marital contract can also be terminated. Such termination is commonly referred to as dissolution of marriage or divorce.[12] The framework for dissolution of marriages is detailed in the following laws: the Muslim Family Law Ordinance 1961 (MFLO 1961), the DMMA, and the FCA. These laws set out the various types and forms of dissolution and termination of marriage, these include: (i) *Talaq*[13] (ii) *Talaq-e-tafweez*[14] (iii) *Talaq-e-mubarat*[15] (iv) *Khula*[16] and (v) *Faskh*[17].

In relation to the present case, the following forms are of relevance: *faskh and khula.* The grant of *faskh* requires the wife to declare and prove a fault by the husband to plead for divorce through court.[18] The DMMA recognizes various grounds on which a wife can seek dissolution of marriage through a judicial decree.[19] One such ground is cruelty.[20] Cruelty, as provided in DMMA, may arise from various instances, i.e., habitual assault, immoral association, forced immorality, property deprivation, religious obstruction.[21] With respect to *khula,* section 10(4) of the FCA,[22] further affirmed in *Khurshid Bibi* (PLD 1967 SC 97),[23] states that the family courts are empowered to dissolve a marriage on the basis of *khula*. During this process, both parties are afforded an opportunity to reconcile. If reconciliation fails, the court may grant a decree for dissolution,

[9] *Ibid* para 19.
[10] *Ibid* para 21-23.
[11] D.F. Mulla, *Principles of Muhammadan Law* (20th edn, LexisNexis 2020) s 250.
[12] 'Divorce' (TheLaw.com Law Dictionary) <https://dictionary.thelaw.com/divorce/> accessed 25 May 2025.
[13] Muslim Family Laws Ordinance 1961, s 7.
[14] *Ibid* s 8.
[15] *Ibid*.
[16] Family Courts Act (FCA) 1964, s 10(5).
[17] DMMA 1939.
[18] *Khurshid Bibi v Muhammad Amin* [1967] PLD 97 (SC).
[19] DMMA 1939.
[20] *Ibid* s 2(viii).
[21] *Ibid* (viii) (a-f).
[22] FCA 1964, s.10(4).
[23] *Khurshid Bibi v Muhammad Amin* [1967] PLD 97 (SC).

contingent upon the wife returning or relinquishing the dower received from the husband as part of their marriage agreement.

It is pertinent to note, that section 5 of DMMA stipulates that the wife's right to dower remains unaffected on the dissolution of marriage based on any of the grounds stipulated in section 2.[24] In contrast to section 5 of DMMA, a marriage dissolved by way of *khula* has historically required some relinquishment of the dower received in the marriage.

4. Key Findings in the Tayyeba Ambareen Case

4.1 Clear Standards for Mental Cruelty

In the present case, the relevant form of cruelty relates to psychological harm, which falls within clause (a) of section 2 (viii) of DMMA, and hence the analysis will focus on this aspect in more detail. Section 2 (viii)(a) explicitly excludes the requirement for cruelty to be solely physical in nature. The *Tayyeba Ambaraeen* judgment clarifies that cruelty has multiple manifestations – it can affect the body or the mind, and it can be planned or unplanned. Such acts would be deemed cruel even if the perpetrator had no ostensible malicious intent. Parameters exist for evaluating whether conduct qualifies as cruel. While the physical aspect of cruelty is a matter of fact, instances where cruelty affects the victim's mental well-being must be assessed in terms of the psychological harm and suffering endured. Comparable standards have been noted in other relevant precedents. In *Mehvish Kazmi v. Pervaiz Hussain*, the the Supreme Court of Azad Jammu and Kashmir (AJK) ruled that the cruelty in matrimonial life is considered to be of founded variety, including both violent and non-violent acts, as well as gestures or mere silence.[25] Thus, cruelty is not limited to physical bearing; rather, it can be mental or directed through one's conduct.[26] Moreover, in the context of marriage, courts have considered false allegations of adultery against the wife to constitute cruelty that results in mental torture and loss of confidence.[27] The Supreme Court in *Tayyeba Ambareen* examined the various forms of cruelty relying upon references from comparative jurisdictions as well as the Quran. It is imperative to analyse those references for a better understanding of the topic.

In matrimonial jurisprudence, cruelty has been expansively interpreted across common law systems to encompass not only physical violence but also persistent emotional abuse. Halsbury's Laws of England (4th Ed.)[28] stresses that cruelty must be assessed holistically, focusing on the cumulative impact of conduct—particularly injurious reproaches, accusations, or taunts—on the

[24] DMMA 1939, s.5.

[25] *Mehvish Kazmi v Pervaiz Hussain* [2022] PLD Supreme Court (AJ&K) 1.

[26] *Yasir v Loubna* [2022] CLC 372 (Pesh).

[27] *Shamim Akhter v Arshad Mehmood* [2017] PLD Supreme Court (AJ&K) 40; *Abdul Hafeez v Shamaila Bibi* [2013] MLD Supreme Court (AJ&K) 1148.

[28] Halsbury's Laws of England (4th ed, 2006 reissue) vol 13 para 1269, 602.

complainant's mental and physical health. The test is contextual, factoring in the parties' social status and psychological resilience, and does not require malevolent intent, though its presence strengthens the claim.

American Jurisprudence (2nd Ed., §35)[29] reiterates that mental cruelty—absent physical harm—can independently justify divorce if it endangers life or health, describing it as sustained, offensive conduct causing humiliation, anguish, and unendurable suffering. Similarly, Corpus Juris Secundum (Vol. XXV)[30] defines cruel treatment as any act—violent or otherwise—that inflicts unnecessary physical or mental suffering or instills a reasonable fear of harm. It highlights the willful infliction of pain or torment, whether through action or omission.

Black's Law Dictionary (9th Ed.)[31] aligns with these interpretations, defining cruelty as the intentional or malicious infliction of suffering, and mental cruelty as conduct so distressing it imperils the spouse's well-being. Words and Phrases (Permanent Ed.)[32] offers an operational summary: cruelty includes acts endangering life, health, or mental peace—especially those that undermine the marital relationship's essential purpose. Recurrent humiliation or emotional torture, even without physical violence, suffices.

The role of accusations of infidelity is particularly emphasized across these sources. False and malicious charges of adultery, particularly if made publicly or repeatedly—as noted in various foreign jurisdictions—can amount to cruelty by destroying a spouse's peace of mind and social reputation.[33] This is extremely relevant in Pakistan, where honor, chastity, and familial perception weigh heavily, particularly for women. Malicious character assassination in the form of false adultery claims can be both emotionally devastating and socially ruinous. In Pakistan's context, these definitions urge courts to expand their interpretation of section 2(viii) of the DMMA, allowing claims based on mental cruelty to gain due recognition.

Moreover, in the present case, the Court emphasised on the delicacy of matrimonial relationships, quoting various Islamic law sources[34] to articulate the importance of mutual love, respect and remedial actions in situations of differences in a marriage. Further, emphasising the sanctity of marital bond in *Tayyeba Ambareen* the Court upheld a minimum standard aimed at preserving the integrity of family structure. The Court held that when determining, the ground of cruelty, the conduct in question must be of such severity that it cannot be reasonably tolerable. Such conduct

[29] American Jurisprudence 2d, vol 24, Divorce and Separation, para 35, 217–18.

[30] Corpus Juris Secundum, vol 25, 16.

[31] Black's Law Dictionary (Ninth Edition), at page 434 Black's Law Dictionary (9th edn, West 2009) 434.

[32] Words and Phrases (Permanent Edition) vol 10A, 329–31.

[33] *Jones v Jones* 60 Tex 451, 458, 461; *Bostick v Bostick* DC Mun App, 163 A2d 817; *Maley v Maley* 140 P2d 262, 265, 18 Wash 2d 766; *Morris v Morris* 107 P 186, 57 Wash 465.

[34] Qur'an, An-Nisa 4:34; Qur'an, Ar-Rum 30:21; Qur'an, Al-A'raf 7:189; *Sahih Muslim*, 1468a, Book 17, Hadith 80; *Jami at-Tirmidhi*, 3895, Book 49, Hadith 295; *Sahih Muslim*, 1218a (ref: thefaith.com/women-in-islam).

must extend beyond trivial disagreements that normally arise between spouses. The conduct must be of such degree that it renders living together impossible.

The Supreme Court of AJK in *Mehvish Kazmi* employed a similar approach in assessing the cruelty of conduct. The Court ruled that mental cruelty must rise to a level where continuation of the marital bond becomes untenable — that is, the suffering inflicted must be so profound that the aggrieved spouse cannot reasonably be expected to condone the conduct or continue cohabitation.[35] This test rightly shifts the focus from isolated acts to the cumulative impact on the victim's emotional and psychological capacity to sustain the marriage. In this sense, the AJK Supreme Court aligns with comparative doctrines that prioritise the effect of the conduct over its form or frequency, a position resonant with the reasoning in the *Tayyeba Ambareen* case. In *Tayyeba Ambareen*, the Supreme Court of Pakistan emphasised a similarly effect-based standard, where sustained verbal abuse, public humiliation, and character assassination were seen not just as morally reprehensible acts, but as forms of cruelty that violated the core objectives of the marital relationship.

