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Articles by Author

Law Reviews by Author

Critique and Comment by Author

Index of Authorities

Civil Law

Constitution & Charters:

Cases:

Criminal Law

Human Rights Law

Intellectual Property Law

International Law

Arskal Salim, Challenging the Secular State: The Islamization of Law in Modern Indonesia, University of Hawaii Press, 2008) 40
Best Practices for Remote Hearing, prepared by the joint E-Hearings Task Force of The Advocates' Society, the Ontario Bar Association, the Federation of Ontario Law Associations, and the Ontario Trial Lawyers Association Ontario, CA, May 13, 2020 72
Carbon Dioxide," NASA Global Climate Change, last updated in April 2020 29
Child Welfare Series Number 66; Child Protection Australia: 2015–16, prepared by Australian Transparency International Institute of Health and Welfare, AIHW, 2017 45
Coinne Henn, "Why Dog Breeding is a Problem Even if the Breeder is Reputable," One Green Planet, November 14, 2017 51
"Corruption Perception Index", 2019 47
Frank E. Vogel, Islamic Law and the Legal System of Saudí: Studies of Saudi Arabia (Leiden; Boston: Brill), 2000 38
"Grand Corruption," Transparency International, last accessed on May 20th, 2020 47
Global Terrorism Index 2019: Measuring The Impact Of Terrorism, prepared by the Institute for Economics & Peace(IEP), 2019 31
Hakim Yousuf and Kamil Omoteso, "Combating Environmental Irresponsibility of Transnational Corporations in Africa: An Empirical Analysis," Local Environment: The International Journal of Justice and Sustainability, Volume 21, Issue 11, 2016 29
Hazardous Air Puts Health of Millions At Risk, prepared by Amnesty International (ASA 33/1370/2019 Pakistan, 2019) 29
Human Development Report 2019, Beyond income, beyond averages, beyond today: Inequalities in human development in the 21st century, prepared by the United Nations Development Programme, UNDP, 2019 41
J.L. Austin, How to do Things with Words (Oxford University Press, 1962) 48
Kristina M. Jackson, Michelle L. Rogers, and Carolyn E. Sartor, Parental divorce and initiation of alcohol use in early adolescence. Psychology of Addictive Behaviors, 30(4), 2016 67
"Leather: Animals Abused and Killed for their Skins," PETA, last accessed on May 21,2020 51, 53
Newton Puberty (Newton - pubertet), on NRK 45
"Petty Corruption," Transparency International, last accessed on May 20th, 2020 47
"Political Corruption," Transparency International, last accessed on May 20th, 2020 47

Constitution & Charters:

Cases:

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SZABIST LAW JOURNAL©

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2020

Our Executive, Judiciary and the Constitution

A Basic Human Right Yet to be Recognised in Pakistan?

By: Barrister Hamza Hidayatallah

1. Life by its very nature is unpredictable and uncertain and as much as we try to plan and structure our future, it is very rare that we actually end up where we expected to. But in all the chaos and unpredictability that is life, each and every one of us is born with one certainty: death, being life's great antagonist but, also its only guarantee.

2. While Pakistani legislature and Courts have gone to great lengths to protect the sanctity of human life and recognise defined processes and circumstances of death which are deemed not to contravene human rights, our law has yet to recognise one fundamental human right: the right to a decent burial.

3. Throughout history almost each and every society, religion and ethnicity has recognised that human beings deserve the fundamental right to a decent burial. While there is often a disparity between the manner and mode considered suitable such as a conventional burial, cremation or the Zoroastrian *Dakma*, the basic principle is that all bodily remains of every person should be relinquished in a respectful and decent manner.

4. However, it would appear that this basic human right has yet to be given legislative or judicial force in Pakistan. While *Article 14* of the *Constitution of the Islamic Republic of Pakistan, 1973* specifically recognises each Pakistani's fundamental human right to be treated with dignity and decency, the courts of Pakistan are yet to recognize that the right to a decent burial arguably falls within the scope of the same.

5. In India this fundamental right has been given sufficient recognition by the Court's under *Article 21 (Protection of Life and Personal Liberty) of the Constitution of India, 1949* whereby it has been held that:

> *"Life in whatever shape and form, one day has to come to an end. This perhaps is the only eternal truth with certainty. Right of decent burial and cremation is an important facet of life, as enshrined under Article 21 of the Constitution of India."* [1]

6. The question also arose in *Ashray Adhikar Abhiyan vs.Union of India*[2] about the right of a deceased homeless person for a decent burial. A voluntary services organisation by name Ashray Adhikar Abhiyan sent a letter addressed to the Chief Justice of India complaining that homeless persons are not given a decent burial when they die. The letter was treated as a writ petition under *Article 32 of the Indian Constitution* and ultimately, it was disposed of on the basis of the affidavits sworn to by the Deputy Municipal Health Officer of the Municipal Corporation of Delhi and the Deputy Commissioner of Police (Headquarters), Delhi, elaborating the various steps taken by the Police, and the local body for providing a decent burial to a homeless dead person, according to the religious faith to which he belonged. Though the said writ petition was closed on the basis of the affidavits of the official respondents, the Supreme Court affixed a seal of approval on the right of a homeless deceased

[1] Court On Its Own Motion v State of Himachal Pradesh, 6609 (HP HC. 2012).

[2] Ashray Adhikar Abhiyan v. Union of India, AIR 554 (SC. 2002).

to have a decent burial as per their religious belief and the corresponding obligation of the State towards such people.

In England, the House of Lords have been pleased to observe that:

> *"We all have an interest in securing the decent burial of a dead body. It is disrespectful, as well as a hazard to public health, if this is not done in a prompt and seemly manner. Hence there is a common law obligation, "in the nature of a public duty", to arrange for this."*[3]

7. Moreover, according to the *Burial Laws Amendment Act, 1880* whether with or without a religious service all burials must be conducted in a decent and orderly manner and anyone who willfully obstructs the same shall be guilty of an offense.

   Even the courts of the United States of America have gone on to develop this concept further to hold that the right to a decent burial is a right of a living person to be accorded to him after death.[4]

8. In Pakistan, the Supreme Court possesses the relevant jurisdiction needed to make such an Order to a healthy environment and basic amenities as is done by courts in other jurisdictions. This jurisdiction is given to the Supreme Court of Pakistan by the Constitution of Islamic Republic[5] which gives it the power to make an order if a question of public importance related to a fundamental right is ever raised. The apex court has previously used this provision[6] when it recognised citizens' right to a healthy environment with regards to right to life and dignity. Into the argument, the right to a decent burial may also fall under the ambit of the right to a dignified life.

9. Accordingly, it would be safe to say that while in practice ethically and morally the people of Pakistan tend to uphold the basic human right to a decent burial; it is a significant fundamental human right that has managed to escape and evade the notice of the legislature and judiciary, and is anticipating recognition either by way of statute or common law. Perhaps, given the increase in population of Pakistan (and in turn death tolls) along with scarcity of land for burial grounds this question will soon rise before the Courts. Till then, this fundamental right finds its force in custom, tradition and culture.

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[3] Kerr v. Department of Social Development (Northern Ireland), 23 (UKHL. 2004).
[4] Persinger v. Persinger, 39 Ohio Op. 315, 54 Ohio L.Abs. 295, 86 N.E.2d 335 (Fayette County Ct. C.P. 1949).; Finley v. Atlantic Transport Co., 220 N.Y. 249, 115 N.E. 715 (Ct. App N.Y. 1917).; Patterson v. Patterson, 59 N.Y. 574 (N.Y. 1875).
[5] *Constitution of Islamic Republic of Pakistan 1973* Article 184(3)
[6] Ms. Shehla Zia v. WAPDA, PLD 693 (SC. 1994).

contentious and non-contentious matters. In addition, he is also an Assistant Professor of the Law of Torts at SZABIST Faculty of Law, Karachi

Review and Reconsideration in the Jadhav Case: Lessons Learnt from the Implementation of Avena and LaGrand in the US Domestic Courts

By: Shayan Ahmed Khan

1. When it comes to the protection of nationals in another State, the right to consular access, as codified under Art. 36 of the Vienna Convention on Consular Relations (VCCR)[1], serves as a potent tool for States to protect the rights of their nationals when they are under arrest, committed to prison, in custody pending trial or facing detention in any other manner in another State. Indeed, an absence of this right has the potential of causing significant prejudice to an individual's human rights. It is in such situations that some States have sought recourse before the International Court of Justice (ICJ) and, interestingly, until the *Jadhav Case*, all three cases for a denial of this right were instigated against the United States[2]. The two cases that reached the judgment stage, the remedy for the violation of consular access was held to be 'review and reconsideration' which is akin to the remedy given in the *Jadhav Case*. It is for this reason that the implementation of the Court's judgment by the United States serves as an important benchmark that ought to be considered by Pakistan whilst implementing the decision of the ICJ.

2. At the outset, however, it is important to elaborate upon 'review and reconsideration' itself. Essentially, it entails that the injuring State must assess and examine *'the legal consequences of the violation of the rights set forth in the Convention*[33] by means of its own choosing. However, this deference to the processes within a State has some conditions attached to it. Firstly, the injuring State must ensure effectiveness in the process[4]. Secondly, this assessment must be carried out through a judicial forum and, therefore, clemency proceedings cannot replace the process.[5] Thirdly, it needs to be undertaken in a reasonable period of time. Finally, if the review and reconsideration is not effectively carried out through the primary means, then recourse must be had to alternate means in order to attain a similar result.[6]

I. Implementation of the Decisions in the United States:

In response to the judgment rendered against the United States in the *Avena Case*, the executive arm not only accepted the decision but also, the President – George W. Bush – issued a *'Memorandum for the Attorney General'* dated 28th February, 2005. Pursuant to this Memorandum, the President ordered all States to give effect to the Court's decision. At the implementation stage, however, the decision of the ICJ was met with great resistance. The domestic courts refused to traverse beyond the existing domestic framework and, in some cases, reached their decisions without even citing *LaGrand* or *Avena.* Indeed, many of the

[1] Vienna Convention on Consular Relations, Apr. 1963, 596 UNTS 261

[2] Vienna Convention on Consular Relations (Paraguay v. United States of America); LaGrand Case (Germany v. United States of America) [2001] ICJ Rep 466; Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) [2004] ICJ Rep 12

[3] Avena, Supra Note 2 at para 131

[4] Ibid

[5] Ibid, para 143

[6] Request for Interpretation of the Judgement of 31 March, 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) [2004] at para 47

courts knocked out claims based on the obligations under consular access by resorting to a lack of implementing legislation.[7] Resultantly, there was little to no implementation of the decisions. Further, almost all cases failed on appeal with the exception of a very few cases, most prominently being that of Osvaldo Torres in Oklahoma whose death sentence was commuted to a life sentence without parole.[8]

II. Procedural Default:

3. The biggest factor for the inadequate implementation before the domestic courts was 'procedural default'.[9] It means that a defendant who could have raised, but fails to raise, a legal issue at trial will generally not be permitted to raise it in future proceedings, on appeal or in a petition for a writ of habeas corpus. Consequently, as the issue of consular access denial was not raised at the trial stage, it barred the defendants from raising this as a ground at the appeals stage.

4. This became most apparent in *Sanchez Llamas v. Oregon*[10]. The accused was not granted consular access and had made incriminating statements to the police, and was then charged with attempted murder. Later, the accused filed a motion to suppress his confession on the same grounds. The domestic courts, all the way to the US Supreme Court, held that the provision did not create extraordinary rights beyond domestic law and that in any case 'procedural default' barred him from bringing such a claim. This decision was surprising as the Supremacy Clause of the US Constitution mandates that 'all treaties made, …shall be the supreme law of the land'.[11]

5. Outside of the US, the conflict between domestic law and consular access can also be observed occurred in Germany. In its decision, the *Bundesgerichtshof (BGH)* stated that whilst Art. 36 of the VCCR does entail a right which may be relied on by foreign nationals, statements already made by defendants cannot be retracted. [12]

III. Prejudice to Rights:

6. In the few cases that passed the procedural stage, the courts went on to look at whether there was any prejudice, at the trial stage, due to the denial of consular access. For instance, in the US litigation of the *LaGrand Case,* the Court noted that it would have provided the defendants a chance had the denial of consular access resulted in any prejudice.

7. In *Faulder v. Johnson,* a violation of the VCCR was found but the Court noted that it was harmless as the ultimate result would have been the same.[13] In *Hernandez v. United States*, the

[7] Medellín v. Texas (Medellín I), 552 U.S. 491, 500–01 (2008); Medellín v. Texas (Medellín II), 554 U.S. 759 (2008) (per curiam); Garcia v. Texas 131 S. Ct. 2866 (2011)

[8] Torres v. State, 2005 OK CR 17 (Okla. Crim. App. 2005)

[9] Breard v. Greene 523 U.S 371 (1998); LaGrand v. Stewart 133 F.3d 1253 (9th Cir, 1998); Sanchez Llamas v. Oregon 548 U.S. 331 (2006)

[10] Sanchez Llamas v. Oregon 548 U.S. 331 (2006)

[11] Constitution of the United States, Art. VI

[12] BGH, Judgment of 7 Nov. 2001, 5 StR 116/01

[13] 81 F.3d 515 (5th Cir. 1996)

Court noted that relief would only be granted if the defendant could show that it would have changed the outcome of the case. In this case, the defendant was unable to do so.[14]

IV. Implementation of Review and Reconsideration in Pakistan:

8. At the time of writing, it is unclear as to the way in which Pakistan aims to undertake the obligation of 'review and reconsideration'. Nonetheless, it is clear that unlike the US, the domestic courts of Pakistan cannot rely on a lack of implementing legislation as pursuant to the *Diplomatic and Consular Privileges Act, 1972*, Pakistan has transposed the obligations set forth in the VCCR. Beyond this, however, there is a lack of clarity as to the exact ways in which implementation may be carried out. That being said, the ICJ has provided broad parameters within which Pakistan is to undertake the obligation. First and foremost, the ICJ observed that the judicial process would be best suited to the task of review and reconsideration.[15] Further, it went onto note that this could be done through the High Courts of Pakistan which can exercise review jurisdiction under Art. 199(3) of the Constitution of Pakistan. At the same time, however, the Court was also wary of the extent to which this process would be effective for an appeal emanating from the military courts in view of the strict parameters set by the Supreme Court in the case of *Said Zaman Khan*.[16]

9. It must be noted that, akin to the United States, our legal system also limits the process of appeals to issues raised at the trial stage, thus triggering 'procedural default' at the stage of review which would most likely be before the High Court. This would especially be the case for an appeal from a decision of the military court which has a very narrow ambit of review. Perhaps, for this exact reason, the Court went a step further than *LaGrand* and *Avena* and noted that in order to undertake 'review and reconsideration', Pakistan ought to also consider enacting appropriate legislation[17] – tacitly hinting at ensuring that the effectiveness is not prejudiced through such a procedural default. In any case, provided that procedural default does occur, it would constitute an internationally wrongful act which must be avoided by Pakistan.[18]

V. Conclusion:

10. The analysis above, clearly illustrates that Pakistan must conduct an examination of any prejudice that may have been caused to Jadhav. The same must be done in a way where no procedural hurdles exist in the exercise of review by the High Court. This would be the only way in which Pakistan can discharge its obligation of effective 'review and reconsideration'. In the unlikely and extreme case that this is not done, India would be free to assert political pressure through organs such as the United Nations General Assembly – a forum through which Mexico continues its endeavour to enforce the decision in *Avena* even more than a

[14] 280 F. Supp. 2d 118 (S.D.N.Y. 2003)
[15] Jadhav Case (India v Pakistan) [2019] <https://www.icj-cij.org/public/files/case-related/168/168-20190717-JUD-01-00-EN.pdf> at para 139
[16] Said Zaman Khan et al. v. Federation of Pakistan, Supreme Court of Pakistan, Civil Petition No.842 of 2016, 29August 2016; Jadhav, ibid at para 141
[17] Jadhav, Supra Note 15 at Para 146
[18] LaGrand, Supra Note 2 at 91

decade later from the judgment.[19] Finally, this would also entitle India to seek recourse from the United Nations Security Council in accordance with Art. 94 of the UN Charter,[20] at least in theory if not practice.

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[19] UNGA Res. 73/257 (2019)

[20] Charter of the United Nations, Oct 1945, 1 UNTS XVI

Environmental Laws and their Implications in Pakistan

By: Hubaish R. Farooqui

1. 2019 was the year when the world saw a rise in awareness campaigns regarding climate change and the global environment on social media and other international forums. From the speeches and protests of Greta Thunberg to the programs and initiatives of Greenpeace, the international community found that it had to grapple with the reality of climate change and the impact that it is having and will continue to have on the world.

