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Military Courts: An Affront To Human Rights

The Impact Of Devolution On Legislative Reform Relating To Law And Order In Pakistan

Failure Of R2P In Syria: Dual Dilemma Of “Invitation-Intervention” And “Responsibility-Interest”

Taking Non-Refoulement Seriously: Why The Extraterritoriality Of Article 33(1) Of the Refugee Convention Needs To Be Addressed

Upholding The International Rule Of Law
FOREWORD

The purpose behind establishing the Research Society of International Law (RSIL) was to build greater awareness and develop capacity in international law at the federal, provincial and institutional level in Pakistan so that our domestic and foreign policies can be improved and our reputation enhanced as a responsible member of the international community.

Since RSIL’s founding in 1993, we have evolved in a unique and dynamic fashion and have constantly sought to reinvent the organization so that it acquires professional and technical excellence in legal research. Throughout this process, we have remained committed to our original mandate and restricted ourselves to providing legal analysis on the challenges facing Pakistan without engaging in partisanship or expressing any political biases. Our research and analysis has therefore consciously focused on ‘state-specific’ issues as opposed to ‘regime-specific’ matters.

In this context, a longstanding objective of RSIL has been the development of a high-quality academic journal, which promotes the dissemination of ideas, findings and law and policy solutions for the multifaceted challenges facing Pakistan. But the development of a quality academic journal requires dedicated funding and significant investment in time and resources. In our nascent years, we struggled to obtain the necessary funding to develop and sustain an academic journal and lacked qualified human resources that could serve as dedicated editorial staff.

In recent years, however, RSIL has rapidly expanded and has evolved into an elite research body, proudly housing a dedicated team of highly qualified researchers based in offices in Islamabad and Lahore. As part of this evolutionary process, we decided to establish the RSIL Law Review in 2017 as a successor publication to the Pakistan Journal of International Law.

The Law Review is indigenously funded by RSIL and staffed by a bright young editorial team. This present iteration is the first edition developed under the editorial supervision of our new Managing Editor, Ms. Noor Waheed, who has infused it with a higher standard of academic sophistication. I can proudly state with confidence that this new and improved version of the RSIL Law Review represents another important milestone in our unique journey as an organization thanks to the hard work and professionalism of our editorial team.

In the months ahead, we will continue our endeavors to improve the academic quality of this journal by introducing peer reviews and seeking accreditation with the Higher Education Commission, Pakistan.

I am thankful to all those who made the effort to contribute to this publication and congratulate the contributors whose submissions were accepted.
I must also acknowledge the efforts of RSIL alumni, whose commitment and dedication in RSIL’s formative years has allowed the organization to stand on its own feet today. It goes without saying that none of this would be possible without the experience, mentorship and funding provided by our President, Mr. Ahmer Bilal Soofi, who has spent the last three decades tirelessly working to improve scholarship in the field of international law in Pakistan.

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

Jamal Aziz*
Editor-in-Chief
RSIL Law Review
June 2019

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

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

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

**Submissions:** The Editorial Team of the RSIL Law Review invites the submission of articles. All submissions must be previously unpublished. The mission of the Review is to publish work that displays written excellence and the highest standard of legal academic analysis. Articles utilizing a creative, trans-disciplinary approach or addressing comparative law issues as they relate to international and domestic law are also encouraged. RSIL accepts student notes (up to 2500 words) and full-length articles (3000 – 8000 words). All those interested, should submit an abstract/articles for review through the submission form available on our website: journal.rsilpak.org or email us at rsil-review@rsilpak.org

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EDITOR’S NOTE

The Research Society of International Law is proud to present the 3rd Edition of the RSIL Law Review and the 1st Volume of 2019. The successor publication to the Pakistan Journal of International Law (2012), RSIL Law Review was founded in 2017 per the vision of Mr. Ahmer Bilal Soofi and Mr. Jamal Aziz who sought a forum for the publication of premium research on international law within Pakistan. Since its inception, the Review has evolved its ambit to include social and humanitarian issues, matters of policy, economics, commerce, national defense and global security.

The articles selected for this volume cover a breadth of legal disciplines and topics that are of pressing importance in 2019. In the aftermath of Aurat March 2019, Saleha Tauqeer (LL.B (Hons) (London)) explores how the objectives established by the different waves of the Feminist Movement make for an effective framework to analyze the state of women’s rights in Pakistan, especially in terms of their practical and legal reality.

As the PTI Government looks to sustain military courts and international pressure mounts on Pakistan to uphold its international human rights obligations, Seemal Hameed (LL.B (Hons) (London)) contests the extension to the Army Act that prioritizes swift retribution at the expense of due process, criminal justice, and human rights in Pakistan.

Jamal Aziz (LL.M (UCL)) and Minahil Khan (LL.M (Sussex)) offer a detailed investigation into the legalities of the 18th Amendment to the Pakistan Constitution. They explore the wide-ranging impact of the Amendment on the State, especially with regards to the ability of law enforcement mechanisms to effectively combat the issue at the forefront of Pakistan’s efforts domestically and internationally: terrorism.

Awais Zahid Abbasi (M.Phil (NDU)), using the ongoing Syrian Civil War as a grim case study, details the contradictions and conflicts that exist within the R2P (Responsibility to Protect) doctrine that may have paved the way for the abuse of international law by powerful global actors.

Fatima Mehmood (LL.M (Harvard)) raises concerns with the Extraterritoriality Clause of the 1951 Refugee Convention, citing its lack of specificity and broad legal interpretation as a violation of the principle of non-refoulment – especially at a time when the global refugee crisis remains at an all-time high and borders have become increasingly impenetrable.

Hira Arif Riar (LL.M (Duke)) expounds upon the ever-increasing importance of the implementation of international rule of law within Pakistan’s domestic legal framework. As Pakistan faces the issue of being on the FATF Grey-List, the US Blacklist for Violations Against Religious Freedom and the scrutiny of various actors calling for the enforcement of Pakistan’s international obligations, the article demonstrates the importance of international law through an extensive review of legal jurisdictions that have benefited from incorporating international law provisions.
The articles in this volume underwent a rigorous review process and I would like to commend the efforts of the authors in producing and maintaining such an impeccable standard of writing, research and analysis. Thank you to my colleagues at RSIL who aided in the editorial process and to all the people who showed their interest in supporting the publication.

This volume of the RSIL Law Review would not have been possible without the mentorship of Mr. Ahmer Bilal Soofi and Mr. Jamal Aziz. Thank you for all your support, encouragement and trust during this endeavor.

Noor Waheed*
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June 2019

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FEMINISM AND THE PRACTICAL VS LEGAL STATE OF WOMEN IN PAKISTAN

SALEHA TAUQEER

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ABSTRACT

Women in Pakistan have a disadvantaged position in the society. Whether one considers familial and interpersonal relationships, the participation and representation of women in the public sphere, women’s access to education and employment opportunities or the extent to which they are protected from violent crimes such as rape, domestic violence, or harassment etc., it would seem that the state of women in Pakistan is deplorable. Attempts to empower women are resisted by religious and cultural interpretations of women’s role and position in society, as well as misinterpretations of religious principles and misogynistic attitudes towards women. Furthermore, feminism is perceived as a western concept that will break down the religious and moral fabric of the society and is often confused with misandry. Lack of knowledge of feminism and misunderstandings about the concept have resulted in a lot of opposition towards any local feminist movements and the ideas that feminists attempt to promote.

Therefore, this essay attempts to briefly explain the three waves of feminism and the various rights that these movements have focused on. It then examines the state of women’s rights in Pakistan, including the right to vote, the right to political representation and the right to use birth control. It explores the restrictions on women’s access to education and employment as well as the roles that are attributed to women by society and the way they contribute to the exploitation of women. The essay further focuses on the issue of violence against women and the intersectional dimension of women’s lives. The essay also focuses on the ways that women in Pakistan can be empowered and identifies changes in legislation and societal attitudes as well as proper administration of justice as viable solutions to improving women’s condition in Pakistan.

INTRODUCTION

Women have been subjugated in society since the beginning of time. It was only in the 20th century that women began to voice opposition against this subordination and to fight for their rights. This activism was prompted as a result of the Second World War, when women were employed in the millions in order to fill the vacancies that had been created because of the men leaving for the war.1 Having experienced economic self-sufficiency and

freedom, women refused to return to their former status in society following the end of the Second World War and thus began the fight for female empowerment.

The fight for women’s rights can be divided into three waves based on the categories of rights that the feminist movement was fighting for during particular time periods. This essay will attempt to discuss the position of women in the Pakistani society in light of the three waves of feminism. This will be done by looking at a number of broad themes including political rights and representation, violence against women, the position of women in the family and gender roles as well as intersectionality. This essay will attempt to determine the extent to which women have been successful in achieving the rights falling under the said themes and will examine the measures that can be taken to further improve their position in society.

1. **The Three Waves of Feminism**

First-wave feminism was a feminist movement spanning over the 19th and early 20th centuries. Based on ideas of liberty and individual autonomy, the movement was mainly concerned with the advancement of contractual and property rights for women so as to place them on an equal footing with men. The movement was also intended to attain other civil rights for women, including equal rights to education, health care and employment. During the late 19th century, the focus of the movement shifted towards the promotion of the political right to suffrage for women.

The right to vote came to the forefront following the Declaration of Sentiments, a document based on the Declaration of Independence having the objective of achieving the same rights for women as for men. In addition to focusing on the right to vote, the document objected to a number of inequalities and injustices perpetrated against women, such as unequal employment opportunities, including lower wages for women and exclusion from certain

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professions such as theology, medicine and law as well as exclusion from higher education. The movement was successful and resulted in the grant of the right to vote for women.

Another focus of the movement was reproductive rights, in particular, the right to use birth control. The birth control movement was led by Margaret Sanger in 1916 and it was not until the US Supreme Court’s decision in 1965 that women were granted the right to use birth control.

Second-wave feminism, occurring in the 1960s-80s, was concerned with various aspects of women’s lives such as private life, professional life, sexuality, and public life (in particular, politics). It focused on issues such as violence against women, including domestic abuse and rape, workplace safety and sexual harassment, pornography, prostitution, reproductive rights, “equality and discrimination.”

Some feminists from the second wave perceive men as the oppressors of women and identify patriarchy as the root cause of women’s subordination. According to Catharine MacKinnon, the “reality of social life is a gender hierarchy of men’s power and domination

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8 ibid.
10 Rosemary Hunter, ‘Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism’ in Margaret Davies and Vanessa E. Munro (eds), The Ashgate Research Companion to Feminist Legal Theory (Ashgate 2014)
and women’s subordination and submission, imposed by force and marked in particular by men’s control over, appropriation and objectification of women’s sexuality”.13

Catharine MacKinnon argues that violence, especially sexual violence, is fundamental to substantiating and maintaining men’s superiority over women. MacKinnon believes that violence against women is a manifestation of patriarchy and is “systemic and systematic, reflecting and perpetuating a social structure within which men”14 have authority over women. For MacKinnon, sexuality is the “lynchpin”15 for male domination, “that which is most one’s own, yet most taken away”16.

Other feminists highlight different reasons for the disadvantaged position of women in society. According to Martha Fineman, everyone is dependent at some point in their life or another, be it during infancy/childhood, illness, or old age. However, the caring responsibility towards dependents, whether young or old, falls disproportionately on women and is devalued. Owing to the “universal dependency”17 of human beings, caring for dependents is a responsibility that needs to be shared. Furthermore, more importance should be attached to the duty of caretaking for dependents and it should be adequately resourced.18 Such feminists also insist upon attaching the same importance to women’s labour, such as parenting, as men’s and upon remunerating women for the duties they perform at home.19

Third wave feminism originated in the middle of the 20th century.20 It is characterised by a shift from “totalizing and unifying”21 categorization of women towards the notion that

13 Rosemary Hunter, ‘Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism’ in Margaret Davies and Vanessa E. Munro (eds), The Ashgate Research Companion to Feminist Legal Theory (Ashgate 2014)
14 Vanessa E. Munro, ‘Violence Against Women, ‘Victimhood’ and the (Neo) Liberal State’ in Margaret Davies and Vanessa E. Munro (eds), The Ashgate Research Companion to Feminist Legal Theory (Ashgate 2013)
15 ibid.
16 ibid.
17 Rosemary Hunter, ‘Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism’ in Margaret Davies and Vanessa E. Munro (eds), The Ashgate Research Companion to Feminist Legal Theory (Ashgate 2014)
18 ibid.
20 Laura Brunell and Elinor Burkett, ‘Feminism’ (Britannica) <www.britannica.com/topic/feminism> accessed 22 February 2019
women’s lives are “intersectional”.\(^{22}\) Therefore, in order to liberate women, grounds of social exclusion or discrimination other than gender need to be taken into account, including, “race, ethnicity, class”,\(^{23}\) creed, nationality, culture, sexual orientation\(^{24}\) and disability.

Third-wave feminists criticised the earlier waves of feminism as focusing primarily on “the lives of white middle-class women”\(^{25}\) and not taking into account the experiences of women belonging to racial minorities. According to third-wave feminists, multiple systems of domination, as opposed to gender alone, are at play to produce inequalities in society.\(^{26}\) The term ‘matrix of domination’, coined by feminists such as Patricia Hill Collins, Bonnie Thorton Dill and Maxine Baca Zinn, represents the idea that no understanding of oppression is complete devoid of a comparison with privilege. The concept recognises that the existence of oppression is attributable to privilege and that all human beings are privileged in one way or another. Therefore, an educated, able-bodied black gay man, while oppressed on the grounds of colour and sexual orientation, is privileged on the grounds of education and lack of disability.\(^{27}\)

2. Political Rights and Representation

Women in Pakistan have been granted numerous civil rights and liberties by virtue of the Constitution of Pakistan. These include, amongst others, the freedom of assembly,\(^{28}\) the right to form associations and unions,\(^{29}\) the freedom of speech and expression\(^{30}\) etc., and notably, the right to vote.

\(^{21}\) Imelda Whelehan, Modern Feminist Thought: From the Second Wave to "Post-Feminism" (New York University Press 1995)
\(^{23}\) ibid.
\(^{26}\) ibid.
\(^{27}\) ‘History of the Matrix’ (George Mason University, Women and Gender Studies) <https://wmst.gmu.edu/center/publications> accessed 9 March 2019
\(^{28}\) The Constitution of the Islamic Republic of Pakistan 1973, Article 16
\(^{29}\) The Constitution of the Islamic Republic of Pakistan 1973, Article 17 (1)
Women are also entitled to political representation in Pakistan. The Constitution gives women “the right to form or be a member of a political party”\(^{31}\) and also ensures the membership of women in the National\(^{32}\) and Provincial\(^{33}\) Assemblies by providing for the reservation of a certain number of seats in such Assemblies for women.

However, as we shall see, not all is well when one considers the state of women in Pakistan in light of the advancements sought by first-wave feminists. The very need for reserving seats for women in the Provincial and National Assemblies shows that women in Pakistan do not have equal political representation. As far as the right to vote is concerned, while it has been guaranteed to people of both sexes by virtue of the Constitution, millions of women who would otherwise be eligible to vote are unable to cast votes for lack of Computerised National Identity Card (CNICs). CNICs are a precondition for enrolment in the voters’ list. Accordingly, absence of the same deprives women of their constitutional right to vote in Pakistan. According to statistical data, the gap between male and female registered voters in Pakistan “increased from 10.97 million in March 2013 to 12.17 million in September”\(^{34}\) 2017 and is expected to widen in the future.

Pakistan is a Muslim-majority state. The Constitution provides that Islam is the state religion.\(^{35}\) In Pakistan, religious views that vary across schools of thought become a barrier in the way of certain rights of women. Hence, the empowerment of women in Pakistan necessitates a reinterpretation of the relevant religious teachings.

One of the most important rights for women, which is affected by religious sentiments is the right to work. Islam has laid down the rights and obligations of the husband and the wife. In light of the traditional roles of the husband and wife in Islam, the concept of the reciprocal

\(^{30}\) The Constitution of the Islamic Republic of Pakistan 1973, Article 19
\(^{31}\) The Constitution of the Islamic Republic of Pakistan 1973, Article 17 (2)
\(^{32}\) The Constitution of the Islamic Republic of Pakistan 1973, Article 51 (1)
\(^{33}\) The Constitution of the Islamic Republic of Pakistan 1973, Article 106 (1)
\(^{35}\) The Constitution of the Islamic Republic of Pakistan 1973, Article 2
duties of the provision of maintenance by the husband and the obedience by the wife emerged in Islamic law. The notion of obedience requires the wife not to leave the matrimonial home without the husband’s permission. Therefore, a Muslim wife may be prevented from seeking or continuing her employment by her husband and her failure to comply with his wishes may deprive her of her entitlement to maintenance. Similarly, the husband also has the authority to prevent his wife from continuing her education.

As Islamic law is applicable in Pakistan and the vast majority of Pakistani citizens are subject to Islamic laws, the concept of obedience of wives in Islamic law has adversely affected women’s rights to education and employment. Apart from religious laws and views, cultural values also dictate that a woman should be subservient and obedient to her husband and prioritize her family over her career, thereby impacting women’s prospects of employment and attaining higher education following marriage. Statistics provide that only 32% of women acquire intermediate or higher education. A 2013 Report of the World Bank reveals that women comprise only 28% of the entire workforce in Pakistan.

How can religious and cultural barriers to women’s rights to education and employment be removed? The solution lies in challenging the relevant provisions of Islamic law on the basis that it is opposed to Islamic principles, followed by a change in the law. While Islamic law provides for the corresponding duties of the husband and the wife, there is no authoritative Islamic principle that suggests that these rights are reciprocal and that if the husband or wife refuses to perform his or her duties, the other spouse may not carry out the duty that is required of him/her by Islam.

The husband-wife relationship is only one example of the familial relations governed by Islam. In addition to setting out the rights and duties of the husband and wife, Islam deals with the parent-child relationship, and also elaborates upon the manner in which Muslims are supposed to treat their relatives, the poor, the needy, orphans, widows, travelers etc. In Islam, the father is required to maintain his children, and children are required to obey both

parents and treat them with respect. If a child is disobedient or rebellious, should that be a sufficient ground to relieve the father of his liability to maintain the child? Certainly not. The rights and duties of a husband and wife are not reciprocal, and while a wife’s refusal to perform her duties towards her husband, or her ‘disobedience’, would definitely constitute the breach of a religious obligation, it should not serve as a ground for the denial of her legal right to maintenance. Consequently, the law needs to be amended and clearly provide that a wife’s right to maintenance is not dependent on her duty to obey her husband.

There is also an alternate solution to this issue. The Muslim marriage contract, *nikah*, is a civil contract between the husband and the wife which allows either party to insert whatever conditions or stipulations he/she may wish to add to the marriage contract. In Pakistan, clause 17 of the *Nikahnama* (the written marriage contract) provides the right to add such conditions. Therefore, a wife may stipulate that she cannot be prevented from continuing her education and also that her husband shall be obliged to bear all the expenses of her education. Furthermore, she may insert a condition relating to her right to work in the marriage contract. In such circumstances, the wife would be entitled to continue her education and/or her employment and would not lose her right to maintenance if her husband later objects to the exercise of such rights.