Additionally in numerous comparative jurisdictions, courts have analogous standards for determining cruelty. One such example is *Prall v. Prall where* the Florida Supreme Court ruled: 'Mere inconvenience, unhappiness or incompatibility of temperament or disposition, rendering the marriage relations between the parties disagreeable or even burdensome, will not authorize a decree of divorce for extreme cruelty.'[36]

4.2 Unilateral Conversion of Statutory Divorce Claims into Khula

The family courts can dissolve a marriage on the basis of *khula* as per section 10(4) of the FCA and pursuant to *Khurshid Bibi*.[37] Both parties are afforded an opportunity to reconcile. If reconciliation fails, the court may grant a decree for dissolution, contingent upon the wife returning or relinquishing the dower received from the husband as part of their marriage agreement. However, if grounds other than *khula* are involved, the family court cannot convert the suit and dissolve the marriage on the basis of *khula*.

In such a case, the grounds invoked, which can include husband's second marriage without the Arbitration Council's permission, desertion or husband's cruelty cannot be brushed aside. Rather the family court must adjudicate upon the grounds in light of evidence presented.[38] Nevertheless, family courts often convert a plaint under DMMA into a plaint of *khula*, even when the grounds under DMMA are seemingly fulfilled. This is problematic for a number of reasons, including

[35] *Mehvish Kazmi v Pervaiz Hussain* [2022] PLD Supreme Court (AJ&K) 1

[36] *Prall v Prall* 58 Fla 496, 50 So 867.

[37] *Khurshid Bibi v Muhammad Amin* [1967] PLD 97 (SC); FCA 1964, s 5..

[38] *Sadia Sultan v Additional District and Sessions Judge Hafizabad* [2012] PLD 98 (Lahore).

economic concerns that the wife will face as a result of partial or complete relinquishment of dower, which she would not have to face had the grounds under DMMA been considered and proven.

As further clarified by the Supreme Court in *Ibrahim Khan v. Saima Khan* (2024 PLD 645 SC), 'a divorce by *khula* is a divorce with the consent and at the instance of the wife, in which she gives or agrees to give consideration to the husband for release from the marriage. It is a bargain or arrangement between the husband and wife whereby she may, as a consideration, release her dower and other rights for grant of *khula*'.[39] Hence, *khula* is contingent upon the wife's decision to leave the marriage in connection to and her surrender of consideration i.e. dower.[40]

Moreover, the Supreme Court of Pakistan in *Ibrahim Khan v. Saima Khan* further clarified the critical distinction between dissolution of marriage under the DMMA and *khula*, emphasizing that courts cannot unilaterally convert a wife's petition for dissolution under the DMMA into one for *khula*. The Court held that *khula* is a unique Islamic right granted solely at the wife's request, typically involving the waiver or return of her dower (mahr), whereas dissolution under the DMMA requires the wife to prove specific grounds such as cruelty or desertion, allowing her to retain her dower upon successful proof.

In this case, the wife had sought dissolution on grounds of cruelty, but the lower courts erroneously converted her petition into *khula*, thereby forcing her to forfeit her dower. The Supreme Court ruled that such conversion without the wife's explicit consent was legally impermissible and that the two forms of divorce are distinct with different legal consequences. The Court further observed that the evidence supported the wife's claim of cruelty and that the husband had effectively divorced her, entitling her to retain her dower.

4.3 Misuse of Restitution of Conjugal Rights

Regarding RCR, the Supreme Court in *Tayyeba Ambareen* observed that courts have a serious responsibility to carefully examine the sincerity of the husband in fulfilling his obligations towards his wife. A husband's claim for RCR should not be driven by personal gratification or assertion of male dominance. The Supreme Court further referenced traditional Islamic jurisprudence, including Mullah's Principles of Muhammadan Law, to outline the classical position that a wife's entitlement to maintenance hinges upon her obedience and cohabitation with the husband — unless she has a lawful excuse, such as cruelty or non-payment of prompt dower. Similarly, the law allows a husband to file a suit for RCR if the wife leaves the marital home without legal justification. However, the Court did not endorse this framework uncritically.

[39] *Ibrahim Khan v Saima Khan* [2024] PLD 645 SC.

[40] *Ibid.*

Instead, it used the reference to highlight how such legal tools — particularly the RCR remedy — are often weaponised against women.

Importantly, the Supreme Court identified male chauvinism as a frequent underlying motive for RCR claims, acknowledging that such suits are routinely filed by husbands to obstruct or frustrate the wife's claim for divorce or maintenance. By accusing a wife of disobedience or willful desertion, the husband attempts to render her '*nasheeza*'[41], thereby disqualifying her from maintenance under classical interpretations. In doing so, the RCR suit becomes not a genuine effort to restore the marital relationship but a strategic tool of control and retaliation — especially when the wife has initiated divorce proceedings.

This judicial recognition in the *Tayyeba Ambareen* decision is groundbreaking. It marks the first time Pakistan's apex court has explicitly acknowledged the systemic misuse of RCR and the gendered power dynamics it perpetuates. The Court's remarks echo and reinforce existing critical literature on the subject, such as the Legal Aid Society's report[42], which highlights how RCR has been historically exploited to harass women, delay their petitions for *khula*, and coerce them into remaining in oppressive marriages.

By cautioning subordinate courts to be wary of such abuse, the Supreme Court introduces an important doctrinal shift. It encourages the judiciary to assess the bona fides of RCR claims more rigorously and to avoid treating them as automatic entitlements of the husband. In doing so, it opens space for a more rights-based and gender-sensitive interpretation of family law — one that aligns more closely with constitutional protections of dignity, equality, and personal autonomy.

The Court held that the claim for RCR must not be tainted with malafide intention of defeating the wife's claim for dower or maintenance allowance. Instead, an RCR claim should be made in good faith, reflecting the husband's genuine desire to restore the marital relationship.[43]

In practice, however, this abuse is widespread. Husbands frequently file RCR countersuits in retaliation to a wife's claim for maintenance, shifting the legal burden onto the wife to prove that her departure from the marital home was justified. In the absence of concrete evidence, family courts often rule that the wife left without valid reason, thereby branding her '*nasheeza*' (disobedient). This label disqualifies her from receiving maintenance, regardless of the underlying marital abuse or economic coercion she may have endured. Such patterns illustrate how the ostensibly neutral RCR remedy is systematically weaponised to control, punish, or

[41] Translates to 'disobedient'.

[42] Qamar N, Zia M and Khan T, 'De-Constructing Conjugal Rights in Pakistani Law' (Legal Aid Society, 2019) <https://www.las.org.pk/media/pdfs/rpandp/De-Constructing-Conjugal-Rights-in-Pakistani-Law.pdf> accessed 25 May 2025.

[43] *Tayyeba Ambareen v Shafqat Ali Kiyani* [2023] SCMR 246 (SC) para 16.

economically disadvantaged women, reducing the legal process to a tool of harassment rather than reconciliation.

4.4 Procedural Overreach

In addition to addressing RCR, the Court also ruled on the scope of appellate courts' jurisdiction. The appellate courts are authorised to reevaluate judgments of trial courts – in this instance, the family courts – to examine the factual and legal errors. The Supreme Court drew a distinction between the domain of lower and appellate court in terms of re-weighing the evidence and credibility of the witnesses. It clarified that the appellate court cannot re-appreciate the evidence unless it is prima facie flawed. The courts have a duty to scrutinise the evidence and distinguish between falsehood and truth in light of available evidence.[44]

In the present case, the family court had initially granted dissolution of marriage on grounds of cruelty, yet its findings were overturned by the High Court. The Supreme Court found this intervention unwarranted, especially since the High Court had engaged in reappraisal of evidence—an act beyond the permissible scope of constitutional jurisdiction.

Referencing *Muhammad Lehrasab Khan v. Mst. Aqeel-un-Nisa* (2001 SCMR 338),[45] the Court reaffirmed that a High Court may exercise judicial review only in narrow circumstances: when there is non-reading or misreading of evidence, manifest illegality, arbitrary use of discretion, or when a decision is based on no evidence at all. These principles were echoed again *in Shajar Islam v. Muhammad Siddique* (PLD 2007 SC 45),[46] where the court emphasised that the scope of judicial review under Article 199 of the Constitution in such cases was limited to instances of misreading or non-reading of evidence or when the finding was based on no evidence, leading to miscarriage of justice and that the high court should not disturb findings of fact through a reappraisal of evidence in its constitutional jurisdiction or use this jurisdiction as a substitute for a revision or appeal and that an interference with the lower courts' findings of fact was beyond the scope of the high court's jurisdiction under Article 199 of the Constitution.

In *Tayyeba Ambareen*, however, the High Court erroneously reassessed factual findings without any established ground for interference—an act the Supreme Court deemed as exceeding constitutional limits. This procedural misstep was not incidental. It underscores how substantive justice in family law—especially in cases involving cruelty—is often compromised through procedural overreach.

5. Critical Analysis: Systemic Barriers and Gender Consequences

[44] *Ibid* para 7.

[45] *Muhammad Lehrasab Khan v Mst Aqeel-Un-Nisa* [2001] SCMR 338.

[46] *Shajar Islam v Muhammad Siddique* [2007] PLD 45 (SC).