2. Following the global outrage against climate change, many governments have taken it upon themselves to make things right and protect their ecosystems by enacting laws and resorting to more sustainable means of energy production. With 2020 reaching a close, Pakistan's government also needs to focus on adopting this global vision and working towards making the country a better home for marine life, natural species, and our future generations.

3. While it is accepted that Pakistan is not a significant contributor to global environmental policies, as a third world nation, the country still needs to protect its ecosystems and adopt a more environmentally friendly lifestyle. The main burden of this lies on the government to create stricter and more efficient laws for the use of non-renewable resources in order to ensure sustainable development. Pakistan already has a statute to protect the environment in the shape of the *Pakistan Environmental Protection Act, 1997*. The 1997 legislation established a Council, the *Pakistan Environmental Protection Council*[1] that further established an agency[2] to act as a watchdog for environmental protection in Pakistan. Although the legislation came into effect and a regulating body was subsequently established, it lacked effective policies that could have been implemented to combat the rapid burning of fossil fuels and the use of non-renewable energy resources causing environmental damage, which contributes to global climate change. It is believed that actions and policies of the agency to combat environmental damages failed to achieve their goals for two main reasons; (i) changes related to the masses without the availability of alternatives, and; (ii) going after the small fish in the pond.

4. As far as the first reason is considered, the recent bans on polythene bags[3] are a prime example of the government's lack of foresight. Such bans have been taking place in intervals and we see authorities urging locals to comply with such bans and law enforcement agencies, especially the police, enforcing such bans.[4] However, they do not last for more than a few weeks and it is arguably the inefficient planning and lack of foresight surrounding the logistics of the implementation of the ban and its imposition without suggestion of feasible alternatives.

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[1] *Pakistan Environmental Protection Act 1997* s 3(1)

[2] Ibid., s 5(1)

[3] Pamela Constable, "Pakistan moves to ban single-use plastic bags: 'The health of 200 million people is at stake,'" The Washington Post, August 13, 2019.
https://www.washingtonpost.com/world/asia_pacific/pakistan-moves-to-ban-single-use-plastic-bags-the-health-of-200-million-people-is-at-stake/2019/08/12/6c7641ca-bc23-11e9-b873-63ace636af08_story.html

[4] Diaa Hadid and Abdul Sattar, "How Bad Is Pakistan's Plastic Bag Problem? See For Yourself," National Public Radio [NPR], August 13, 2019.
https://www.npr.org/sections/goatsandsoda/2019/08/13/749362829/how-bad-is-pakistans-plastic-bag-problem-see-for-yourself

5. Living just a nick above the poverty line and in inadequate standards, local small-scale shopkeepers and traders conduct their businesses with the motive of cutting costs to earn as much profit as they can. Since a large proportion of the local market operates with this motive, it is unreasonable to expect them to switch from the cost-effective utility of polythene bags to expensive or cumbersome options such as cloth or paper bags. In light of their daily wage status, they simply cannot afford to make such a switch. Consequently, many local shopkeepers not only criticize the ban imposed on the use of polythene bags, but also actively flout it. Such a mindset is not just limited to the ban of polythene bags and plastic products, but instead any change which is advocated without incentive or effective alternatives by the government.

6. The *World Bank* in its report[5] presented that 13 in every 1000 people in Pakistan rely on private transportation, mainly motor vehicles such as cars and motorbikes for their daily conveyance which today in the population of 200 million[6] is surely a large number and shows how deeply rooted the system of private transport is in the masses. Therefore, if the government wishes to go after reducing this number provided the high level of air pollution these vehicles cause, it cannot do so effectively unless it creates an efficient alternative, such as adequate public transportation, that is able to provide the facility to the vast amount of population. Hence, it is pertinent to note that before the Pakistan Environment Protection Council or the agency wishes to impose a policy regarding environmental protection or for the curbing down of excessive pollution, it has to plead to and work with the government on finding better alternatives regarding the situation and the policy consideration.

7. This brings us to our second reason, which is that the government and the Council in its policies have been targeting small fish and are going after the wrong people to combat the environmental damage. It can be agreed upon that the basic utilities of the daily lives of the general population have contributed immensely to global climate change, however, the major share has been made by the large corporate entities working in the production, and other business sectors. The *United Nations* in its report in 2010[7] stated that if the top 3000 companies of the world would have to pay for the environmental damage they have caused, they would end up losing one-third of their total profits, in other words the environmental damage caused by these corporations would amount to a total of $2.2 trillion, and this report goes back to 10 years which means today, provided the advanced machines, the damage is only likely to increase. The theory can be used for Pakistan as well.

8. Taking the examples of private organisations such as K-Electric or the Sui Southern Gas Company (SSGC) or, most importantly, the Water and Power Development Authority (WAPDA) who refuse to use sustainable resources to generate electricity or for gas distribution. We can also consider the high amount of deforestation and excavation through heavy machinery by construction companies, pollution by the factories of multinationals, use of less advanced aircraft by airlines, the work of petroleum companies. The list is non-exhaustive but the point is that these large corporations damage the environment way more

[5] *World Development Report: Reshaping Economic Geography*, prepared by The International Bank for Reconstruction and Development / The World Bank (2009).
[6] *Provisional Summary Results of Census-2017*, prepared by the Ministry of Statistics, Governmentof Pakistan (2017).
[7] *A New Era of Sustainability: UN Global Compact-Accenture CEO Study 2010*, prepared by United Nations Global Compact (UNGC, 2010).

than any individuals can. Combating them is a far more efficient and feasible way of reducing the damage than going after the masses as by imposing regulations on them the Council can achieve far more in terms of environmental protection. If large corporations take steps to reduce the environmental damage that their operations cause, great changes can be achieved and this indeed did happen in Nigeria where oil companies through their CSR activities combated the pollution caused by their oil production.[8] The recovery was called by the *United Nations Environmental Program* (UNEP) as one of the greatest ever[9] and hence, it can be assumed that if a similar activity can be done by the corporations in Pakistan, an incredible change in terms of environmental protection can be achieved.

9. Lastly, the justification for going after large conglomerates instead of individuals is that the problem can be solved on a wider scale. As proven earlier, it is evident that one major hurdle that prevents any policy for eco-protection from being successful is the failure to implement it effectively. This is because effective implementation requires the compliance of a population of approximately 200 million people. However, in the alternative, the Council, with the assistance of the government, needs to strike a deal with corporate leaders of the country through the help of legislation in order to achieve their goals. Conclusively, it is time to realise that the acts of passing laws or creating new specialized departments are not enough anymore in 2020 when climate change is a scientifically proven reality due to the increasing carb on dioxide levels.[10] A UK based rights group stated that the last smog in Lahore posed a threat of respiratory disease to the tens of thousands of people[11] as the air quality index for Lahore skyrocketed to around 600[12] (air is usually considered unhealthy at 200.)[13] The recent unpredicted winter in the country is also a sign of climate change, and with the proportion of heatwaves in summer increasing annually, the Council and the government need to step up their game with respect to combating the environmental damage.

10. Since living in the 21st century it can no longer be said that climate change is not an imminent threat because it is and every country needs to do what it can in its power to make reforms to reduce its emissions so we can do right by our later generations and give them a healthy environment to live in.

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[8] Hakim Yousuf and Kamil Omoteso, "Combating Environmental Irresponsibility of Transnational Corporations in Africa: An Empirical Analysis," *Local Environment: The International Journal of Justice and Sustainability*, Volume 21, Issue 11 (2016).
https://www.tandfonline.com/doi/pdf/10.1080/13549839.2015.1119812

[9] *Annual Report 2011*, prepared by the United Nations Environment Program (UNEP, 2011).

[10] "Carbon Dioxide," NASAGlobal Climate Change, last updated in April 2020.
https://climate.nasa.gov/vital-signs/carbon-dioxide/

[11] *Hazardous Air Puts Health Of Millions At Risk*, prepared by Amnesty International (ASA 33/1370/2019 Pakistan, 2019).

[12] "Air Quality Forecast for Lahore," Air Quality Index, last accessed on May 21, 2020.
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[13] "Air Quality Scale," World's Air Pollution, last accessed on May 21, 2020.
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Witness Protection and Anti-Terrorism Proceedings

By: Zaynab Meno

I. Background and Objectives:

1. Pakistan is one of the countries in the world most affected by the scourge of terrorism.[1] Although terrorist-related incidents have decreased recently, the rates of casualties and the damage to the country remain staggering. With over 1,800 terrorism-related deaths across Pakistan in 2016, the country remains the 5th most affected by terrorism globally.

2. At present, the criminal justice system designed to deal with terrorist offences is ridden with challenges. In 2016 only 28% of cases brought before KP's Anti-Terrorism Courts (ATCs) resulted in convictions - the remaining 72% were acquitted or consigned.[2][3] In addition, there is a backlog of 1,700 cases in Sindh's 33 ATCs, with a low conviction rate of approximately 17%. The recent UNODC Country Office Pakistan review of the counter-terrorism cases in KP reveals some of the challenges to the capacity and operation of the institutions throughout the justice chain. This study focuses on the process, the legislative and capacity needs of the justice institutions, and also provides a comprehensive approach to coordination and capacity building.

3. An important factor hindering the counter-terrorism justice system emerged at the level of investigation. The over-reliance on confessions by law enforcement and the judiciary undermines the credibility and reliability of the information obtained. According to the Research Society of International Law, the lack of evidence is due to the lack of will on the part of the witnesses and this in turn is due to the lack of proper security given to witnesses.[4] Other reasons for the reluctance of potential witnesses to come forward in criminal proceedings can include social pressure or the general hesitance to involve oneself in the affairs of others.

4. The ability to shield the witness from external influences, including potential threat from the defendants and intimidation by law enforcement, is the cornerstone of a successful criminal justice system. The testimony of a witness (or victim) in court or during the investigation can be crucial to upholding the principle of a fair trial. Witness protection affects the general criminal law of a country since it may act in derogation of two known and accepted principles of criminal law: 1) the right to confront witnesses and 2) the need for a court to be open. Therefore, it is important that witness protection measures are balanced, i.e. proportional to their need, and that the openness and transparency of the trial is safeguarded during the time witness protection measures are in place.

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[1] *Global Terrorism Index 2019: Measuring The Impact Of Terrorism*, prepared by the Institute for Economics & Peace (IEP, 2019).

[2] *Pakistan's Action to Counter Terrorism: Understanding the Counter Terrorism Response - Case Analysis of Khyber Pakhtunkhwa*, prepared by United Nations Office on Drugs and Crime (UNODC, 2017).

[3] *Lexico powered by Oxford*, s.v. "consign," accessed August 26th, 2020. Put someone or something in (a place) in order to be rid of it or them.
https://www.lexico.com/definition/consign

[4] *Human Rights and Pakistan's Counter-terrorism Legislative Landscape*, prepared by the Research Society of International Law with support from American Bar Association Rule of Law Initiative (RSIL ABA-ROLI, 2017).

5. The value of witness testimony is emphasized in International Human Rights Law. The *1950 European Convention of Human Rights*[5] and the *1966 International Covenant on Civil and Political Rights*[6] consider the importance of witness testimony an element of a fair trial. Ensuring the quality of testimony, or procedural protection of the witness, is also a fundamental entitlement of the accused. The jurisprudence of the *European Court for Human Right*s and the *UN High Commissioner for Human Rights*[7] highlights the situations in which the attendance of witnesses in court (an element of the fair trial) is intended to ensure the protection of the witness, specifically in cases of organized crime and terrorism. The international instruments dedicated to combating terrorism cite witness protection as a valid element of counter-terrorism criminal proceedings. For instance, the *Convention of the Organization of the Islamic Conference* (OIC) on Combating International Terrorism stipulates *'to undertake all necessary measures to ensure the protection of a witness or expert including the necessary security required by the condition of the witness or expert and of his family, and circumstances of the case and types of expected risks'*.[8]

6. Depending on the circumstances, including age of the witness and severity of the crime, witness protection can take place at the level of investigation, court hearings, during and/or post-trial. In-court witness protection measures are generally authorized and regulated by criminal procedure legislation. Such measures are intended to prevent the accused or his or her accomplices from intimidating or attacking the witness. For instance, testimony via conference link allows a real-time audio-visual interaction between the witness and the participants of the trail. Removed from the courtroom and the physical threat of intimidation by the defendants, the witness can feel more secure to testify.

II. Rules of Procedure:

7. Additionally, witness protection should be based on clear rules and unified procedure. Supporting transparency of the process, as well as enhancing legislative clarity is pertinent in attaining its effectiveness. Accordingly, the admission and termination of protective measures should occur according to clearly defined criteria, to be assessed against each case. The rules of handling of the case, including strict adherence to confidentiality and safeguarding the rights of the witness, should be included in the code of conduct for the police and administrative staff involved in the program. Rules of procedure ought to be reviewed periodically to ensure responsiveness to changing circumstances and to enact and enforce legislation proscribing acts that violate internationally recognized norms relating to human rights.

III. Witness Protection in Pakistan:

8. The *2014 Protection of Pakistan Act* calls on the Government to take adequate measures to provide security to prosecution witnesses, including the establishment of high security prisons

[5] *European Convention of Human Rights 1950* Article 6.3

[6] *International Covenant on Civil and Political Rights 1966* Article 15

[7] *Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism*, prepaed by the Human Rights Council (A/HRC/22/26, 2012).

[8] *Convention of the Organization of the Islamic Conference on Combating International Terrorism 1999* Article 37

with courtrooms. Across Pakistan, legislation has tried to create systems for the implementation of such measures.[9]

- **Islamabad:**

9. The federal '*Witness Protection, Security, and Benefit Act*' of 2017 uses an inclusive definition of a 'witness' and includes persons associated with him/her as well. This legislation is applicable to the Islamabad Capital Territory (ICT) and is formulated to cover witnesses of 'serious offences' during investigation, inquiry, and trial stages. The Act offers six types of protection to a witness, which are as follows:

    1. Concealing of identity by wearing a mask, changing the voice or appearance, or other form of separation during investigation, trial, and examination as provided by the Act;
    2. Allowing distance testimony, video-conferencing or other arrangements, as approved by the authorities;
    3. Relocating the witness, including provision of accommodation for him/her;
    4. Provision of reasonable financial assistance;
    5. Compensating the legal heirs of a 'protected witness' if the witness is killed due to his/her protected status, including the provision of education and livelihood;
    6. Provision of special security arrangements for the witness for a reasonable amount of time.

10. The Act established the Witness Protection Unit (WPU) to manage the programme, including the establishment of the admission criteria. The Witness Protection Advisory Board (WPAB), comprising the Secretary the Administrative Ministry, Secretaries Ministries of Justice and Finance, Attorney General, and Inspector General (IG) ICT Police, advises the WPU. The witness can enter the programme based on a Memorandum of Agreement outlining the tenets of the protection.

- **Sindh:**

11. The Sindh legislation was the first to be issued in Pakistan in 2013. The *Sindh Witness Protection Act 2013* includes many of the same provisions that were later also embodied in the federal legislation, as listed above, however also included establishing a new identity for the witness, and providing reasonable financial assistance to the witness, whenever practicable, for obtaining a means of livelihood.

12. The Witness Protection Unit within the Sindh Home Office manages the programme. The Unit is headed by the Additional Inspector General of Police, Crime Investigation Department Sindh, who serves as the Chief Witness Protection Officer. Admission to the programme is administered by the Chief Witness Protection Officer, on his or her consideration of the report of a Committee established to assist the Head of the Unit. It is also at the discretion of the

[9] *Pakistan's Action to Counter Terrorism: Witness Protection - Policy Options for the Criminal Justice System in Khyber Pakhtunkhwa*, prepared by United Nations Office on Drugs and Crime (UNODC, 2018).

Chief Witness Protection Officer to terminate the protection and/or disclose information about a person under the programme.

- **Punjab:**

13. The *2017 Punjab Witness Protection Bill,* now becoming the *Punjab Witness Protection Act 2018 (Act XXI of 2018),*[10] divides witness protection measures into two categories: a) out-of-court measures and b) in-court measures. The Law provides for the establishment of two witness protection units: one for anti-terrorism cases and one for other serious offences. The Witness Protection Units are charged with risk assessment and taking out of court measures. Out-of-court measures are to be finalized by witness protection units, to be overseen by a Witness Protection Board. These measures include provision of close protection services, lodging in safe houses, permanent relocation arrangements, and financial assistance to witnesses if they are rendered unable to continue employment or move about freely as a result of their involvement in the cases. In-court measures are to be taken by the court after a decision regarding the need for witness protection. The Law requires that the judge decides that a witness is under threat or distress before ordering any measures. Special measures include:

    1. Screening of witnesses;
    2. Taking testimony by video-link;
    3. Excluding persons from court;
    4. Prohibition of cross examination in person;
    5. Reporting restrictions;
    6. Anonymity provisions.