In practice, most people are unaware of their right to add conditions of their choice to the marriage contract and consequently stipulations are hardly ever inserted in the *Nikahnama*. In fact, clause 17 itself is usually struck out by a *maulvi* (a religious personality present at the time of the conclusion of the marriage contract) before either party has had the chance to include any conditions in the marriage contract.\(^{38}\) Therefore, it is necessary to educate the general populace of their right to add such conditions to the marriage contract and to prevent *maulvis* from striking out clause 17, or rather any clause, from the *Nikahnama*.

In order to prevent *maulvis* from doing so, the Parliament may introduce legislation making it illegal for any person other than the contracting parties themselves or their attorneys to

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strike out any stipulations from the *Nikahnama*. Parliament should impose penal sanctions on those who breach the legal provision. Conversely, Parliament may also introduce a new standard *Nikahnama* that compulsorily incorporates the right to education and the right to work for the wife after marriage or legislation curtailing the right of the husband to prevent his wife from studying or working.

As far as birth control is concerned, while women in Pakistan do have the right to use birth control, the use of contraceptives remains low. The Pakistan Demographic and Health Survey (2012-13) provides that over 30% of married women in Pakistan use some sort of contraception and that 26% of such women utilise latest contraceptive methods.\(^{39}\) One factor that prevents women from using contraceptive methods is religious belief. According to the Pakistan Demographic and Health Survey of 1990-91, religion was the reason behind approximately 13% of women and 18% of husbands refusing to use contraception. When questioned about ‘the ideal number of children’, around 60 percent of married men and women replied with “up to God”.\(^{40}\) Therefore, there is a dire need to challenge the association of religious beliefs with the use of birth control in Pakistan and to encourage family planning.

3. **Subordination and Oppression of Women**

Pakistan is a patriarchal society, with men enjoying considerable privilege, power and control as compared to their female counterparts. Providing for the maintenance of the wife and children is considered to be the responsibility of the man of the family, both from a religious and cultural standpoint. As it is the husband/father who has to provide for the family, he has the authority to make decisions concerning the family. The position does not change even where it is the women of the family who are partly, or even entirely, contributing to the expenses of the family. Furthermore, due to the cultural notion of ‘obedience’ of wives, husbands are able to exercise considerable authority over the lives of women.


Women suffer in the public domain too. According to the World Economic Forum’s (WEF’s) Global Gender Gap Report 2016, Pakistan ranked 143rd on both economic participation and opportunity.\(^4\) According to a Report of the International Labour Organization, Pakistan had the lowest percentage of women at middle and senior managerial levels (with only 3% of women being managers by occupation).\(^5\) In a research by McKinsey Global Institute of 18 countries belonging to the Asia-Pacific region, Pakistan stood last, with a score of 0.20 on a scale of 0-1, with 0 standing for gender inequality and 1 for gender parity.\(^6\)

![Figure 1](image.png)

Women in Pakistan are also subjected to gruesome acts of violence and suppression such as domestic violence, sexual abuse (including sexual harassment, rape, marital rape and gang


\(^4\) ibid.
rape), acid attacks, honour killings, child marriages and customs such as *wani* or *swara*\(^{45}\) whereby women are given in marriage as punishment for crimes committed by male members of their families. Forced marriages are not limited to customs like *wani* and *swara* and may include the marrying of a woman to the Holy Quran, giving of a woman in marriage as payment of a debt, forced marriages following abductions, marriage of women to their rapists, forced conversions of Hindu or Christian women followed by a forced marriage or simply compelling women to marry against their wishes.

Furthermore, the perpetrators of these acts are usually men. As far as domestic violence is concerned, although women may also be responsible for domestic violence against other women (for instance, mothers-in-law may be perpetrating violence against their daughters-in-law), domestic violence is an offence usually committed by men. A survey revealed that “the husband, father and brother of the victim are most often the perpetrators of”\(^{46}\) domestic violence. The decisions of *swara* are pronounced by tribal councils called jirgas in order to settle feuds between families. Such jirgas comprise only male members of the village or community.\(^{47}\) Tribal councils are also responsible for pronouncing other anti-women decisions and subjecting them to derogatory and inhuman treatment as punishment for the commission of crimes such as parading women naked around their village or having them gang raped. In this way, women are punished *by men* for crimes committed *by other men*. Women may also be subjected to such cruel treatment as punishment for their own ‘crimes’. For instance, a married woman in Tandlianwala, Faisalabad, was gang raped by members of the village council as punishment for marrying without her father’s consent.\(^{48}\) It is pertinent to note that while Islamic law requires the consent of a woman’s guardian (who is usually the father) in order for her marriage contract to be valid, the consent of the guardian is no longer a legal requirement for the validity of a woman’s marriage in Pakistan.

\(^{47}\) ibid.
Hundreds of women and girls in Pakistan are killed in the name of ‘honour’ on an annual basis. In Pakistan, “women and girls are seen to embody family honour”.\textsuperscript{49} Therefore, a woman seen to be bringing shame to her family, for example by having a premarital affair, is punished brutally. In Pakistan, the number of such decisions being pronounced on an annual basis ranges from approximately 900 to slightly over 1,000. However, these statistics may not be a true reflection of reality as they are based only on the data collected by human rights organisations or by law enforcement agencies or the media\textsuperscript{50} and cannot account for cases that go unreported.

While men may also be victims of honour killings, such atrocities are more often directed towards women. For instance, in 2015, about 1100 women in Pakistan were killed in the name of honour as compared to 88 men.\textsuperscript{51} Furthermore, such killings are usually carried out by male members of the victim’s family, such as brothers, fathers and husbands.\textsuperscript{52} The Annual Report of the Human Rights Commission of Pakistan of 2011 provides that:

“at least 943 women were killed in the name of honour, of which 93 were minors. The purported reasons given for this were illicit relations in 595 cases and the demand to marry of their own choice in 219 cases. The murderers were mostly brothers and husbands, in 180 cases the murderer being a brother and in 226 cases being the husband of the victim…”\textsuperscript{53}

Of all the atrocities that women in Pakistan are subjected to, acid attacks are perhaps the most barbaric. Statistics provide that a minimum of 400 acid throw incidents occur every year in Pakistan, and that 80% of the time, the victims of such attacks are women.\textsuperscript{54} The reasons for such attacks may include women refusing marriage proposals, women ‘accusing’

\textsuperscript{49} Mustafa Qadri, ‘Shocking: Surge of Honor Killings in Pakistan’ (\textit{Amnesty International}) \texttt{<www.amnestyusa.org/shocking-surge-of-honor-killings-in-pakistan/>} accessed 2 March 2019
\textsuperscript{50} ibid.
men for harassment, family disputes,\textsuperscript{55} or any action of a woman that may have “provoked patriarchy”.\textsuperscript{56} Acid attacks are also usually carried out by male relatives of the victim.\textsuperscript{57}

As far as sexual abuse is concerned, statistics provide that 70\% of females in Pakistan experience some form of “physical or sexual violence”\textsuperscript{58} during their lives by sexual partners while “93\% of women experience some form of sexual violence in public places in their lifetime”.\textsuperscript{59} According to Muhammad Ali Bilgrami, the General Manager of Madadgaar National Helpline 1908, of all the cases that were reported through the helpline, “the highest percentage of victims was that of women at 56\%”.\textsuperscript{60} Perpetrators of sexual abuse, too, are usually men.

In Pakistan, the offence of rape has been defined in section 375 of the Pakistan Penal Code (PPC), which has been reproduced below:

\begin{quote}
\texttt{“375. Rape: - A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions: (i) against her will; (ii) without her consent; (iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt; (iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or (v) with or without her consent when she is under sixteen years of age.

\texttt{Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape”}.}\textsuperscript{61}
\end{quote}

\textsuperscript{57} ibid.
\textsuperscript{59} ibid.
\textsuperscript{60} Ibid.
\textsuperscript{61} Pakistan Penal Code (Act XLV of 1860), s 375
Previously, the offence of rape was dealt with under the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, which limited rape to sexual intercourse with a woman or man to whom the accused was not validly married. Therefore, the express exclusion of the words “is not validly married” in the PPC suggests that the provision is not limited to rape outside of wedlock\(^62\) and the law now, in fact, criminalises marital rape. However, there is ambiguity as to the intended scope of the provision as there are no judgments of the higher courts on the matter. Recently, section 377 of the PPC, which deals with “unnatural offences” of a sexual nature, was invoked by a woman claiming marital rape.\(^63\)

While it is true that the laws on rape in Pakistan are flexible enough to include the offence of marital rape, section 375 of the PPC is not common knowledge and most of the population of Pakistan is unaware of the possibility of marital rape being penalised owing to ineffective interpretation of legislation by police officials and the judiciary. Furthermore, previous standards for what constitutes rape may prevent section 375 from being interpreted in a way that includes marital rape.\(^64\)

Notably, almost all kinds of violence against women as well as tribal customs and acts detrimental to women such as forced marriages, honour killings and swara have been criminalised by appropriate legislation in Pakistan. For instance, the Criminal Law (Second Amendment) Act, 2011 criminalises acid attacks while the Criminal Law (Amendment) (Offences in the name or pretext of Honour) Act, 2016 deals with honour killings.\(^65\) However, such legislative provisions do not serve as a deterrent in the vast majority of cases and violence and cruelty against women is widespread.

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\(^{62}\) The Legal Brief, ‘Rape Laws in Pakistan’ (Lawyer Readia, 20 February 2015)

\(^{63}\) ‘Woman files case of ‘marital rape’ against husband’ (The News, 16 September 2018)

\(^{64}\) Hamza Rao, ‘Marital rape: Is it criminalized in Pakistan?’ (Daily Pakistan Global, 31 August 2017)

\(^{65}\) ‘Women’s Rights/Laws’ (The Punjab Commission on the Status of Women)
How can women in Pakistan be liberated from such oppression and how can violence against them be minimised? First of all, we need to recognise the reason behind the law being an ineffective mechanism to prevent cruelty against women. The reason is, undoubtedly, the lack of implementation of the law and improper administration of justice. Therefore, the first remedy to ensure the protection of women in Pakistan is to strengthen the justice system. Local feminist movements also insist upon the proper implementation of laws relating to women’s rights. One such movement is Aurat March. Aurat March was a rally held on International Women’s Day in 2018 and subsequent 2019, in a number of cities across Pakistan in order to demand the protection of various women’s rights.66 Ensuring the implementation of the Protection against Harassment of Women at the Workplace Act 2010 was a part of the manifesto of the Aurat March.67

However, other measures may also be adopted in order to prevent such acts from happening in the first place. Awareness campaigns and a change in societal attitudes and mindsets resulting from the education of children from an early age, both at the home and at school, about gender equality and about respecting the dignity and autonomy of other human beings are all necessary measures that need to be taken in order to ensure a more egalitarian society.

With respect to marital rape, it would seem that merely criminalizing marital rape would not be sufficient. Due to religious and cultural values, a majority of women in Pakistan believe that their consent to the marriage constitutes indefinite consent to sexual intercourse. While it is true that refusal of sexual intercourse by wives without any reasonable justification is chastised in Islam, it does not mean that women are incapable of denying consortium to their husbands and that there can be no concept of marital rape in Islam. Islam itself specifies situations in which sexual relations between a husband and wife are prohibited. For instance, a married couple is forbidden from having sexual intercourse while fasting, during the obligatory pilgrimage to Makkah (Hajj) and when the wife is menstruating. Anal sex is also prohibited by Islam. Furthermore, there are several situations in which refusal of sexual

intercourse may be deemed reasonable by the wife e.g. when she is unwell, has recently delivered a child or is pregnant. Why should forceful sexual intercourse not constitute marital rape in such situations and why, then, is the concept of marital rape considered incompatible with Islamic principles?

Islam requires Muslim men to treat their wives well and several ahadith exist on the matter. While refusing consortium to the husband is an undesirable act in Islam, Muslim women need to be educated about the fact that they are well within their power to do so and that their husbands should not be allowed to inflict harm upon them, whether physical, sexual, or psychological.

4. **Gender Roles and Women’s Unpaid Domestic Labour**

Other second-wave feminists would be concerned with the stereotypical roles of men and women in Pakistani society and how they are detrimental to women. In Pakistan, cultural interpretations of the roles of men and women in society are largely based on their religious roles. Accordingly, men are considered to be the breadwinners of the family while women’s duties are confined to the home. However, the duties of the wife are not limited to those established by religion. Women have to undertake additional responsibilities that are imposed upon them by the society. In Pakistan, the ‘joint family system’ is a common feature of family life. Accordingly, after marriage, a number of Pakistani women are required to live with other members of the husband’s family, such as parents, brothers and their families, even though the concept of a ‘Sharia dwelling’ in Islam requires the husband to provide the wife with an accommodation that is free from other members of his family. According to a survey, 67% of Pakistani citizens preferred the joint family system over the nuclear family system. Furthermore, there was a greater preference for the joint family system among people from rural areas.68

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Therefore, the wife’s duties in a Pakistani household include not only household chores such as sweeping, laundring, dishes etc. and caring for her own children, but also for other relatives of the husband, especially his parents. The workload increases with the number of people in the household. Women are not remunerated for these duties and their labour goes underappreciated and undervalued.

How can the exploitation of women’s labour in Pakistan be reduced or eliminated? In light of the views espoused by Martha Fineman, the solution lies in paying women for the work they do at home and also in creating a culture where men share, or take on equal, responsibility of the household and of the dependents in the family. This would not only prevent exploitation of women’s labour, but also make taking on household responsibilities financially viable for women. According equal recognition to “women’s domestic labour” as all other forms of paid labour was also one of the demands of the Aurat March 2019. In order to empower women in Pakistan, it is necessary to change societal mindsets by challenging the notion that women are entirely responsible for duties concerned with the home and by teaching the youth that household responsibilities are to be shared.

5. INTERSECTIONALITY

Gender is one amongst numerous other factors that can disadvantage women (and individuals in general) in Pakistan. For instance, the socio-economic background or class of a particular individual is a very important contributor to their position in society.

The class of a particular individual can benefit or disadvantage them in many ways. For instance, in Pakistan, the class of an individual impacts their access to education. Children belonging to the lower strata of society are largely deprived of the right to education. At the Oslo Summit on Education and Development 2015, Pakistan was said to be “among the world’s worst performing countries in education”. According to the manifesto of the government that came into power in 2018, approximately 22.5 million children do not attend

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70 “Shall I Feed My Daughter, or Educate Her?” Barriers to Girls’ Education in Pakistan’ (Human Rights Watch, 12 November 2018) <www.hrw.org/report/2018/11/12/shall-i-feed-my-daughter-or-educate-her/barriers-girls-education-pakistan#> accessed 27 February 2019
school. While an alarming number of children, regardless of gender, do not have access to education in Pakistan, it would seem that girls are in a worse position as compared to boys. 32% of girls discontinue education at the primary level in Pakistan as opposed to 21% of boys. 59% of girls stop attending school by grade six as compared to 49% of boys. By grade 9, the number of girls receiving an education amounts to 13%. 71 In the WEF’s Global Gender Gap Report 2016, Pakistan ranked 135th with respect to accessibility of education. 72

Similar to the case of education disparity, though poverty impacts access to health care facilities for both genders, statistics show that women are particularly discriminated against, especially women from the rural areas. According to a report of the World Health Organisation, there are huge health disparities “within and between the provinces along the lines of class, rural-urban divide, gender, caste and religion. With increasing poverty and high unemployment, people’s purchasing power with regards to healthcare is diminishing fast”. 73 The report also revealed that girls are at a greater risk of death in comparison to boys.

According to Dr Farzana Bari, chairperson of the Gender Studies Department Quaid-e-Azam University, the private sector accounts for 70% of health care in Pakistan. 74 However, owing to abject poverty in the country, such facilities can only be accessed by the relatively affluent people in the society and the majority has to rely on public health care facilities which are both inadequate and of a substandard quality.

Moreover, poverty itself impacts women more than it does men. Women constitute 70% of the total population of poor people in the world. 75 According to statistics, most of the people from the total world population of 1.5 billion “living on 1 dollar a day or less” 76 were

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71 ibid.
73 ‘Discrimination: For women in rural areas, healthcare not a basic right’ (The Express Tribune, 7 July 2013) <https://tribune.com.pk/story/573754/discrimination-for-women-in-rural-areas-healthcare-not-a-basic-right/> accessed 6 March 2019
74 ibid.
75 ‘The Feminization of Poverty’ (Mount Holyoke College) <www.mtholyoke.edu/~abbar22/classweb/feminizationofpoverty/> accessed 7 March 2019
women. From the 1990s to the 2000s, the gap between the number of men and women who were affected by poverty continued to increase, thereby giving rise to the concept of “feminization of poverty”.77 Feminization of poverty is the idea that “women experience poverty at rates that are disproportionately high in comparison to men”.78 All over the world, women earn almost half as much as men do.79 When it comes to Pakistan, statistical data has revealed that “three-quarters of Pakistan’s abject absolute poor are women and girls, i.e. for every four Pakistanis in poverty, three are women/girls”.80

Poor women, especially those from urban areas, are also more likely to be affected by the barbaric decisions of tribal councils or jirgas.81 Furthermore, the likelihood of being subjected to bonded labour as well as forced religious conversions also increases with poverty. While abductions and forced conversions impact all minority religious groups in Pakistan, Hindu and Christian females seem to be particularly affected. According to the statistics provided by the Aurat Foundation and the Movement for Solidarity and Peace (MSP), approximately 1000 females are kidnapped, subjected to forced conversions and married off to their abductors each year. Furthermore, according to the volunteer group, Responsible for Equality And Liberty, almost 20-25 Hindu girls are forcibly converted on a monthly basis. Following such conversions, these girls are subjected to sexual abuse, “sold off, become victims of human trafficking or are forced into prostitution”.82

The connection of bonded labour with forced conversions is also apparent. Hindus constitute a major part of Sindh’s bonded labour force. According to statistics, approximately 40,000-50,000 people are involved in bonded labour in Sindh alone while the bonded labour force in Pakistan numbers at around 2 million. Bonded labour renders

77 ibid.
78 ‘The Feminization of Poverty’ (Mount Holyoke College) <www.mtholyoke.edu/~abbat221/classweb/feminizationofpoverty/> accessed 9 March 2019
labourers powerless in relation to their landlords. For instance, Jeevti, a 14-year-old Hindu girl whose parents were involved in bonded labourer, was kidnapped in the middle of the night from her parents’ house by the landlord, forcibly converted, and married to him as his second wife because her parents apparently owed him $1000. Despite the fact that Jeevti’s mother approached the police and the courts, they did not take any action against the landlord.\(^{83}\)

The state of religious minorities in Pakistan is pitiful. People belonging to religious minorities are not only at a greater risk of being trapped in bonded labour, but are generally discriminated against when it comes to employment. Hindus who are not involved in bonded labour “are forced into low-status jobs that many Muslims refuse to take, such as sweeping streets or sewage cleaning”.\(^{84}\) The state itself promotes such intolerance. For instance, Ahmadis were declared to be non-Muslims by the state in 1973 and suffer a strict curtailment of rights even from a minority standpoint (and their status remains the same even today).\(^{85}\)

Women belonging to minority religious groups are subjected to “abductions, rape, forced marriages, forced conversions and allegations of blasphemy”.\(^{86}\) A survey of Hindu and Christian women in Pakistan revealed that over 60% of such women felt that most Muslims would not support them in times of religious hostilities in the country. 32% of the women claimed that they had been the object of hate speech and 27% stated that “they had faced difficult and derogatory questions”.\(^{87}\)

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\(^{83}\) ibid.