While *Tayyeba Ambareen* marks a significant step in the recognition of psychological cruelty in Pakistani family law, its real-world impact is hampered by persistent systemic and procedural flaws that the Supreme Court alone cannot remedy. First, the judgment, though progressive in its articulation that cruelty under section 2(viii)(a) of the DMMA, 1939, includes psychological abuse, does not provide trial courts with concrete, context-sensitive guidelines for assessing such harm—leaving ample room for subjective interpretations, which have a high probability of uptaking patriarchal interpretations.[47] A comparison can be drawn between similar Supreme Court judgments in India, which have gone a step further in safeguarding implementation and practical implementation of such cases. For example, in *Raj Talreja v. Kavita Talreja*[48] and *Samar Ghosh v. Jaya Ghosh,*[49] the Indian Supreme Court has laid down detailed illustrative criteria for mental cruelty, including sustained verbal abuse, public humiliation, and cumulative psychological impact. In addition, the guidelines of the Supreme Court were reinforced by subsequent judicial training and development of gender-sensitive protocols.[50] These implementation focused interventions are a necessary next-step to ensure jurisprudential advancements are also carried out in practice.

Second, despite the Supreme Court's explicit condemnation of the widespread judicial practice of converting cruelty-based dissolution petitions into *khula* decrees,[51] a lot of such petitions, in particular in Punjab, are still converted to *khula*, compelling women to relinquish part of their dower and undermining the statutory distinction between fault-based divorce and *khula*.[52] In contrast, the Family Courts Act, 2023 (Bangladesh)[53] offers a compelling comparative model, explicitly safeguarding women's dower rights in cruelty-based divorces and prohibiting such unilateral conversions.

Third, and most troublingly, the procedural loopholes surrounding RCR petitions continue to be weaponized by husbands as a means of delaying divorce proceedings, exerting economic and emotional pressure, and forcing wives into unfavorable settlements. The Supreme Court in *Tayyeba Ambareen*[54] observed that RCR is often misused by husbands who have otherwise failed to fulfill their marital and financial obligations, yet lower courts routinely grant RCR without scrutinizing the bona fides of the petitioner or the context of abuse. Looking at other jurisdictions, recent interventions by the judiciary in India have gone a step further to impose strict evidentiary

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47 *Tayyeba Ambareen v Shafqat Ali Kiyani* [2023] SCMR 246 (SC) para 9.

48 *Raj Talreja v Kavita Talreja* [2017] 14 SCC 194.

49 *Samar Ghosh v Jaya Ghosh* [2007] 4 SCC 511.

50 Choudhry S, Women's Rights in the Indian Matrimonial Courts: Gender, Law and Practice (Bloomsbury Publishing 2019).

51 *Tayyeba Ambareen v Shafqat Ali Kiyani* [2023] SCMR 246 (SC) para 19 ; *Ibrahim Khan v Saima Khan* [2024] PLD 645 SC.

52 Ali SS, Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man? (Kluwer Law International 2000).

53 Family Courts Act, 2023 (Bangladesh).

54 *Tayyeba Ambareen v Shafqat Ali Kiyani* [2023] SCMR 246 (SC) para 15.

and good faith requirements in recognition of the concerns raised on use of RCR as a tool of oppression.[55] Adopting clear guidelines, evidentiary standards and procedural requirements can perhaps contribute to increased accountability and deter misuse of RCR in the future as well.

Further, this judgment exposes the persistent gendered logics embedded within Pakistani family law, even amidst apparent doctrinal progress. Feminist legal theorists have long argued that the structure and practice of family law in Pakistan are shaped by patriarchal assumptions, which systematically disadvantage women both in substance and procedure.[56] While the Supreme Court's recognition of psychological cruelty as actionable is a welcome doctrinal shift, the absence of clear, gender-sensitive evidentiary standards leaves lower courts with broad discretion—discretion that is frequently exercised in ways that minimize or dismiss women's lived experiences of emotional abuse and coercive control.[57] As Choudhry notes in her comparative study of Indian matrimonial courts, similar gaps in guidance have historically led to the trivialization of women's suffering and the perpetuation of patriarchal norms, until sustained feminist advocacy and judicial training began to shift the culture.[58]

Moreover, feminist scholars contend that procedural practices—such as the unilateral conversion of cruelty-based petitions into *khula* and the routine acceptance of RCR petitions without rigorous scrutiny—reinforce the notion that women's claims are less credible or less deserving of full legal remedy.[59] These practices not only undermine women's financial rights but also symbolically recast their pursuit of justice as a personal failing rather than a legitimate response to harm. Comparative jurisdictions offer important lessons: in India, the Supreme Court's evolving jurisprudence on mental cruelty[60] and the introduction of gender-sensitive judicial training have begun to address these embedded biases, while Bangladesh's Family Courts Act (2023)[61] provides explicit statutory protection for women's economic interests in cruelty-based divorces.

6. Conclusion

The *Tayyeba Ambareen* case marks a progressive shift in recognizing psychological cruelty as grounds for divorce in Pakistan. By condemning forced *khula* conversions and misuse of RCR

[55] *Smt Saroj Rani v Sudarshan Kumar Chadha* AIR [1984] SC 1562.

[56] Choudhry S, Women's Rights in the Indian Matrimonial Courts: Gender, Law and Practice (Bloomsbury Publishing 2019) 18–22.

[57] Ali SS, Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man? (Kluwer Law International 2000) 112–14.

[58] Choudhry S, Women's Rights in the Indian Matrimonial Courts: Gender, Law and Practice (Bloomsbury Publishing 2019) 201–05, 204.

[59] Ali SS, Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man? (Kluwer Law International 2000) 112–14, 120.

[60] *Raj Talreja v Kavita Talreja* [2017] 14 SCC 194; *Samar Ghosh v Jaya Ghosh* [2007] 4 SCC 511.

[61] FCA 2023 (Bangladesh).

suits, the Supreme Court of Pakistan has theoretically strengthened protections for women in abusive marriages. Yet, systemic challenges remain.

The comparative examples underscore the urgent need for reform in Pakistan: the development of clear, gender-sensitive guidelines for assessing psychological cruelty, mandatory judicial training, legislative safeguards against the unilateral conversion of statutory divorce claims into *khula*, and procedural reforms to prevent the misuse of RCR. Ultimately, this critique underscores that legal reform must go beyond doctrinal clarification. It requires a transformation in judicial culture, the adoption of gender-sensitive evidentiary standards, and procedural safeguards that prioritize women's lived realities. Without such reforms, the progressive promise of *Tayyeba Ambareen* will remain unfulfilled, and the lived realities of women in Pakistani family courts will continue to be shaped by procedural injustices and patriarchal biases.

Finally, while *Tayyeba Ambareen* sets a crucial precedent, its success hinges on addressing the gaps between legal doctrine and practice. Only then can Pakistan's family law system truly combat matrimonial cruelty.

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Children Online: Are Cybercrime Laws in Pakistan Effective against Online Child Sexual Abuse?

Laiba Khan[1]

Abstract

The epidemic of online sexual crimes against children in Pakistan has intensified with the proliferation of digital platforms – ranging from the dark web to mainstream social media – raising serious questions about the effectiveness of the country's legal and enforcement frameworks. Despite the enactment of the Prevention of Electronic Crimes Act 2016 ('PECA') and amendments to the Pakistan Penal Code, critical gaps remain in addressing the possession of child sexual abuse material ('CSAM'), online grooming, and financial sextortion. This paper investigates the shortcomings in current laws and their enforcement, including the limitations of PECA, the evolving institutional landscape following the replacement of the FIA Cyber Crime Wing with the National Cyber Crime Investigation Agency ('NCCIA'), and the need for specialised enforcement bodies. Drawing on international standards – such as the United Nations Convention against Cybercrime, the United Nations Convention on the Rights of the Child ('CRC'), and the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) – and comparative insights from the United Kingdom and India, the paper highlights the urgency of aligning Pakistan's legal framework with global best practices. A gender-sensitive lens is applied throughout to examine the differential impact of online child sexual abuse on girls, boys, and youth. The paper concludes with actionable recommendations, including legislative reform, institutional capacity building, enhanced mutual legal assistance, and national awareness initiatives to ensure robust protection for children in the digital age.

1. Introduction

'There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they can grow up in peace.' — Kofi Annan, the 2001 Nobel Peace Prize Winner.[2]

Children, who are undoubtedly the most vulnerable group and the future of society, are targeted exceedingly by predators online, which poses a grave threat to the social fabric of our society. Online Child Sexual Exploitation and Abuse ('OCSEA') has increased with the advancements in technology and the digital space, in direct proportionality. According to data analytics, there are

[1] At the time of writing, the author was a third-year LLB candidate with the University of London International Programmes, with a research interest in cyber law and child protection.

[2] Kofi Annan, quoted in C Clifford, 'Universal Children's Day' (Foreign Policy Association) <https://fpa.org/universal-childrens-day/> accessed 9 September 2025.

more than a hundred million internet users in Pakistan, where 19% of users were between the ages of five and twelve.[3]

In this paper, I discuss the effectiveness of cybercrime laws in protecting the vulnerabilities of minors and what can be done to improve legal and technological mechanisms to achieve this goal. Notably, the scope of this paper is limited to analysing legislative provisions and elements of cases that deal with minors who are exposed to the internet and online networking. Any normative arguments regarding law, policies and reforms are restricted only to the extent of children-centric provisions and exclude the discussion of the entire legislation or provision.