14. Witness protection measures under the Bill are viewed as exceptional measures. The convenience of witnesses is not a factor recognized by the Bill.

- **Balochistan:**

15. The *Balochistan Witness Protection Act, 2016* was promulgated on 26th March 2016. It provides a legal framework for the protection of witnesses in the province. The law provides a very general definition of 'witness'. The protections afforded by the law are similar to the witness protection regime introduced at federal level; the law extends protection to families of the witnesses as well. As in Punjab and at the federal level, the programme is to work under the oversight of a *Witness Advisor Board* (WPAB), which will be assistedby a *Protection Unit* (PU) for implementation. The Secretary, *Home & Tribal Affairs Department of the Government of Balochistan* shall act on his behalf. The PU will further establish a Committee to assist the PU in implementation. The IGP Balochistan, who is the head of the police administration in the province and is expected globally to be vested with the power to protect the witnesses, has been included as a member of the committee. Another provision of the law allows appointment of *Witness Protection Officers* (WPOs). The protection will be extended to a witness,

[10] *Punjab Witness Protection Act 2018 (Act XXI of 2018*) (Pjb), the Act was passed by the Punjab Assembly on May 16, 2018, was given assent by the Governor on May 21, 2018 and was published in the Punjab (Extraordinary), dated 24 May 2018, on pages 8133-38.

according to the law, on the basis of a Protection Agreement. The courts have also been empowered to pass a Witness Protection Order, which will be appealable to the High Court.

16. An added feature of the Balochistan legal regime is that it criminalises the acts endangering protected witnesses. Additionally, towards the end, the powers of police officers to protect witnesses have been kept intact; this dual responsibility model of witness protection where the duty is divided between Boards, Units, Officers, and the Police Unit is less likely to yield effective implementation.

- **Khyber Pakhtunkhwa:**

17. **The province of** Khyber Pakhtunkhwa has not yet introduced a dedicated provincial legislation on the subject. It, therefore, utilizes Section 21 of the *Anti-Terrorism Act, 1997*, as the applicable legal regime for witness protection.

18. Moreover, the Witness Protection models of Sindh, the ICT, and the planned Witness Protection regime of Punjab, are based on examples of international jurisprudence and practice, and are aligned with the international standards of the ToC. These solutions also show progressive steps that legislators and policymakers in Pakistan considered viable in the context of the country, and which may therefore be considered by the KP authorities. According to the Pakistan Institute of Legislative Development and Transparency, the approaches contained in the Sindh legislation were transferred from those observed in other countries, without due consideration for associated financial capacity constraints.[11]

19. Further analysis of the tenets of existing witness protection programmes in Pakistan, as well as those observed in different countries, will support the KP policymakers in their decisions regarding the most viable means of witness protection, while avoiding the legislative and administrative pitfalls of earlier models adopted in the country. In fact, given the technological developments, witness statements can also be recorded through modern techniques as permitted under Article 164 of the Qanoon e Shahadat Order which allows the court to consider evidence made available through modern devices or techniques. Working within the Article 164 domain, the witness protection law can include the option of pixelating the face of the witness or digitally altering their voice to avoid any threat of being identified.

IV. Conclusion:

20. In conclusion, witnessing a terrorist activity puts an individual in an extremely vulnerable position - which explains the reliance that these witnesses have on the criminal justice system. If the witness is a victim, his or her protection relates to the fundamental principles of providing fair and swift justice. It is paramount that the conduct of the law enforcement and other actors involved in the witness protection be guided by the principles of shielding the wellbeing of the witness beyond his/her physical protection. Effective witness protection needs to be designed in a way that promotes the transparent conduct of those involved. The multi-layered infrastructure of the protection scheme or the programme, including the

[11] *Sindh Witness Protection Act 2013* (Sindh)

oversight of admission and termination, is proposed to ensure accountability across all stages of the process. The confidentiality enforced on all participants of the witness protection is intended to shield the privacy of the witness, especially in situations where the disclosure of information on his/her identity and whereabouts by the participants of the programme or the media, can endanger his/her life. If relocated, the witness changing his or her identity and abode should not mean the derogation of family, property, and inheritance rights. Policymakers must consider how to transfer deeds and entitlements to new identities in order to better protect the witnesses. These measures will aid and ease the witnesses to come forward and testify, helping increase the number of cases that are brought to court.

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Analysing the Zakat and Ushr legislations of Pakistan: In light of Shariah and Fundamental Rights

By: Syeda Maha Fatima

1. Zakat is one of the five fundamental pillars of Islam and it requires the Muslims who are Sahib e Nisab to give 2.5% of their wealth to the needy and poor. Sahib e Nisab may be defined as a person who has wealth equivalent of the nisab which under the Sindh Zakat and Ushr Act[1] has been explained as:

   "nisab" in relation to assets liable to Zakat except agricultural produce and animals fed free in pastures, means 612.32 grams of Silver, or cash or gold, or goods for trade, or any assets liable to Zakat under Shariah, the aggregate value of which is equal to the value of 612.32 grams of silver, as notified by the Chief Administrator for each Zakat year or, in the case of a person whose assets liable to Zakat consist only of gold, 87.48 grams of gold.

2. Zakat on agricultural produce is called Ushr which is collected on a compulsory basis at a rate of 5 percent of the produce from every landowner, grantee, allottee, lessee, leaseholder or landholder unless they fail to meet the definition of sahib-e-nisab.[2]

3. The concept of Zakat is a religious ritual that stands for the values of purification of wealth after a portion of it is redistributed in the society to help the poor, orphaned and the destitute. The question that needs consideration is whether Zakat payment is a private obligation or a public one. Is there any responsibility that lies with the state to ensure people pay Zakat and is the current system of Zakat and Ushr collection obsolete?

4. Shariah requires the state to collect and distribute Zakat and Ushr and owing to those concepts of shariah law, "The Zakat and Ushr Ordinance XVIII 1980" (the "Ordinance") put into effect during Zia-ul-Haq's reign, codified these shariah rules. It made Pakistan one of the six Muslim nations which made the collection and payment of Zakat mandatory.[3]

5. The 18th amendment to the Constitution, passed on April 8th 2010 by the National Assembly of Pakistan, devolved many of the ministries at federal level to provincial including the subject of Zakat and Ushr. This resulted in the provinces legislating for laws on Zakat and Ushr in their own jurisdiction and thus, effectively repealing the 1980 Ordinance. However, the new legislation adopted the sections from the Ordinance in their own statutes and therefore, inherited its problems as well.

6. Legislations passed by all four provinces defined the term "Sahib-e-Nisab" in more or less the same manner,[4] therefore the issues which arise in this legislation will also sprout up in the others. In this article we will look into issues arising from the Sindh Zakat and Ushr Act 2011 (the "Act").

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[1] *Sindh Zakat and Ushr Act 2011* (Sdh) s 1 (xvii)

[2] Ibid., s 5

[3] Martin E. Marty and R. Scott Appleby, *Fundamentalisms and the State: Remaking Politics, Economics, and Militance* (University of Chicago Press, 1996), 320.

[4] *Sindh Zakat and Ushr Act 2011* (Sdh) s 2(xvii); *Punjab Zakat and Ushr Act 2018* (Pjb) s 2(r); *Khyber Pakhtunkhwa Zakat and Ushr Act 2011* (KP) s 2(xvii); *Balochistan Zakat and Ushr Ordinance 2011* (Bal) s 2(q)

I. Procedural Issues That Are Likely To Be Faced:

Who is Eligible?

7. According to the Sindh Zakat and Ushr Act, 2011,[5] payment and recovery of Zakat applies only to Muslim citizens of the relevant province and company or other association of persons, or body of individuals, whether incorporated or not, majority of the shares of which is owned, or the beneficial ownership of which is held, by Muslim citizens.

8. The issue with the original ordinance was that it made it compulsory for Muslims of all sects to pay Zakat; however, the Shia Muslims rejected the compulsion as their fiqh (religious sources and jurisprudence)[6] did not allow such enforcement. As a result, the CZ-50 declaration was announced through which Muslims could declare their faith and fiqh and be exempted from payment. However, that encourages a very pertinent question: why is the government allowed to ask a person to declare their sect? This requirement, in essence, appears to be a violation of the Constitution of the Islamic Republic of Pakistan 1973 (the " Constitution")[7] which categorically allows a person the "... freedom to profess, practice and propagate his religion" . What may even further impede on such a right is that if your fiqh is not then recognised by the Federal Shariat Court, you will not be able to get an exemption.

9. The law appears to be discriminating against the minorities which is a violation of the fundamental right stated in the Constitution under, equality of citizens and the freedom to profess religion; Subject to law, public order and morality:- Conclusively, any law or policy that appears to be a violation of the fundamental rights must be amended as to make it compatible with the rights as "Not only must Justice be done; it must also be seen to be done."[8]

10. This section of the Act further imposes an obligation on corporations whose majority shareholders are muslims as it states;

    "...as regards payment and recovery of Zakat and Ushr applies only to Muslim citizens of the Province and a company, or other association of persons, or body of individuals, whether incorporated or not, majority of the shares of which is owned or the beneficial owner ship of which is held by such citizen..."

    The section is written in such a way that it forces the non-Muslims in such companies to have to bear the burden of Zakat, even though individually they are not required to pay it. If a non-Muslim, or someone who is exempted from the payment of Zakat, is a shareholder in Muslim majority owned company he will have to pay Zakat either directly or indirectly. The verbiage of the act makes it so that these non-Muslims do not come under the ambit of exclusions[9] mentioned in the Sindh Zakat and Ushr Act (or in the legislation of the other provinces) and

[5] *Sindh Zakat and Ushr Act 2011* (Sdh) s 1(2)
[6] Frank E. Vogel, *Islamic Law and the Legal System of Saudí: Studies of Saudi Arabia* (Leiden; Boston: Brill, 2000), 4–5.
[7] *Constitution of Islamic Republic of Pakistan 1973* Article 20
[8] R v Sussex Justices, ex parte McCarthy, 1 KB 256 (EWHC. 1924).
[9] *Sindh Zakat and Ushr Act 2011* (Sdh) s 1(2)

therefore, are compelled to pay Zakat. This is a violation of the fundamental right of Safeguard against taxation for purposes of any particular religion:

"No person shall be compelled to pay any special tax the proceeds of which are to be spent on the propagation or maintenance of any religion other than his own."[10]
Steps need to be taken in order to resolve this matter and to protect the rights of the minorities.

11. According to The Sindh Zakat and Ushr Act, "Sahib-e-Nisab"[11] means a person who owns or possesses assets not less than nisab but does not include –

    i. Government or a local authority;
    ii. a statutory corporation;
    iii. a company or other enterprise, owned wholly, directly or indirectly, by Government;
    iv. a local authority;
    v. or a corporation owned by Government, either singly or jointly with one or more;
    vi. the Investment Corporation of Pakistan and its Mutual Fund;
    vii. a recognized Provident Fund;
    viii. a deeni madressa registered as such under the Societies Registration Act,1860;
    ix. mosque;
    x. an orphanage registered as such under the law relating to orphanages and others.

12. The legislation exempts state-owned corporations from paying Zakat and Ushr whereas private companies are obliged to do so. This was further confirmed in the Civil Appeal No. 39 of 2015[12] and it seems that the law is biased as it favours the companies such as Water and Power Development Authority (WAPDA) that are owned by the government.

13. The vagueness of the law can be explored through the case of Pakistan Telecommunication Employees Trust (PTET)[13] which managed the Pakistan Telecommunication Corporation Employees' Pension Fund. It was decided that corporate trusts and funds meet the criteria of "nisab" and hence, are required to pay Zakat. Why is it that the PTET was found to be Sahib e Nisab whereas S.2 of the Ordinance exempts entities owned by the government, directly or indirectly, from paying Zakat? The Supreme Court gave a reasoning in this case that the trust was established to pay the pensions of the retired employees of a federal organization, however, the trust worked as an autonomous body according to the Pakistan Telecommunication (Re-organisation) Act 1966 and therefore is not wholly owned, directly or indirectly, by the government.
    Such jurisprudence does help in the implementation of the Act, however, there is still a lot of confusion due to its wide interpretation.

[10] *Constitution of Islamic Republic of Pakistan 1973* Article 21
[11] *Sindh Zakat and Ushr Act 2011* (Sdh) s 2(xxiv)
[12] The Administrator General Zakat, Central Zakat Administration, Islamabad and others v. Pakistan Insurance Corporation through Secretary, Karachi and others, PLD 468 (SC. 2016).
[13] Pakistan Telecommunication Employees Trust v. Federation of Pakistan through Secretary, Minister of Information Technology, Cr.R.P. No.86/2015 (SC. 2017).

Who is the recipient?

Collection and disbursement of Zakat and Ushr

14. The disbursement and collection of Zakat is another issue that needs to be addressed. The political motivation behind the collection and disbursement of Zakat has crippled the system. There is huge room for corruption in the disbursement process as the zakat money goes through a lot of hands. First from the Sindh (Provincial) Zakat Council to the District Committees, next it goes to the Taluka/Town Committee according to the needs of that council and then to the Local Committee. Even though the councils disburse the Zakat to deeni madaris (religious schools), hospitals and other charitable institutions, we cannot be sure whether the institutions it is transferred to are legitimate or affiliated with these political parties and the corrupt individuals. The transparency of Zakat disbursement was also addressed in the suo motu case[14] where the vice-President of Dar-ul-uloom Karachi Mufti Taqi Usmani stated, "If the Zakat system has to continue, it must be reviewed thoroughly and replaced with a fresh system based on realities on the ground, lest the Zakat, a sacred form of worship, should fall prey to corruption and to say the least, of mismanagement". In order for there to be some accountability, the Act states:[15]

"The annual report of the Local Fund Audit on the Sindh Zakat Fund shall be laid before the Provincial Assembly and that on a District Zakat Fund or a Local Zakat Fund before the District Council concerned established under the law relating to local government."

15. Furthermore, audits performed by the Local Fund Audit are also required by the Act yet the issue of corruption remains, revealing the sad state of affairs. According to the legislation, Zakat and Ushr are collected for the poor, disabled and the destitute to help them in their fulfillment of basic rights. However, not much change can be seen in the lifestyle of the poor. On the contrary, Zakat brings up more socio economic problems than it resolves.[16] Consequently, people have lost faith in the system and such distrust has allowed them to look for loopholes. In the recent Supreme Court suo motu case, Mufti Taqi Usmani, an Islamic scholar and a former judge of the Shariat Appellate Bench of the Supreme Court, was invited to give his opinions on the current Zakat and Ushr legislation. Mr Usmani discussed the the problems with Zakat collection stating that many people transfer their money, before the deduction date, from their savings accounts to the current accounts or find alternatives to evade this payment.[17] The rich people of the country keep their money in foreign currency accounts or buy assets through foreign currency in order to be excluded from the class of individuals eligible for the payment and thus, the system of deduction from bank accounts is not effective anymore as the amounts it collects is meagre and not enough to make a difference.

[14] Supreme Court Suo Motu Case Coronavirus

[15] *Sindh Zakat and Ushr Act 2011* (Sdh) s 11(5)

[16] Arskal Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia* (University of Hawaii Press, 2008), 117-119

[17] Supreme Court Suo Motu Case Coronavirus

16. There is also a question of whether the expenses of all the Zakat Central and Provincial Councils being paid from the collected Zakat is valid. According to Mr Usmani, the basic purpose of Zakat is to help the poor and the destitute and only a limited amount of the Zakat can be used to pay for the salaries of the employees of the Zakat councils and committees. The limit has been mentioned in the Shariah but not in the legislations and therefore, it is easy to discredit the system due to the lack of accurate data of zakat payers/receivers and difficult to keep checks which makes corruption much easier.

17. Ushr collection is practically non-existent and raises various issues as governments seem to be less interested in the collections. Many ministers and members of the ruling party and the opposition are landowners and therefore, they are not politically or personally inclined to work actively for it. There is still an issue of land registration in Pakistan because of which accurate data cannot be retrieved. There is also a lack of awareness amongst the landowners about Ushr as most of the emphasis is on Zakat payment and collection. Those who do know about it, try to evade it. The need for awareness campaigns is important, especially in rural areas, for Ushr payment and collection to be effective.