\(^{84}\) ibid.


Disability is a further ground for discrimination in Pakistan. People with disabilities, especially women, are “among the most neglected” and marginalised people in Pakistani society. Despite the fact that legislation pertaining to the rights of persons with disabilities exists in Pakistan and certain policies have also been adopted in order to improve their position in society, discrimination against such persons is widespread and the existing legal mechanism is inadequate to ensure proper protection of their rights. Therefore, it is imperative that the Parliament enacts a new statute that comprehensively deals with the rights of persons with disabilities and also includes acid attack victims within the definition of disabled persons, similar to the initiative taken by the Indian Government.

It is clear that women’s lives have an intersectional dimension to them and in order to truly empower women in Pakistan, the state needs to end systematic discrimination on all grounds. Furthermore, awareness and education of the masses is necessary in order to promote tolerance and the principle of equality of citizens.

Currently, religious laws are very difficult to amend in Pakistan because religion has been politicised, is deeply personal and any suggestions for a progressive change in religious laws is seen as an attack on religion. For instance, the Governor of Punjab, Salman Taseer was shot down by his security guard for questioning the blasphemy law in the country. Recently, the country was shut down because of large-scale protests following the Supreme Court’s decision to acquit Asia Bibi, a Christian woman who had been accused of blasphemy. Given this reality, some argue that Pakistan needs to become a secular state and do away with Islamic laws completely as intolerance and discrimination against women and minorities cannot be eliminated until this is done. However, there may be room within

Islamic jurisprudence to accommodate certain changes that both correspond with religious tradition as well as espouses progressive values that secure the advancement of women.

6. **CONCLUSION**

This essay has examined the status of women’s rights in Pakistan with regard to various civil rights and liberties as well as the prevalence of violence aimed at women. In particular, it has been observed that while rights exist on paper, they have not adequately been realised in practice and are not properly enforced. Furthermore, gender roles contribute towards women’s exploitation in Pakistan and various factors form the basis of discrimination against women in Pakistan such as class, creed and disability.

It is clear that a change in the position of women in the Pakistani society requires a range of measures to be taken including legislative enactments, strengthening the judiciary, ensuring proper implementation of laws and a change in societal attitudes with respect to the roles attributed to men and women. Improving the status of women in Pakistan also necessitates moving away from inflexible, rigid and monolithic interpretations of Islam that oppress women towards more modern and ‘rights-friendly’ interpretations by questioning existing understandings of Islamic principles, eliminating all forms of discrimination and intolerance as well as state action in order to eradicate all kinds of factors that may disadvantage certain persons or groups in the society such as poverty, disability etc.
MILITARY COURTS: AN AFFRONT TO HUMAN RIGHTS

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ABSTRACT

The Peshawar School Attack tragedy saw in its wake the establishment of military courts, which allow for the prosecution of civilians accused of terrorism offences. However, what was initially intended to be a short-term solution, four years ago, is still in existence today. Presently, the PTI government is again making efforts to extend the military courts for a period of another two years. This article sheds light upon how these courts deal a severe blow to the integrity of our criminal justice system which also exercises jurisdiction over offences for terrorism. Additionally, concerns have also been raised with regards to Pakistan’s obligations under a multiplicity of International Conventions.

INTRODUCTION

On 16th December 2014, a terrorist attack on the school children of Peshawar shook the nation to its core. It was in the aftermath of this act of horror when the entire nation decided to firmly stand against terrorism. The political and military leadership apparently forged a consensus ‘to come down hard on the terrorists through a concerted national effort.’ It was claimed that Pakistan faces an ‘extraordinary situation’ which poses a ‘grave and unprecedented threat to the integrity of Pakistan and thus special measures were required to deal with it’. 92

This national political consensus was translated into a 20-point National Action Plan (NAP) which was unanimously approved by the Parliament on 24 December 2014. The plan demanded the formation of military courts to deal with terrorism cases, this was regarded as an essential measure to counter terrorism. It also required to lift the ban on death penalty in such cases. Later, in January 2015 the Parliament approved two extraordinary pieces of

legislation, i.e., the Constitution (Twenty-First Amendment) Act, 2015\(^3\) and The Pakistan Army (Amendment) Act, 2015. The aim of these laws was to set up constitutionally protected military courts to try civilian suspects as the amendments allowed military courts to try offences related to “terrorism” committed by those who claim to, or are known to, belong to a terrorist organization “using the name of religion or a sect”. This was widely criticized by human rights activists since the new laws allowed blatant violation of the principles of fair trial and due process owing to the trials not being public, the absence of a right to appeal, and no legal qualifications of judges in the military courts.

Moreover, Pakistan lifted the moratorium on the death penalty on 9\(^{th}\) January 2015, and since then, more than 400 prisoners on death row have been hanged, while around 8000 still await execution. The then Prime Minister Nawaz Sharif called it an important step to keep the masses of the country safe. However, the Human Rights Commission of Pakistan marked this step as an ineffective form of punishing emphasizing that the moratorium on death penalty should be restored.

The new law was termed as a ‘bitter pill’ which was necessary to swallow for the security of the country. The Preambles of both the bills were largely similar citing the “extraordinary situation and circumstances” that demanded “special measures for speedy trial”.\(^4\) Both amendments lapsed on 6 January 2017 pursuant to a “sunset clause”.

1. **Pakistan Army Act, 1952**

Following the amendment in Section 2 of the Pakistan Army Act, 1952, military courts were given the authority to try persons who claim to, or are known to belong to “any terrorist group or organization using the name of religion or a sect”\(^5\) and carrying out acts of violence. The rules of evidence in the Pakistan Army Act are the same as those observed by the civilian courts.\(^6\) However, the amendments to the Act allows the Federal Government to transfer proceedings pending in any other court against any person accused under scheduled offences to military courts. It is important to note that once a case has been

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\(^3\) Constitution (Twenty-first Amendment) Act, 2015.  
\(^5\) Section 2(d)(iii) of the Pakistan Army Act, 1952  
\(^6\) Section 112 of the Pakistan Army Act, 1952
transferred, there is no requirement for a re-appraisal of evidence and verdicts can be based on previous evidence and recorded statements.

The Act now also does not require the proceedings to be in public and there is no requirement to disclose the identity of the accused. Furthermore, an accused person may be tried and punished for offences under the Act in any place whatsoever. 97

2. THE 2017 EXTENSION: MOCKERY OF THE CRIMINAL JUSTICE SYSTEM

The renewal of military trials for civilians accused of terrorism has only weakened the rule of law, and undermined the right to fair trial and equality before the law in Pakistan 98

Despite earlier promises that the use of military courts to try civilians was only a “temporary” and “exceptional” measure, after the expiration of the 21st Amendment, the Parliament enacted additional amendments in the law to renew military courts’ jurisdiction over civilians. On 30 March 2017, Parliament passed the 23rd constitutional amendment and amendments to the Army Act, 1952, with retrospective effect from 7 January 2017 (when the previous Amendments to the law had lapsed). 99 The 23rd Amendment provides, amongst other things, that for offences related to terrorism committed by those who claim to, or are known to, belong to “any terrorist group or organization misusing the name of religion or a sect”, the Article 175 of the Constitution of Pakistan will not be applicable. 100 These amendments were enacted for a two-year period from the day of their commencement, and were due to expire on 30 March 2019. The preambles of the amendments included that military courts “have yielded positive results in combating terrorism” and that it was in “national interest” to extend them for an additional term.

Many opposition leaders resisted the bill as they believed that supremacy of Parliament and democracy should not be compromised by bringing any such amendments. Whilst those in support believed that the extension is imperative to combat terrorism and consequently for

97 Section 93 of the Pakistan Army Act, 1952
100 Constitution (Twenty-third Amendment) Act, 2017.
the survival of the country. The agreement as to the amendment was also based on the consensus that judicial reforms will be ensured in the two-year extension period.\(^{101}\)

However, even today in 2019, there is no indication of any such reform and ordinary criminal justice is still compromised and incapacitated to deal with terrorism cases in an efficient manner.

3. **The Secrecy Surrounding Military Courts**

During the 2015-2017 term for military courts, it has been reported via Pakistan’s military that around 274 people were convicted for terrorism related offences and almost 161 were sentenced to death. For 110 cases the military did not disclose any information related to their trials. Even the names of the convicts were not revealed. And when the military did choose to release the information on the convicts, it was ascertained that 94.6% of the convicts were sentenced on the basis of their confessions.\(^{102}\)

It was alleged by the family members and lawyers of many accused that they were coerced into confessing crimes and no rights were given to them. Many such appeals were lodged in civilian courts claiming that the convicts in military courts were denied the right to fair trial.

"Not only were the trials held in secret, also judgments with exact charges, reasoning and evidence have not been disclosed", said Reema Omer, international legal adviser for the International Commission of Jurists.\(^{103}\)

She also asserted that the high confessional rate in military courts is worrisome alleging that in regular murder cases the convictions on the basis of confessions is not even 5 percent (in Pakistan), while in these special courts 95 percent of convicts have confessed to their crimes before military courts. This raises grave concerns about torture and other ill-treatment.

\(^{101}\) 'Senate Approves Two-Year Extension To Military Courts' (Samaa News 2017).

\(^{102}\) Asad Hashim, 'Pakistan To Renew Military Courts For 'Terror' Suspects' (Aljazeera 2017).

\(^{103}\) Asad Hashim, 'Pakistan To Renew Military Courts For 'Terror' Suspects' (Aljazeera 2017).
Moreover, data reveals that the accused persons of those convicted by Pakistan's military were imprisoned under a 2011 Pakistani law. This law allows indefinite detention without charge in terrorism-related cases, and had, in some cases, been held in custody without trial for as long as six years, the data reveals.\textsuperscript{104}

4. A MILITARY SOLUTION TO TERRORISM

It is of no doubt that the establishment of military courts in Pakistan sidelines the country’s already ailing civilian courts. The 21\textsuperscript{st} Amendment to the Constitution of Pakistan was not the first time the country has authorized military courts in Pakistan. On October 17, 1979 not long after General Zia ul Haq took over the country in a military coup, military courts were established. These were closed courts and none of its decisions could be challenged in civilian courts. Around one hundred courts were established at that time.\textsuperscript{105} The law back then, authorized the military tribunals to make arrest of various political workers and journalists.

The situation now in Pakistan is very different from that time but it is incontestable that turning over the adjudication of terror cases from ordinary civilian courts to military courts considerably damages and undermines our civilian judiciary.

These special courts have the prerogative to try civilians in secrecy without any accountability which allows the military to pursue their own vendettas. The confidentiality of the cases permits the military tribunals to practice contravening legal principles without adhering to the principles of justice and fair trial. Since the military courts do not work under any coherent legal precedent, little or no information exists as to the basis of convictions and acquittals. This creates doubt in the minds of the public as to any conviction that is produced under these courts therefore it is suggested that the evidence is made public to eradicate any ambiguity and speculation as to the convictions.

\textsuperscript{104} Ibid
\textsuperscript{105} Rafia Zakaria, 'Military Courts And Terrorists Heroes' (Aljazeera 2014).
It is also worth discussing that Pakistan needed a military solution because of its lack of faith in civilian justice system. The ordinary courts have a low conviction rate specially with regards to terrorism cases. One of its major reason is that the safety of adjudicators, witnesses and all other involved parties is at stake in any such case. To circumvent this, enough protection should be provided to these parties if a just outcome is required in the civilian courts. Like the Pakistan Army, civilian security outfits should also be capacitated to protect the parties in terror cases.106

5. CHALLENGING THE DECISIONS OF MILITARY COURTS

The decisions of the military courts cannot be appealed in the ordinary justice system. Nonetheless, the petitioners can initiate the writ jurisdiction of the High Court and Supreme Court. The right to review is available on grounds of coram non judice, mala fide and without jurisdiction. In the Supreme Court 2016 judgment the right to interfere was narrowly interpreted.107 Nonetheless, the Courts chose to act more responsibly in the Peshawar High Court 2018 judgment and iterated that the operation of military courts violated human rights in various cases of terrorism.

5.1 Supreme Court 2016108

In 2016, the Supreme Court heard 16 petitions from relatives of the people challenging the conviction and death sentence given to the accused persons. It was contented that the procedures adopted and followed during the proceedings infringed the right to fair trial and due process. It was alleged that the victims of the disappearance had been subjected to secret trials and that no pre-trial proceedings were conducted, no proper evidence was produced, the lawyers further contended that their clients were tried in secret, without access to legal counsel of their choice and the confessions were obtained illegally through coercion. They also claimed that they were denied access to military court records that were of utmost

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106 Ibid
107 Said Zaman Khan v. Federation of Pakistan and others
108 Said Zaman Khan v. Federation of Pakistan and others
importance for the appeal.\textsuperscript{109} Also, it was contended that at least two cases involved juveniles and therefore could not be tried by the Field General Court Martial (FGCM).

The Supreme Court in its judgment dismissed all the petitions without considering any allegation in detail. Azmat Saeed, J in his judgment held that while the right to appeal on the grounds of mala fide, coram non judice and without jurisdiction was available to the petitioners, the grounds were to be given a strict interpretation. He held that the nature of the offence was exactly the mischief sought to be suppressed by the law and the trial reflected the due fulfillment of the mandate and the purpose of the law. He also clarified that neither the High Court nor the Supreme Court could sit in appeal over the findings of the FGCM or undertake an exercise of analyzing the evidence produced before it or dwell into the merits of the case. Most of the arguments were overthrown on the ground that the amendments to the law regarding the operation of the military courts could not be questioned on the basis of fundamental rights.

It was ruled by the Supreme Court that the military did not violate any rights whatsoever. The Supreme Court held that there was no evidence of bad faith or abuse of process. The courts chose to turn a blind eye towards the blatant violations of human rights by the military tribunals and this increased the fear of international jurists and human rights group regarding the working of military courts.

5.2 Peshawar High Court 2018\textsuperscript{110}

The Peshawar High Court (PHC) on 18\textsuperscript{th} October 2018 set aside the punishments awarded to 74 convicts by military courts in various cases of terrorism. The judgment favored those who advocated against the practice of military courts as it confirms the violation of human rights in the military tribunals. The judgment highlighted a series of abuse of human rights including:

\textsuperscript{109} Asad Hashim, 'Pakistan Supreme Court Dismisses Civilian Appeals Against Military Convictions' (Reuters 2016).
\textsuperscript{110} Peshawar High Court, Writ Petition 536-P of 2018, 18 October 2018
i. The record produced by the Field General Court Martial/Military Personnel & Deputy Attorney General & AAG did not contain (erased from record) all dates, names of prosecution’s witnesses, their designations, amongst other significant details.

ii. Proceedings were solely based on confessional statements. A judicial magistrate was not present on the record presented. A list was provided listing the Judicial Magistrates in a sealed envelope, but was not allowed to be published/placed on the record. The protocol of mandatory precautions was also not observed. And therefore, it was decided that the statements cannot be relied upon.

iii. All the confessional statements were identical in all cases, i.e., all the judicial confessional statements were recorded in Urdu in the same handwriting and in one specific tone/style. Moreover, there were no eyewitnesses to these confessional statements and facts indicate that they were obtained in isolation where the accused persons had no contact with their lawyers/families. In aggregate, these flaws have led the Court to believe that the confessions are largely fabricated, and if not, they were obtained under duress and through coercive means. Reliance is placed on 1982 SCMR 321 (State v. Asfandyar Wali and 2 others), 2017 SCMR 670 (Muhammad Pervez and others v. the State and others), 2017 SCMR 713 (Muhammad Ismail v. The State), and 2016 SCMR 274 (Azeem Khan v. Mujahid Khan), whereby confessions obtained in such a manner would have no evidentiary value.

iv. The credibility of the defence counsel was questioned. The Army Act allows the accused persons to have a private civilian lawyer but surprisingly all the accused persons in the military courts had one lawyer claiming that the parties have consented to be represented by the same defence. It was quite apparent that this was not true and consequently it was regarded as a violation of the right to fair trial by the courts as the accused were denied to engage with their choice of defence counsel.

v. The courts also highlighted the link between enforced disappearances and military courts proceedings. Emphasis was drawn upon the fact that the state agencies denied any knowledge of the whereabouts of missing persons until their names were released in a press statement (listing the names of people convicted and sentenced to death by military courts).

vi. Moreover, the Peshawar High Court, through a reading of 2017 SCMR 1249 (Said Zaman Khan and others v. Federation of Pakistan) listed 4 grounds through which it
could be capable of assuming jurisdiction of cases emanating from FGCM Courts. They are as follows:

- No evidence,
- Insufficient evidence,
- Absence of jurisdiction,
- Malice of facts & law.

After considering all the aforementioned facts and upon assuming jurisdiction on the four grounds listed in the case of Said Zaman Khan and others v. Federation of Pakistan, the Court was free to dilate upon Article 10A of the Constitution, which allows it to adjudge upon the compatibility of the procedural irregularities in FGCM proceedings with the fundamental right to a fair trial.

Therefore, it was iterated in the judgment that the military courts have grossly violated human rights and therefore the above-mentioned findings led the Peshawar High Court to conclude that the cases brought forward were cases of “no evidence” and were based on “malice of facts and law.” Thus, the judgements were set aside and the respondents were directed to set free all the accused, convicted through the Military Courts.

Following this judgment, the Government (appeal filed by the Ministry of Defence) challenged the decision before the Supreme Court. The Supreme Court has granted an interim stay on the release of the alleged terrorists until a written order is issued after hearing the appeals.

6. **CONTINUING BREACH OF INTERNATIONAL HUMAN RIGHTS**

_Military trials of civilians have been a disaster for human rights in Pakistan, Frederick Rawski, ICJ’s Asia Director*

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111 Right to fair trial: For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.

112 Peshawar High Court, Writ Petition 536-P of 2018, 18 October 2018 (p.173.)

It is of no doubt that the trial of civilians by military courts is an insult to human rights and international law. Establishment of military courts have been widely criticized for the right reasons. The International Commission of Jurists (ICJ) said that the military courts system is a “glaring surrender” of fundamental human rights in Pakistan.