In the first part of this paper, foundational definitions are laid down, followed by a doctrinal analysis of Pakistan's current legal framework for tackling online child sexual abuse. The focus is on key statutes, particularly the Prevention of Electronic Crimes Act 2016 ('PECA'), and relevant sections of the Pakistan Penal Code 1960 ('PPC'), along with their practical implications.

The second part adopts a normative approach, identifying gaps in existing laws and examining the shortcomings of executive enforcement bodies, particularly the Federal Investigation Agency ('FIA')[4]. This part also explores technological approaches to combating online child sexual exploitation, assesses the effectiveness of mutual legal assistance mechanisms, and incorporates a gender-sensitive perspective to better understand how victims are differently impacted.

The final part of the paper evaluates Pakistan's international obligations, including commitments under the Child Rights Convention ('CRC'), Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography ('OPSC') and other relevant international frameworks.

2. Tracing Pakistan's Legal Efforts on Online Child Abuse

2.1 Defining our Parameters

To meaningfully assess the legal and institutional responses to OCSEA in Pakistan, it is essential to first establish conceptual clarity. The language used in legal frameworks and policy discussions often varies in scope and precision, particularly in a developing legal area like cybercrime. Therefore, this section outlines key terms that will frame the discussion throughout this paper. Clear definitions ensure a consistent understanding of the relevant legal categories and help distinguish between overlapping but distinct concepts in law, technology, and child protection.

[3] DataReportal, 'Digital 2024: Pakistan' (2024) <https://datareportal.com/reports/digital-2024-pakistan> accessed 1 September 2024.

[4] National Cyber Crime Investigation Agency (NCCIA) <https://www.nccia.gov.pk> accessed 20 June 2025.

1. OCSEA: there are multiple variations of definitions for this term, however most of these broadly encompass all acts of offense that target children including child sexual exploitation, online grooming, live streaming, online coercion and blackmail, possession, production and sharing of indecent virtual material of children.[5]

2. Cybercrime: while there is no set definition of cybercrime in international or Pakistani legal literature, a widely accepted definition entails illegal activities carried out on global electronic mediums.[6] In the context of Pakistan's legislation, PECA encapsulates the outlawed online activities that can take place in cyberspace.

3. Cyberspace: even though this term is used interchangeably with the internet, cyberspace can be defined as the space that exists within the scope of the internet.[7] To connect it with the previous example, cyberspace is the virtual space where social media apps and all global platforms exist, which can be accessed through the internet.

4. Child: the relevant definition of a child is set out in PECA,[8] and the CRC as minors under the age of eighteen.[9] This definition will be relied upon for the purposes of this discussion.

2.2. State of Current Legislation: A Doctrinal Approach

This section will analyse the steps taken through national legislation to counter online child abuse in cyberspace. Before delving into legalities, the categories of child abuse must be identified. The European Union classifies three types of OCSEA: the first category pertaining to passive content where the child is a recipient to pornographic or harmful content, secondly where the child is made to come in direct contact with the perpetrator who sexually abuses them and thirdly where the child is made a target of bullying.[10] In this paper, the focus will remain on the first category with limited discussion on the second category, while the third category falls out of its scope.

[5]ECPAT International, 'Disrupting Harm: Evidence on Online Child Sexual Exploitation and Abuse' (2021) <https://ecpat.org/resources/disrupting-harm> accessed 18 June 2025.

[6]K Brush and M Cobb, 'What is cybercrime and how can you prevent it?' *TechTarget* <https://www.techtarget.com/searchsecurity/definition/cybercrime> accessed 20 June 2024.

[7] 'The Difference Between Cyberspace & The Internet' *Cyber Security Intelligence* (22 May 2017) <https://www.cybersecurityintelligence.com/blog/the-difference-between-cyberspace-and-the-internet-2412.html> accessed 26 January 2026.

[8] Prevention of Electronic Crimes Act 2016, s2 (vi-a).

[9] Convention on the Rights of the Child 1989, Art 1.

[10] S Livingstone, L Haddon, A Görzig and K Ólafsson, 'EU Kids Online: Final Report 2011' (2011) LSE Research Online <https://eprints.lse.ac.uk/45490/1/EU%20Kids%20Online%20final%20report%202011%28lsero%29.pdf> accessed 26 January 2026.

The Constitution of the Islamic Republic of Pakistan entails provisions to protect marginalised groups, including children.[11] Further, the PPC is the main source of criminal law in Pakistan and has many provisions related to OCSEA.[12]

With regard to online abuse, Section 292A of the PPC states that whoever seduces a child with the intent to engage in sexual activity or exposes a child to sexually explicit material that is documented—such as in a film or a computer-generated image—shall be punished with a minimum imprisonment of one year, which may extend to seven years, or with a fine not less than one hundred thousand rupees and up to five hundred thousand rupees, or both. A broader parameter is drawn by Section 328A, pertaining to cruelty to a child, which punishes any person who wilfully causes physical or psychological harm to a minor with imprisonment for a term not less than one year and up to three years, or a fine ranging from twenty-five thousand to fifty thousand rupees, or both.

More narrowly, the crime of sexual abuse against minors is set out in Section 377A, which states that if a person coerces or persuades a child under the age of eighteen to take part in a lewd act, they shall be punished with imprisonment for a term not less than fourteen years and up to twenty years, and with a fine not less than one million rupees.

It must be noted that Sections 292A and 292B, relating to exposure to seduction and child pornography, were repealed by the Criminal Law (Amendment) Act 2023 (which will be discussed later). However, prior to their repeal, Section 292B was invoked in the 2016 case of *Muhammad Shahzad Khaliq v. The State*,[13] to prosecute child pornography offenses, thereby demonstrating the law's pragmatic utility. Furthermore, the acts of dealing with obscene materials are criminalised under Section 293, which prohibits the sale, distribution, or exhibition of lewd and obscene material (as defined under Section 292), and punishes the offender with a minimum imprisonment of six months, which may extend to three years, or a fine, or both. Pertinently, Sections 371A and 371B criminalise child prostitution by prohibiting the buying and selling of persons—including minors—for immoral purposes.

Moving on, PECA was drafted in response to the National Action Plan of 2014,[14] where points 11 and 14 specifically pointed to the need for regulation of cyberspace. PECA, as arguably the most important legislation in the realm of cyberspace, has openly addressed OCSEA through many of its provisions. Section 21 of PECA pertains to the modesty of a minor and a natural person. The subsections refer to situations of fabricating data including displaying a person's face over a

[11] Constitution of the Islamic Republic of Pakistan 1973, Art 37.

[12] Pakistan Penal Code, 1860.

[13] *Muhammad Shahzad Khaliq v. The State* Criminal Appeal No 151 of 2020.

[14] National Action Plan 2014.

sexually explicit video or picture,[15] displaying a picture or video of a person engaging in a lewd act,[16] or inducing a person to engage in a sexual act.[17] It prescribes the punishment of imprisonment, for a term which may extend to seven years and with a fine which may extend to five million rupees in case any person is involved with online child abuse. Further, if this offense is repeated by an offender then the sentence may be increased to a term of ten years with a fine.

Moreover, Section 22 of PECA criminalises production, distribution, transmission, and procurement of child pornography, through information systems, amongst others. The term child pornography is expanded through subsections to include an act in which a minor is engaged in a sexual act,[18] a 'realistic' image produced in which a minor can be seen to be engaged in a sexual act,[19] or one in which a minor's identity can be deciphered.[20] A person found guilty of this offense shall be subject to an imprisonment sentence extendable to twenty years with a minimum fine of one million rupees.

PECA also addresses online grooming through Section 22-A, which encompasses the offence of cyber grooming. It explicitly criminalises the act of building a relationship with a minor with the intent to produce or distribute child sexual abuse material. The perpetrator may face an extendable imprisonment term of ten years with a minimum fine of five hundred thousand rupees, and a maximum of ten million rupees.

The offence of child prostitution and sex tourism is dealt with through Section 22-B, which criminalises the use of an information system for the purposes of child sexual exploitation. A person found guilty of this offence may face a prison sentence of up to twenty years and a minimum fine of one million rupees.

The Act extends to encompass the crime of kidnapping and trafficking through cyberspace through Section 22-C. According to this provision, if a minor is contacted through an information system for trafficking, abduction or kidnapping, the perpetrator can be imprisoned for up to twenty years and a minimum fine of one million rupees.

The last limb of PECA that will be explored in this section is Chapter Three of its legislation that pertains to executive regulations and procedural powers. Section 29 empowers the Federal Government to designate an investigative team under the Act. Importantly, Section 20-D states that the FIA should acquire the child sexual abuse content and refer it to the Pakistan

[15] Prevention of Electronic Crimes Act 2016, section 21 (1)(a).
[16] Prevention of Electronic Crimes Act 2016, Section 21(1)(b).
[17] Prevention of Electronic Crimes Act 2016, Section 21(1)(d).
[18] Prevention of Electronic Crimes Act 2016, Section 22(1)(a).
[19] Prevention of Electronic Crimes Act 2016, Section 22(1)(b).
[20] Prevention of Electronic Crimes Act 2016, Section 22(1)(d).

Telecommunication Authority for investigation and removal, regardless of whether a complaint has been made regarding the material or not.

Hence, the Act defined and set parameters for important terms such as 'sexually explicit conduct', which has been expanded to cover a variety of real or simulated actions, such as different types of sexual intercourse, bestiality, masturbation, sadistic or masochistic acts, and the indecent display of specific body parts.