II. Conclusion:

18. The deduction of zakat from the savings accounts on the 1st of Ramadan comes across as financial extortion by the government. States should not be allowed to make this payment through the banks since a lot of Sahib e Nisab prefer paying their Zakat to an individual they know is in dire need of it, rather than to the state, where the scope of corruption and misuse is enormous.

19. The system of mandatory payment to the government seems to be failing. The State Bank of Pakistan's Statistical Supplement shows that the Zakat receipt in the year 2017-2018 totaled to approximately 41,567 Million Rupees, showing that the amount paid by individuals privately is many times more than the amount collected by the banks. Pakistan stands at 152 out of 189 countries and territories on the Human Development Index.[18] If Zakat is collected and distributed in a fair and just manner, it can help in the economic growth of Pakistan and in the alleviation of poverty. However, at this point, that seems to be a far-fetched dream.

20. The government either needs to make this process more transparent in order to motivate individuals to pay Zakat through the banks or they need to make the bank deductions voluntary. Another remedy could be that the state should not adopt a paternalistic attitude towards individuals, forcing them to pay Zakat, instead they should leave it to the people to pay Zakat in whichever way the individuals deem suitable. The current system fails to meet the transparency criteria and if the whole system is not revamped soon then it might be better for the public that the Zakat payment and collection becomes a private subject instead of a public one. The ordinance of 1980 and the reign of Zia ul Haq is history yet the repercussions of his extreme views and orders are still felt in the country through the Hudood Ordinance and the Zakat and Ushr laws.

[18] *Human Development Report 2019, Beyond income, beyond averages, beyond today: Inequalities in human development in the 21st century,* prepared by the United Nations Development Programme (UNDP, 2019).

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Child Sexual Abuse In Pakistan and its legal implications

By: Amani Abbas

Compared to 2017, child sexual abuse cases have increased from 9 cases per day to 12 cases per day. Although the Government has taken initiatives to control the matter by making changes to the law, there is still a gap when it comes to the implementation of these laws.[1]

1. In the past few years, Pakistan has seen a drastic increase in the reported number of child sexual abuse cases - from highly reported cases such as that of Zainab Ansari to passing daily headlines with the names of children subject to the crime. Why has this become the norm? Why has our society failed to address the issues and concerns related to sexual child abuse and pedophilia, despite the fact that the Pakistan Penal Code 1860 clearly categorises sexual crimes against children as federal offences punishable by strict imprisonment.[2]

2. It is pertinent to note that child trafficking is common in Pakistan as well and there are organisations working to commit the heinous crimes of child trafficking and even the making of child pornography. The alarming level of child trafficking in Pakistan was exposed by *End Child Prostitution and Trafficking (ECPAT) International*, a global organisation working to combat child prostitution and trafficking, in a report that stated India and Pakistan are among the most common destinations for victims under the age of 16 who are trafficked from South Asia.[3] Furthermore, the same organisation also states that Afghan refugees in Pakistan often fall in the trap of child trafficking given their poor financial background and they often become victims to child prostitution in cities like Lahore.[4] The arrest of Saadat Amin from Kasur for being a part of that international racket and supplying data related to child pornography[5] clearly evidenced how deep these networks run. Though the perpetrator was arrested under the Prevention of Electronic Crimes Act 2016 for spamming data,[6] child pornography is also a federal crime punishable by imprisonment under the Pakistan Penal Code 1860[7].

3. Other than these systematic offences of child abuse, individual cases of such abuse are also very prevalent in Pakistan. Sahil, a Non-Governmental Organization working to provide a safe environment for children, states that Punjab topped the list with the most cases of child abuse in the country at 65% and Sindh came in second with 25% of the cases.[8] It is more alarming to know that these child sexual abuse cases have increased from 9 cases per day to 12 cases since 2017.

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[1] *Annual Report 2018*, prepared by Sahil (2018).
[2] *Pakistan Penal Code 1860* s 377-B
[3] *Situation Analysis Report on Prostitution of Boys in Pakistan (Lahore & Peshawar)*, prepared by ECPAT International in collaboration with Pakistan Pediatrics Association (2006).
[4] Ibid.
[5] "Child pornography racketeer released on bail," Dawn Newspaper, last updated on May 15th, 2020. https://www.dawn.com/news/1557160
[6] *Prevention of Electronic Crimes Act 2016* s 22
[7] *Pakistan Penal Code 1860* ss 292-B and 292-C
[8] *Cruel Numbers 2018: A Compilation of Statistics on Child Sexual Abuse Cases in Pakistan*, prepared by Sahil (2018).

4. Unfortunately, it is clear that simply legislating on a point of law is not enough. The Penal Code has been in force for decades now and yet child trafficking[9] and child pornography still take place and still go undiscovered. Therefore, efforts that go beyond legislation are also needed now, in order to take a more serious note of these crimes and the long-lasting impact on the victim's life.

5. There is also an argument to be made that the low rate of discovery and prosecution of these crimes is linked to a low rate of reporting. Most incidents remain unreported because victims and their families do not come forward with their cases either on the basis that such allegations bring disgrace and dishonor or that they expose families to the risk of being pressured by influential families who have a vested interest in covering up the incidents. This can be seen from the fact that a number of the victims' families in Kasur were approached in order to silence them on the matter, and in turn, exonerate the criminals from the clutches of justice.[10]

6. In the case of Zainab Ansari, the abuser was given the death penalty after nationwide outrage. Soon after this, in February 2020, following a national conversion on the death penalty in child sexual abuse cases, a resolution was moved in the National Assembly calling for the death penalty for perpetrators of child sexual abuse.[11] Even though the resolution is non-binding and has little legal effect, it portrays the hardline approach being taken to dealing with this issue. However, there is still the question of how effective the death penalty is in terms of reducing child sexual abuse? While it responds to the public sentiment for justice, there is little evidence that it is actually effective in ending child abuse. The death penalty is also a violation of human rights norms embraced in many countries as the United Nations Office of the High Commisioner for Human Rights (OHCHR) in its second protocol to the International Covenant of Civil and Political Rights (ICCPR) expressly prohibited execution and ordered prohibition of death penalty.[12] While Pakistan has not ratified the second optional protocol, there is no denying the clear stance taken by international law on the matter. It is important to take measures from a grass root level and assess the impact of the most draconian form of execution - a public hanging.

7. Sarah Belal, founder of Justice Project Pakistan, an NGO that defends people on death row, says - *'Public hanging adversely impacts the psycho-social well-being of children by immunizing them to violence. The children who witness public hangings are more likely to reproduce it in later years. Children viewing these spectacles perceive them as theatrical performances thereby becoming desensitised to the violence. Having such severe punishments will also discourage the victims & their families to come forward and report the incidents of abuse, especially if the perpetrator is related to the victim.'*[13] All these factors must be considered by the government before giving the resolution a statutory footing. In addition, the importance of rehabilitation must be considered as well, as an alternative to retributive punishments.

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[9] *Pakistan Penal Code 1860* s 369-A

[10] Xari Jalil, "Is Something Wrong With Kasur?" Dawn Newspaper, Updated January 30th, 2018. https://www.dawn.com/news/1384248

[11] *The House strongly condemns the brutal killing of 8 years old Iwaz Noor in Nowshera, Resolution No. 34, February 7, 2020*, prepared by the National Assembly of Pakistan (NAP, 2020).

[12] *Second Optional Protocol to the International Covenant on Civil and Political Rights* Article 1

[13] Enum Naseer, "Having public executions or death penalty for child sexual abuse will adversely affect efforts to protect children," The News, February 16th, 2020. https://www.thenews.com.pk/tns/detail/613868-having-public-executions-or-death-penalty-for-child-sexual-abuse-will-adversely-affect-efforts-to-protect-children

8. The physical and psychological impact of sexual abuse on children cannot be overstated. Victims of the crime become noticeably more withdrawn and display emotions of sadness and depression. Communication gaps between parents and their children can lead to the child becoming anti-social which ultimately leads to deteriorating forms of behavior and mental health.[14] In countries with poor healthcare systems like Pakistan, proper treatment for recovery and rehabilitation including the provision of appropriate therapy and counseling and provision of medical services are severely lacking.

9. Arguably, a system overhaul is needed: child protection services need to be improved and the criminal justice system needs to be reformed. Cases of child sexual abuse have shown that police are not trained or sensitised to deal with these cases. Police stations and local authorities fail to provide appropriate aid to the families, whether through the launching of search and rescue parties or filing of First Information Reports (FIRs). Though the Senate has responded to some of these issues by adopting legislation which deals with the recovery of kidnapped/abducted children[15], this act has its own drawbacks. The most significant of them is that its implementation is limited to the Federal territory of Islamabad. This is a major drawback in light of the fact that the crime does not maintain geographical boundaries. However, there may be scope to extend the jurisdiction of this act in the future.

10. While actions on a state level need to be taken, simultaneously, awareness efforts need to be incorporated into educational curricula. Examples of such education is the difference between good touch and bad touch, an understanding of consent, discussions on being aware of one's own comfort around people. Efforts can be made to communicate this information through different mediums including animated cartoons for the benefit of the easy understanding of children. Many NGOs, including Sahil, are doing this work but it must be amplified to raise more awareness. Such videos are very popular in many European countries such as Norway where a TV series aimed at children between the age of 8-12 years is broadcasted that educates them about basic sexual behaviours.[16]

11. The dilemma of our society is the failure to identify the root causes, areas of abuse and providing safeguards for it. Child sexual abuse seems to have become like a plague, affecting every province in the country with affected victims growing at an alarming rate. A conservative society like ours often deals with sexual abuse and awareness related to the subject as taboo. Instead what is needed is the taking of proactive measures to acknowledge and deal with the issue, including training of law enforcement, reform of child protection services, streamlining of judicial processes and awareness and education efforts.

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[14] *Child Welfare Series Number 66; Child Protection Australia: 2015–16*, prepared by Australian Institute of Health and Welfare (AIHW, 2017).

[15] *Zainab Alert, Response and Recovery Act, 2019*

[16] *Newton Puberty (Newton - pubertet)*, on NRK.
https://nrksuper.no/serie/newton-pubertet

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Corruption: Pakistan's yet another Legislative Failure

By: Barrister Hamzah Asad

1. Corruption has always been part of the global patronage; however, destruction of the system starts when the executive, who is responsible to curtail and later prevent any such parlous activities, gets involved in the epidemic itself. Empires and democracies alike have crashed in the hands of those in power who failed to come up with a transparent accountability mechanism.

2. Today, corruption is a topic that is discussed in almost all international dialogs and seminars and while there is not a single definition for corruption under International law, one international organisation defines it as "*the abuse of entrusted power for private gain.*"[1]

3. Transparency International has classified the types of corruption as:

    a. Grand Corruption The abuse of high-level power that benefits the few at the expense of the many, and causes serious and widespread harm to individuals and society. It allows political high-ups to misappropriate funds at the expense of the public good.[2]
    b. Petty Corruption It refers to everyday abuse of entrusted power by low- and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments, and other agencies.[3]
    c. Political Corruption is a manipulation of policies, institutions, and rules of procedure in the allocation of resources and financing by political decision-makers, who abuse their position to sustain their power, status and wealth.[4]

4. As far as Pakistan is concerned, the situation has exacerbated as shown by the *Transparency International (Corruption Perception Index)*,[5] wherein the ranking of Pakistan slipped three places in the *Global Corruption Index* from a score of 32 — a point lower than its score of 33 on the 2018 index.

5. Pakistan has promulgated five Anti-Corruption legislation from its time of existence till now; the *Prevention of Corruption Acts 1947*, the *Public Representatives Disqualification Act 1949*, *the Elected Bodies Disqualification Ordinance 1958*, the *Ehtesab Act 1997* and, the *National Accountability Ordinance 1999.* The irony is that some of these legislations were passed by way of an Ordinance or an Act during the military dictatorship in the country, holding a specific cult of civil representatives accountable for actions they were then accused of committing.

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[1] "What is Corruption," Transparency International, last accessed on May 20th, 2020. https://www.transparency.org/en/what-is-corruption

[2] "Grand Corruption," Transparency International, last accessed on May 20th, 2020. https://www.transparency.org/en/corruptionary/grand-corruption

[3] "Petty Corruption," Transparency International, last accessed on May 20th, 2020. https://www.transparency.org/en/corruptionary/petty-corruption

[4] "Political Corruption," Transparency International, last accessed on May 20th, 2020. https://www.transparency.org/en/corruptionary/political-corruption

[5] "Corruption Perception Index 2019," Transparency International, last accessed on May 20th, 2020. https://www.transparency.org/en/cpi/2019/results/pak

6. However, without prejudice to previous legislations, this review will focus on the *National Accountability Ordinance (NAO) 1999*. The then military dictator General Musharraf promulgated the NAB Ordinance, which was designed to set up a National Accountability Bureau to eradicate corruption and hold those *"public-office holders"* accountable who are involved in any corrupt practices.

7. Unfortunately, it is not possible to limit the aspirations of those in power while discussing NAB Laws. The element of political victimization or the circumstances in which the law was made cannot be ignored; each section of the Ordinance is drenched in vendetta, as is explained.

8. While any law is being drafted there are three kinds of intentions, which are to be studied in order to understand its nature. Jurisprudentially this distinction is derived from *J. L. Austin's* construction of a speech act,[6] which he broke into three constituent parts: a Locutionary Act, Illocutionary Act, and Perlocutionary Act. According to Austin, a locutionary act consists of uttering something with a sense and reference, illocutionary act means performing an act in saying something: the act takes place when there is a 'conventional procedure' which fixes the behavior and circumstances that must obtain for the speaker to bring about the conventional effect associated with the procedure, namely the performance of a specific act and finally a perlocutionary act consists of a change in the extra-linguistic reality.

9. Now, if we look into the intention of the lawmaker while drafting the NAB Laws, the element of political victimisation cannot be ignored- the NAB Ordinance was promulgated in 1999 but it was expressly stated in it that the ordinance shall come into force from January 1985.[7] This section is clearly contrary to the Constitution of Pakistan,[8] which explicitly bars the State from retrospective punishment and so prohibits the State from giving punishment under laws promulgated after the commission of the original crime.

10. The Ordinance also explains who per the law will be a public office holder;[9] after giving a meticulous list of civil public office holders (*President of Pakistan, Prime Minister, Governor of provinces, Chairman Senate, Speaker/ Deputy Speaker of National/ Provincial Assemblies, etc*.) the Ordinance clearly states that it shall not apply on serving members of the Armed Forces. Such enactments are not just contrary to the basic structure of the constitution but later in time, they have shown to create a divide between the armed forces officials and people they claim to protect. The Constitution explicitly states that *"All* citizens [be it a Civilian or an Army Officer] *are equal before the law and are entitled to the equal protection of the law."*[10]

11. The Ordinance, as like other legal enactments, provides immunity to the armed forces in the name of *National Security*, that no serving officer of the army can be suited in court because it might end up being a grave threat to the national security, whereas serving Prime Ministers of the state are disposed of and sent home on an allegation which is not actually corruption in terms of law.

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[6] J.L. Austin, *How to do Things with Words* (Oxford University Press, 1962).

[7] *National Accountability Ordinance 1999* s 2

[8] *Constitution of Islamic Republic of Pakistan 1973* Article 12

[9] *National Accountability Ordinance 1999* s 5(m)

[10] *Constitution of Islamic Republic of Pakistan 1973* Article 25(1)

12. Moreover, the Ordinance ascertains a benchmark as to who can actually hold the office of "*Chairman NAB.*"[11] Here, too, the civil leaders i.e. the political stakeholders are ignored and it is explicitly stated that a Judge, an Army Officer or a BS-22 grade Civil Servant can only be appointed as Chairman of the accountability watchdog. Such drafting demeanors show that the idea behind the law is to target the political stakeholders of the country, therefore, an unclouded distinction has been ascertained in the ordinance as to who will be held accountable by whom.

13. The 1999 Ordinance also explains what actually amounts to corruption or corrupt practices[12] and states that :

    "a holder of a public office, or any other person, is said to commit or have committed the offense of corruption and corrupt practices if he has issued any directive, policy, or any SRO or any other order which grants or [attempts to grant] any [undue] concession or benefit in any taxation matter of law or otherwise so as to benefit himself or any benefit or associate or a benamidar [or any other person.]"[13]

    This very section is against the notions of natural justice as it fails to determine what actually will be considered in favor of the public office holder? How will it be monitored? Will it not shift the burden of proof based on a very ambiguous standard of investigation?