The right to due process and fair trial is potent in international as well as domestic law and has been thoroughly protected via several regulations. However, the implementation of the said right is a battle that Pakistan is constantly losing, especially with the establishment of military courts. The military courts have been neglecting the principles of fair trial and due process for 4 years now.

There are several international laws that protect right to due process and fair trial.\textsuperscript{114} Article 14 of the International Covenant on Civil and Political Rights (ICCPR), to which Pakistan is a party to, states that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. The UN Human Rights Committee (a body to monitor the implementation of ICCPR) clarified that the right to a fair trial before an independent and impartial court under Article 14 of the ICCPR applies to all courts, whether ordinary or specialized, civilian or military. Moreover, the covenant states that the authorities must assume a party innocent unless proven guilty.\textsuperscript{115}

Article 14 of the Convention Against Torture (CAT) grants compensation to the victim of torture and an enforceable right to fair trial. No such compensation is due if the verdict is overturned on appeal. The victim also has the right to complain to Courts and NGO’s and to select a counsel and a doctor of their choice.\textsuperscript{116} Yet as mentioned above, the victims were regularly denied any such rights.

\textsuperscript{114} Article 8, 10 and 11 of UDHR, Article 14 and 15 of ICCPR, Article 13 and 14 of CAT, Article 40 of CRC, Article 6 of CERD, Article 13 of CRPD.

\textsuperscript{115} Communication No. 770/1997, Mr. Dimitry L. Gridin v. Russian Federation, CCPR/C/69/D/770/199, paras. 3.5 and 8.3.

\textsuperscript{116} UN Committee Against Torture (CAT), Report of the UN Committee against Torture: Twenty-fifth Session (13-24 November 2000) and Twenty-sixth Session (30 April-18 May 2001), 26 October 2001, A/56/44; UN Committee Against Torture (CAT), UN Committee Against Torture: Conclusions and Recommendations of the Committee against Torture, Bosnia and Herzegovina, 15 December 2005, CAT/C/BIH/CO/1.
The Convention on the Rights of the Child (CRC) protects the rights of the children. Article 40 of the Convention requires the Government to set a minimum age below which children cannot be held criminally responsible and to provide minimum guarantees for the fairness and quick resolution of judicial or alternative proceedings. General Comment No. 10 on the Convention on the Rights of the Child also recognizes that social workers may also be appointed with lawyers whilst dealing with juveniles. However, this is an ambitious article when it comes to military courts considering the courts record of dealing with the accused persons.

The ICJ cited serious fair trials violations in the operation of military courts, including: denial of the right to counsel of choice; failure to disclose the charges against the accused; denial of a public hearing; a very high number of convictions based on “confessions” without adequate safeguards against torture and ill treatment. Such a high confession rate has raised concerns that torture or other ill treatment has been used to coerce confessions, in blatant violation of Article 7 of the ICCPR. Facts reveal that the secret hearings are not even disclosed to the accused’s legal counsel. Individuals were unable to retain counsel of their own choosing, and family members were not granted visitation to the accused. This is again a violation of Article 14 of the ICCPR.

As evident, there is an entire framework that protects the right to fair trial but none of these obligations compel the military courts to stop causing destruction to the accused persons. It has been reported by local media that there are 11 military courts operating in the country. Two of these are located in Sindh, three in Khyber Pakhtunkhwa, three in Punjab and one in Balochistan, but very little information is available regarding the operation of these special courts. Most of the information available to the public of these trials is via the Inter Services Public Relations (ISPR) website. This usually includes ambiguous references and does not specify the nature of the crime committed by the alleged convicts. Till date there is ambiguity

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119 Article 7, International Covenant on Civil and Political Rights
120 Article 14, International Covenant on Civil and Political Rights
121 'More Than 180 Convicts Sentenced To Death By Military Tribunals In Pakistan Since 2015' (Pakistan Today 2018).
surrounding the working of the military courts. Therefore, it is essential for Parliament to question the Army regarding these proceedings to clear the air regarding the legality, procedures and fairness of these courts.

According to International Commission of Jurists (ICJ) data, the military courts have dealt with 717 cases out of which 641 have been decided. The fate of the remaining unsolved cases depends on the future of the military courts. Out of the decided 641 cases, death penalty has been awarded to 345 convicts while 296 have been given prison sentences. It was reported in the same article that from 2014 to 2018, terrorists from Tehrik-e-Taliban, Toheedwal Jihad Group, Sepah-e-Sahaba, Jaish-e-Muhammad, Al-Qaeda, Lashkar-e-Jhangvi, Harkat Ul Jehad-e-Islami and from other proscribed organizations were awarded death penalty by the military courts.

7. **DEMILITARIZATION OF JUSTICE**

The 23rd Amendment and the amendments to the Army Act, 1952, lapsed on 30 March 2019. The Government has once again proposed to extend the term for military courts for another two years. However, this decision is not getting consensus among the parliamentary parties and there is no sign of extension, *as of yet*. The misery of this situation is that despite several criticisms the Government till date is focusing on the extension of the military courts instead of enhancing the capacity of our criminal justice system. The military courts were a need of an “emergency situation” that has now turned into a general practice. Military courts must not be considered a permanent answer to terrorism and any further extension to these special courts should be seen as the abortion of the ordinary criminal system.

**CONCLUDING REMARKS**

Pakistan continues to be on a war with terrorism. Military courts were established to offer speedy justice but it was not anticipated that this justice will be provided at the cost of basic

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124 (Pakistan: as military courts lapse, Government must prioritize reform of the criminal justice system, 2019)
principles of fairness. The special courts create a parallel judicial system which not only goes against Pakistan’s constitution but also against the norms of democracy and human rights. It was advocated that military courts cannot be the bastions of justice as they fail to provide even bare-minimum of what is expected from a democratic state.

The operation of military courts has had serious implications for human rights of accused persons facing military trials. Military courts lack basic fair trial and due process guarantees required by Pakistan’s international human rights obligations. Therefore, in order to align our domestic law with our international obligations, military courts for civilians should be abolished completely and as mentioned above, any extension to these courts will be an announcement of failure of Pakistan’s justice system globally.

To counter the problems legislative changes should be introduced to strengthen the civilian justice system. Talking about the need for reforms in the criminal justice system, Ms Omar said,

[The] criminal justice system would require substantial reform of a number of institutions - which have historically been resistant to change - including the prosecution, the police and the judiciary, each of which has its own set of complications. Furthermore, there is also a need to revise and update the legislation related to criminal justice - both substantive and procedural, as well as legal aid provisions.\(^{125}\)

The ICJ in the 2019 Briefing Paper on “Military Injustice in Pakistan”,\(^{126}\) examined the performance of Pakistan’s military justice system for terrorism-related offences since the 21st and later the 23rd amendments came into force. It explained how the trial of civilians in military courts violates Pakistan's obligation under international law. The paper proposes that the people charged with criminal offences should be tried by independent and impartial courts in proceedings that comply with international fair trial standards. The Government should strengthen the ability of the criminal justice system to ensure that the trials are

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126 'Military Injustice In Pakistan' (International Commission of Jurists 2019).
effective as well as in line with the national and international obligations. It was rightly said that the;

_The continuing operation of military courts to try terrorism-related offences does not help counter the very real terrorist threat facing Pakistan, but it has and will further continue to erode the effectiveness of the country’s administration of justice and the rule of law._ 127

The 2018 Peshawar High Court judgment was a step forward to realize the destruction that the special courts have been causing. In the 2016 Supreme Court judgment the Court had a chance to reverse the militarization of justice in progress under the guise of combatting terrorism and to reinforce independence of the judiciary in the country. However, this opportunity was missed but then in 2018 the appeals with similar facts were upheld. Although the Government has challenged this decision, nevertheless it can be seen as a silver lining.

Pakistan is under a duty to protect its citizens from terrorist attacks and also to protect the fundamental rights of its citizens. It is undesirable to combat terrorism on the expense of the rights of the citizens. To effectively fight terrorism in the long run, the procedural requirements should be lawful and legitimate. History shows that departure from ordinary legal procedures in fighting any national crisis is never an appropriate and long-lasting solution. Thereby, Pakistan should bring the perpetrators to justice in a legitimize manner and must not sacrifice the principles of the rule of law under the label of ‘secret proceedings’.

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127 Ibid
THE IMPACT OF DEVOLUTION ON LEGISLATIVE REFORM RELATING TO LAW AND ORDER IN PAKISTAN

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ABSTRACT

In April 2010, the 18th Amendment to the Constitution of Pakistan was passed whereby the Concurrent Legislative List was abolished and with a few additions to the Federal Legislative List, all remaining areas were devolved to the Provinces. This paper looks at the impact of the devolution of powers with regards to legislative reform for law and order in Pakistan. In doing so, it highlights the background to the 18th Amendment especially in terms of Pakistan’s commitment towards the law and order situation, the constitutional framework that underpins the 18th Amendment and also the different judicial mechanisms available to reconcile Federal and Provincial legislation relating to law and order.

BACKGROUND

In April 2010, the Parliament passed the 18th Amendment to the Constitution of Pakistan. This amendment made wide-ranging changes to approximately 36 percent of Pakistan’s Constitution, by amending 102 of its total 280 Articles. The Amendment came about in the context of a unified drive by political parties in Pakistan to reverse the constitutional changes made by military dictators in the past and institute civilian-led constitutional reforms.

128 “Analysis: Five Years of the 18th Constitutional Amendment: Federalist Imperatives on Public Policy and Planning” UNDP
Ultimately, the Eighteenth Amendment Bill was unanimously approved by Parliament with 292 votes in favour (and none against) in the National Assembly and 90 votes in favour (and none against) in the Senate. The political maturity displayed by all political parties during this process represented a historic moment in Pakistan’s troubled democratic and constitutional history.

The principal impact of the 18th Amendment has been the institution of a paradigm shift in the structural contours of the State of Pakistan from a heavily centralized to a predominantly decentralized federation. The legislative intent was to restore Pakistan’s constitution to its original intent of a decentralized federation of provinces and reverse the consolidation of powers at the Centre after years of military and autocratic rule.

INTRODUCTION

The 18th Amendment constituted a dramatic shift in the alignment of the State, creating considerable confusion regarding the legislative competencies of the Provinces. Nevertheless, the 18th Amendment is a revolutionary instrument as it disposed of the Concurrent Legislative List altogether and reduced some of the competences in the Federal Legislative List by devolving them to the Provinces. Only the Federal Legislative List remained as the exclusive competence of the National Assembly, all other legislative subjects fell within the residual category. However, despite the abolition of the Concurrent Legislative List, the 18th Amendment did create an exceptional category wherein the old category of concurrent legislative powers would remain, namely, criminal law, criminal procedure and evidence.

In order to fully comprehend the impact of the 18th Amendment to the Constitution, it is important to start by analyzing the law and order situation in the country, especially when

129 ibid (n1) UNDP
131 Constitution of Pakistan, 1973, Article. 142 (b): 'Majlis-e-Shoora (Parliament) and a Provincial Assembly shall have power to make laws with respect to criminal law, criminal procedure and evidence.'
faced with a volatile security situation and the redistribution of powers between the Federation and the Provinces. This has been a problematic area as there have been a number of provincial laws which have been declared void as a result of confusion regarding their legislative competence. However, there is a wide range of case law that has produced useful judicial pronouncements and interpretations when determining the validity of a provincial law. This analysis will be followed by recommendations that can serve as a guide to counter the challenges that have arisen from the 18th Amendment.

1. **Law and Order Situation at the Time of the 18th Amendment**

The 18th Amendment came into force in July 2011 and represented a remarkably short implementation period for an instrument designed to make broad, sweeping changes to the Constitution and governance structures in Pakistan. Interestingly, this period coincided with the largest spike in terrorism incidents in Pakistan’s history.

Between the years 2009-2011, there was a total 25442 fatalities including both civilian and terrorist casualties. Although the total rate of fatalities progressively decreased, the number of civilian casualties in 2011 was higher as compared to previous years. Given the state of the country, the 18th Amendment came at a time when law and order was faltering.

During this time, the terrorist conviction rate was dismally low and the State was failing to successfully prosecute terrorists apprehended by military operations. Between the years of 2008-2014, out of a total 7565 alleged terrorists, around 72.4% were acquitted by the Anti-Terrorism Courts.132

The situation in Karachi was particularly critical during this time. As a result, in 2011 the Supreme Court of Pakistan took a Suo Moto notice of the law and order situation of the city. The landmark judgment of *Watan Party v. Federation of Pakistan* exposed the failure of the provincial government to deal with the multifaceted nature of violence within the city and

<http://www.satp.org/satporgtp/countries/pakistan/database/casualties.htm>
the confusion between the federal and provincial government on how to tackle the problem.\textsuperscript{133}

According to the Supreme Court, there was 'substantial evidence that Karachi has reached the verge of destruction posing a threat to the very stability of Pakistan'.\textsuperscript{134} It was argued that no amount of kinetic measures, through Rangers or the Army, could provide a long-term solution to a problem inherent in the political processes of the country.\textsuperscript{135} The only possible solution was through the advancement of the criminal justice system with better equipped prosecutors and improved forensic techniques. The Court further held that although the executive was primarily charged with the duty to control law and order and to implement fundamental rights within the province, the federation was also responsible to protect every province from both internal disturbances and external aggressions.\textsuperscript{136} Thus, the court impressed upon the need for consistency between the provincial and federal government.

The law and order conditions prevalent in Balochistan during this period also hit a new low and resulted in the President of the Balochistan High Court Bar Association filing a Constitutional Petition in the Supreme Court of Pakistan which sought to enforce the fundamental rights of the citizens of the province. The capacity constraints of the Provincial government and lack of coordination with the Federal government was in full display during court proceedings and resulted in a scathing judgment where the Supreme Court went as far as to say that the Provincial government had lost its constitutional authority to govern the Province because of violation of fundamental rights of the people of Pakistan.\textsuperscript{137} The Court clarified that it was the joint responsibility of both the federal and provincial government to ensure the protection of fundamental rights within the province.\textsuperscript{138}

\textsuperscript{133} Watan Party and another v. Federation of Pakistan and others, PLD 2011 SC 997
\textsuperscript{134} ibid
\textsuperscript{135} ibid
\textsuperscript{136} ibid
\textsuperscript{137} President Balochistan High Court Bar Association v. Federation of Pakistan, 2012 SCMR 1958
\textsuperscript{138} President Balochistan High Court Bar Association v. Federation of Pakistan, 2012 SCMR 1958 at para 49
In light of such rulings and given the general atmosphere prevalent within the country, drastic constitutional measures were employed to tackle the law and order situation. This included the imposition of Governor rule in the provinces, imposition of emergency or requisitioning the armed forces to act in aid of civil power.\textsuperscript{139}

2. \textbf{SHORT TERM COUNTER TERRORISM STRATEGY}

In 2013, the Pakistan Muslim League-N (PML-N) came to power with a sizable majority in the National Assembly. With the intent to appear tough on counter-terrorism and law and order, the federal government enacted the Protection of Pakistan Act, 2014. Although hailed as a cure-all for the security situation, the Act was fraught with legal defects and administrative failures of the Special Courts established under the Act. By the time the sunset clause of the Act came into effect, the Special Courts under the PPA had not decided a single case.\textsuperscript{140}

On the other hand, during 2013-2014, there was a divergence of opinion on the option of dialogue with the militants attacking the State. The Khyber Pakhtunkhwa government believed that the deteriorating law and order situation could only be remedied if the federal government distanced itself from the US-led war on terror and therefore pushed for a negotiated settlement with the Taliban.\textsuperscript{141}

In light of the above, it is safe to state that during 2009-2014, Pakistan’s response to the deteriorating law and order situation can only be described as a general lack of direction and ineffective policy response.

3. \textbf{THE STATE’S RENEWED RESOLVE TO FIGHT TERRORISM}

\textsuperscript{140} ibid
In 2014, Pakistan suffered two devastating terror attacks one on the Jinnah International Airport, Karachi,\(^ {142}\) the other on the Army Public School, Peshawar.\(^ {143}\) As a result, Pakistan initiated two major military operations against militants in the country and also, with joint consensus of all political parties, devised the National Action Plan.

Operation Zarb-e-Azb was launched with the aim of flushing out all local and foreign militants in North Waziristan. This resulted in a significant improvement in the overall security situation, with terror attacks dropping to a six year low since 2008.\(^ {144}\) In 2017, the country faced a resurgence of deadly terrorist attacks.\(^ {145}\) Hence, Zarb-e-Azb was followed by a country-wide operation code-named Radd-ul-Fasaad. The need for military operations proved that institutional measures had failed to tackle extremism in Pakistan. Moreover, despite the acclaimed success of operation Radd-ul-Fassad, critics claim that Operation Zarb-e-Azb did not manage to ‘break the back of terrorism in Pakistan, as was intended by the Army’.\(^ {146}\)

The National Action Plan, devised pursuant to the attack on Army Public School, Peshawar contained twenty points requiring extensive actions and intricate coordination between the Federation and Provinces. Point 20 of NAP called for revamping and reforming the criminal justice system. The low conviction rates of suspected terrorists was evidence of the weak anti-terrorism framework of the State. The investigative and prosecutorial failures by the law enforcement agencies and lack of inter-agency coordination resulted in weak preparation of cases. Therefore, institutional police and judiciary reforms are absolutely necessary for translating military gains into courtroom successes against militants.


\(^ {144}\) Army Chief inaugurates Wana Cadet College' The Nation (17 September 2015) http://nation.com.pk/17-Sep-2015/army-chiefinaugurates-wana-cadet-college-


\(^ {146}\) Nazir Ahmad Mir, ‘Operation Radd-ul-Fasaad : Timely, but Unlikely to Succeed' ( I D S A , M a r c h 2 0 1 7 )

https://idsa.in/idsacomments/operation-radd-ul-fasaad_namir_170317
4. **Need for Reform in Criminal Law and Procedure**

The main legal tool for countering terrorism in Pakistan is the Anti-Terrorism Act (ATA) 1997. The Act established special Anti-Terrorism Courts (ATCs) which were delegated the task of dealing with terrorism cases, avoiding inevitable delays in ordinary criminal courts. However, the operation of the ATCs has been criticized for two primary reasons. First, due to its high acquittal rate and second due to case overload and slower disposal. The latter corresponding with the broad definition of terrorism that encompasses a variety of criminal offences.

Another problem with the approach towards fighting terrorism is the lack of modern legislation. The laws applicable to terrorism cases are the 1898 Criminal Procedure Code (Cr.P.C)\(^{147}\) the 1984 law of evidence\(^{148}\) and the general penal laws. These laws can only be described as archaic and fail to reflect modern realities of terrorism. Moreover, the police are dedicated adherents of the Cr.P.C and overlook the procedures prescribed under the ATA. Additionally, there is no concerted effort to devise laws and policies to de-radicalize extremism. Events following the APS attack highlighted the failure of the criminal justice system. Consequently, the government enacted the 21st Amendment which established military courts to try certain hard-core terror suspects.