Comparatively, while PECA fills a critical gap by addressing digital-specific offences such as cyber grooming and online trafficking, the overlap with PPC provisions like Section 371B can lead to procedural ambiguities, where it becomes unclear whether a suspect should be tried under PECA or the PPC—or both. This creates uncertainty for investigators and prosecutors, potentially diluting case strength. Further, in *Muhammad Shahzad Khaliq v. The State*, the court's reliance on now-repealed Section 292B highlights a broader issue: the judiciary is often left to fill in the blanks left by vague or evolving legislation, especially in the digital domain. Without technical training, judges may struggle to apply complex concepts such as data hashes or digital consent.

While Pakistan's statutory provisions on online child sexual abuse and exploitation are extensive on paper, there are concerns about enforcement, overlap, and clarity. For instance, Section 292A of the PPC and Section 21 of PECA both criminalise exposure to explicit material, but vary in language and scope, potentially causing confusion or duplication in charges. Moreover, some terms—such as 'modesty,' 'lewd,' or 'realistic image'—lack precise legal definitions, which may hinder uniform judicial interpretation. Despite escalating penalties in the 2023 amendment, conviction rates remain low, suggesting that merely increasing punishments may be insufficient without complementary reforms in law enforcement, digital forensics, and judicial training. Additionally, the repeal of Sections 292B–292C without an immediate update in PECA or the PPC to fill the void raises questions about continuity of protection against child pornography offenses.

To conclude this section, although Pakistan has enacted a reasonably broad legislative framework to tackle online child sexual abuse, the implementation of these provisions is riddled with challenges—from investigative inefficiencies within the FIA to the judiciary's limited technical training. The overlapping nature of PECA and PPC further complicates the prosecutorial process, raising the need for clearer demarcation of offences and improved capacity-building. While the legislative direction is promising, the state's ability to deliver justice remains constrained by resource, technological, and coordination gaps

3. Nuanced Perspectives: A Normative Approach

3.1. The Inadequacy of Current Law and Efficiency of Executive Bodies

In this section, the loopholes and contradictions of Pakistan's current law will be explored and later, the steps taken by executive authorities will be examined in order to assess the practical efficiency of cybercrime laws pertaining to children. This disconnect stems not only from statutory ambiguity but also from gaps in enforcement, public awareness, and institutional will. Firstly, the differences in scope between the PPC and PECA will be explored, as were by Justice Mohsin Akhtar Kayani in 2020. Through his comparative analysis, Justice Kayani pointed out the differences between Section 292-B of the PPC and Section 22 of PECA, stating that the former gives a wider meaning to child pornography where a person accused of even preparing CSAM should be classified as an offender.[21] On the contrary, PECA requires the offender to route that information through an information system.[22] Justice Kayani stated further the differences in sentencing with PPC imposing an extendable sentence of twenty years alongside a one million rupees fine, compared to PECA's sentence of seven years with a fine.[23]

This divergence reflects a broader challenge in cyber law: the technological specificity of PECA narrows its applicability, whereas PPC—though less digitally tailored—often allows for broader judicial interpretation. As courts often default to statutory literalism, this can make PECA less effective when the crime does not neatly involve digital 'transmission.'

However, it must be noted that this judgment was announced before the Criminal Laws (Amendment) 2023. Since then, the penalty under Section 22 of PECA increased from seven years to an extendable imprisonment term of ten years with a minimum fine of five hundred thousand rupees, and a maximum of ten million rupees. Further, the repealed PPC Sections, 292-B and 292-C are no longer operative; hence, the differences in the definition of child pornography have also dissipated.[24]

The post-2023 legal landscape arguably neutralises earlier statutory tensions between PPC and PECA. However, it also exposes a deeper issue: the lack of harmonisation in Pakistan's penal architecture, where overlapping statutes lead to inconsistent charging practices and judicial confusion in cybercrime trials.

An overarching issue with PECA remains in its applicability. Sections 21 and 22 of PECA in practicality serve to be ineffective as they only come into force after the CSAM is 'transmitted' or 'displayed'. Hence, perpetrators can exploit this loophole to withhold sensitive data and coerce victims into committing more lewd acts by threatening to share their photos. Many news reports

[21] *Muhammad Shahzad Khaliq v. The State* Criminal Appeal No 151 of 2020 [2022]. In this case, the court applied s 292B of the Pakistan Penal Code 1860 to conduct extending beyond direct production or distribution, demonstrating its broader scope as compared to s 22 of the Prevention of Electronic Crimes Act 2016.

[22] *Muhammad Shahzad Khaliq v. The State* Criminal Appeal No 151 of 2020.

[23] Ibid.

[24] Criminal Laws (Amendment) Act 2023.

cover such cases frequently, where minor victims are groomed to send sensitive data to predators who then withhold that data to blackmail the victim into sending more CSAM or even abuse them in other cases.[25] Pakistan's current law fails to penalise mere possession of CSAM unless it is transmitted, reflecting a reactive rather than preventive approach and leaving children vulnerable during the coercive grooming stage Hence, the law should include possession and collection of CSAM alongside distribution to enhance its effectiveness against online abuse. Furthermore, Sections 22-A, B and C of PECA, are non-cognisable offenses which means offenders can be allowed bail. This is a regressive element in law and should be revised to make the offenses of cyber child grooming and soliciting cognisable offenses to counter the growing rates of cybercrime against children.

Moving over to the executive's role in curbing OCSEA, the workings of the FIA, the primary investigative agency for this matter will be examined. Over the past five years, FIA has recorded more than two million cases of child abuse, however only about 400 complaints have been recorded in the past four years.[26] This data is alarming, but the problem only festers from hereon; since 2018, only a mere 124 individuals have been arrested for cases involving online child sexual abuse.[27] The agency has gone on to give unofficial statements exclaiming that they cannot find the time to raise awareness for child protection online.[28] This sentiment not only showcases the lack of prioritisation of this sensitive issue but also an element of apathy towards the sanctity of their work.

Many lawyers and cybercrime experts anecdotally assert that the FIA often encourages settlements between complainants and accused, even in serious cases of child abuse—despite child sexual exploitation being non-compoundable under Pakistani law. This is a grave violation for the offence of child abuse is a non-compoundable offence, which means that the case must be followed through to trial and no out-of-court settlement should be pursued.[29] Besides showing officers' disservice to their job, this exposes deep-rooted structural issues in the system. For any department to work effectively, there must be sufficient and quality trained staff, however at FIA, the working conditions are a lot different. According to sources, each officer has to deal with a minimum of six thousand applications per year, while cost cutting by the government has led to months-long salary blocks for many workers.[30] Hence, the inefficiency of the implementing

[25] R Haq, 'Is Pakistan failing to tackle online child abuse?' *The News* (5 February 2023) <https://www.thenews.com.pk/tns/detail/1037128-is-pakistan-failing-to-tackle-online> accessed 26 January 2026.

[26] Ibid.

[27] Ibid.

[28] Ibid.

[29] Code of Criminal Procedure 1898, Section 320.

[30] R Asif, 'Cybercrime upsurge aided by FIA's lack of capacity' *The Express Tribune* (9 March 2023). <https://tribune.com.pk/story/2405070/cybercrime-upsurge-aided-by-fias-lack-of-capacity> accessed 26 January 2026.

authorities is not just caused by dishonesty in work but the inhumane and unfair working conditions adding to the problem.

Encouraging compromise in non-compoundable offences is not only ethically concerning but legally impermissible. It constitutes a deviation from prosecutorial duties under the Code of Criminal Procedure 1898 (CrPC) and undermines the legislative intent behind categorising child sexual abuse as a grave and uncompromisable crime.

To take these points into perspective, it becomes glaringly obvious that the law has not yet evolved to deal with the growing technological advancements of the modern age, thus it falls short in many areas concerning child protection online. It must also be noted that the reason for the lack of involvement is also caused by online illiteracy and societal shame. If more parents or guardians are aware, and proactive of the troubles minors in their household are plagued with online, there would be more reports made to executive authorities.[31] For even if all legal lacunas were to be filled and the executive were pushed to action, justice could not be delivered unless the guardians stood firm till the matter was resolved in a court of law.[32] This reflects a larger problem of bureaucratic underinvestment in child protection infrastructure. When the state does not financially prioritise cybercrime investigation, it sends a signal that such crimes are low on the governance agenda—effectively normalising neglect.

However the problem of reporting, whether it stems from online illiteracy or shame, is not mutually exclusive from the entrenched issue of distrust of common civilians in state systems. The judiciary does little to encourage the ordinary citizens to come to court and demand justice when about 85% of the population believes there is corruption in the judiciary.[33] To counter this, judicial reform in this context cannot solely focus on expediting cases or increasing penalties. It must also centre on rebuilding public trust through transparency, specialised OCSEA courts, and sensitivity training for judges dealing with vulnerable minors. When this general view is placed in context of priorly explored issues of online illiteracy, societal shame and the executive's inefficiency, the multi-dimensional scope of this epidemic can be actualised.

Ultimately, addressing OCSEA requires a holistic approach—legislative coherence, executive capability, and judicial trust must operate in tandem. A fragmented response, no matter how well-intentioned, will only create further delays in justice and deepen the harm inflicted upon child victims. This paper encourages the principle of harmony between the pillars of state and increased human and financial resource allocations to units working to investigate OCSEA with

[31] OECD, 'Children in the Digital Environment: Revised Typology of Risks' (2021) OECD Digital Economy Papers.