14. This politically motivated document empowers the Chairman to start an investigation, arrest the accused, stop him/her form work, destroy his/her years old reputation on a mere presumption of suspicion. The Ordinance says that the Chairman NAB can call off any investigation if it is proved *prima facie* that no case can be built against the person being investigated.[14] This particular section shows that even in situations where there is not conclusive evidence available as to who is to be held accountable, the chairman can put anyone behind bars for a period of 90 days in order to satisfy his own prejudices. The mockery of the bureau is so extensive that once a person is declared innocent, no damages or even a press release is issued by the bureau that they were at fault. There is no apology. Drafting errors such as *"due process of law"* results in tarnishing an officer's decades-old departmental reputation, as it simply does not give any kind of safeguard to them regarding self-incrimination.

15. The bureau, although being an accountability holder itself, fails to comply with the basic legal standards, as it empowers the Chairman to appoint anyone whosoever he deems fit for the job within the department.[15] The method/ procedure of regular hiring (*explained in the Civil Servants Act*) is bypassed as the Chairman holds all authority to *Hire and Fire.* The members of the bureau are immune from all basic legal requirements including *Separation of Power, Rule of Law, Equal Opportunity and Departmental Accountability.*

16. However, with all the flaws and uncertainties, the silver lining in this is the evolution of law. Pakistan has witnessed five anti-corruption laws being made during democracies and martial

[11] *National Accountability Ordinance 1999* s 6(ba)
[12] Ibid., s 9
[13] Ibid., s 9(a)(7)
[14] Ibid., s 9(c)
[15] Ibid., s 28

laws each relatively better than the other. Still, a lot is to be done. It is certain that the NAB Ordinance is ill in terms of our constitution and morality hence should be amended as per the aspirations of democratic legislators. Like various other laws, this Ordinance, too, reflects incompetent drafting and political victimisation. Favorable laws for the upper judiciary and military will continue to haunt the legal corridors of the State if they are not altered. If the State plans on seeking accountability, it should be for all and not just for a specific elected cult but for those as well who are selected amongst the judiciary and military.

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Prevention of Cruelty to Animals Act 1890: An Act That Craves Change

By: Fariyal Ishaque

1. From treating animals cruelly to mutilating and causing unnecessary suffering to them, the Prevention of Cruelty to Animals Act, 1890 covers some of the main offenses committed against animals such as starvation,[1] torture, killing of an animal in a cruel manner,[2] etc. However, not only has the lack of implementation been disappointing, which was ranked by the *World Animal Protection Index* as an 'F'[3] (indicating that the National Government has not assigned any responsibility for improvement of animal welfare) but the 1890 Act itself has become severely outdated and updates are scarce although attempts have been made, such as the 2018 Amendments.

2. Not much has come in the way of progress; the 1890 Act is not one that is capable of being used in moderation with new issues concerning animal rights arising, such as forced captivity, animals being used for entertainment purposes (dog/rooster fights),[4] fur/leather being derived from animals which are not strictly farm animals,[5] forced breeding (for example: dogs),[6] etc; the 1890 Act's provisions being severely restrictive and redundant, for example Section 5(5A) being confined purely to goats whereas unnecessary killing for other animal's skin is also widespread such as pangolin, an animal exclusively found in Africa and Asia.[7] Fines for most wrong-doings against animals were either Rs. 50, Rs. 100 or Rs. 500.[8] However, the 2018 amendments have improved on these provisions, changing fines from Rs. 50 or Rs. 100 to Rs. 100,000, Rs. 200,000 or Rs. 300,000,[9] but let us shed some light at the provisions contained in the Act itself.

3. What should immediately be noted about the 1890 Act are the terms or subjects of which the meaning is either vague or does not cover each and every aspect. For example, the Act defines an *'animal'* as a domestic or captured animal.[10] Analysing the word '*domestic'*, it would be assumed that it only covers those animals which have been tamed; such as house pets or farm animals. It does not, however, cover wild animals; although, the 1890 Act recognises

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[1] *Prevention of Cruelty to Animals Act 1890* ss 3 (c) and (e)

[2] Ibid., s 5

[3] Pakistan on the World Animal Protection Index, last accessed on May 21, 2020. https://api.worldanimalprotection.org/country/pakistan

[4] "A Closer Look at Dogfighting," ASPCA, last accessed on May 21, 2020. https://www.aspca.org/animal-cruelty/dogfighting/closer-look-dogfighting

[5] "Leather: Animals Abused and Killed for their Skins," PETA, last accessed on May 21, 2020. https://www.peta.org/issues/animals-used-for-clothing/animals-used-clothing-factsheets/leather-animals-abused-killed-skins/

[6] Coinne Henn, "Why Dog Breeding is a Problem Even if the Breeder is Reputable," One Green Planet, November 14, 2017. https://www.onegreenplanet.org/animalsandnature/why-breeding-dogs-is-a-problem-even-if-the-breeder-is-reputable/

[7] "What is a Pangolin," Save Pangolins Organization, last accessed on May 21, 2020. https://www.savepangolins.org/what-is-a-pangolin

[8] *Prevention of Cruelty to Animals Act 1890* s 3 (3A) (1), s 5(5A), s 6, s 7

[9] *Prevention of Cruelty to Animals (Amendment) Act 2018* ss 3 and 4

[10] *Prevention of Cruelty to Animals Act 1890* s 2 (1)

endangered animals and captured animals.[11] Thus, a dilemma would seem to arise when considering whether a captured wild animal which has been tamed could be covered under the general provisions of the 1890 Act.

4. The word *'domestic'* cannot cover every animal capable of being tamed, otherwise it risks morphing the distinction between wild, captured or endangered animals and ignoring the species to which the animal belongs to. For example, a puma in Russia which is known as Messi is being raised by a couple, so it begs the question whether that puma, if it was in Pakistani jurisdiction, should be considered as a domestic animal or a wild animal according to the 1890 Act.

5. This also raises another issue of the word *'domestic'* being vague, attaching with it a risk of it being exploited by those justifying keeping wild or endangered animals. The definition derived from a case from the UK that can be used as a persuasive precedent and it holds the following: *'Whether an animal is to be regarded as wild or domestic is a question of law, and is to be judged according to the genus or class of which it belongs, not the characteristics of the individual animal.'*[12]

6. Furthermore, while the 1890 Act mentions *'captured animals'*[13], thus covering zoo animals, there must be separate provisions for these animals since, in the hope of making money and pleasing the public, the rights of these animals are easily forgone. For example, in January 2019, four nilgais (Blue bulls) in Islamabad zoo died due to the extreme cold and failure to construct adequate huts or provide other provisions for keeping them warm, or the elephant in Lahore Zoo, named Suzi, who died of loneliness and its partner, named Kazaan, was kept in isolation and tied in chains as well. While Pakistan's zoos are supposed to follow international standards established by the *European Association of Zoos and Aquaria (EAZA)* and *the World Association of Zoos and Aquariums (WAZA)*, they are blatantly disregarded and there has been minimal enforcement of these standards. If the problem concerns the usage of government funds, it begs the question on how zoos were even made to operate and where the wild animals were acquired from.

7. There is no proper legislation on the regulation of animals being sacrificed on the holy day of Eid-ul-Azha. This is specifically where the state does not focus much on the Islamic teachings of paying adequate respect to the sacrificial animal. In these incidents, animal rights laws are almost non-existent. These animals are often purely seen as a source of food and are thus subject to such behaviour and treatment which is in grave violation of the 1890 Act and ignore the provisions set down on animals for human consumption by the *World Organisation for Animal Health*.[14]

8. The 1890 Act also talks about penalising the selling of meat of a dead animal which was killed in an unnecessarily cruel manner. However, no proper analysis or aid to interpretation is provided by the legislations or any ministry on what constitutes a cruel manner and what are the correct ways of slaughtering animals, and on what criteria current slaughterhouses across the country are not considered cruel. Section 11 of the 1890 Act says the following, *"Nothing*

[11] Ibid., s 2(3)

[12] McQuaker v Goddard, 1 KB 687 (UK CA, 1940).

[13] *Prevention of Cruelty to Animals Act 1890* s 2(1)

[14] World Organisation for Animal Health, "Terrestrial Animal Health Code," Chapter 7

in this Act shall render it an offence to kill any animal in a manner required by the religion or religious rites and usage of any race."[15] This provision has great scope for abuse and can be used as a defence and justification for disguising the abuse inflicted on a sacrificial animal by the people who slaughter it. However, looking at the precise wording of Section 11 of the 1890 Act, it would have been best to have not legislated on such a fragile matter in such a faint way or rather to legislate in a more detailed manner.

9. Moreover, section 5 of the 1890 Act is a very reductionist provision since it specifically mentions possession of the skin of a goat which is killed in an unnecessarily cruel manner. This section fails to consider that the skins of other animals are also at play in such circumstances. It is not clear from this section whether products made from animals such as leather or animal testing for products in an unnecessarily cruel manner are also covered. If the intention of section 5 of the 1890 Act is to deter people from killing animals purely for selfish reasons in a cruel manner, it is unclear since it specifically mentions goats but no other animals. Skins can be obtained from zebras, bisons, kangaroos, elephants, crocodiles, snakes, ostriches, exotic lizards, and in some circumstances, cats and dogs as well.[16]

10. Regulation of such products is also non-existent. For example, L'oreal products are sold widely in Pakistan even though there have been more than multiple claims about those products being tested on animals cruelly.[17] The 1890 Act also does not cover circumstances in which an animal is sexually abused, nor does it cover bestiality, for which specific legislations and provisions should be enacted. There has been a great increase in sexual abuse cases of animals, for example: the sexual abuse of Indus Dolphins in Sukkur, the sexual assault of a chicken in Punjab by a 14-year-old boy who claimed to have done it out of frustration, the sexual abuse of a donkey in Pakistan owned by a needy family which was later stolen. The Act also does not cover hit-and-run cases of which the main victims are animals, especially stray cats and dogs. Road kills are extremely frequent and there is no law which specifically penalizes such an action. While it can be said that killing an animal in a cruel manner can cover this, it cannot wholly apply to it as at times hit-and-run cases with animals are not intentional like their cruel killing, but are still heinous acts.

11. Moreover, hunting of wildlife is also an issue since it is regulated in a half-hearted manner. The Pakistani Government has allowed foreigners to hunt the national animal of Pakistan, the Markhor, time and time again with the payment of a specific amount. Courts have, however, proved helpful in punishing those guilty of illegally hunting the Markhor, such as in the case of *Ghulam Dastagir and 3 others v The State*[18] where 6 months worth of imprisonment and a year worth of probation was imposed. With regards to allowing foreigners to pay and hunt endangered animals, in the *Houbara Bustard Case*,[19] the Supreme Court had previously imposed a ban on the hunting of Houbara Bustard which was lifted in the case of *Atta-Ur-Rehman v*

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[15] *Prevention of Cruelty to Animals Act 1890* s 11

[16] "Leather: Animals Abused and Killed for their Skins," PETA, last accessed on May 21, 2020. https://www.peta.org/issues/animals-used-for-clothing/animals-used-clothing-factsheets/leather-animals-abused-killed-skins/

[17] Aly Laughlin, "30 Makeup Brands Which Still Test on Animals in 2020," Cruelty Free Kitty, April 13, 2020. https://www.crueltyfreekitty.com/cruelty-free-101/makeup-brands-that-test-on-animals/

[18] Ghulam Dastagir and 3 others v The State, NLR Criminal 417 (SC. 2015).

[19] Government of Punjab v Aamir Zahoor-ul-Haq, PLD 421 (SC. 2016).

Aamir Zahoor-ul-Haq,[20] stating that the limitations and checks imposed on the hunting of the Houbara Bustard are reflected in the terms and conditions issued to hunters.

12. The Prevention of Cruelty to Animals Act 1890 needs severe amendment. While the 2018 amendments on the increase of fines are well-appreciated and were much needed, the amendments came late showing the lack of attention and regard being given to animal rights. This causes one to wonder whether further amendments will take years or decades. The 1890 Act contains many provisions which can be abused because of the vagueness of terms as well as the lack of disregard to the implementation of the provisions in the Act of 1890 itself. Therefore, it is necessary to state that mere amendments to more than a century old act are not enough and it is high time that we draft a new legislation for protection of creatures that offer us nothing, but love.

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[20] Atta-Ur-Rehman v Aamir Zahoor-ul-Haq, NLR Civil 37 (SC. 2017).

Intellectual Property Enforcement In Pakistan: Jurisprudence, Current Approach, And Ambiguity In Current Law

By: Salman Ahmed

I. Pakistan's Treaty Obligations in Light Of Global Intellectual Property Law:

1. In the year 1883, a group of 8 predominantly Western European states got together and signed *the Paris Convention for the Protection of Industrial Property*. The convention sought to protect intellectual property in the broadest manner and included the protection of patents, trademarks, industrial designs, service marks, and trade names.[1] Over the years, numerous other countries went on to accede to and ratify the Convention, resulting in there being 177 contracting parties today.[2] Pakistan ratified the Convention in the year 2004.

2. In order to further streamline and consolidate the protection of Intellectual Property across the world, the Agreement on *Trade-Related Aspects of Intellectual Property Rights (TRIPS)* came into effect in the year 1995.[3] Introducing protection for numerous forms of intellectual property and creating standards for countries to abide by, the Agreement is the most far-reaching multilateral agreement that governs intellectual property law today.

3. In light of the obligations laid onto member states by the TRIPS agreement, Pakistan repealed *the Patents and Designs Act 1911* and *the Trademarks Act 1940* and replaced them with the *Trademarks Ordinance 2001*, *the Patents Ordinance 2000*, and *the Registered Designs Ordinance 2000*.[4]

4. Now governed by the Trademarks Ordinance 2001, Pakistan's intellectual property regime has come closer to the global intellectual property rights regime. As an emerging economy, however, there are numerous issues that fall in the way of enforcement, anti-infringement, and anti-counterfeiting initiatives, as a result of underdeveloped jurisprudence, as well as weakness of state functionaries.

II. Importation of Products That Violate Intellectual Property Rights: SRO 170(I)/2017 And Trade Marks Ordinance 2001 Compared:

5. By virtue of the Trade Marks Ordinance 2001 (the "**Ordinance**"),[5] the owners of trademarks have numerous avenues available to them to act against the use/importation of imitated/infringing trademarks.

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[1] *Paris Convention for the Protection of Industrial Property 1883*

[2] "Administered Treaties; Contracting Parties; Paris Convention," World Intellectual Property Organisation, last accessed on May 21, 2020.
https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2

[3] *The Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS)

[4] Soneri Travel And Tours Ltd. v. Soneri Bank Limited, CLD 193 (2011).

[5] *Trade Marks Ordinance 2001*

6. The Ordinance states[6] that importation of infringing goods, material or articles, covering, the proprietor of a registered trademark may give notice to the concerned collector of customs to take action against infringing goods or goods that bear false indications as to their source or the identity of manufacture and that these are expected to arrive in Pakistan.[7] Subject to the fulfillment of certain procedural requirements for initiating such a notice, the right holder may request the collector to treat such goods as prohibited and the collector thereafter may seize such goods if he is satisfied that these goods bear an infringing trademark.

7. Pursuant to the obligations enumerated thereunder in the Trademarks Ordinance, the Federal Board of Revenue on 16th March 2017 promulgated some amendments [8] in order to add *Chapter XXVIII: Enforcement of Intellectual Property Rights to the Customs Rules 2001* by exercising powers under the Act[9]. This SRO defined the procedure to be adopted by a right holder when he suspects that goods that infringe its trademark have arrived at a customs station in Pakistan for enforcement action to be taken against such goods. The following was reproduced:[10]

> *"A right holder who has valid grounds for suspicion that imported goods are infringing his intellectual property rights protected under the Copyrights Ordinance 1962, and the Trademarks Ordinance 2001, may, at the time of arrival of suspected goods at the notified customs station, make an application on the format set out in Annexure-A to these rules, to the Director, IPR (Enforcement) having jurisdiction, requesting for initiating enforcement action against such goods."*

8. The anomaly is that despite having been codified through two separate legal instruments, the timeline of the application itself remains unclear. When is the right holder expected to, rather, mandated to submit such an application to the collector of customs? Rule 680 of the SRO states: *"May, at the time of arrival of suspected goods,"* while the Ordinance states:[11] *"are expected to arrive in Pakistan from outside Pakistan."* Since both provisions concern the same type of enforcement action, the contradictory language is perplexing.

9. The Ordinance suggests that such an application/request is to be submitted before such goods have arrived in Pakistan, and the SRO suggests that such an application may be made "at the time of arrival of such goods. If we consider the Ordinance as legislation, and the SRO as delegated legislation, then consequently the Ordinance shall prevail. Therefore, an application for enforcement action should be made before the arrival of such goods in Pakistan. The difficulty is, how is a right holder whose rights are being infringed supposed to be aware, in advance, of the fact that infringing goods are destined for Pakistan? Without an insider in the infringer entity, or an official from the country of origin sharing such information, this is virtually impossible, which is perhaps why most such complaints/applications are not instituted under the Ordinance, but the SRO.