It was envisaged that wide-ranging and comprehensive reforms would take place in the criminal justice system pursuant to Point 20 of NAP, resulting in effective civilian led response to terrorism in the country. Unfortunately, no meaningful measures have been adopted at the federal or provincial level. As a result, military courts were further extended for a two-year period. Although military courts were set to expire in January 2019, the current government plans to further extend its operation. Failure to implement Point 20 reflects the overall failure in the implementation of the NAP as 12 out of the 20 points have a clear nexus with criminal justice requiring effective and well-functioning institutions for their execution.

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\(^{147}\) Code of Criminal Procedure, 1898, Act V of 1898

\(^{148}\) Qanun e Shahadat Order, 1984, Act X of 1984
5. **Policy Implementation and the 18th Amendment**

Following the 18th Amendment, Article 142 of the Constitution provided both Parliament and Provincial Assemblies with the power to make laws concerning criminal law, criminal procedure and evidence. The Provincial Assembly does not have the exclusive power to legislate over issues of law and order and in case of conflict; the federal law will take precedence.

This has caused considerable confusion regarding law making at the provincial level, especially in relation to police, counter-terrorism, probation parole, sentencing, preventive detention, countering violent extremism etc. The area of Police Reforms has been particularly delayed as Provinces are unsure whether they had the competence to legislate. In the area of probation and parole, the Provinces have the exclusive control over the Reclamation and Probation Departments, but have failed to amend the Federal Probation of Offenders Ordinance 1960 which establishes these departments. Similar problems are faced by the Provincial Counter-Terrorism Departments which are governed by the Federal Anti-Terrorism Act 1997. Although provinces have attempted to push the boundaries of the constitutional provisions, given the inherent uncertainties in the area, reforms remain far off.

The area of law and order is extensive, impacting a range of areas where the provinces exercise executive control. Therefore, executive functions with the corresponding legislative competency to enact reformative laws to improve the functioning of the executive are crucial. Although the past few years have seen a decline in terrorist incidents, this is primarily due to military operations conducted throughout the country. The legal tools implemented to reduce terrorist activity have largely failed to effectively prosecute suspected terrorists. Therefore, it is no surprise that there is fear of resurgence of violence once military actions subsides. Comprehensive reforms of the criminal justice system, criminal law and procedure are necessary for the effective implementation of the National Action Plan.
6. **Applicable Constitutional Framework**

The 18th Amendment made considerable changes to the structure of the Constitution. It abolished the Concurrent Legislative List which gave simultaneous legislative authority to the Federation and the Province. Instead, a few additions were made to the Federal Legislative List and the remaining areas constitute residuary subjects; a Provincial domain. ¹⁴⁹ However, despite the abolition of the Concurrent List, under Article 270AA, laws made prior to the 18th Amendment remain in force until expressly amended or repealed. ¹⁵⁰ Moreover, according to Article 142(b), power to makes laws pertaining to criminal law, procedure and evidence is retained by the Parliament and the Provincial Assemblies concurrently. Furthermore, under Article 143, where laws have been enacted by both the Federation and Provinces, the federal law will prevail in case of a discrepancy. ¹⁵¹

The areas of criminal law, procedure and evidence require uniformity due to their impact on the fundamental rights of citizens. A non-uniform approach may result in unequal treatment of citizens in different provinces. Justice Qazi Faez Isa in judgment of the Balochistan High Court held that the Constitution required uniformity of criminal law, Cr.P.C 1898 and evidence in Pakistan leaving provinces to legislate only in respect of such matters not already covered by federal law. ¹⁵²

Article 142(b) has created ambiguity regarding the competence to legislate in this area. Consequently, the process of criminal justice reforms has been largely stunted and is often challenged in courts. For example, the Balochistan High Court held that in light of Article ¹⁴⁹ Constitution of Pakistan 1973, Article 142(c): Subject to the Constitution— Provincial Assembly shall, and Majlis-e-Shoora (Parliament) shall not, have power to make laws with respect to any matter not enumerated in the Federal Legislative List.

¹⁵⁰ Constitution of Pakistan 1973, Article 270AA: Notwithstanding omission of the Concurrent Legislative List by the Constitution (Eighteenth Amendment) Act, 2010, all laws with respect to any of the matters enumerated in the said List (including Ordinances, Orders, rules, bye-laws, regulations and notifications and other legal instruments having the force of law) in force in Pakistan or any part thereof, or having extra-territorial operation, immediately before the commencement of the Constitution (Eighteenth Amendment) Act, 2010, shall continue to remain in force until altered, repealed or amended by the competent authority.

¹⁵¹ Constitution of Pakistan 1973, Article 143: If any provision of an Act of a Provincial Assembly is repugnant to any provision of an Act of Majlis-e-Shoora (Parliament) which Majlis-e-Shoora (Parliament) is competent to enact, then the Act of Majlis-e-Shoora (Parliament), whether passed before or after the Act of the Provincial Assembly, shall prevail and the Act of the Provincial Assembly shall, to the extent of the repugnancy, be void.

¹⁵² Muhammad Kamran Mullahkhai v. Government of Balochistan, PLD 2012 Balochistan 57
143, the promulgation of the Code of Criminal Procedure (Amendment) Act 2010 was *void ab initio*. In light of this judgment, similar amendments made by Sindh may also be challenged.

In another case, an attempt to repeal the National Accountability Ordinance 1999 through the Sindh National Accountability Ordinance 1999 Repeal Bill was challenged in the Sindh High Court. It is claimed that in view of Article 142 and 143, the Sindh Assembly does not have the authority to restrict the jurisdiction of NAB.\(^{153}\)

In Khyber Pakhtunkhwa, the KP Ehtesab Commission Act 2014 was challenged in the Peshawar High Court on the grounds that the NAB Ordinance 1999 was a federal law, prevailing over provincial law and should be declared ultra-vires the Constitution. The Court stated that both the Parliament and Provincial Assemblies had the power to legislate on the matter provided their laws were in conformity to one another.\(^{154}\) Similarly, the KP Control of Narcotics Substance Bill 2017 can be challenged as contrary to Article 142(b). The Bill aims to limit the jurisdiction of the Anti-Narcotics Force, established through the federal Anti-Narcotics Force Act 1997.

The ambiguity over provincial legislative competence has resulted in delay to promulgate various essential reforms as well as increased judicial intervention. The above instances highlight the confusion regarding legislative competence years after the 18th Amendment.

7. **The Legislative Lists and Due Competence**

There are two categories of law that fall under the ambit of law and order. The first is the criminal law, procedure and evidence, governed by Article 142(b) of the Constitution. The second category concerns all subjects not included in the Federal Legislative List or falling under the category of Article 142(b). This constitutes a vast category of areas that fall under the exclusive domain of provinces.

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\(^{154}\) Noor Daraz Khan v Federation of Pakistan, PLD 2016 Peshawar 114
As stated before, the 18th Amendment completely abolished the Concurrent Legislative List. The subjects contained in that list now fall in the residual category for the provinces to legislate upon. During the existence of the List, the Federation promulgated laws on the subjects contained therein and took precedence over provincial laws. Following the 18th amendment, these laws can now be repealed or amended by Provincial Assemblies.

One clear challenge to the residual category is establishing what subjects fall within its ambit as it has not been expressly enumerated in the Constitution. This is particularly problematic in the ambit of law and order as it is often difficult to determine what falls under Article 142(b) and what falls in the residual category. Police laws are a prime example of this confusion. Provincially enacted Police laws primarily concern the establishment, structuring and discipline of the Police. But some may also relate to criminal procedure. Each province has legislated its own set of Police laws which either repeal or amend the federal Police Laws.

According to the Research Cell of the Office of the Advocate General of Punjab, Police is a matter distinct from criminal law and procedure and therefore, clearly falls within the legislative competence of the Provinces. This opinion, submitted to the Home Department, paved the way for the enactment of the Punjab Police Order (Amendment) Act 2013. On the other hand, in Zafarullah Khan v. Federation of Pakistan, the Lahore High Court took the opposite view i.e. police laws are primarily relatable to enforcement of criminal law.\(^{155}\) However, it is important to note that this case was decided before the passing of the 18th Amendment and the court may hold a different opinion today.

The KPK government through its Police Act 2017 adopted a more cautious approach. Section 141 of the Act only repeals the provisions of the federal Police Order that relate to the Provincial Legislative Field, expressly stating that provisions relating to the Federal Legislative Field continue to remain in force. On the other hand, the Balochistan Police Act 2011 completely repeals the application of the Police Order 2002 in the province.\(^{156}\)

\(^{155}\)Zafarullah Khan v. Federation of Pakistan, Writ Petition No. 16244/2002 (Lahore High Court)

\(^{156}\)Balochistan Police Act 2011, sec. 46
Although, establishment and functioning of institutions which enforce law and order fall under the provincial domain, it must be noted that some laws related to such institutions cannot be completely divorced from criminal law, procedure and evidence. For example, certain actions of police officials may amount to criminally punishable crimes. Similarly, laws related to functioning of the police will have an impact on criminal procedure. A more holistic approach is required for effective reforms to be legislated. It is not enough for provinces to be limited to legislate upon restructuring institutions like the Police.

The subject of law and order goes beyond the provisions of Article 142(b). It encompasses criminal law, procedure and evidence as well as the institutions established to maintain it and laws to regulate their operation. Therefore, law and order straddles both federal and provincial legislative competences, although most elements of the overall category fall in the provincial domain.

8. **Delineating the Legislative List**

At this point, it is important to define elements that fall under the jurisdiction of Article 142(b) and those that fall in the residual category. The following are definitions based on jurisprudence of the superior judiciary in Pakistan as well as Constitutional commentary by various scholars.

Article 142(b) specifies subjects upon which both the Parliament and the Provincial Assembly may legislate. It includes criminal law, criminal procedure and evidence. According to Black’s Law Dictionary, Criminal law is *'the body of law defining offenses against the community at large, regulating how suspects are investigated, charged, and tried, and establishing punishments for convicted offenders. Also termed penal law'*.

Perkins & Boyce states that *'Often the term ‘criminal law’ is used to include all that is involved in ‘the administration of criminal justice’ in the broadest sense. As so employed it embraces three different fields, know to the lawyer as (1) the substantive criminal law, (2) criminal procedure, and (3) special problems in*

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the administration and enforcement of criminal justice… the phrase ‘criminal law’ is more commonly used to include only that part of the general field known as the substantive criminal law…”

Considering the above definitions in relation to Article 142(b), the Parliament and Provincial Assembly may enact laws which create and define offences against the community at large and establish punishments for those convicted of such offences.

Criminal procedure is defined by Black’s Law Dictionary as ‘the rules governing the mechanisms under which crimes are investigated, prosecuted, adjudicated and punished. It includes the protection of accused persons’ constitutional rights.’

The Cr.P.C 1898 provides further guidance on the content of the term criminal procedure. An overview of the headings of the Cr.P.C indicate that procedure include the establishment of criminal courts, their hierarchy, outlining their powers, provisions relating to arrest and detention of accused persons, process to compel persons to appear before court, process of producing documents or moveable property, rules governing the functions and powers of Police, powers and methods of investigation, rights of accused, trial process, provisions of bail, framing of charges, mechanisms for appeal, sentencing procedure, procedure for dealing with special categories of persons, etc.

Evidence, unlike the other two terms, is not limited to the qualifier criminal. It consists of both criminal and civil evidence. Evidence as described by Black’s Law Dictionary includes testimony, documents and tangible materials as well as the rules of evidence.

These definitions clarify the elements of subjects that fall under article 142(b). We must now consider what falls under the exclusive domain of provincial legislation by defining the contours of the residual category. After the 18th Amendment, laws that fall under the

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159 Black's Law Dictionary Entry for Evidence (9th edn, 2009) p. 635: Evidence, n. (14c) (1) something (including testimony, documents and tangible objects) that tend to prove or disprove the existence of an alleged fact (2) … (3) the collective mass of things, esp. Testimony and exhibits, presented before a tribunal in a given dispute (4) The body of law regulating the admissibility of what is offered as proof into the record of a legal proceeding.
residual category can only be repealed or amended by provinces, even if previously enacted by federal laws. As the category is not expressly enumerated in the Constitution, the constitutional jurisprudence defines the issue by what it does not include rather than what it does include. Therefore, a good starting point would be to exclude items mentioned by the Constitution.

Article 142(a) of the Constitution states that only the Parliament has the exclusive power to make laws with respect to matters in the Federal Legislative List. The List is found in the Fourth Schedule to the Constitution and is divided into two parts. Part I lists 53 competences on which the Parliament can legislate. It is a wide array of areas and includes inter alia matters relating to defense of Pakistan, taxation, elections, fisheries, international treaties and conventions, export of opium, nuclear energy, migration etc.

Part II enumerates a further 18 areas where the Parliament can legislate. However, under Article 152, the Council of Common Interests (CCI), a body comprising the Prime Minister, the Chief Ministers of the Provinces, and three members of the Federal Government, is required to formulate and regulate policy on those areas. Therefore, Part II of the list allows some provincial say in areas like railways, oil and minerals, industry, electricity, ports, census, legal, medical and other professions, etc. Thus, only the Parliament can legislate on matters of criminal law in these areas. The Province can only influence legislation through their Chief Minister in the CII. Excluding the matters specified in the Federal Legislative List, better clarifies the content of the residual category. Hence, all matter and offences related to those matters fall under the residual category.

The list of matters to fall under the residual category can only be limited by one’s imagination. However, for the purpose of delimiting the area of law and order, there are two primary means of determining its substantive content. The first are matters that previously fell under the Concurrent Legislative List. The second means is by referring to the State Legislative List of the Indian Constitution. In India, States can only legislate on matters listed in the State Legislative List; the residual matters are left for the Central Government. Given that India and Pakistan share a similar legal heritage, this is a useful approach.
The Concurrent Legislative List contained 48 entries. Once abolished, most of the entries on the list now fall under the residual category. Only three particular entries have been included in the Federal Legislative List, while entries related to criminal law, procedure and evidence are now governed by Article 142(b). Examples of matters falling under the residual category, concerning law and order include, but are not limited to, actionable wrongs, prisoners, preventive detention, arms and ammunition, explosives, opium, environmental protection, newspapers, printing presses, etc.

These entries constitute the domain of provincial legislation. It must be noted that some of the categories cannot be regulated without elements of Article 142(b) being a significant component. Matters concerning explosives or opium are just some examples that will require some form of penal sanction or procedural and evidential element in their legislation. Thus, the Provincial Assembly, while exercising its exclusive domain, will have to borrow from their powers under Article 142(b). Although Article 142(b) empowers provincial legislation, there is a problem in case of pre-existing federal law. Under Article 143, in case of conflict between federal and provincial laws, the federal law is to take precedence, rendering the provincial law null and void.

As stated above, the Constitution of India, 1949 can also serve as a reference point for determining what falls under the residual category. Subjects that fall under the Indian State Legislative List can constitute subjects that fall under the Residual Legislative List of Pakistan. These subjects include, but are not limited to, establishment of public order, police, prisoners, reformatories, borstal institutions and other similar institutions.

Defining the contours of criminal law, procedure and evidence under Article 142(b) and determining the content of the residual category helps to eliminate the confusion regarding the legislative competence of Provinces, especially in regards to law and order. The following section will provide an overview of the judicial scrutiny subjected to the distribution of powers between the Federation and Provinces.
9. **JUDICIAL INTERPRETATION**

The superior judiciary has, on multiple occasions, scrutinized the validity of statutory instruments by attempting to outline the boundaries of legislative competence as set out in Articles 141-144 of the Constitution. Following the 18th Amendment, litigation challenging the validity of laws and subordinate legislation has increased considerably.

Very recently, in March 2018, the Supreme Court of Pakistan held that the Sindh Assembly was competent to enact the Sindh (Repeal of Police Order, 2002 and Revival of the Police Act, 1861) Act, 2011 by repealing the Police Order 2002 which had been passed at the Federal level. Subsequently, however, a review petition was filed at the Supreme Court which purports that the Supreme Court failed to consider that the Sindh Assembly is repealing a federal law to the extent of its application to Sindh. There are many such cases that have been heard by the Superior Judiciary in Pakistan especially after devolution. The body of case law has resulted in the emergence of certain interpretational doctrines and principles.

9.1 **Doctrine of Pith and Substance**

The superior judiciary often relies on the doctrine of ‘pith and substance’ in order to determine which of the two legislative lists a contested statutory instrument falls under, i.e. Federal or Residual legislative categories. The doctrine is particularly relevant to the provisions of Article 142(b) which explicitly fall under the competence of both federal and provincial legislature. This is because under Article 143, where there is a conflict between concurrent legislations by the Province and the Federation, the federal will prevail. Thus, the onus lies on the province to ensure that the law in pith and substance does not relate to the corpus of Article 142(b). The doctrine has been invoked in several notable cases, including *Sapphire Textile Mills v. Collector of Central Excise and Land Customs Hyderabad*,[160] *Mian Ejaz Shab v.*

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[160] Sapphire Textile Mills Ltd. v. Collector of Central Excise and Land Customs Hyderabad, 1990 CLC 456 [Karachi]: “When the question is whether any impugned Act is within any one of the three Lists, or in none at all, it is the duty of the Court to consider the Act as a whole and decide whether in pith and substance, the Act is with respect to a particular category or not. This can be inferred only from the design and purport of the Act as disclosed by its language and the effect which it would have in its actual operation… Subjects must still overlap and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is it true nature and character to be found. If...
Federation of Pakistan and even by the Supreme Court in Progress of Pakistan Co. Ltd v. Registrar Joint Stock Companies Karachi. In the latter case, the Supreme Court held that when considering a statutory instrument, the Courts are required to examine the object of the legislation as well as its effect.

An example of the practical application of the doctrine was the amendments to the federal Police Order 2002, proposed by the Punjab Government. The Office of the Advocate General of Punjab opined that Police was a matter distinct from criminal law and procedure. As such the Punjab Assembly was well within its legislative competence since, in pith and substance, it related to the governance and functioning of the Police and only touched on criminal law and procedure incidentally.

9.2 Principle of Incidental Encroachment

The principle of incidental encroachment is a judicial tool employed by the judiciary to reduce the space for conflict between federal and provincial laws and ensure harmonious interpretation. An ancillary to the doctrine of pith and substance, the principle entails that the validity of legislation cannot be called into question if its substance incidentally infringes on matters beyond its competence.

In The Province of East Pakistan v. Sirajul Haq Patwari the court held that validity of a laws made by various legislatures are to be accepted as fact and prevail unless their operation is frustrated by rules such as pith and substance, occupied field and incidental encroachment.

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161 Mian Ejaz Shafi v. Federation of Pakistan, PLD 1997 Karachi 604: “To determine the Constitutional validity of an Act, its pith and substance should be considered... That is, it must be ascertained whether the impugned legislation is directly in respect of the subject covered by any particular Article of the Constitution or touches the said Article only incidentally or directly. If it be found that the legislation is in substance one on a matter which has been assigned to the Legislature, there can be no question of its validity even though it might incidentally infringe on matters beyond its competence”.