[32] R Haq, 'Is Pakistan failing to tackle online child abuse?' *The News* (5 February 2023) <https://www.thenews.com.pk/tns/detail/1037128-is-pakistan-failing-to-tackle-online> accessed 26 January 2026.

[33] M Imran, G Murtiza, and K-ur-R Tariq, 'The Prevalence of Corruption in Pakistan's Judicial and Law Enforcement Sectors' (2023) 7(1) Pakistan's Languages and Humanities Review.

the formation of new think tanks to counter the growing issue. Pertiently, a new cybercrime unit for child abuse should be built so that the overload on FIA is reduced while children-centric crimes are given the urgent priority they require.

3.2. Technological Approaches and the Role of Mutual Legal Assistance

This part will dive deep into the technological tools that have been internationally developed, and potential ones that can be used to protect children online. The majority of abuse material related to children is published on the dark web, a deeper layer of the internet that provides an extra layer of anonymity to perpetrators.[34] This side of the internet is not usually operated by the general public, but rather by human traffickers, sadists, pedophiles and terrorists. Since these acts take place behind a curtain of encryption and networks, it is imperative for government and cybersecurity departments to be stocked with the necessary technological tools and strategies.

The National Centre for Missing and Exploited Children (NCMEC) and INTERPOL use image-analysis tools such as PhotoDNA, which generates a unique hash—a digital 'fingerprint'—for known CSAM. These hashes enable the detection of altered or duplicated images, even if resized or edited, and allow forensic investigators to match suspect content to known CSAM.[35] PhotoDNA is now integrated into INTERPOL's International Child Sexual Exploitation (ICSE) database and can be accessed by trained law-enforcement personnel to streamline victim identification and reduce duplication.[36] This system not only promotes victim protection but also helps ensure that only investigators with specialised training handle CSAM, enhancing both efficiency and sensitivity in investigations.

As 2013 concluded, over 3,000 victims from more than 40 countries, along with over 1,500 offenders, had been identified and documented in the database; which showcases its effectiveness on a large scale.[37] More recently, by the end of 2024, the National Center for Missing & Exploited Children's CyberTipline reported 20.5 million suspected incidents of online child sexual exploitation—including nearly 63 million image and video files—reflecting the massive scale of

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[34] A Bloomenthal and P Rodriguez, 'What Is the Dark Web?' *Investopedia* (17 April 2024) <https://www.investopedia.com/terms/d/dark-web.asp> accessed 26 January 2026.

[35] Microsoft, 'PhotoDNA Cloud Service' (Microsoft, 2025)<https://www.microsoft.com/en-us/photodna> accessed 15 June 2025

[36] Tech Coalition, 'Update on Voluntary Detection of CSAM' (Tech Coalition, 2025) <https://www.technologycoalition.org/knowledge-hub/update-on-voluntary-detection-of-csam> accessed 16 June 2025

[37] Interpol, 'International Child Sexual Exploitation Database' (4 November 2014) <https://www.interpol.int/content/download/5433/file/83%20GA%20-%20Ministerial%20-%20P2.1%20-%20Germany.pdf> accessed 26 January 2026

the problem and underscoring the crucial role of image-hashing tools like PhotoDNA in investigative workflows. [38]

Another tool to combat OCSEA is putting data mining and analytics to use. This tool is usually opted by companies to streamline their search for audience preferences and trends, they extract specific types of data from a larger dataset.[39] Since the amount of data on cyberspace only increases, if it is thoroughly mined through, then analytics companies can act to link data from various databases and map it out for law agencies who can catch predators quicker in this way. Through employing tools like deep learning and Artificial Intelligence ('AI'), threats can be identified and stopped swiftly.[40]

A more hands-on strategy involves online undercover operations, where law enforcement officers pose as minors on social media platforms to engage potential predators. These tactics have proven efficient and resource-effective—requiring minimal logistical support while enabling swift evidence gathering. Between October 2022 and September 2023, England and Wales' dedicated Undercover Online ('UCOL') Network successfully arrested 1,665 individuals, safeguarding 1,397 children, and securing 1,386 years' worth of custodial sentences.[41]

The second part of this section will explore international cooperation mechanisms such as mutual legal assistance ('MLA'). Through this process, states may request judicial assistance from other states in regards to criminal investigations, especially with transnational crimes.[42] OPSC enshrines this mechanism in Article 10 whereby it encourages state parties to cooperate in prevention, detection, investigation and prosecution of the perpetrators found criminally liable under the Optional Protocol. It also encourages states to strengthen and construct systems to aid in the identification of victims through MLA and INTERPOL.[43] Hence, the harmonisation between international and domestic law must be encouraged in order to combat both translational and national crimes.

[38]National Center for Missing & Exploited Children, 'CyberTipline Report' (2024).

[39] Vaporvm, 'What is Big Data Analytics for Cyber Security' (Vaporvm, 1 January 2021) <https://vaporvm.com/what-is-big-data-analytics-for-cyber-security/> accessed 26 January 2026.

[40] Ibid.

[41]National Police Chiefs' Council, 'More than 1,600 suspected online child sex offenders arrested in 12 months' (NPCC, 5 October 2023) <https://www.npcc.police.uk/News/Latest-News/2023/October/More-than-1600-suspected-online-child-sex-offenders-arrested-in-12-months/> accessed 20 June 2025.

[42] United Nations Office on Drugs and Crime, 'Study on the Effects of New Information Technologies on the Abuse and Exploitation of Children' (2015) <https://www.unodc.org/documents/Cybercrime/Study_on_the_Effects.pdf> accessed 26 January 2026.

[43] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000

However the viability of MLA is debatable when it is analyzed through a pragmatic lens. CSA is a crime that requires urgent action to stop predators and protect the minor, so MLA may not be the quickest approach to tackle the issue. Since the procedure requires formal assistance and state information to be dispensed, it may take more time than informal modes of communication between police and executive authorities. They can advise each other on how to proceed with time-sensitive leads and novel cultural practice that can help crack the case.[44]

One such example is 'Operation Avalanche' (1999), in which U.S. authorities used subscriber data from the Landslide Productions 'gateway'—reportedly listing about 35,000 names—to launch an international effort resulting in arrests across nearly 40 countries.[45] The Federal Bureau of Investigation ('FBI') shared the information of subscribers from overseas with their respective law enforcement agencies. Thus, operations were carried out in Canada, Switzerland, Ireland, UK and Germany alongside almost fifty other countries. The operation was a success in uncovering a vast international child pornography ring, leading to over 100 arrests in the U.S. and numerous others worldwide. It underscored the critical role of MLA frameworks and the effectiveness of joint international operations, even when coordinated through informal law enforcement communication channels such as INTERPOL and direct agency-to-agency cooperation. The use of a subscriber database from the Landslide Productions case enabled multiple jurisdictions to initiate targeted investigations.[46]

A notable suggestion for Pakistan can be to add the United Nations Convention against Cybercrime, which offers a valuable blueprint for improving cross-border evidence-sharing, a longstanding obstacle in OCSEA cases.[47] If Pakistan signs and ratifies the UN Cybercrime Convention, it could enhance its ability to request and provide timely electronic evidence in criminal investigations, overcoming the delays and informality that currently undermine its MLA processes.

In India, the National Commission for Protection of Child Rights (NCPCR) took the initiative of meeting with major social media platforms for protection of children online.[48] Social media

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[44] UNODC (n 42).

[45] US Senate, 'Protecting Our Children: The Importance of Collaboration Between the Entertainment Industry and Law Enforcement to Address Illegal File Sharing and Other Internet Crimes' (Hearing before the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, 108th Cong, 2003). Statement by a US Postal Inspection Service official on Operation Avalanche, noting that the Landslide subscriber database contained approximately 35,000 names used in global investigations.

[46] Ibid.

[47] United Nations Convention against Cybercrime 2024.

[48] 'NCPCR asks social media platforms to explore ways to protect children online' (The Economic Times, 22 September, 2024) <https://economictimes.indiatimes.com/tech/technology/ncpcr-asks-social-media-platforms-to-explore-ways-to-protect-children-online/articleshow/113573770.cms?from=mdr >

houses like Youtube, Meta, X, Reddit, Snapchat and Google sought to build systems through CSAM detection tools that can identify and report illegal content to law enforcement agencies.[49] Such kinds of collaborations between state agencies and social media platforms can help reduce the amount of CSAM on their platforms and create awareness to curb its existence altogether.

When it comes to Pakistan, the FIA does not rely on formal MLA treaties, and instead engages with social media platforms on an informal, discretionary basis to obtain user data for cybercrime investigations.[50] This not only is a grave neglect towards addressing the cyber-assaults that minors may experience, but also an arbitrary mechanism that breaches the freedom to privacy.

According to the FIA, when a cybercrime complaint is registered, the management of social media platforms like Facebook are contacted. However, there is no certainty of a time frame in which the information would be obtained and released. A reason for this can be that no big social media companies have set up their offices in the country due to which a gap in their understanding remains. Victims claim that it has been years since action is taken against the perpetrators who exposed their explicit pictures online. [51]

Thus, this paper argues that it is pertinent for technology to be utilised and evolved in a way that protects the data and information of minors online, while swiftly tracking down, reporting and blocking perpetrators who prey on impressionable minds for their sadistic means. Since the medium of the crime of OCSEA is online, the most effective response is to counter it through equally sophisticated technological tools.