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[6] Ibid., Chapter VI
[7] Ibid., ss 53-66
[8] SRO 170(I)/2017
[9] *Customs Act 1969* s 219
[10] *Custom Rules 2001* Rule 680
[11] *Trade Marks Ordinance 2001* s 53(1)(b)

III. Ambiguity in Implementation Created by The SRO:

10. The SRO however, presents its own set of difficulties. The language in Rule 680, *"May, at the time of arrival of suspected goods,"* is vague and does little to provide guidance as to the course of action to be taken by right holders. How wide is "the time of arrival"? The use of the phrase "at the time of arrival" suggests that such an application may not be made before these goods have arrived. However, what would be the timeframe stipulated given the procedural requirements laid out in the SRO, it would be greatly dependent on a stroke of luck if such an application is made precisely at the time of arrival. As such, a question that arises is how long after the arrival of such goods such an application can then be made? Neither the ordinance nor the SRO provides any guidance on this aspect. This loophole gives the importer of infringing goods the opportunity to contest such seizures before a court of law and due to the silence on the timeline issue, be granted relief.

11. Consider also that a substantial quantum of such infringing/counterfeit goods originates from China and are in fact deceptively similar/counterfeit versions of brands/trademarks/products of extremely visible and large multinational companies (MNCs) or manufacturers. While these MNCs are increasingly aware of the theft of their intellectual property rights and have thus taken steps to seek trademark registrations in Pakistan and retain counsel in numerous jurisdictions, there are yet many others that do not have a presence in Pakistan and although they make their products available here through e-commerce channels, they cannot in any manner be expected to be apprised of the fact that infringing versions of their products have landed in Pakistan and make an application for enforcement thereto "At the time of arrival of such goods.", particularly when they do not operate stores/offices/physical presence here and therefore have no staff in Pakistan under their employment.

IV. Ex-officio Action by Customs Authorities (Where The Right-holder Does Not File An Application):

12. The SRO does,, however, provide another method for enforcement action to be initiated vide *Rule 682, subrule (1)* of which states:

> *"An officer of Customs, having reasonable grounds to believe that the goods infringing the provisions of the Copyright Ordinance 1962, the Trade Marks Ordinance 2001, or Section 15 of the Act has arrived at the Customs Station of his jurisdiction, shall, with the approval of the concerned additional collector, inform in writing the concerned Directorate of IPR (Enforcement) for taking cognizance in accordance with these rules."*

13. The procedure to be followed in this case is enumerated at *Rule 682 (1) through (6). Rule 680 Sub-rule (2) states:*

> *Upon receipt of such notice from the officer of Customs intimating about the arrival of infringing goods at the Customs Station, the Directorate of IPR (Enforcement) shall immediately consult the recordation database to determine as to whether or not any right holder of infringing goods is registered with IPO Pakistan.*

"If the right holder of infringing goods is registered with IPO Pakistan, the Director IPR (Enforcement), shall issue him a notice intimating about the arrival of infringing goods at a Customs Station and seeking right holder's consent to initiate enforcement action against the infringing goods."

14. A bare reading of Rule 682, therefore, suggests that Customs Authorities; the concerned Collector and the Directorate of Intellectual Property Rights(Directorate IPR) can initiate ex officio action against infringing goods without having received an application pursuant to the SRO, but that such action would have to be succeeded with an application once Directorate IPR has verified that the right holder is registered with the intellectual property office(IPO) Pakistan, has intimated the right holder of such arrival and when consent to initiate action has been received from the right holder.

15. The steps to be taken are therefore sequential and if any requirement on either limb stands unfulfilled, the question of moving onto the next step does not arise. This is clear from the move between *Rule 682 Sub-rules 2 and 3.*

Sub-rule 2 ends with:

"shall immediately consult the recordation database to ascertain as to whether or not, any right holder of infringing goods is registered with IPO Pakistan."

Subrule 3 starts with:

"If the right holder of infringing goods is registered with IPO Pakistan, the Director IPR shall issue him a notice intimating about the arrival of infringing goods….

V. Enforcement Action Against Importation When the Right Holder Does Not Have Trademark Registration(s):

16. In light of the sequential steps, the question that arises is, what if the right holder is not registered in Pakistan? There is no procedure provided for in order to cater to such a situation, and even Section 53 of the Ordinance is premised on trademark registration. (*"The proprietor of the registered trademark may…"*). This means that regardless of the legal instrument being chosen, a bona fide right-holder in a trademark that is not registered in Pakistan is essentially helpless to prevent the entry of goods that infringe its intellectual property rights into Pakistan. This becomes even more serious in light of the sheer volume of extremely prominent multinational and foreign corporations that have extremely well-known trademarks but do not have registrations for the same.

17. This presents as a huge procedural defect since the entire purpose of both of these instruments is to curb the importation of infringing goods. It is then important to ask at this juncture, what constitutes infringing goods? In light of the procedural difficulty, can goods be infringing only in relation to a registered trademark? The adjudication regime suggests this since a suit for infringement of a trademark cannot be filed in Pakistan without registration, as made clear through *Section 39 (5) of the Trade Marks Ordinance 2001*.

18. But the definition of infringing goods in the SRO changes things. It defines this at *Rule 679 (iv)* as:

> *"any goods that are brought into the country in violation of the Copyright Ordinance 1962, The Trademarks Ordinance 2001, the Patents Ordinance 2000, Registered Designs Ordinance 2000, Registered Layout-Designs of Integrated Designs of Integrated Circuits Ordinance 2000 and Section 15 of the Act."*

19. This leads to the question, in light of this definition, that: is it that the rights of the goods can only be considered as infringed when the trademark being contravened is registered in Pakistan? That is not, however, what the definition or the overall trademark regime in Pakistan suggests since this is entirely possible under the Trademarks Ordinance regardless of registration. This has been highlighted in the Ordinance as prohibition of unfair competition[12] and protection for well-known marks regardless of registration.[13]

20. The following are excerpts of *Section 67* most relevant to this discussion reproduced:

> *Definition of unfair competition and provisions relating to thereto.-*
>
> *(1) An "unfair competition" means any act of competition contrary to honest business practices in industrial or commercial matters and, without prejudice to the foregoing, such acts may include-*
>
> > *(a) all acts of such nature as to create confusion by any means whatsoever with the establishment, goods, services or industrial or commercial activities of a competitor;*
> >
> > *(b) false allegations in the course of trade of such a nature as to discredit the establishment, goods, services or industrial or commercial activities of a competitor;*
> >
> > *(c) indications or allegations the use of which in the course of trade is liable to mislead the public as to nature, manufacturing process, characteristics, constituents, quality or the suitability for their purpose of the goods or services;*
> >
> > …
> >
> > *(e) making of false or deceptive statements in the course of trade;*
> >
> > *(f) misleading advertise;*
> > *or*
>
> *(2) Any act of unfair competition shall be unlawful.*

21. In light of *Section 67(1)(a) and 67(1)(c) read with Section 67(2)*, it is clear that the specified acts are unlawful and this would violate the statute. In light of *Rule 679(iv)* therefore, this would mean that such goods would be infringing goods as defined therein. The Honorable High Court of

[12] Ibid., s 67
[13] Ibid., s 87

Sindh has even gone so far as to assert that read together, the provisions of *Section 67 and 86* come together to create a protective regime for well-known trademarks of international repute that is altogether distinct from *Section 40 of the Trade Marks Ordinance 2001*.[14]

22. Reference must also be made to *Section 86*, which is a widely known and oft-invoked provision of the Ordinance. The following is subsection 3 of the same reproduced:

> *"the owner of a trademark which is entitled to protection under the Paris Convention a well-known trademark shall be entitled to restrain by injunction the use in Pakistan of a trademark which, or the essential part of which, is identical or deceptively similar to the well-known trademark."*

23. This would mean that even if a well-known mark is not registered in Pakistan, the infringing versions of such a trademark would violate Section 86, and therefore, the Trademarks Ordinance. Such versions would also come under the ambit of infringing goods in the SRO. If these are infringing, the fact that registration is required under the SRO for there to be enforcement action creates immense difficulty. It also means that extremely prominent brands would be at a loss when seeking to prevent the import of such products into Pakistan.

24. Yet, this however, does not mean that such companies would not be able to institute legal proceedings in Pakistani courts based on their well-known trademarks. Although registration would allow them to file a suit for infringement under the Trade Marks Ordinance - a statutory remedy - they can still sue under the tort of passing-off. In such a suit, such a company may ask for permanent injunction, damages, rendition of accounts, but it does not provide any guarantee of the withdrawal of these goods that have already been circulated through different channels of commerce.

VI. Vague Legal Provisions Affect Adjudication by Courts:

25. The timeline issue has also come under discussion in a recent judgment[15] where the Honorable Sindh High Court, while deciding a suit for declaration, injunction and damages, decreed a suit in favor of the Plaintiff that had imported a consignment of goods including batteries, automobile parts, and cosmetics through a *Goods Declaration (GD) form dated 06.02.2019*.

26. Brief facts of the case are that the Plaintiff was an importer of the aforementioned goods, while Defendant No. 1 was the Federation of Pakistan, Defendant No. 2 was DGIPR, Defendant No. 3 was the Collector of Customs, Defendant No. 4 was the Clearance Collectorate. After processing by Defendant No. 4, the clearance of the Plaintiff's consignment was not allowed and it was alleged that Defendants No. 2 and 3 detained the goods and thereafter issued a Seizure Order.

27. The Plaintiff contended that such detention and seizure was unlawful and without jurisdiction, on the basis, inter alia, that applicable procedure had not been followed.

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[14] ARC International v Ahmer Mansoor, CLD 226 (SHC. 2012).

[15] Vide Order and Judgement dated 02.08.2019 (SHC).

28. In paragraph 10, and after discussion of the arguments of the two sides and introducing the applicable legal provisions, the Court began to discuss and analyze the facts as they related to applicable law. It stated that:

> *"Insofar as the case in hand is concerned, it is apparently not a case initiated by Defendant No.4 in terms of Rule 682 as no document of whatsoever nature in this regard has been placed before the Court so as to suggest that Defendant No.4 had initiated or made an attempt to initiate such proceedings. Even the written statement is also silent to this effect; hence, it must be presumed that the action was initiated in terms of Rule 680 ibid and not Rule 682 as contended by the learned Counsel for Defendant No.2 & 3, i.e. on the basis of a complaint made by a property right holder to the effect that its Intellectual Property Rights are being infringed by the importer."*
>
> *"No document of whatsoever nature in this regard has been placed before the Court so as to suggest that Defendant No. 4 had initiated or made an attempt to initiate such proceedings."*

29. This statement, of course, refers to the requirement in Rule 682(1):

> *"the officer of customs who has reasonable grounds to believe that infringing goods have arrived at a station of his jurisdiction, shall with the prior approval of the concerned additional director, inform in writing the concerned directorate of IPR Enforcement for taking cognizance."*

30. The Court apparently found that so much-written intimation was presented before it, and therefore the action was presumed to not fall under *Rule 682*. However, the fact that this written intimation was not presented cannot in of itself mean that the situation does not fall under Rule 682. As specified, the procedural defect pointed out, that the absence of the intimation in writing was considered a fatal flaw, not to mention that the Plaintiff also pointed to the requirement of joint examination of the goods as required in Rule 681(3) had remained unfulfilled, although the court did not consider this in its decision.

31. However, the SRO does not seem to address a situation where this "officer of Customs" in *Rule 682(1)* is an officer of the Directorate of IPR Enforcement. Certainly, where it is an officer of the Directorate itself that comes across the possible import or presence of infringing goods, he would not have to stick to such procedure since the chain of communication ends with the Directorate itself.

32. It seems in light of this judgment that in such a situation, or in a situation where the office of the Directorate of IPR Enforcement, not necessarily through him/herself but through any officer that works thereunder "*has reasonable grounds to believe that infringing goods have arrived at a station of his jurisdiction*," the procedural requirement in terms of the chain of communication involving such officer, the Additional Collector and eventually the concerned officer of the Directorate of IPR Enforcement would not be satisfied and this would mean that the situation is seen by the court to fall under Rule 680 only.

33. At paragraph 11 of the judgment, analyzing how the situation does not fulfill the procedural requirements of *Rule 680*, the court states:

"Though all efforts were made on behalf of the Defendants No.2 & 3 by their Counsel that the action was initiated on the basis of a complaint, as provided in Rule 680, however, the record placed before the Court itself reflects otherwise. Perusal of Seizure No.12/2019, in respect of one of the product, reflects that in Para-2, it has been stated that; Whereas this Directorate held up the above-said consignment on the ground of containing allegedly counterfeit trademark goods of LOREAL, an action brought forth against the owner of the goods by Messrs LOREAL, 14, rue Royale, Paris 75008, France "the right-holder)," which clearly reflects that the Directorate has held up the consignment on the ground of containing allegedly counterfeit trademark. Time and again, learned Counsel for Defendants No.2 & 3 was asked to place on record the actual detention notice or any other document, whereby the goods were detained. However, he has failed to refer to any such document from the record. This justifies the stance of the plaintiff that the goods were first detained on its own by Defendant No.2 & 3 through computer blocking; and thereafter, further proceedings took place."

VII. The Concepts of Detention And Seizure: Operation And Sequence In The SRO And The Ordinance Compared:

34. It is also noteworthy that the facts were not contested in this case and that the issues to be determined were framed by the consent of the parties. At para 6(i) while framing the issues, the aspects of the vires of the detention on the one hand, and the seizure on the other have been clubbed. This invariably creates the impression that either these two are interchangeable terms, or that the vires of one are being linked to the other, which is not the case under the law. Under the law, the detention is prima facie and provisional in nature; based on cause and following a hearing. This is reflected in Rule 681 Sub-rule (4) which states:

> *"Upon determination of the fact that the detained goods infringe the Intellectual Property Rights of the Right Holder, such goods shall be seized by the Directorate General IPR (Enforcement), and the case shall then be forwarded to the concerned Collectorate of Customs having jurisdiction for adjudication, as per the procedure laid down under the Act or judicial authority, as the case may be."*

35. It is important to mention however that this analogy does not apply in the context of the Ordinance since these two legal instruments differ as to the sequence of detention and seizure.

36. Under Section 56 of the Ordinance, a seizure may be affected without even giving the importer the right of hearing. Once the requirements laid out in Section 53 through 55 are fulfilled , Section 56 (b) states that the Collector of Customs shall seize the goods unless he is satisfied that there are no reasonable grounds of believing that the trademark shall be infringed by the importation of the goods. This is possible provided that the goods to which Section 53 applies:

> *(a) bear of them a trademark which, in the opinion of the Collector of Customs is identical with or deceptively similar to the registered trademark; and*
>
> *(b) are goods in respect of which the trademark is registered.*

VIII. Enforcement Regime of The SRO in Light of Trademark Lawsuits:

37. Now *Section 56(b)* presents its own problems, such that the goods may not be seized if they are registered for goods other than those that have been imported, and thus, presumably that even if the right holder, in fact, manufactures or otherwise deals in such goods. The emphasis is again on procedural aspects rather than the proactive curbing of the import of infringing goods.

38. The courts have decided that infringement is possible even when the right holder's registration is in different classes[16] (reference is made to the *Nice Classification of Goods and Services*) or categories of goods that are different from those being dealt in by the infringer/imitator/importer,[17] and further when the prior user doesn't even have a trademark registration in Pakistan and is a well-known mark pursuant to Section 86 and therefore deserves protection on that count alone.[18] These decisions have a rational basis since, despite the direct presence in Pakistan or without having secured trademark registrations, foreign entities ought to be able to seek protection under the Trademarks Ordinance 2001.

39. One of these cases which was decided by the Supreme Court provides critical guidance in this respect.[19] The crux of the controversy was that the Appellant wanted to be able to assert that the widely known and reputed electronics maker Philips was only registered in Pakistan for goods falling in Class 7 being machines, machine tools and motors (except for vehicles) including magneto electric welding machines and that since it did not manufacture and sell sewing machines, it should be allowed to obtain a registration for the trademark Philip for use upon its sewing machines. This argument was rejected and the Supreme Court held that in the circumstances the different nature of the goods would lose relevance.

40. In light of this discussion, it is strange therefore that the requirement of Subsection (b) has been added to *Section 56*. As for example, if a well-known international clothing brand is registered in Pakistan in the Class that pertains to clothing and apparel, the Collector would then be under no obligation to seize goods such as watches bearing that trademark as they fall in a different class (even though as accessories to apparel, logic dictates that they be seen as belonging to the apparel category).