162 Progress of Pakistan Co. Ltd v. Registrar Joint Stock Companies Karachi and the Islamic Republic of Pakistan, PLD 1958 Karachi 887: “It is beyond question that when an enactment apparently relates to subjects which are within the competence of two Legislatures then, in order to determine the question of the validity of the legislation it is the pith and substance of the impugned legislation that is to be looked to. It is clear too that in order to determine the pith and substance we first consider the whole scheme of the distribution of powers as between the Centre and the Provinces, and we then look to the object of the legislation as well as its effect.”

163 The Province of East Pakistan and others v. Sirajul Haq Patwari and others, PLD 1966 Supreme Court 854
The Court held that a legislature making incidental and necessary encroachments on the exclusive powers of another legislature could rely on this doctrine to save the law unless the field is already occupied by Federal Legislature. In another case, the Court clarified that provincial law will be fully valid if, in relation to the incidental encroachment upon a ‘forbidden’ field, it has only impinged upon the unoccupied portion of the field; i.e. field not legislated upon by the Federation. The Supreme Court has stated that it would be erroneous to invoke the doctrine where there is no competition between the federal and provincial legislation, merely because the provincial law encroaches upon a matter in the Federal Legislative List.

This doctrine is particularly relevant in light of Article 142(b) which empowers both the federal and provincial legislature to enact laws on criminal law, procedure and evidence. A practical example of this is the Police Act 2017, enacted by the KPK Assembly. Section 141(2) of the Act states that provisions of the federal Police Order 2002 which relate to the Federal Legislative List shall remain in force. Therefore, the Act may incidentally encroach upon a matter that may relate to Article 142(b) but will not be void if that point of law has not been covered by federal law.

9.3 Doctrine of Occupied Field and Principles of Repugnancy and Paramourncy

The doctrine of occupied field is associated with the larger doctrine of pith and substance. This doctrine applies the principles of repugnancy and paramountcy in order to avoid any conflict between federal and provincial laws. According to this doctrine, where concurrent federal and provincial laws have been enacted and there exists a conflict between the two, then the provincial law will to that extent be repugnant and void. According to the principle of paramountcy, a provincial law must yield to a federal law where (a) compliance with both laws is impossible or (b) where compliance with a provincial law would be

164 Messrs Quetta Textile Mills Ltd. through Chief Executive v. Province of Sindh through Secretary Excise and Taxation, Karachi and another, PLD 2005 Karachi 55
165 Shamas Textile Mills Ltd. and others v. The Province of Punjab and two others, 1999 SCMR 1477
166 Khyber Pakhtunkhwa Police Act 2017, Act No. II of 2017
167 Dr. Iftikhar Ahmed, Senior Medical Officer, Abbotabad v. Government of Khyber Pakhtunkhwa, PLD 2016 Peshawar 212
incompatible with the spirit of the federal law, thereby frustrating or undermining the independence of a federal enactment.

The doctrine of repugnancy is attracted in case of a direct conflict between federal and provincial law.\footnote{Noor Daraz Khan v. Federation of Pakistan, PLD 2016 Peshawar 114} This was confirmed by the Peshawar High Court in the case concerning the KP Ehtesab Commission Act 2014 in the presence of the National Accountability Bureau Ordinance 1999; a federal law. The Court stated that repugnancy must exist in fact and not merely on possibility. Since the KP Ehtesab Commission Act 2014 does not contravene principles of the NAB Ordinance, it was held to be legal and valid.

An example of the practical manifestation of repugnancy is the case where amendments made under the Code of Criminal Procedure (Balochistan Amendment) Act 2010 were challenged on the grounds of Article 143. The court held the changes to be void as Balochistan had sought to specifically undo the changes made to the Cr.P.C by the Federation.\footnote{Muhammad Kamran Mullahkhail v. Government of Balochistan, PLD 2012 Quetta 57}

10. \textbf{Judicial Emphasis on Harmonious Interpretation}

Given the influx of litigation post the 18th Amendment, the superior judiciary has opted for a more pragmatic and mature approach towards cases relating to 18 Amendment, ensuring harmonious interpretation and upholding the principles of cooperative federalism. In the case concerning the Khyber Pakhtunkhwa Ehtesab Commission Act 2014 the Peshawar High Court laid down guidelines on the operation of Article 143 and emphasized that its provisions should only be relied upon as a last resort. According to the Court, laws should only be struck down by courts where the legislature does not have the competence, and where the law leads to the abridgement of fundamental rights enshrined in the Constitution. The Court cautioned that the power to strike down or declare a legislative enactment void should be exercised only where there is no other alternative. Instead, every effort should be made to reconcile the two laws in order to avoid striking it down. Moreover, the principle of
repugnancy was not attracted where federal and provincial laws simultaneously operated in a supplemental role.

Recently, the Lahore High Court in *Punjab Higher Education Commission v. Dr. Aurangzeb Alamgir*[^170^] stated that according to the principle of cooperative federalism, powers are divided between the federal government and the provinces. The court was of the opinion that the 18th Amendment itself makes room for cooperativeness and coordination between governments in case of overlap. The Court also noted that the Constitution itself provides for cooperative federalism under Part V, the creation of the Council of Common Interest being a prime example.

According to the Court, since the principle is an intrinsic part of the Constitution, it forms a powerful interpretative tool for courts to apply in cases of legislative overlap. Areas limited by the Article 142 can also be accorded a more workable and compliant interpretation, rendering the application of Article 143 as a last resort. The court emphasized on the need for cooperation between the two forms of legislatures. It held that the role of federal law is to provide uniform minimum standards, leaving provinces to supplement these standards under the principle of cooperative federalism. This case is an example of the judiciary’s attempt to ensure cooperation between the federation and province.

**Recommendations**

The 18th Amendment sought to create a participatory federation. In light of the above, it is clear that following the Amendment, there has been considerable confusion with regards to legislative competencies, more so on the subject of law and order. The following recommendations aim to provide measures to counter some of the challenges that have arisen as a result of the 18th Amendment especially with regard to criminal law, criminal procedure and evidence under the larger umbrella of law and order.

The doctrine of pith and substance should be employed by legislators. First it should be determined what the law in substance relates to which should then be tallied with the Federal

[^170^] Punjab Higher Education Commission v. Dr. Aurangzeb Alamgir and others, PLD 2017 Lahore 489
Legislative List to determine where its competence lies. In case of incidental encroachment upon federal matters, legislatures should adopt the approach taken in the KP Police Act 2016 which states that all the provisions of the federally legislated Police Order relating to the Federal Legislative List shall continue to remain in force.

More clarity should be accorded to Article 142(b), in order to determine when the Federation and Provinces can operate in unison to create laws. Both the Parliament and the Provincial Assemblies should enact laws and policies in accordance with the legal definitions of criminal law, criminal procedure and evidence as mentioned above.

The Residual List must be clearly defined. This can be achieved by deducting all areas enumerated in the Federal Legislative List as mentioned above, all areas under the abolished Concurrent List were evolved to the provinces with the exception of a few. These areas now fall within the Residual List. Moreover, the Constitution of India, 1949 can be used as a reference to determine which areas fall within the residual legislative list of Pakistan by relying on the areas that are enumerated in India's State Legislative List.

When interpreting laws, Courts should adopt a purposive approach and look at laws in concomitance. Laws should not be struck down in the absence of a conflict simply because they encroach upon another legislative field. Moreover, provincial statutes should specify that the law be interpreted harmoniously with Federal law and where a conflict arises federal law should prevail.
FAILURE OF R2P IN SYRIA: DUAL DILEMMA OF “INVITATION-INTERVENTION” AND “RESPONSIBILITY-INTEREST”

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ABSTRACT

After eight years of crises and 11 vetoes in the UNSC, the world community has so far failed not only to find a peaceful solution to end the conflict but also to protect the civil population of Syria from mass atrocities. Rather than finding a solution to this crisis, cold-war rivals; United States and Post-Soviet Russia, have made Syria as their “Power-projection ground” by pulling-in other developing neighboring states to the conflict. On one side, some are invited into the conflict by the host state and on the other side, some are intervening on the grounds of “Responsibility to Protect (R2P)”. This ongoing situation has raised serious questions on the principles of R2P and has identified numerous loopholes that allow powerful states to manipulate the principles in their favor. This manipulation in result creates the dual-dilemma of ‘Invitation-Intervention’ and ‘Responsibility-Interest’ leading to the failure of R2P.

INTRODUCTION

History shows us that war and power have a powerful connection that is keeping them interlinked since times immemorial. Throughout history, the overarching objective of states has remained the same i.e. to maximize power, however, the means and tools kept on changing. With the advent of 21st century and shifting of normative structure, tools became legal in nature but the goals remained the same in terms of the hidden vested interests. Now as direct or conventional wars have become less likely due to considerations such as costs, durations, foreign supported insurgencies and hostile local public opinion, in addition to nuclear threat, powerful states are using indirect means to further their geopolitical influence. The perfect example for this is the Syrian Civil War. The Syrian Civil War is not only one of the bloodiest conflicts in the world today; it's also one of the most complex.171 A conflict that started as a peaceful uprising against President

Bashar Al Assad escalated to an unmanageable crises that has left the Syrian people to the mercy of ‘interest-play’ between major players of international community. This power struggle has not only killed more than 500,000 civilians including women and children but also led to the worst humanitarian crisis of contemporary times. Numerous atrocities have been committed by all parties involved in the conflict. At one side, the government of the Syrian president Bashar Al Assad backed by Russia has been accused for dropping barrel bombs on the rebel held areas and using chemical weapons against innocent civilians. On the other hand, United States and allies are being accused for backing Anti-Assad forces in violation to the sovereignty principle of UN Charter.

After eight years of crisis and 11 vetoes in UNSC, the world community has so far failed to not only find a peaceful solution to end the conflict but also to protect the civil population of Syria from mass atrocities. Rather than finding a solution to this crisis, former Cold-War rivals; United States and Post-Soviet Russia, have made Syria their “power-projection ground” by pulling-in other developing neighboring states to the conflict. On one side, some are invited into the conflict by the host state and on the other hand, some are intervening on the grounds of “Responsibility to Protect (R2P)”. This ongoing situation has raised serious questions on the principles of R2P and has identified numerous loopholes that allow powerful states to manipulate the principles in their favor. This manipulation in result creates the dual dilemma of ‘Invitation-Intervention’ and ‘Responsibility-Interest’ leading to the failure of R2P.

To address the dual-dilemma, this essay is divided into three sections. In the first section, it will highlight the basic principles of R2P, its foundation as per Just War Theory, and the grounds for intervening in any civil war. In the second section, this paper will address the loopholes within R2P which allow powerful states to use force for their vested interests hence creating a clash between ‘responsibility’ and ‘interest.’ In addition to this, the paper will raise the question regarding how R2P will respond when there is an Invitation-Intervention dilemma? In the last section, this essay will analyze the Syrian Civil War and its complexity to provide an empirical base for the discussed arguments. The research is purely

in the form of qualitative-deductive analysis and an interplay between Realist and Liberalist ideas. The debate in this essay revolves around a central argument that says: R2P has failed in Syrian Civil War due to the lack of international political will, divergent interests of political players and their inability to compromise on these interests – backed by the dual dilemma of ‘Invitation-Intervention’ and ‘Responsibility-Interest’.

1. **Responsibility to Protect – Foundation and Grounds for Intervention**

The ‘Responsibility to Protect’ also referred as R2P and RtoP, is an international political agreement and commitment of nation states in the UN, to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity, to help member states who are unable to fulfill this responsibility, and to take necessary measures against a state unwilling to do so. With this principle two responsibilities are at play: external i.e. helping other states to cope with such crises, and internal i.e. to protect their nation from any kind of atrocities. This norm of international law emerged after the crises in Iraq and Kosovo when the international community grew skeptical of the United Nation Security Council upon witnessing the hidden agendas that were allowed to play out under the name of humanitarian interventions (HIs). To regain the lost glory and credibility of UN, former secretary General Kofi Annan urged members of the General Assembly to find an alternative to HIs that fulfils the purpose of protecting people globally. During his speech he raised a question that “If humanitarian intervention is, indeed an unacceptable assault on sovereignty, then how should we respond to a Rwanda, to a Srebrenica - to gross and systematic violations of human rights that offend every precept of our common humanity?”

The conflict between the principles of non-interference and humanitarian intervention challenged the global community to come up with a new approach to save the basic purpose of HIs i.e. to protect populations during civil wars or conflicts within a state. To embark upon this journey, at the end of year 2000, the International Commission on Intervention and State Sovereignty (ICISS) was established. This commission came up with the term

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‘Responsibility to Protect’ and for the first time defined state sovereignty in terms of responsibility rather than the territorial integrity.\textsuperscript{175} At 2005 UN World Summit, this term was widely accepted by the member states and became a corner stone of International Humanitarian law. In this summit, all nation states pledged to uphold this new principle focused on Bary Buzan’s concept of Human Security.

The basic difference between R2P and the principle of humanitarian intervention is that the latter was in violation to the non-interference principle of UN Charter, and the former removed this conflict by defining sovereignty in Liberalist terms i.e. ‘responsibility to protect civilians’\textsuperscript{176} This principle argued that if a state is unable or unwilling to protect its population then it loses its sovereignty, and in this case, it’s the responsibility of international community to protect the population of that state.\textsuperscript{177} In other words, the ICISS report on R2P created a new discourse that sovereignty is not only about the territorial integrity and non-interference, but also the responsibility to protect inhabiting population. In Kofi Annan’s words, “sovereignty must not be seen as a protective shield from the massive human rights violations, and right to intervene should be observed under the principle of responsibility to protect”.\textsuperscript{178}

The report highlighted three key pillars of R2P; Responsibility to Prevent, Responsibility to React, and Responsibility to Rebuild.\textsuperscript{179} The Responsibility to Prevent was given extra importance and was highlighted as an equal to Responsibility to Protect. On the question of when to intervene, the ICISS report suggested that external responsibility to protect i.e. international intervention in another state, will be justified under three scenarios. First; if the state is either unwilling or unable to protect its citizens, second; if the state herself is the one committing crimes against its population, and third; if the people in neighboring states are threatened by such actions.\textsuperscript{180} In addition to that, it was made clear that the authority to

\textsuperscript{176} Gareth Evans, ‘From humanitarian intervention to the responsibility to protect’ (2006) 19, Wisconsin International Law Journal; No: 3, 523-537.
\textsuperscript{177} Ibid. 4
\textsuperscript{180} Ibid.
intervene lies with the UNSC. This criteria for intervention broadened the scope of HIs and created room for international and regional players looking to further their vested interests.

While discussing the framework of intervention and the essentials of the use of force, the Commission provided the foundation of R2P under the basic tenants of Just War doctrine. This report elaborated that to intervene states must: have ‘right cause’ i.e. to put an end to human suffering; use of force should be opted as the last resort only when all other efforts are being suffocated; force should be proportional to what is necessary; and the benefits should be greater than the cost endured.\footnote{Gareth Evans, \textit{The Responsibility to Protect: Ending Mass Atrocity Crimes once and for all} (Washington: Brookings Institution Press, 2009) 142.} Although the Commission vested authority in the UNSC, it did not raise any objection on the possibility of interventions sanctioned by the UNGA or key regional states in case the UNSC fails to fulfill its responsibility. Now the question arises: is this a flaw in the R2P mechanism or a strength? We will explore this question in the following section.

Although there is no doubt that R2P is a great contribution to the evolution of international law in the 21\textsuperscript{st} century, its effectiveness is highly debated among scholars. Some argue that R2P has filled all the gaps within humanitarian interventions and provides a new framework to uphold the sanctity of international law. As stated by Gareth Evans in his book, R2P has contributed in four ways:

“A new way of talking about humanitarian intervention; it insisted upon a new way of talking about sovereignty; it clearly spelled out what responsibility to protect means and finally it provided guidelines for military intervention”.\footnote{Ibid.}

On the other hand, some scholars argue that R2P has some unaddressed loopholes that provide room for powerful states to pursue their vested interests. As a result of these loopholes, intervention can become an opportunity for the exploitation of weaker states.
The next section is devoted to address what these loopholes are and how they provide room for power politics and exploitation. In addition to that, the following section will also argue that the conflict between traditional sovereignty and sovereignty as responsibility is still not fully reconciled under the principle of R2P.

2. LOOPHOLES WITHIN R2P AND THEIR POSSIBLE OUTCOMES

There is no doubt that R2P has its merits, but at the same time one must consider its shortcomings to clear out inconsistencies so that an optimal solution can be reached. In this paper, the shortcomings within the R2P will be referred to as loopholes and it is argued that these loopholes provide room for the pursuit of the vested interests of players involved in a conflict which is a failure of the R2P.

The first loophole identified within R2P lies in its redefinition of sovereignty ‘as responsibility’. The problem with this is that due to a diversity of perspectives globally, it is virtually impossible to reach a consensus-based definition of ‘responsibility’ that is operationally substantive and universally accepted. In 1945, the United Nations was established based on the idea of the sovereign equality of all states as stated under Article 2 of the UN Charter. The reason behind, this was to establish international peace and stability so that future wars can be avoided. The redefinition of sovereignty on idealistic terms has now created flexibility, in what was formerly that universally accepted international norm, creating space for suspicion and exploitation.

This loophole can be addressed within the framework of Realism which argues that states are unitary actors and the sole protectors of their inhabitants. It further argues that whatever happens within a state is the responsibility of the government and others cannot intervene in their internal affairs. This concept was the basis of Westphalian system of Nation-states and traditional sovereignty. Under customary international law, the concept and principle of non-interference is widely accepted in the ever-evolving arena of international law. The principle of non-interference provides complete right to a sovereign state to exercise its hold within its
The jurisdiction reinforces the authority of a state to govern the people and property within its territorial boundaries. By this principle other states have no right to intervene in the internal affairs of a sovereign state. Now, as the R2P argues that sovereignty means ‘responsibility to protect’, the acceptance of this interpretation comes to question. Many modern nation-states are unwilling to accept this interpretation because they perceive it as a tool to enhance the Liberalist agenda of its creators. In conflict-driven environments, such interpretations can have the deadliest outcomes resulting in the exploitation of weaker states at the hands of powerful ones.

The outcome of said loophole is the ‘intervention verses invitation’ dilemma. To describe this dilemma, let’s assume a state under civil war that invites an ally to help her in removing the threat or to act as a mediator to end the conflict. Meanwhile another state or group of states intervene based on R2P without the permission of host-state. Under such a scenario, which actor(s) are the legitimate intervener(s)? Such scenarios are not considered by the principle of R2P and mark the biggest flaw in its conceptualization. This flaw is directly attributed to the concept of sovereignty defined under R2P because invitation fulfils the criteria of states’ responsibility and presents no hurdle for the concept of traditional sovereignty in terms of non-interference, leaving no room for another intervention. But what if this invitation leads to more human rights violation and crimes against humanity? Do interventions become legitimate in such cases? The complexity of these questions creates a bigger problem for R2P and leads to its failure as evident in the case of Syria.