3.3. Gender Perspective

Adding a gender-sensitive lens to legal and social problems is essential to understand how different forms of violence manifest and are experienced by individuals differently, particularly in digital spaces. When assessing the situation in Pakistan, the Digital Rights Foundation Cyber Harassment Helpline received 4,441 new cases in 2021 where children were targeted in 184 cases (4%).[52] Data from the helpline reflects that females are generally more vulnerable to extortion and non-consensual use of their information, including but not limited to their pictures, videos, and phone numbers. It is also worthy to note the difference in the forms of harassment that boys and girls suffer. According to the Digital Rights Foundation's 2021 Cyber-Harassment Helpline

[49] Ibid.

[50] 'FIA having difficulty obtaining data in cybercrime cases, NA body told' *Dawn* (27 August 2019) <https://www.dawn.com/news/1501878 >

[51] T Fareedi, 'FIA awaits data access for probes' *The Express Tribune* (24 March 2021) <https://tribune.com.pk/story/2289255/fia-awaits-data-access-for-probes> accessed 26 January 2026.

[52] Digital Rights Foundation, 'Annual Report Cyber Harassment Helpline' (2021) <https://digitalrightsfoundation.pk/wp-content/uploads/2022/05/helpline-annual-report-2021-1.pdf> accessed 21 June 2025.

report, many female users experience online harassment reflective of in-person abuse—such as receiving lewd comments, moral policing, and public shaming on major platforms like WhatsApp and Facebook.[53] Further, the added layer of anonymity through the internet gave perpetrators the opportunity to be more elusive as more girls claim to receive sexual and lewd imagery by men on social media and texting apps. Boys, on the other hand experience the term 'catfishing', where they are scammed into talking to a male pretending to be a female.[54] It must be noted, that till date, there has been no dedicated gender lens report on OCSEA in Pakistan and statistics remain scarce.

However, international forums and research provide a comprehensive and nuanced understanding of the gendered nature of CSA, highlighting the disparities in its impact on boys and girls. The Child Exploitation and Online Protection Centre submitted that in a sample of nearly 250,000 images of CSAM, girls were featured four times more than boys between 2005 and 2009.[55] While this is a relatively old figure, the landscape has not changed much since then, for most research indicates that girls feature disproportionately more CSA than boys. Global studies consistently show that girls feature disproportionately in CSAM compared to boys—usually by a margin of two to three times. For example, a meta-analysis of 55 studies across 24 countries found CSA prevalence ranged from 8–31% for girls, compared to 3–17% for boys.[56] Similarly, the Internet Watch Foundation's 2023 report found that 97% of CSAM images processed featured girls, with only 15% involving boys.[57]

A popular example to illustrate this phenomenon is that of 'sexting'. Sexting as a cultural phenomenon has enabled much predatory behaviour that has impacted the reputation of many girls. While some exchanges may be consensual, in most instances, girls feel peer pressured to partake in such activities wherein boys request them for personal and nude photographs.

This sort of culture breeds a hypersexual environment which only enables child predators and minors to be preyed upon. An important research study showcased how age and gender are inextricably linked, showing that girls aged thirteen to seventeen, were four times more likely to

[53] Digital Rights Foundation, 'Cyber-Harassment Helpline Annual Report' (2022) <https://www.dawn.com/news/1690550> accessed 21 June 2025.

[54] Digital Rights Foundation 'Young People and Privacy in Online Spaces'(2021) <https://digitalrightsfoundation.pk/wp-content/uploads/2021/05/Young-People-and-Privacy.pdf> accessed 21 June 2025.

[55] E Quayle and T Jones, 'Sexualised Images of Children on the Internet' (2011) 23(4) Sexual Abuse: A Journal of Research and Treatment 343.

[56]H Barth and others, 'The Prevalence of Child Sexual Abuse' (2013).

[57] Internet Watch Foundation, 'Annual Insights and Data Report 2023' (2023) <https://www.iwf.org.uk/news-media/news/sexual-abuse-imagery-of-girls-online-at-record-high-following-pandemic-lockdowns> accessed 26 January 2026.

believe sharing nudes to be a norm, hence girls in those ages shared their nudes by 8% more.[58] The element of peer pressure cannot be ignored in such situations where 38% of children from ages nine to seventeen say that they have participated in sharing their nudes. The study went on to analyse motivations for sharing which showed that boys perceived sharing their own sexually explicit material to be humorous and a generally positive experience.[59] However, boys are also exposed to the evils on the internet through exposure to violent content. As young boys make up a larger portion of online video gaming, they are commonly exposed to verbal harassment as well as explicit and gendered content.[60] Moreover, In 2022, NCMEC reported a significant rise in financial sextortion affecting teenage boys. That year alone, the CyberTipline logged 10,731 reports of financial blackmail—where perpetrators demanded money, not additional images—with teenage boys increasingly identified as the primary victims.[61] In the same NCMEC analysis of Online Enticement reports, 78% of reported victims were female, 13% male, and in 9% of reports gender could not be determined.[62] This reflects the disproportionate targeting of girls, particularly in grooming and sexual exploitation cases. However, as noted, boys are increasingly becoming victims of a different but equally harmful trend—financial sextortion.[63]

An important point to note is the attitude of guardians towards discovering their child to be victimised for CSA. The research brought to light that male caregivers blamed their daughters 39% of the time, while only 26% of female caregivers blamed their daughters when found in nude photographs.[64] However, it must be noted that this study only took the views of western subjects where societal aspects of shame and honor are much more deflated compared to south asian attitudes. The attitudes of caregivers can greatly impact the rate of OCSEA. The more aware and active a parent is in supporting their child, the more likely it is for children to stay away from such activities and report predators.

4. Comparative Lens

4.1. International Frameworks

[58] Thorn, 'Self-Generated Child Sexual Abuse Material: Attitudes and Experiences' (August 2020) <https://info.thorn.org/hubfs/Research/08112020_SG-CSAM_AttitudesExperiences-Report_2019.pdf> accessed 26 January 2026.

[59] Ibid, p 26.

[60] UNODC (n 42).

[61] National Center for Missing & Exploited Children, 'Behind the Scenes: How NCMEC Identified New Sextortion Crisis' (15 December 2024) <https://www.missingkids.org/blog/2024/behind-the-scenes-how-ncmec-identified-new-sextortion-crisi> accessed 17 June 2025.

[62] Ibid.

[63] Ibid.

[64] Thorn (n 58).

International law recognises that with the advancement of technology, more opportunities and forms of OCSEA are manifesting in cyberspace. CRC[65] and OPSC[66] laid down the framework for safeguarding children from any form of violence, exploitation, abuse, and discrimination while ensuring that the child's best interests are the central focus in all decisions that impact them. Article 34 of the CRC pertains to the protection of children from all forms of sexual abuse withthe exclusion of virtual child pornography and AI generation. In 2021, the Committee acted to include digital rights of the child in General Comment No. 25 on the rights of child.[67] Its overarching aim remains to inculcate the responsibility of the state to protect its most vulnerable group: children. Under part 5, it states the need for state parties' laws to be compatible with international human rights standards and stay up to date with new developments by embracing amendments.[68]

International law provides many guidelines for states to act in accordance with international standards to curb online violence against children. Pakistan has ratified both the Convention on the CRC and OPSC, thereby committing to uphold the rights of the child in both physical and digital spaces. State parties are required to offer suitable support and legal guidance to help child victims of offenses outlined in the OPSC throughout all stages of criminal justice proceedings. They must also safeguard the rights and interests of the child and ensure that the child's best interests remain the top priority. Furthermore, international instruments encourage states to incorporate gender-sensitive approaches into their domestic laws and procedures to ensure that the differential impact of such offenses on boys and girls is fully addressed.

In 2020, the Government of Pakistan's report, submitted under Article 12(1) of the OPSC, outlined several legislative and procedural measures adopted to safeguard children.[69] These included amendments to the PPC and the CrPC via the Criminal Law (Amendment) Act, 2016, which criminalised child trafficking, child prostitution, child pornography (now referred to as child sexual abuse material, or CSAM), and the sale of children.[70] Notably, the report mentioned the insertion of Section 292-C of the PPC to specifically address CSAM.[71] It also confirms that Pakistan provides MLA in criminal matters under bilateral and multilateral treaties and conventions to

[65] Convention on the Rights of the Child 1989, Art 3.

[66] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2002, Art 1-2.

[67] UN Committee on the Rights of the Child, 'General Comment No 25 on Children's Rights in Relation to the Digital Environment' (2021). <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-25-2021-childrens-rights-relation> accessed 20 June 2025.

[68] Ibid.

[69] Report submitted by Pakistan under Article 12(1) of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (CRC/C/OPSC/PAK/1, 13 November 2020), paras 1–2, 4–5.

[70] Ibid.

[71] Ibid.

which it is a party—demonstrating, at least in theory, legal development in line with its international commitments.[72]

In addition to existing frameworks, the recently adopted United Nations Convention on Cybercrime 2024 provides a comprehensive global treaty for addressing cyber-enabled crimes, including online child sexual abuse and exploitation. Article 14 of the Convention specifically addresses offences related to child sexual exploitation material and outlines obligations for states to preserve and share electronic evidence, enabling greater international cooperation in cross-border OCSEA investigations. However, Pakistan is yet to sign and ratify the Convention.