41. The Ordinance, therefore, does not look into the detention aspect, which has instead been merged into a seizure action. The adjudication and hearing stage has thus been relegated to *Section 57 (iii)*. Thus, although the word seizure has been used, its nature is provisional such that in light of customs practice, it is essentially equivalent to detention of the goods.

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[16] Seven-up Company v Kohinoor Thread Ball Factory and 3 Others, PLD 313 (SC. 1990). [Cited cases preceding the year 2001 were decided under the previous law being the Trademarks Act, 1940 but deliberations of the deception and confusion condition are nonetheless still relevant]; Sony Kabushiki Kaisha, Tokyo (Sony Corporation) v Registrar Of Trade Marks and Another; Abdul Aziz Noor Muhammad Trading As Aziz Products v The Seven-up Company

[17] Messrs Alpha Sewing Machine Company v Registrar Of Trade Marks and Another, PLD 1074 (SC. 1990); Messrs Dewan Sugar Mills (Pvt.) Ltd v M. B. Abbasi and Others, YLR 2672 (2007); Unilever Ltd v Sultan Soap Factory and Another, PLD 939 (SC. 1991).

[18] Javed Akhtar Chauhan v Mumtaz Ali And 2 Others, CLD 1706 (2016).

[19] M/s Alpha Sewing Company v Registrar of Trademarks and another, PLD 1074 (SC. 1990).

42. The SRO's regime, on the other hand, is different. It is the detention therein that is provisional, and the seizure takes place after each side is invited to present their stance and the Directorate of IPR Enforcement decides whether to issue a seizure notice, thereafter. All of this takes place pursuant to *Rule 681 Sub Rule 4* and the requirements that precede it. Thereafter, if a seizure notice is issued, the proceedings then move to the concerned Collectorate of Customs having jurisdiction for adjudication, which takes place under *Section 179 of the Customs Act 1969*.

43. The detention of a consignment and the seizure order thereto are two different elements and events with a different scope and enabling law. It must be kept in mind that the Trademarks Ordinance envisages exactly this type of scenario, whereby *Section 53(1)(b)* states "are expected to arrive from outside Pakistan." Of course, the word expected is crucial, since it reflects a situation whereby a right-holder comes to the knowledge that goods infringing its rights will arrive in Pakistan in the near future. Without being privy to the precise pleadings of each side in the case, it is strange as to why neither the court nor the Defendants referred to the specific statutory provisions that govern a complaint to Customs before the infringing goods have even arrived in Pakistan pursuant to the Ordinance.

IX. The Operation of *Rule 686*:

44. This is not to say that the law itself does not come with its own set of legalese and difficult to maneuver procedural sequences.

45. In paragraph 4, when rephrasing the submissions of the learned counsel for Defendant No. 2 and 3, the court refers to one such submission and recalls this as counsel pleading that "even health and safety rules have been violated." The issue of health and safety standards has also been addressed directly in the SRO itself.

46. At *Rule 686*, the SRO states:

> *"Miscellaneous: Notwithstanding anything contained in these rules, the Director IPR (Enforcement) or the Collector of Customs having jurisdiction may in the exercise of the powers conferred under Section 15 of the Act, detain any goods for IPR Infringement of health and safety standards."*

47. A glaring loophole is apparent from a perusal of the instant Rule, since "*IPR infringement of safety standards*" remains quite ambiguous. Ordinarily, infringe means to limit/undermine/encroach on something. In a legal context and in Black's law dictionary, "an act that interferes with one of the exclusive rights of a patent, copyright and trademark owner." Perhaps the rule uses the word infringement in the general sense and thus refers to the violation of health and safety standards. However, the word infringement is preceded by IPR, which establishes that this is infringement in the legal sense and relates specifically to IP. The difficulty with this interpretation is, what is the "IPR infringement of health and safety standards?" Does this refer to goods that present a danger to consumers? If so, why would this rule be part of a notification concerning IPR? Perhaps it refers to goods that are infringing as well as present a danger to health standards. This seems like the most logical takeaway, since infringing goods are highly likely to be of an unverifiable standard/quality, and one might also seek aid from the fact that the enabling provision here is Section 15 of the Customs Act, which concerns

counterfeit goods. Regardless, one cannot deny that these Rules did not undergo review or perusal of an IP practitioner or a person well-versed with relevant IP law.

48. The reason the relative ambiguity of the rule is of concern is because of the apparent basic purpose of the promulgation of the rule is to protect public safety. The contents of the SRO also establish that since *Rule 686* does not specify the procedure to be followed in such a situation, that the procedural requirements - even if mandatory in situations caught by *Rules 681 and 682* - would not apply, perhaps because following the (lengthy and equivocal) procedure would cause delay and defeat the very purpose of the ex-officio powers bestowed by *Rule 686*.

X. Conclusion:

49. It may be useful to look at China, where a large number of counterfeit products are manufactured, yet it has taken steps to satisfy the international community regarding its anti-counterfeiting, anti-piracy and anti-infringement measures. This is moreso with regard to the persistent objections of the *United States through its office of the United States Trade Representative (USTR)*. The office of the USTR has severely criticised China at multiple junctures in recent years, including in 2017 when it said that in addition to not doing enough for the protection of foreign technology and intellectual property, it was also creating hurdles for foreign companies that did not conduct research in or manufacture in China.[20] The USTR's "Update Concerning China's Acts, Policies and Practices Related to Technology Transfer, Intellectual Property, and Innovation" published on 20th November 2018 focused a great deal on cyber-enabled theft of Intellectual Property and proprietary information.[21] In light of this criticism, one cannot deny that China has indeed taken steps to present the picture that it is doing what it can to strengthen its intellectual property protection mechanisms, however, the USTR criticized these steps as window dressing that did not go to the root of the problem.[22] American magazine Foreign Policy did however appreciate and point out steps China has recently taken,[23] and although one might argue that the primary motive stems from the fact that China is fast becoming a creator rather than adopter of new ideas, the fact of the matter is that China recognizes that its place as a possible leader in the world of innovation is predicated on its own actions with regards to innovative products and services.

50. It flows from this therefore, that policies are very important to the knowledge economy, which any developing state must aspire to become if it wishes to achieve economic growth, and must

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[20] David Lawder, "U.S. trade barriers report slams China on overcapacity, tech transfer," Reuters, March 31, 2017. https://www.reuters.com/article/us-usa-china-trade-barriers-idUSKBN1720GL

[21] *Update concerning China's Acts, Policies and Practices related to Technology Transfer, Intellectual Property and Innovation*, prepared by the Office Of The United States Trade Representative Executive Office Of The President (USA, USTR, November 20, 2018).

[22] "USTR Special 301 Report Highlights Continued Issues with IP Enforcement, Notorious Markets in China," IPWatchdog, April 30, 2019. https://www.ipwatchdog.com/2019/04/30/ustr-special-301-report-highlights-continued-issues-ip-enforcement-notorious-markets-china/id=108747/

[23] Yukon Huang & Jeremy Smith, "China's Record on Intellectual Property Rights Is Getting Better And Better," Foreign Policy, October 16, 2019. https://foreignpolicy.com/2019/10/16/china-intellectual-property-theft-progress/

be formulated not just without fear or favor of any stakeholder, but also with respect and consideration for all stakeholders. Having given effect to international treaties and instruments that protect intellectual property rights, the times to come must make the necessary modifications that will protect the intellectual property of foreign and national entities with equal fervor. If Pakistan wishes to head in a direction wherein it is able to command respect for what it achieves in the invention sphere, then it must give coherent and demonstrable protection and weightage to international commitments and the intellectual property of foreign companies. This means that the adjudication authority, which is responsible for hearing claims of infringement or piracy, should focus on the spirit and purpose of Pakistan's international commitments with regards to Intellectual Property Rights Enforcement, rather than the procedural requirements of national law or ancillary legal instruments. This, of course, does not negate the exigency of revamping the relevant laws and SROs in a manner that is more coherent and definitive.

About the Author:

The author is an advocate of the High Courts of Pakistan on the civil side. he specialises in Intellectual Property, on which he regularly advises and litigates matters concerning prominent foreign and local entities. Some of the widely renowned entities he has recently worked with and advised include Facebook, Nestle, TikTok, and Netflix. In the past he has also trained students at the British Overseas School and Southshore School for A Levels in public speaking, mooting, Model UN and parliamentary style debates. More recently he trained students at the Lecole School for Advanced Studies for the prestigious Jean Pictet Moot Court Competition and Jessup.

Meeting Their Parents: A Right Always Ignored For Divorced Affected Minors

By: Fahad Ahmed Siddiqui

1. As the social and economic dynamics change rapidly in our society, conjugal and familial relationships too, become more complex, as well as the conditions of their dissolution. With the rise of these social changes that affect family life, there is a more emergent need to amend the laws that govern family relationships, during and after marriage. At present, our legal framework for child custody assumes that custody can be vested with either one of the contesting parties and suitability is determined in a comparative manner. But just as the reasons for dissolving marriage have shifted over time as the society has progressed, we need to think about custody differently and provide for a broader framework within which divorcing parents and children can decide what custodial arrangement works best for them.

2. While the judiciary has tried to take steps to mitigate this conservative viewpoint, the idea that under certain favorable circumstances the welfare of the minor could also be ensured from simultaneous association with both parents remains ignored. Since there is no inherent contradiction between pursuing the welfare of the minor and the concept of shared parenting/custody, it is high time that the law provides for this option.

3. It is a known fact that a large number of divorce/separation affected minor children suffer from personality disorders, misconduct, substance abuse, criminality and antisocial traits, etc.[1] This can be attributed to appropriate contact denial between the non-custodial parent(s) with their children involved in child custody litigation in the garb of procedural technicalities such as monthly visitation within court premises for a period as minimum as of 1 hour or two hours once or twice a month. Surprisingly, child custody litigation is based upon the protection and welfare of the minors. However, the family courts in Pakistan often place restrictions on the enjoyment of a very important right, that is, the right to free access to one's parents; without even giving any reason thereto. It is a settled law as enshrined in the *General Clauses Act 1897*,[2] that every authority has to pass a speaking order while adjudicating on matters of civil rights of the litigants, and to give valid reasons as to why an essential right of the minor to have equal and frequent access to both of his parents is curtailed and is limited to a mere 2 hours of visitation once or twice a month and that too to be held within the premises of the court instead of the home of the non-custodial parent (or any other place which elicits the feeling of a family home). It is proposed that the visitation schedule should be revisited so that neither the custodial parent is deprived of the complete custody and access of the minor, and nor is the minor child prevented from meeting their own non-custodial parent with whom, in a normal situation, they would have had an opportunity to interact and would have received parental love and affection.

4. It is pertinent to note that right to a fair trial in order to determine one's civil rights is an important right of a non-custodial parent which is often neglected. It is also pertinent to note here that the concept of fair trial and due process has always been the golden principle of

[1] Kristina M. Jackson, Michelle L. Rogers, and Carolyn E. Sartor, "Parental divorce and initiation of alcohol use in early adolescence," *Psychology of Addictive Behaviors, 30*(4) (2016): 450–461. https://doi.org/10.1037/adb0000164

[2] *General Clauses Act 1897* s 24-A

administration of justice, but after being incorporated in the *Constitution of Pakistan*,[3] it has become necessary that due process should be adopted for conducting a fair trial and any order passed in violation of due process shall be considered to be void. On the touchstone of this observation made by the *Honourable Supreme Court of Pakistan*, it becomes abundantly clear that every family/guardian court is under a constitutional obligation to assign valid reasons while curtailing the fundamental rights of movement and frequency of access of a minor child involved in child custody litigation and while imposing visiting restrictions for an indefinite period on the non-custodial parent. It is witnessed that as a matter of practice a visitation schedule is chalked out by a guardian/family court while adjudicating an application under the provisions of the *Guardian & Wards Act 1890*[4] and it does not provide any reason or justification as to why the monthly meeting between the divorce affected child with his non-custodial parent should be conducted for a period of just two hours and within the court premises. Additionally, the Supreme Court has also given its guidelines for minors to not be forced to be away from their biological parents.[5]

5. A Family Court is deemed to be aware of the fact that in any proceedings before it, where the visitation right of a minor is in question, the Court must regard the minor's welfare as its first and paramount consideration, and may not consider any subjective claims of either parents in respect of the visitation rights. Hence, an order granting visitation rights of the minor to have better access and approach towards his non-custodial parent must not be dealt with on the basis of mere technicalities. The order granting visitation rights of the minor requires due-diligence to be practiced by the learned family/guardian courts responsible for handling the matter and a visitation schedule comprising of better interaction with the non-custodial side of the family should be chalked out so as to minimize the fallouts and devastating effects of separation of minor's parents inter-se.

6. Our family justice system is obliged to follow the commands of Superior Courts while chalking out an interim visitation schedule of meetings between a minor child and his non-custodial parent (the father, mostly). It is the right time for our family justice system to start appreciating the courts' powers with regard to visitation rights, custody of minors and the nature of parental care and that it must act in a way a wise parent would do. "Welfare"' should be construed in a way so as to include in its compass all the dominant factors essential for determining the actual welfare of the minor instead of legal technicalities.[6]

7. For the first time, guidelines were issued by the honourable *Lahore High Court* in 2009.[7] The honourable court observed, "Cases pertaining to custody/visitation issues of the minors are not ordinary cases like the breach and enforcement of other civil rights/obligations, such as the property disputes, etc. These cases have their own dimensions, repercussions, and consequences, founded upon the human emotions and sentiments. The resolution and adjudication of this special kind of matters, therefore, should be conceived, considered and settled in a different perspective and context, which obviously revolves around the welfare of the minor, but at the same time the natural feelings of the parents cannot be overlooked and

[3] *Constitution of Islamic Republic of Pakistan 1973* Article 10-A
[4] *Guardians and Wards Act 1890* s 12
[5] Babar Hussain and another v. Mujeeb Ahmad Khan and another, SCMR 1235 (SC. 2012).
[6] 2002 PLD 267 SC
[7] Mst. Maryam Masood vs. Mughisuddin Mirza and Others, CLC 1443 (LHC. 2009).

ignored."

8. In these cases where parents, on account of their discord and disparity, have grown apart, the child should not be deprived of having the maximum of what they could receive from either of the parents. And it does not behoove the the two parties, who may have parted on bad terms to claim exclusive possession over the child. While it may be clearly understood that the father is the natural and legal guardian and under the Islamic Personal Law and the right of mother to "Hizanat", in case of a male child, terminates around the age of seven years, (this observation, in no manner, shall be construed of causing any prejudice to either party on the issue of minor's custody), while considering the question of visitation the welfare of the minor should be the priority.

9. It is significant to observe at this juncture that the *Guardian and Wards Act* was passed in 1890, almost 130 years back. The *Family Courts Act 1964* was passed by our Parliament almost 54/55 years ago and our society is evolving at a rapid pace. Pakistan today is adopting new ethos and new concepts. The standards set primarily in 1890 by the colonizers and later in 1964 by Pakistani Parliament cannot be made applicable directly to the litigants of this digital age in the 21st Century, when many of these litigants live in metropolitan cities like Lahore, Karachi, and Islamabad and the circumstances have changed. Therefore, a time has come to change our mindset and we need to look for a solution where both parents may have an amicable relationship and can share custody so that the child can have the best from both of them. We also need to take into account the observations made by superior courts of Pakistan in multiple judgments such as in *Sughran Bibi case* where the honourable Lahore High Court stated: "Rights, if any, of the parents are to be given a second place and the child's welfare, will always be the key consideration.[8] The welfare of the minor/child includes, but is not limited to his health, education, physical, and psychological well-being as well as his development". Earlier the honourable Lahore High Court laid emphasis on the fact that welfare of minor was prime consideration before the Court,[9] admittedly, the respondent was the father of the minor and as the natural guardian he had right of his supervision under the Islamic Law, therefore on separation of the parents the minor could not be permanently deprived of the love and affection of either of the parents.

10. Similarly, the honourable division bench of the *Balochistan High Court* held that neither the father nor the minor could be deprived of the company of each other.[10] Father being a natural guardian was not only required to participate in the upbringing of the minor, but should also develop the bonds of love and affinity with the child. To achieve this the Court was to facilitate a congenial, homely, and friendly environment and reasonable visitation schedule. Office of the guardian Judge or office of Civil Nazir of the court, for the said purpose, was not a conducive environment for the meeting of the child and the non-custodial parent. Meeting in court premises could not serve the purpose of the meeting either, and it would be preferable that the meeting should be held at the residence of the father or any other suitable place for the minor.