The third important loophole within the R2P paradigm lies in its criterion addressing the question of when to intervene. It stipulates that neighboring states can intervene in another state if they feel that the actions taking place within that state can be threatening to the peace of their own state. This criterion is so vague that it allows states tremendous leeway to interpret the clause in any way that suits them. This difference of interpretation results in

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power politics within a region and allows neighboring states to use such an opportunity for their vested interests.

Finally, the question of authority to authorize use of force that rests with the UNSC. In case the UNSC is unable to act, the authority to authorize an intervention lies with the UNGA or regional players and organizations. This loophole is dangerous because most of the time it results in the clash of interests between two competing global or regional powers resulting in more human rights violations, reducing the conflict state to a ground for power-projection. This outcome is not only the resultant of this loophole but can also be attributed to other loopholes formerly discussed. The Syrian Civil War is an excellent case study in the defence of this assertion.

3. **A Case Study: Syrian Civil War & the Duality of ‘Invitation-Intervention’ and ‘Responsibility-Interest’ Dilemma**

The history of the Middle East is full of conflicts involving genocide and crimes against humanity such as in the case of Libya and Iraq (or more recently Yemen) but the Syrian crisis is arguably the worst in this nature. Since this crisis began, 500,000 people have lost their lives up to date, 5.7 million people have fled the country, and 6.6 million people have been displaced having left their cities and homes.\(^{185}\) Despite the enormous number of casualties in seven years, the international community has not only failed to find a peaceful solution but has also been unable to protect the population of Syria. This marks the biggest failure of the UNSC in general and of R2P in particular. The question is, is it lack of political will (due to divergence of interests), or the loopholes of R2P that are preventing the Syrian crisis away from reaching a peaceful conclusion?

This paper argues that it is in fact both the absence of political will and loopholes of R2P. These factors are directly linked to each other and have gone hand in hand in exacerbating this crisis and even further away from a peaceful solution. The ‘Invitation-Intervention’ dilemma as discussed in the previous section is of a complex nature that makes it difficult to

\(^{185}\) "Syria: Global Centre for the Responsibility to Protect," *Global Centre for the Responsibility to Protect*, last modified May 15th, 2018, http://www.globalr2p.org/regions/syria
decide which side is legitimate. The dilemma is crucial because it attacks the very first objective of international law, which is to ‘recognize the legitimacy.’ This outcome of the discussed dilemma allows us to raise the question: if it is not clear under the premises of international law, then how can one reach to a peaceful solution? The Syrian crisis is a practical manifestation of this clash between theoretical concepts of two different schools of thought i.e. Realism and Liberalism, over the definition of same subjects. The two powerful international players of Syrian crisis are United States and Russia, with the latter supporting the Assad regime and being invited into the crisis and the former in opposition to Assad having intervened on grounds of R2P.

This Invitation-Intervention dilemma has also created another dilemma namely that of ‘Responsibility-Interest’. The US and its allies have justified the intervention in Syria based on R2P but have also acted against the Resolutions of the UNSC because Russia has vetoed resolutions granting them permission to intervene in Syria. As R2P gives UNSC the authority to intervene, the intervention of the US and its ten allies becomes unjustifiable, creating a clash between responsibility and interests. During this clash, the Realist school of thought would argue that states would prefer interests to responsibility because states look for opportunities to gain power over their adversaries. If it was about responsibility, then we should have seen a similar approach in the Yemen conflict as opposed to the current double standard. And in such cases where responsibility comes second to deadly powerplay, outcomes are bleak. This is why Syria has become a power-projection ground between Russia and United States.

While discussing the third loophole, this paper argued that neighboring states and regional powers could interpret the threat emerging from conflict states as a danger to their national peace and security. As R2P allows these neighboring states to intervene in the victim state, the criterion can result in conflict states becoming victims of interpretations that may or may not suit the vested interests of regional stakeholders. This is the case in Syria, where different regional players are involved in fighting and financing different factions already involved in the crisis. These players are Turkey, Israel, Jordan, Lebanon, Iran and Saudi Arabia. All these regional and neighboring players have justified their actions under the same criterion
proposed by R2P, but evidence shows that their goal is to gain and secure their vested interests within Syria rather than protecting civilians from mass atrocities.

**CONCLUSION**

The Syrian Civil War is a case study of the failure of the Responsibility to Protect (R2P) principle and has identified major loopholes within its conceptualization. This case has initiated a debate amongst scholars about the effectiveness of R2P and it is argued R2P has given more leeway for the exploitation of weaker states. The first loophole discussed in this paper was the concept of sovereignty as responsibility which is in direct contradiction to the Westphalian concept of traditional sovereignty. As noted by Max Huber in the case of ‘Island of Palmas’, “Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the function of a State.” The new concept of sovereignty as responsibility will take time to be accepted as a universal alternative to its traditional concept. Until and unless it reaches to that point, R2P cannot be fully successful in its implementation.

The other major loopholes within R2P are; Invitation-Intervention clash and the criterion that allows neighboring states or regional organizations to intervene in the conflict state. Such a criterion is in direct confrontation to the accepted and non-contested principle of Non-Interference stated under UN charter. Such a clash between two principles of international law is discouraging for the viability of R2P in general and human security in particular. Furthermore, these loopholes also provide room for major players to intervene at the behest of their own interests. As in the case of the Syrian Civil War, such a scenario leads towards a clash between responsibility and interests and allows these states to project their power capabilities in order to create more influence in the region. The presence of these inconsistencies within R2P have had a devastating impact on international peace and stability as evident from the Syrian crisis. To successfully reach a resolution, states have to find unified grounds for humanitarian interventions with safeguards against selective interventions and the exploitation of weaker states.
TAking non-refoulement seriously: why the extraterritoriality of Article 33(1) of the refugee convention needs to be addressed

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Abstract

This article critically analyses the uncertainty surrounding the extraterritorial application of the non-refoulement obligation as incorporated in Article 33(1) of the Refugee Convention 1951. In doing so, it engages in a comparative critique between the restrictive interpretation afforded to the provision by the United States Supreme Court and the liberal reading of the text by the European Court of Human Rights. The polarised interpretations adopted by these adjudicative bodies highlight the ambiguity in the text of Article 33(1) and consequently, its susceptibility to arbitrariness and abuse. Therefore, this article proposes an incremental reform in two phases, beginning with reforming the text of Article 33(1) itself to bring it into line with the liberal reading of the text as it stands. In the second phase, the establishment of an independent international Judicial Commission is concerned, tasked with ensuring convergence in the interpretation of the revised text of Article 33(1).

Introduction

Refugees have co-existed with history; from the expulsion of legendary tribes of Israel by Assyrian rulers in 740 BC, to one of the first recognised displacements of people across nation states via the Edict of Fontainebleau issued by Louis XIV of France in 1685\(^{186}\) and the mass exodus of Jews post the assassination of Tsar Alexander II in 1881,\(^{187}\) history has been witness to a somewhat perpetual forced movement of people across states.

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\(^{186}\) This banned Protestant worship and led to the emigration of Protestants eventually.

However, the 1951 Refugee Convention was the first instance of the international community’s largely universal acceptance of the status of refugees as a human rights issue and was the foremost reflection of an awareness that this issue called for a unified and consolidated protection regime. Historically, this Convention was a response to the massive displacement of people that had transpired after the events of the Second World War. Rooted in Article 14 of the Universal Declaration of Human Rights, the application of this international legal edifice for refugee protection was further solidified by its 1967 Protocol which removed geographical limitations of the Convention (confined to “events occurring in Europe before 1 January 1951” with the aim to ensure refugee protection worldwide, regardless of state of origin.

Termed a “status and rights-based instrument”, the Refugee Convention’s underlying principles are non-refoulement, non-discrimination and penalization. The focus of this article is non-refoulement in Article 33(1), the essence of which is to prohibit states parties from returning asylum-seekers to places from where they have escaped and would be liable to persecution.

It was through this very concept that the signatories to the Convention expressed their commitment to ensure that refugees would never be returned to their states of origin to face persecution or death.

Today, however, the horrors of the Second World War have been replaced by new horrors characterized by the massive forced displacement of peoples in numerous regions around

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190 “Everyone has the right to seek and to enjoy in other countries asylum from persecution.”
191 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)
193 Article 1, Refugee Convention
the world suffering from fundamentalist terror regimes, civil war, persecution or human rights violations. This changed setting has shed new light on the nature and extent non-refoulement as encapsulated in Article 33. Among the most relevant modern-day perceived legal lacunas in Article 33 is whether it has extraterritorial application or not, which is a key issue as it determines the decisive moment which triggers a state’s responsibility for refugees.

As an example, let us consider that an asylum seeker, “A”, escapes from Country B where there is ongoing persecution at the hands of state authorities of a certain class of citizens to which A also belongs. A then reaches, after a cumbersome journey, the border of Country C. At the moment he reaches this border, the non-refoulement provision needs to determine whether he can be sent back to the horrors of Country B just because he has not yet entered Country C’s territory or if doing so would be an act in contravention of Country C’s non-refoulement obligation to A.

In light of the importance of this provision for the stability of the entire refugee protection regime, it is highly problematic that its exact nature and scope remains ambiguous to date. It is acknowledged from the outset that this international legal edifice runs into the same problems of uniform, practical enforcement that other human rights do. However, the basic clarity in the very language and scope of the obligation, albeit theoretically, is what this article shall establish the need for. Only when the obligation itself is clear can steps be taken towards consolidated and meaningful enforcement. Therefore, the central objective of this article is to analyse how and why the reformation of Article 33(1) is vital to any holistic uplifting of the actual refugee crises plaguing our world today. Moreover, identifying the contours of Article 33(1) may help appreciating the implications that stem from the fundamental humanitarian legal principles which form the basis for Article 33.196

1. **THE PROBLEM SURROUNDING ARTICLE 33(1)**

1.1. **The Importance of Article 33(1)**

The text of Article 33(1) is as follows:

“No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.

1.2. Non-Refoulement of Refugees as Customary International Law

Article 33 is part and parcel of customary international law, therefore binding even on non-states parties to the Refugee Convention.197 This section will illustrate how this obligation forms a customary norm, having both the requisite opinio juris and state practice in its favour.198 Laying out Article 33’s status as part of custom at the outset is vital because it emphasises the importance of the obligation to the entire refugee regime, making the need for its clarity paramount and pressing.

The UNHCR has concluded199 that the principle of non-refoulement is now custom due to its incorporation in regional and international treaties.200 States parties have also issued a Declaration whereby they recognised the customary status of Article 33.201 Not only that, it has been systematically recognised and affirmed in the 1967 United Nations Declaration on Territorial Asylum,202 conclusions of the UNHCR Executive Committee and resolutions of the United Nations General Assembly.203 Moreover, as far as state practice is concerned, to date, there has been no case of total disregard for the principle.204

198 These elements of the formation of customary international law have been confirmed, inter alia, in North Sea Continental Shelf Cases 1969 ICJ Rep 3, the Lotus Case (1927) PCIJ Ser. A No.10, Anglo-Norwegian Fisheries Case 1951 ICJ Rep 116 and Nicaragua v USA 1986 ICJ Rep 14.
199 UN High Commissioner for Refugees (UNHCR), The Principle of Non-Refoulement as a Norm of Customary International Law: Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany, 31 January 1994
200 Among others, the principle has been incorporated in the OAU Convention 1969 governing the specific aspects of refugee problems in Africa which has 42 state parties and the American Convention on Human Rights 1969 to which 24 States are now parties.
202 UN General Assembly, Declaration on Territorial Asylum, 14 December 1967, A/RES/2312(XXII)
203 UNGA/RES/37/195, paragraph 2; UNGA/RES/48/116, paragraph 3; UNGA/RES/2312(XXII), Article 3
Thus, the status of Article 33(1) has been elevated to that of custom. This is significant because it means that this is one responsibility which states cannot escape vis-à-vis asylum seekers since a breach of it would be tantamount to destroying any other rights a refugee may have. All other rights enjoyed by refugees under the Refugee Convention are contingent upon a State being obliged not to refouler asylum-seekers. For example, Article 16 of the Refugee Convention accords the right of access to courts in the host state’s territory. However, that right for a refugee can only be crystallised once the host state has an international responsibility not to send him/her back; otherwise, that right is rendered redundant. This obligation is thus the starting point of nation-State’s international obligations towards refugees.

1.3. **Non-Refoulement of Refugees as *Jus Cogens***?

*Jus cogens* has been defined by Articles 53 and 64 of the Vienna Convention on the Law of Treaties as a peremptory norm accepted by the community, without any derogations. According to Article 42(1) of the Refugee Convention and Article VII (1) of its Protocol, derogations from Article 33 are proscribed. Notwithstanding that, unlike the largely settled status of the obligation as a customary norm, its status as *jus cogens* is far from certain.

Non-refoulement has been explicitly granted “peremptory norm” status by the UN High Commissioner on Refugee’s Executive Committee in 1982. The 1984 Cartagena Declaration went a step further and declared non-refoulement with regard to refugees to be

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205 Article 16(1) reads as: “A refugee shall have free access to the courts of law on the territory of all Contracting States.”
206 “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”
207 “If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”
208 “At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive.”
209 “At the time of accession, any State may make reservations in respect of article IV of the present Protocol and in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention other than those contained in articles 1, 3, 4, 16(1) and 33 thereof...”
210 UNHCR EXCOM Conclusion No. 25 (XXXIII), 20 October 1982: “the principle of non-refoulement [is] progressively acquiring the character of a peremptory rule of international law”
Proponents of the view that the obligation is a norm of jus cogens argue that such norms do not have any allowance for deviation, thus no violations of them are permitted “in any way whatsoever”.  

Notwithstanding the above acknowledgments, there are serious doubts as to its jus cogens status of non-refoulement for two reasons. Firstly, had it been a principle of jus cogens to which no derogations were permitted, then the exception in Article 33(2) would not have been there and neither would states have adopted restrictive readings to the obligation itself. It is primarily because the obligation is not a peremptory norm that it itself spells out situations where it can be foregone and the next section illustrates in more detail how the obligation has been prone to inhibitory readings. Secondly, while the UNHCR’s views as to the customary status of the principle have been reiterated by other international bodies, its views as to its supposed status as jus cogens has not.

Thus, non-refoulement has not, as of yet, reached the status of jus cogens and in view of the importance given by international law to the sovereignty of states, it is unlikely that it will ever reach the status of an obligation to which no exception will be allowed. It would run afoul of practicality if the obligation was in fact non-derogable because that would render States extremely unlikely to accept it and in any case, there are certain situations where derogations are justified, for example in cases of threat to security and necessity. This is in light of not only increasing global security concerns but also in view of the burden such a status would impose on the economic status of countries.

1.4. The Linguistic Ambiguity in Article 33(1)

211 Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in South America, 1984, paragraph 5.
Given the importance of Article 33(1), augmented by its status as customary international law, it is all the more problematic that there is linguistic ambiguity surrounding its extraterritorial application. This, in turn, renders it susceptible to a myriad of interpretations. The focus is on the uncertainty surrounding the exact scope and application of the phrase “...expel or return a refugee in any manner whatsoever to the frontiers of territories...”

It is uncontroversial that Article 33(1) and even the Refugee Convention on the whole do not place obligations on states to admit refugees within their sovereign territories. However, the controversial question is whether Article 33(1) leaves it up to the discretion of states to reject refugees at its borders.

1.5. **Literal Interpretations**

Read “restrictively”, Article 33(1) seems to propound the obligation of non-refoulement as restricted to those within the boundaries of the host state. Various delegates, including the Swiss and Dutch, took this reading, as evident from the records of the Conference of the Plenipotentiaries in 1951.

Here, it is important to examine the converse “literal” meaning of the phrase. Read liberally, the words “in any manner whatsoever” were clearly meant to proscribe all and any acts of “removal or rejection that would place the person concerned at risk”. Thus, the aforementioned all-encompassing phrase did not distinguish between expulsion once within a state’s territory or rejection even before entering a state. Moreover, Bethlehem, literally interpreting the words “return” and “refouler” reaches a different conclusion than proponents of the restrictive reading. The existence of two alternative “literal” readings of Article 33(1) lends weight to the assertion that the obligation is ill-defined in the Convention.

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216 Ibid
217 U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 16th mtg., UN Doc. A/CONF.2/SR.16 (Nov. 23, 1951)
A provision which goes to the heart of the entire refugee regime is thus vulnerable to two starkly contradictory “literal” readings.

The liberal literal reading of the text also seems to echo the concern that a refugee really has no choice when he decides to access one state’s territory over the other. Thus, the onus cannot be on potential asylum seekers to make reasoned judgments before purporting to enter territories of countries depending on whether that state interprets Article 33(1) narrowly or widely making the activity of seeking asylum equivalent to a “dangerous lottery.” The refugee only seeks refuge; and an assessment of his/her right to that refuge cannot be practically done without allowing him/her a chance to have his legal status determined.

1.6. Contextual Interpretations

If a contextual approach is taken to Article 33(1), interpreting it in view of Article 32, the meaning of “expel or return” clarifies itself. Article 32(1) reads:

“The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order and in pursuance of a decision reached in accordance with the process of law.”

Thus, because Article 32 specifically refers to refugees lawfully “in” the receiving state’s territory, proponents of the restrictive reading take this to mean that Article 33(1) also then assumes the same premise: the non-refoulement obligation could only logically apply to asylum seekers “in” a state’s territory.

States which adopt this restrictive reading, then, take measures in pursuant of it claiming them to be in line with their obligation of non-refoulement. The range of such measures is non-exhaustive and extensive but may include visa controls, pre-entry clearance procedures,

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220 Guy S. Goodwin-Gill, The Refugee in International Law 206 (2nd edition 1996): 206 (“The words ‘expel or return’ have no precise meaning in general international law. . . . [A]though article 32 possibly implies that measures of expulsion are reserved for lawfully resident aliens.”).
measures to inhibit access to a state’s borders and rejecting refugees at the state’s borders themselves.

However, opponents to this restrictive reading argue that the only restriction placed by Article 33(1) is that the duty of non-refoulement crystallises only when there has been an affirmative classification of an individual(s) as refugee(s). If looked at in a historical context, this argument in fact carries weight in light of Article 3 of the 1933 Refugee Convention which explicitly referred to “non-admittance at the frontier” as an element of the non-refoulement obligation of states.

Therefore, proponents of the liberal interpretation reason that because Article 3 explicitly contained rejection at frontiers as amounting to refoulement, thus, by necessary historical corollary, Article 33 also encapsulates the same notion. However, this is not the strongest argument that has been made in favour of a wider interpretation of Article 33. The very fact that the new provision omits the extension provided for by its preceding provision is conclusive in itself that the drafters’ intentions behind both were starkly different.

Therefore, the above discussion makes it clear that Article 33(1) is in fact laden with obscurity. It is too ambiguously worded for an obligation cardinal to the entire refugee protection regime.