Another important milestone is the Lanzarote Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, commonly referred to as the Lanzarote Convention, includes specific provisions addressing offenses such as child pornography (Article 20) and online grooming (Article 23).[73] It is available for ratification by member states of the Council of Europe and can also be acceded to by non-member states. It remains the only binding international instrument that explicitly addresses the possession, production, and distribution of self-generated sexually explicit images involving children (commonly referred to as 'sexting'), including provisions for both criminalisation and exceptions where minors consensually create such content among themselves.[74]

Further, use of the term 'child sexual abuse material' emphasises the seriousness of the crime and the harm caused to child victims and helps promote public understanding of the issue. The UN Committee on the Rights of the Child has recommended that State parties, in line with recent advances in child protection, avoid using the term 'child pornography'—which implies consent or trivialisation—and instead adopt terms like 'use of children in pornographic performances and materials,' 'child sexual abuse material,' and 'child sexual exploitation material' to more accurately reflect the gravity and exploitative nature of the content.[75]

4.2. An Insight into Global Jurisdictions

This paper draws comparative insight from the legal frameworks of the UK and India, both of which present useful lessons for Pakistan. The UK, as a common law jurisdiction with

[72] Ibid.

[73] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention, Council of Europe (2007), Arts 20 and 23 <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201> accessed 20 June 2025.

[74] ECPAT International, 'Legal Frameworks on the Production and Possession of Self-Generated Sexual Content Involving Children' (2020).

[75] ECPAT International, 'Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse' (2025) <https://ecpat.org/wp-content/uploads/2025/04/Second-Edition-Terminology-Guidelines-final.pdf> accessed 26 January 2026.

sophisticated child protection laws and robust enforcement mechanisms, offers a benchmark for how comprehensive legal and investigative tools can work together. India, on the other hand, shares post-colonial legal traditions and similar societal challenges with Pakistan, yet has managed to enact forward-thinking reforms on OCSEA. Comparing these jurisdictions helps identify gaps and opportunities in Pakistan's own framework.

The UK has made significant progress in tackling possession and distribution of CSAM, its evolving framework also highlights key challenges Pakistan must anticipate, such as defining digital possession and prosecuting cases involving encryption and transnational content. The Protection of Children Act 1978 criminalises the act of withholding or possessing indecent photographs of children.[76] So even if a party were to open an email with an attachment of such sort as explained above, it would be considered an offense.[77] Similarly, downloading, storing or accessing websites with pop ups sexual imagery of children is to be regarded as an offense.[78] The law on this matter is deeply and intricately developed with case law such as the concept of possession is defined through a test where a person shall be shown to be in custody of the material and be able to retrieve it at will.[79]

The law in India has taken progressive strides in recent years. Their key legislation, Protection of Children from Sexual Offences Act 2012, defines 'child pornography' as, 'Any visual depiction of sexually explicit conduct involving a child which includes photograph, video, digital or computer generated image indistinguishable from an actual child and image created, adapted, or modified, but appear to depict a child.'[80] This depiction of child pornography is a technically advanced definition for it encompasses the concept of AI generation of CSAM which legislation in Pakistan fails to put forth. The Indian model demonstrates that regional jurisdictions with shared cultural and legal roots can adapt to the complexities of modern digital abuse. However, the challenge for Pakistan lies not only in adopting such language, but also in ensuring effective implementation amid limited resources, online illiteracy, and enforcement inefficiencies.

4.3. A Way Forward: Reform Priorities and Urgent Concerns

Despite considerable legislative progress, the Pakistani legal framework continues to fall short in effectively preventing and prosecuting OCSEA. This paper identifies several priority areas for urgent reform.

[76] Protection of Children Act 1978.

[77] *R v. Smith* [2003] 1 Cr. App. R.13.

[78] *R v. Harrison* [2008] 1 Cr. App. R.29.

[79] *R v Fellows and Arnold* [1997] 1 Cr. App. R. 244.

[80] Protection of Children from Sexual Offences Act 2012.

First, there is a critical need to amend PECA to explicitly criminalise the 'possession and collection' of CSAM, rather than only its transmission or distribution. Current gaps allow perpetrators to exploit the law, undermining its deterrent effect. Second, the 'non-cognisable' nature of many cyber offences related to children must be reconsidered. Making offences such as online grooming and exploitation 'cognisable' and 'non-bailable' would enable swifter intervention by law enforcement. Third, capacity building within executive bodies, especially the FIA, remains essential.

A notable recent development is the replacement of the FIA Cyber Crime Wing with the National Cyber Crime Investigation Agency ('NCCIA'). This move reflects an institutional attempt to strengthen cybercrime enforcement; however, implementation has been slow. As of now, NCCIA lacks an operational online presence, and its official website redirects users to the former FIA cybercrime complaint form. This suggests that practical and procedural issues from the FIA's framework remain unresolved, making it crucial for the NCCIA to prioritise building a visible, accessible, and child-focused infrastructure as part of its mandate.

A review of FIA case data reveals a troubling disconnect between incident reports and legal outcomes. Official records shared with the NCRC indicate that only 133 OCSEA complaints were registered in 2021, increasing slightly to 250 in 2023—yet convictions remained at just 6 during this entire three-year period.[81] Meanwhile, overall cybercrime complaints logged across the FIA rose from 386,602 in total, yet only 4,067 FIRs were filed, and just 92 convictions were secured in 2023.[82] This disparity reveals systemic inefficiencies in investigation, prosecution, and follow-up mechanisms.

Further, a recent experience shared by a legal clerk on LinkedIn underscores these systemic gaps. After being subjected to abusive, sexually explicit messages on Facebook, she attempted to lodge a complaint through the FIA's online portal. However, she encountered multiple obstacles, including a faulty CAPTCHA system, the inability to attach evidence, and a complete lack of acknowledgment or tracking number after submission. Despite her legal background and persistence, previous complaints she had filed went unanswered. This not only highlights technical deficiencies but also reveals how inaccessible the current system remains to victims of cyber abuse—especially those unfamiliar with legal procedures. The clerk later met with representatives of the newly formed NCCIA and submitted feedback, which the agency reportedly welcomed. This account illustrates both the need for urgent infrastructural reform and the importance of user-informed policy development.

[81] Bankopedia, 'Summary of FIA Cybercrime Data' (LinkedIn, November 2024) <https://www.linkedin.com/posts/bankopedia_cybercrime-digitalsecurity-fia-activity-7245403177309614081-gqFj> accessed 10 June 2025.

[82] Ibid.

For reformation, a dedicated cybercrime unit for child protection—separate from general cybercrime divisions—should be created with adequate resources and specialised personnel. Fourth, public awareness and digital literacy campaigns must be expanded. Parents and guardians must be empowered to identify early signs of online abuse and report cases without stigma. Bridging the trust gap between citizens and law enforcement is equally vital. Fifth, existing MLA mechanisms must be strengthened through formal treaties and streamlined cooperation protocols with tech companies and foreign law enforcement. Pakistan should also take steps to ratify and implement the 2024 UN Cybercrime Convention, which offers robust standards for international cooperation, procedural safeguards for electronic evidence, and specific obligations regarding online child sexual exploitation material under Article 14.

Aligning domestic practices with this Convention would mark a substantial step in fulfilling Pakistan's international commitments while enhancing its operational capacity to investigate and prosecute OCSEA. Informal and delayed cooperation impedes justice in cross-border cases. Finally, a gender-sensitive and intersectional framework must inform future policy.

By addressing these urgent concerns through legislative, institutional, and societal reform, Pakistan can move toward a legal and enforcement ecosystem that meaningfully protects children in digital spaces.

5. Conclusion

The issue of OCSEA is an urgent and multifaceted challenge that demands sensitive, targeted, and systemic intervention. This paper has examined the Pakistani legal framework—particularly the PPC and PECA—and found that while legislative steps have been taken, critical gaps remain. These include the narrow focus of PECA on the distribution rather than the possession or collection of CSAM, the non-cognisable status of serious offences such as cyber grooming, and the chronic under-resourcing of key enforcement bodies such as the FIA. At the international level, Pakistan's commitments under instruments like the CRC and OPSC underscore its obligation to align domestic laws with global standards. Comparative insights from jurisdictions with effective MLA mechanisms and specialised child-focused cybercrime units illustrate the need for similar structures in Pakistan. Furthermore, this paper has highlighted the underutilisation of technological tools such as hash-matching software (e.g., PhotoDNA) and undercover digital operations, which, if institutionalised and ethically regulated, could significantly enhance the identification and prosecution of offenders. The analysis has also adopted a gender-sensitive lens, revealing how girls are disproportionately targeted in CSAM, boys are increasingly affected by financial sextortion and exposure to violent content. These findings underscore the urgent need for a coordinated, child-centred response. To this end, the paper recommends amending PECA to include possession of CSAM as a punishable offence, reclassifying cyber grooming as a cognisable and non-bailable offence, creating a dedicated

cybercrime unit for child protection, expanding training and resource allocation for the FIA, strengthening MLA frameworks with digital platforms, launching national awareness initiatives to enhance reporting, and integrating a gender-informed approach into legislative and enforcement mechanisms.

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