[8] Sughran Bibi vs Munawar Akram, MLD 2036 (LHC. 2019).
[9] Mst. Ayesha Shahid vs Additional District Judge and Others, MLD 1592 (LHC. 2018).
[10] Abdul Khaliq vs Ms. Mah Noor and Others, PLD 44 (Quetta. 2018).

11. Whereas the honourable *Sindh High Court* said that, "Father and mother both were working parents, therefore, had equal right to have temporary custody of a minor."[11] A minor daughter was in her tender age and she required the love and care of both the parents and therefore, the father was entitled to spend some time with his daughter at his house during summer vacations. In the case of *Mst. Aliya Fazil*[12] Honourable Lahore High Court observed that the father could not be denied the minimum right of access to his minor children nor would he be considered an alien enemy qua them. A child would need love, affection, care and attention of their mother as well as love, affection, company and guiding hand of their father - depriving the father of his right to meet his children would lead to emotional deprivation on both sides.

12. Advocates practicing in the child custody jurisdiction should understand that under the mandate of family jurisprudence as much as keeping in view of the locus parentis capacity, a learned guardian/family court, while chalking out an interim visitation schedule of meeting of a minor child with his/her non-custodial parent, must appreciate the common practice amongst separated couples to use children as pawns to cause emotional damage to each other. Provisions of the *Constitution of the Islamic Republic of Pakistan* need to be implemented in their true spirit in custody and guardianship proceedings in order to ensure protection of fundamental rights of fair trial, right of privacy and dignity of man.[13] Rights of children from broken families and the rights of non-custodial parents should be protected simultaneously, by announcing a reasonable at home "MINIMUM STANDARD" visitation schedule right from the start of the child custody litigation, in the similar manner as that of the fixation of interim maintenance allowance under the provision of *Family Courts Act, 1964*. This relief of "minimum at home visitation schedule" should be available to all non-custodial parents without discrimination from the very beginning of the trial, at least during the interim stage, till the final disposal of litigation pending adjudication before the learned guardian/family judges respectively.

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[11] Imran Butt vs Mehreen Imran, CLC 1209 (SHC. 2015).

[12] Mst. Aliya Fazil vs Mirza Farhan Rubbani, MLD 1631 (LHC. 2013).

[13] *Constitution of Islamic Republic of Pakistan 1973* Article 10-A

Pakistani Courts In Times Of Covid-19
An attempt to revisit the need for remote hearing and artificial intelligence

By: Fazeel Hyder Chohan

I. Abstract:

1. This review paper begins with the brief background of how the current world order is hit by the Novel Coronavirus (hereinafter referred to as "COVID 19" or "the pandemic" or "the virus") and moves to conclude that the post COVID-19 phase will bring changes with an accompanying desire for innovation. In the second half of this paper, the author emphasizes the necessity to introduce remote hearings in the judicial system of Pakistan: for that purpose, the author has provided a brief analysis of the legality of transforming courts to Electronic-Courts ("e-courts"). Lastly, the author has pressed for and provided the utility and legality of artificial intelligence systems for the courts in Pakistan.

II. Background:

2. The world at present is witnessing a massive change owing to the devastation brought about by COVID-19. The pandemic has already caused significant and fundamental changes to the world order, ranging from global transportation to the socio-economic sector, from food supplies to oil prices. When it comes to the effects of the pandemic, Pakistan and its judicial machinery are not an exception to the rule. Since the first known case of COVID-19, and particularly after the government-imposed lockdown, the judicial organ of the state is at a standstill. Bar Councils across the country announced the suspension of work and advised their members not to attend courts, except for urgent matters. The court system that is burdened with more than 1.8 million cases pending for final disposal[1] was thrown into a state of a judicial paralysis.

3. Undoubtedly, when the health crisis abates we will be in a new world. Like any other administrative unit and organ of state, the judicial machinery in the country has to find alternative ways for the proper functioning of courts to dispense justice to its citizens. With this in mind, for the purposes of this paper the focus is placed upon exploring possible options that, on one hand would be useful to normalise the functioning of the courts, and on the other hand, to adhere to the minimum of the Standard Operating Procedures, (hereinafter referred to as "SOPs"); that is maintaining social distance to prevent the spread of the virus.

III. An era of remote hearings:

4. The judicial system is the bulwark of justice and the country's courts see a daily influx of thousands of people - from court staff to litigants and their families to law enforcement officers and prison inmates. If allowed to continue as per routine, this would expose many

[1] *Consolidate statement showing pendency, institution and disposal of cases during the period 1-31st December, 2019 in the Supreme Court of Pakistan, Federal Shariat Court, High Courts and District Judiciary*, prepared by the Law and Justice Commission of Pakistan (LJCP, 2019)

litigants, judicial officers and court staff to the great risk posed by COVID-19. For this reason, in March Chief Justice Ahmed Ali Shaikh of Sindh High Court ordered the relevant authorities to restrict the public from visiting the courts for unnecessary purposes in order to prevent the spread of the virus.[2]

5. Having courts open and operating as per routine is crucial to preserve rule of law and access to justice. However, as noted above, allowing courts to function with normal procedures will put everyone involved in the judicial system at risk. On the other hand, implementing a system of remote hearings will facilitate in containing the virus while also dispensing justice. Before moving on to finding a place for remote hearings in our judicial system, it is of paramount importance to first understand the terminology of "remote hearings." Thus, for the purpose of this paper, "remote hearings" means the adjudication on a matter of law by a judge with electronic infrastructure. In this paper, remote hearing and e-courts are used interchangeably, that is a judicial determination by a judge without the in-person attendance of lawyers and litigants in the courtroom.[3] In commonwealth countries, e-court proceedings are conducted as follows:
    i. by way of an email exchange between the court and the parties;
    ii. by way of telephone using conference calling facilities;
    iii. by way of the court's video-link system, if available;
    iv. by way of other, secure video calling facilities.[4]

6. The idea of resorting to the technology and innovation of e-courts is not new to the judicial system of Pakistan. It was last year, when the former Chief Justice of Pakistan, Asif Saeed Khan Khosa launched an "expeditious justice initiative" and established model criminal trial courts, which decided over five thousand pending cases in a span of six months. This was categorised by many as a silent revolution in the judicial history of Pakistan. The said initiative also introduced "video link hearings"[5] - a novel system which allowed a counsel and judge to proceed with a matter while being at two different benches. This was the first time the idea for Artificial Intelligence systems (hereinafter referred to as "AI" or "AIS") in courts was floated.

7. Having resolved that, the present pandemic poses real and obvious challenges to the effective and fair operation of the court, and therefore, remote access to the court has become a necessity. However, the incorporation of e-courts in the judicial system raises the questions of whether it is practicable to move to e-courts in the prevailing legal regime in the country, or whether we would need separate legislation to validate them.

8. This alternative will definitely fall short of providing the opportunities that are available during a live courtroom hearing. To be specific, there will be issues relating to accessibility to the

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[2] "People barred from visiting courts 'unnecessarily' amid coronavirus fears," The Express Tribune, March 13th, 2020. https://tribune.com.pk/story/2175655/1-people-barred-visiting-courts-unnecessarily-amid-coronavirus-fears

[3] *Best Practices for Remote Hearing*, prepared by the joint E-Hearings Task Force of The Advocates' Society, the Ontario Bar Association, the Federation of Ontario Law Associations, and the Ontario Trial Lawyers Association (Ontario, CA, May 13. 2020).

[4] *Remote Access to the Court of Protection Guidance*, prepared by the Honourable Mr Justice Hayden, Vice President of the Court of Protection, Judiciary Of England And Wales (March 31, 2020).

[5] *E-court System Successfully Launched in Supreme Court*, Press Release issued by the Supreme Court Of Pakistan (PR NO.24/2019, Islamabad, Pakistan, May 27, 2019).

required equipment, security and privacy, statutory limitations and several other impediments like matters relating to the management of documents that is, mode of preparation and presentation of documents, marking of exhibits etc. Yet this virtual environment for hearing will stand the minimum yardstick set by the Pakistani law. Remote hearing will be able to guarantee fair trial as a public hearing, witness testimony, right to counsel, right to appeal and so on will still be available.[6] Lastly, the "places of sitting of courts"[7] in civil procedural law and the "establishment of courts"[8] in criminal procedural law are at the discretion of Honorable High Courts and provincial governments respectively, thus remote hearing will not be restrained by procedural technicalities and administrative directives from the Supreme Court will do for the working of remote hearing.

IV. Innovation with artificial intelligence system:

9. While this pandemic poses a threat to the global economy, it may afford an opportunity in disguise for the judicial system in Pakistan to leave behind conservative Anglo-Saxon systems and incorporate modern technologies for more efficiency. Under the umbrella of e-courts, we can think of an experiment with AI in courts. As was the case with remote hearings, we shall first consider the context and then explore the legality of using AI under Pakistani law.

10. In this era of technology and automation, the phrase artificial intelligence is heavily loaded with a variety of different conceptions and understandings, therefore to set the clear terminology, for the purpose of this paper AI is a "non-biological autonomous entity."[9] AI is by no means is a new invention, rather AI products control the major share in the technology market these days[10]. Big renowned players in AI products, to name some out of many are IBM, Google, Facebook, Amazon, Tempus, and Data-Robot. The understanding of AI should not only be restricted or limited to a humanoid robot that is, a robot that has an appearance and shape to resemble a human body, but, AI is a general terminology, which means to include and not limited to face lie detector, text mining software, language processing and brain mapping software, smart search engines and translation devices.

11. It is suggested that, even given concerns with implementation, AI has the potential to be of extreme utility for the judiciary:
    a) it can assist the judge as a librarian,
    b) it can assist our judges in detecting a lie of a witness by face detector,
    c) in cases of defamatory remarks or in the cases of cybercrimes that involves the use of social media avenues, AI can assist our judiciary as a text mining software,
    d) it can assist judges by suggesting the best possible decision by comparing the facts of a case with the settled jurisprudence in similar circumstances.

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[6] *Constitution of Islamic Republic of Pakistan 1973* Article 10-A

[7] *West Pakistan Civil Courts Ordinance 1962* s 13

[8] *Code of Criminal Procedure* ss 9-14

[9] Thomas Buocz, "Artificial Intelligence in Court – Legitimacy Problems of AI Assistance in the Judiciary," *Retskraft-Copenhagen Journal of Legal Studies*, Volume 2, Number 1 (2018): p. 41-59. https://static1.squarespace.com/static/59db92336f4ca35190c650a5/t/5ad9da5f70a6adf9d3ee842c/1524226655876/Artificial+Intelligence+in+Court.pdf

[10] *Artificial Intelligence; the Rise of the Machines*, prepared by Bank of America Merrill Lynch (BAML, December 2016).

12. When it comes to evidence, at present, there are no set rules for weighing evidence as Article 2(c) of *Qanoon-e-Shahadat Order* (hereinafter referred to as "Q.S.O") only defines the term. The Supreme Court held on the matter that:

> *"Rule of caution enjoins upon the court to seek independent corroboration of witnesses found to be interested/inimical."*[11]

13. The apex court of the country in another case decided:
"Eye-witnesses, though interested, their testimony inspired confidence, and the proposition that the evidence of an interested witness should be overlooked irrespective of its probative force, is not supported by any law."[12]

14. Due to a weak reporting and investigation mechanism, cases with primary evidence are scarce. Judges have to look for strong corroboration of evidence and have to consider the truthfulness of the testimony made by witnesses. AI, when employed with a face lie detector or text mining technologies, will be a very useful tool for the judiciary when they are deciding upon the authenticity of the evidence.

15. From the perusal of cases cited above, it is evident that there are no predetermined guidelines to deal with the testimonies of interested/related witnesses and every witness testimony has to be reviewed on a case-by-case basis. Our domestic law in general and criminal law in particular, necessitate courts to determine the probative value of evidence and credibility of witnesses[13] by applying the judicial mind. Without weighing the evidence, a minimum amount of burden cannot be discharged, let alone the higher evidentiary threshold of "beyond a reasonable doubt"[14] in criminal cases.[15] Thus AI can be the desired "corroborated, unimpeachable evidence andreal evidence" that is required to adjudicate safely.

V. Legality of using artificial intelligence under Pakistani law:

16. Having covered the utility of AI, the legality of its use under Pakistani law will now be elaborated upon. Assigning tasks to the AI systems that are purely administrative in nature, such as maintaining court files, will not have any bearing on the outcome of the case and thus, requires no consideration as to the legality of its use. However, employing AI for non-administrative purposes or assigning judicial functions such as using it as a "face lie detector" during witness testimony will raise questions relating to the "admissibility" of the evidence.

17. Section 164 of Q.S.O authorizes the use of modern devices as evidence. It is arguable that AI can truly be termed a modern device. The Supreme Court of Pakistan, while considering the question of whether the new mode referred in Section 164 is sufficient to prove "misconduct" and "corruption," held that: "Screening of video cassettes are admissible and conclusive

[11] Piyaro v The State, SCMR 25 (SC. 1998).
[12] Abdul Waheed v The State, SCMR 1807 (SC. 1998).
[13] P. Cr.L.J 503 (2001).
[14] SCMR 1221 (2008).
[15] PLD SC 1 (SC. 1996).

evidence."[16] Hence, it can be concluded that the evidence adduced from artificial intelligence systems is admissible and it can suffice the test of appreciation.

18. Admittedly, using AI assistance as a lie detector and/or as a brain mapping software could raise constitutional issues pertaining to discrimination under Article 25 of the *Constitution* and self-incrimination provided in Article 13(b) of the *Constitution*. Primarily, Article 25 may be invoked because before employing AI to the judicial machinery, we need to be mindful of the fact that AI cannot be used in all types of cases and therefore, it is important to distinguish between plain cases and hard cases.

19. Plain cases are those cases where the terms used in the case do not require much interpretation and the outcome of the case is straightforward, whereas hard cases are those which require deep discussion and extensive interpretation. AI cannot be employed with the latter category of cases mainly because AIS are to assist judicial officers with the tasks that have already been programmed in it and AI was never devised to replace the application of judicial mind. As for the resolution of "hard cases", we need an extensive judicial interpretation of different facts and terms involved which also necessitates taking into consideration several social impacts that the judicial decision might have and therefore, employing AIS for "hard cases" will not be advantageous in the current time.

20. The distinction made in the preceding paragraph as to the exclusion of AIS from hard cases might be an act of discrimination for some litigants. To this end, judges will have to exercise discretion as to the usage of AI.[17] Moreover, Supreme Court, while considering the question of equality of all citizens and discrimination in the case of *Attiya Bibi Khan Vs The Federation of Pakistan*, held that,

> *"Equal protection of law does not envisage that every citizen be treated alike in all circumstances. That reasonable classification is permissible and to make classification reasonable, it should **(a)** be an intelligible differentia which distinguishes person and **(b)** and the differentia must have rational nexus to the object sought to be achieved by classification."*[18]

This judgment makes clear that differentiation based on reasonable classification is permissible, hence differentiation by the judges between hard cases and plain cases for the purpose of employing AI will not breach Article 25 of the *Constitution*.

21. Lastly, to attract the provision of Article 13(b) of the *Constitution*, the Supreme Court has affirmed "compulsion" as the main element for self-incrimination. AIS do not threaten or compel rather, they merely help the judges to see the macro-facial movements which would not have been noticeable otherwise. In *Alpha Insurance Company vs United Insurance Company of Pakistan*, the court held,

> *"The scope of the provision, by its own force excludes, production of incriminating material otherwise than through **compulsion**."*[19]

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[16] Custom Collectors v Saeed-Ur-Rehman, PLD 249 (SC. 1989).
[17] SCMR 256 (SC. 2001).
[18] Attiya Bibi Khan v The Federation of Pakistan, SCMR 1161 (SC. 2001).
[19] Alpha Insurance Company vs United Insurance Company of Pakistan, SCMR 1668 (SC.1996).

VI. Conclusion:

22. Rule of law and access to justice is central to the philosophy of the legal system of Pakistan. The apex court while ordering the businesses to reopen, cannot afford the suspension of the administration of justice. Unprecedented times call for unprecedented measures, remote hearing being new to our judicial machinery, fits well within the existing legal framework.

23. Though businesses and courts have reopened in Pakistan following the uplifting of the government-imposed lockdown, it is only wise to realise that COVID-19 has not been eliminated, globally and within Pakistan. The threat of a second wave of the pandemic continues to hover over us. Keeping these circumstances in mind, courts need to be prepared for any such event and the introduction of a mechanism for remote hearings is possibly the best way to do so. Indeed, the advantages of such a mechanism can be much more expansive than just the enabling of the courts' operations during a lockdown, such as giving access to people residing in geographically remote areas and having a disability-friendly legal course of conduct.

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