1.7. The Practical Implications of an Ambiguous Non-Refoulement Obligation

Given the unfettered freedom of interpretation the text of Article 33(1) enables, states are likely to pursue their own national interests at the expense of diluting the Article 33(1) obligation to the extent that it no longer retains any effective force in protecting refugees. Of greater concern is the fact, as pointed out by D’Angelo, that denial of access to a state’s territory does not make potential refugees disappear. Instead, what happens is that heavier burdens are imposed on other states who give wider interpretation to Article 33(1).

223 D’Angelo, “Non-Refoulement” at 311
not only unfair but is also inequitable as it essentially means that geographically larger states with much more developed economies, infrastructure and housing facilities can refuse access to their territories for refugees merely by interpreting their non-refoulement obligations restrictively. On the other hand, smaller, underdeveloped or developing nation-states, may be left to bear the brunt of refugees seeking access to their territory by virtue of the fact that they take their Article 33(1) responsibility in its essence and give it a wider meaning. Equally, smaller states, too, could deliberately adopt a restrictive interpretation, given their lack of capacity for hosting refugees and either way, it would be a raw deal for refugees. Thus, this leaves the following question: what is the purpose of laying down an obligation which is so central to the entire legal edifice for refugee protection but is so ambiguous in its language that its practical implementation is essentially rendered arbitrary?

As Chia stated, “diversity of opinion” in the process of interpretation is a “necessary and healthy element”. However, when interpreting a humanitarian treaty like the Refugee Convention, it is crucial to not overlook its foundational principles of justice. Thus, Chia correctly points out that while the subjects of the Convention are States, its objects are refugees who are its “substantive beneficiaries”.225

Thus, varying interpretations are inevitably an essential part of human rights instruments such as the Refugee Convention. However, if these interpretations begin to vary to such an extent that they taint and compromise the aims and objectives of the Convention itself and distort the rights of its beneficiaries, then there is a problem with the provision itself.

2. The Restrictive Interpretation of Article 33(1)

2.1 Sale v Haitian Centers Council

This case pertained to the 1981 proclamation issued by President Reagan whereby he termed the “continuing illegal migration” of “undocumented aliens” as a serious national security threat to

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225 Ibid, at 218.
the US. Following this, the Coast Guard was authorized through the President’s executive order to “intercept and return vessels” carrying fleeing Haitians. According to the respondents, the military coup in Haiti in 1991 witnessed as its aftermath a “reign of terror in Haiti” with over thousands of Haitians killed or subjected to extreme violence on account of their political beliefs. Owing to this, persecuted Haitians set out in overloaded boats and undertook the dangerous journey through sea to the US in order to escape persecution. However, these Haitians were continuously interdicted by the US Coast Guard and their boats were returned to Haiti. Subsequently, various organisations and Haitian aliens brought action challenging the interdiction programmes. The respondents based their action on domestic as well as international law. For the purposes of the present article, the author shall only be focusing on the international law aspect of the claims.

The Supreme Court decided by a majority of 8 to 1 that the actions of the Coast Guard in interdicting Haitians before they reached the borders of the US were not in violation of the non-refoulement obligation in Article 33(1). An important aspect of this understanding of the Supreme Court is reflective in its unambiguous acceptance of the non-refoulement obligation itself; the majority did not think the US was not bound by that obligation. However, despite this acknowledgment, the majority decided that Article 33(1) did not have extraterritorial application and therefore, the US was in line with its international law obligation not to refouler refugees to territories where they faced the risk of ill-treatment.

Justice Stevens, delivering the opinion of the Court, reasoned that it was evident from not only the text but also the negotiating history behind Article 33(1) that there was no intention to grant it extraterritorial applicability. However, the Court’s reasoning was problematic. The Court took the negotiating history of Article 33(1) out of its proper context and deliberately strained its reading of the literal text of the article. While the former is independent of the linguistic ambiguity of Article 33(1), the latter problem sources directly from the language of the text which enabled the Supreme Court’s reading.

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226 Presidential Proclamation No. 4865, 3 CFR 50-51
227 Executive Order No. 12324, 3 CFR, p. 181
229 Ibid, at 155
The first rationale provided by the Court for its decision was based on a contextual reading with Article 33(2). Article 33(2) allows states to forego their non-refoulement obligations if the concerned individual is a danger to the country that he is in. This was misfounded as the comparison between Article 33(1) and Article 33(2) could not properly be made in the context of extraterritoriality; Article 33(2) is quite explicit in its geographical application. The Court was of the view that if Article 33(1) applied extraterritorially, the exception in Article 33(2) would be reduced to an “absurd anomaly”. Drawing from this, the Court concluded that “dangerous aliens in extraterritorial waters would be entitled to” Article 33(1) because they would not literally be in any “country” to satisfy the threshold for the exception in Article 33(2). On the other hand, aliens residing within the receiving state would not be so entitled. Therefore, the Court found it “more reasonable to assume” that Article 33(2) applied to those within the country because of the very understanding that the obligation in Article 33(1) was limited to aliens within a state’s territory.\textsuperscript{230}

However, Blackmun J (dissenting) opined that unlike Article 33(2), Article 33(1) does not contain any geographical limitation; it only limits the place where a refugee can be sent to and does not talk about the place where he may be sent from. Blackmun J was correct and the first argument of the majority’s reasoning that was based on a contextual analysis with Article 33(2) is flawed. Such an inference would lead to the oddity of Article 33(1) only applying, for example, to refugees with families if Article 33(2) created an exception for refugees who “constitute a danger to their families”.\textsuperscript{231}

The second limb of the Court’s reasoning was based on an interpretation of the French word “refouler” to be indicative of Article 33(1)’s limited territorial application. This was misconceived as such an interpretation rendered the justification for a non-refoulement obligation completely unachievable. The Court referred to its previous decision in Leng May Ma v Barber,\textsuperscript{232} which relied on Shaughnessy v United States ex rel. Mezei,\textsuperscript{233} to suggest that “refouler” refers only to exclusion of aliens who are merely “on the threshold of initial entry”.

\textsuperscript{230} Supra note 228, at 180
\textsuperscript{231} Supra note 228, at 194
\textsuperscript{232} 357 U.S. 185 (1958), at 187
\textsuperscript{233} 345 U.S. 206, 212, 73 S.Ct. 625, 629, 97 L.Ed. 956 (1953)
Moreover, the Court stated that “refouler” is not an exact synonym for “return” in English. On the other hand, the Court observed that translation dictionaries did use words like “repulse,” “repel,” “drive back,” and even “expel” as containing the same meaning as “refouler”. Therefore, the Court concluded by implication that “return” means a “defensive act of resistance or exclusion at a border”, and not the conduct of transporting to a destination.  

According to Hathaway, this is the most “disingenuous” of all the arguments made by the Court. The executive order in question itself expressly authorised the Coast Guard “to return” Haitian boats to Haiti, which was precisely the act that Article 33(1) prohibited. Moreover, it is not clear why the plain meaning of “refouler” was not applied to the situation at hand, especially when French newspapers themselves were reporting the incident as one where the US had decided to “return” the refugees.

Moreover, by interpreting “refouler” as “expel”, Article 33 was transformed into a circular and redundant obligation as this translation would then mean that no contracting state “shall expel or refoule (expel) a refugee”. Clearly, the word refoule cannot be translated to mean expel as that would reduce Article 33 to repetition of itself.

According to Blackmun J, the text of Article 33(1) was clearly prohibitive of the government’s actions, whether reliance was placed on the word “return” or “refouler”. While the majority thought it appropriate to rely on contextual meanings and the negotiating history in order to aid their interpretation of the text, the minority view was that the text was clear. This divergence in views as to the clarity of the text is indicative of the ambiguity in the text. Had the text really been clear, the majority would not have relied on secondary instruments of statutory interpretation.

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234 Supra note 228  
235 Supra note 219, at 337  
237 Le bourbier haitien, LE MONDE, May 31- June 1, 1992  
238 Supra note 228
Lastly, the Court relied on the negotiating history of the Convention to support its restrictive reading of Article 33(1).\footnote{Supra note 228, at 184} However, it did so in a rather peculiar fashion. It relied on the statement of the Swiss delegate present during one of the negotiating conferences where he explained that he understood the words “expel” and “return” to pertain only to refugees in the host country. The Court relied upon this observation and the fact that no one at that Conference expressed discord with the Swiss delegate’s understanding.\footnote{Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Thirty fifth Meeting, U.N.Doc. A/CONF.2/SR.35, pp. 21-22 (July 25, 1951)}

However, the Court’s reliance on this specific aspect of the negotiating history is misplaced. This article submits that reliance on this history itself is not incorrect because the Vienna Convention on the Law of Treaties directs that reliance on this history should be an alternative of last resort.\footnote{Article 32} As far as Article 33 is concerned, the text is ambiguous and unclear, thus making the use of this history itself appropriate. Therefore, the criticism levelled at the use of the negotiating history by the Court is directed at the inaccurate understanding of the history and its misapplication by the Court.

The Court relied on statements of a foreign delegate that were not discussed or voted upon by the US itself, which were not considered by the US Senate when it ratified the 1967 Protocol and that were actually refuted by the US government official who negotiated the Convention itself.\footnote{Supra note 228} Moreover, if the negotiating history of the Convention is looked at in a more holistic manner, it becomes clear that despite the ambiguous text, the intent of the drafters was unambiguous in that they wanted to secure the widest possible protection for refugees.\footnote{Refugee Convention, at Preamble, ¶2} The Court’s decision is the most basic and apparent breach of Article 33(1) which was envisioned to render impermissible all methods which would result in refugees being “pushed back into the arms of their persecutors”.\footnote{Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.21, Feb. 2, 1950, at 7.}
There was no basis for the Court to have reasoned that the drafters envisaged interdiction and return such as that carried out by the US against Haitians.\textsuperscript{245} Moreover, the Court seems to have been oblivious to another aspect of the negotiating history. The drafters of Article 33 decided to amend it and include the phrase “in any manner whatsoever”, which was explained to encompass methods inclusive of refusal of admission in addition to expulsion and return.\textsuperscript{246} Therefore, the inclusion of the all-encompassing “in any manner whatsoever” was made with the intent to make the obligation apply extraterritorially as well. This was a key snippet of the negotiating history which was conveniently overlooked by the Court.

Moreover, the majority reasoning failed to take account of the observations of the UNHCR as \textit{amicus curiae} in the case. The High Commissioner had explicitly expressed his assent of the extraterritorial application of Article 33(1). He was of the view that the US government’s interpretation extinguished “the most basic right enshrined in the treaty” for a whole class of refugees and rendered the most fundamental protection of the refugee regime meaningless.\textsuperscript{247}

Therefore, it can be gauged from the above analysis that the decision of the Supreme Court was based on an inaccurate interpretation of Article 33(1), which was enabled and triggered by its ambiguous text and its ability to be interpreted in the manner that it was. This decision exhibits how Article 33(1) is vulnerable to abuse via such strained readings of its text.

2.2 \textit{The Haitian Centre for Human Rights et al. v. United States}\textsuperscript{248}

The Inter-American Court of Human Rights agreed with the UNHCR that Article 33(1) did have extraterritorial application and explicitly criticized the majority’s interpretation in the US Supreme Court.\textsuperscript{249} Here, the petitioners highlighted the various hardships and forms of persecution that the repatriated interdictees had to face once the Coast Guard returned them

\textsuperscript{245} Supra note 228
\textsuperscript{246} Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.22, Feb. 2, 1950, at 20.
\textsuperscript{247} Ibid, paragraph 157
\textsuperscript{248} Case 10.675, Report No. 51/96 (1997) (Decision of the Inter-American Court of Human Rights)
\textsuperscript{249} Ibid, paragraph 157
to Haiti. Many were arrested in Haiti, several of those were found shot to death, beaten in public, forced to identify other repatriated Haitians and tortured.  

This explicit disagreement with the Supreme Court’s interpretation of Article 33(1) is further proof of its dubious nature as the correct reading of the obligation. This disagreement was premised on the arguments advanced by the UNHCR as amicus curiae and Blackmun J’s dissent in Sale.

As exhibited by this complaint, the effects of construing the obligation as not applying extraterritorially are extreme. The effects, in fact, completely defeat the obligation. Non-refoulement is aimed at preventing return of refugees to places where it is likely they would face persecution. That is precisely what the fate of the repatriated Haitian refugees was. This practical reality that these Haitians had to face when they were returned is reflective of the problem with the Supreme Court’s approach. Via a strained interpretation of an unclear text, the Supreme Court nullified the core obligation of non-refoulement.

However, while this case does highlight the practical lacunae the Supreme Court’s reasoning is capable of creating, the Inter-American Court did not offer a reading which permitted extraterritoriality on the text of Article 33(1) itself. The judgment of this court was premised largely on claims of the interdicted Haitians arising out of the American Convention on Human Rights, American Declaration of the Rights and Duties of Man and customary international law binding upon the US. Article 33(1) was only addressed briefly, that also in mere endorsement of the UNHCR’s views as amicus curiae.

2.3 R (European Roma Rights Centre) v Immigration Officer at Prague Airport  

The importance of this judgment of the United Kingdom House of Lords is the simple fact that it follows the problematic interpretation in Sale. This decision reiterates how the

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250 Ibid, paragraph 10
252 Articles I, II, XVII, XVIII, XXIV, XXVII, Inter-American Commission on Human Rights (IACHR), American Declaration of the Rights and Duties of Man, 2 May 1948
253 [2004] UKHL 55
absence of a clear prohibition on extraterritorial non-refoulement in the provision makes it vulnerable to continuous abuse by states.

This case concerned the lawfulness of procedures adopted and applied to the appellants at Prague Airport by the British Immigration Officer. These appellants belonged to Romani ethnicity and were Czech nationals. They were all refused entry into Britain at the Prague Airport itself, before boarding the plane. 254 These Czech Roma had escaped from discrimination, persecution, harassment and poor living standards in the Czech society.255

Lord Bingham expressed in unequivocal terms his approval of the restrictive reading of Article 33(1) and justified it by reference to the literal text itself. According to him, the court’s task was confined to interpreting the written document to which they had assented and not to decide on what an “ideal world” should look like.256 He additionally observed that the obligation of interpreting a treaty in good faith does not apply if a state interprets a provision as it is and refuses to do more than what the provision requires. Moreover, he distinguished the situation of the Haitians in the US from that of the Czech Roma because he believed the plight of the former and their treatment by US authorities was of much greater magnitude.258 The facts, according to him, also differed because the Haitians, unlike the Roma, were outside the country of their nationality when they were repatriated.

However, what Lord Bingham failed to acknowledge was the fact that the effect of measures taken in both jurisdictions was similar in its application to the fate of the asylum seekers. Both measures ensured refugees did not gain access to the border. The only difference was that the UK intercepted the asylum seekers before they even left, saving themselves the inconvenience of returning them from their own territory. Otherwise, both states had taken preemptive action to stop the inflow of asylum-seekers by ensuring, albeit in different ways, that access to the territory was rendered impossible in the first place. Thus, what is

254 Ibid, paragraph 1
255 Ibid, paragraph 3
256 Ibid, paragraph 18
257 Article 26 Vienna Convention on the Law of Treaties
258 Supra note 253, at paragraph 21
important is that the implications of both measures is the same for the principle of non-
refoulement notwithstanding their distinguishable nature.\footnote{259}

Lord Hope expressly approved the decision in the US Supreme Court,\footnote{260} acknowledging as
correct both the textual and contextual arguments relied on by the majority in Sale.\footnote{261} The
interpretation adopted in Sale was destructive towards the entire regime of refugee
protection, and the House of Lords is susceptible to the same charge for having followed
that restrictive interpretation. It shows how dangerous the ambiguity in the text of Article
33(1) really is.

The House of Lords relied on the supposedly clear meaning emanated by the provision but
the question remains: did this “clear” meaning of the literal text uphold the rights of refugees
in the widest possible sense? In fact, this “clear” meaning essentially made the obligation
redundant and devoid of any practical value.

3 THE LIBERAL INTERPRETATION OF ARTICLE 33(1)

3.1 The European Court of Human Rights

The ECtHR in Hirsi Jamaa took a reading of Article 33(1) contrary to that adopted by the
highest courts of the UK and US. It was the first case in which this judicial body delivered a
judgment on interceptions at sea wherein it unanimously decided that the obligation of non-
refoulement does have extraterritorial applicability.

This case concerned Somali and Eritrean migrants who fled Libya in 2009 on vessels, aiming
to reach the Italian coast. However, they were intercepted by Italian authorities before they
could access the border or the refugee determination procedures of the receiving state. They
were transported back to Libya.

\footnote{259} D’Angelo (2009) at 294
\footnote{260} Ibid at 70
\footnote{261} Ibid at 68
The ECtHR did not rely solely on Article 33(1) in finding Italy in breach of its obligations. Its conclusion was based equally on Article 3 of the European Convention of Human Rights, Article 4 of the Italian Navigation Code (2002), bilateral accords between Libya and Italy, the United Nations Convention on the Law of the Sea (1982), the Palermo Protocol (2002), Resolution 1821 (2011) of the Parliamentary Assembly of the Council of Europe and other European Union law. For the purposes of the present article, however, only the court’s reasoning vis-à-vis its interpretation of Article 33(1) will be considered.

The ECtHR adopted a four-pronged line of analysis when interpreting Article 33(1) liberally. Firstly, the court emphasised the significance of refugee-status determination and its proximity to the non-refoulement obligation. Since the determination of this status is “declaratory”, Article 33(1) applies to not only those awaiting status determination but also those who have not yet applied at all. This reasoning of the court carries immense practical weight. Until and unless asylum-seekers are allowed access to refugee protection procedures of host states, the propriety of their claim to be refugees can never be ascertained. In order to afford them this opportunity, which the court points out is “instrumental in protecting primary human rights”, it is imperative that the obligation of non-refoulement apply extraterritorially. This argument has also been endorsed by Vandvik by his emphasis on the practical realities concerning the non-refoulement obligation; Article 33(1) requires a substantive determination of refugee status which is logically impossible until an asylum-seeker is allowed access to the procedures as a starting point.

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262 This reads as follows: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”
263 As amended in 2002, this provided as follows: “Italian vessels on the high seas and aircraft in airspace not subject to the sovereignty of a State are considered to be Italian territory.”
264 The Court relied on Articles 92, 94 and 98 of this Convention.
267 Supra note 81, at 63.
268 Ibid
269 Vandvik, B., 2008. Extraterritorial Border Controls and Responsibility to Protect: A View from ECRE, Amsterdam: ECRE
Secondly, the court explicitly disapproved of the United States Supreme Court’s interpretation of Article 33(1) in Sale as it ran counter to the “literal and ordinary meaning”\(^\text{270}\) of Article 33(1). The court reasoned that treaties must be giving their ordinary interpretation according to the Vienna Convention on the Law of Treaties. The court was convinced of the view that since Article 33(1) was clear, no reliance should have been placed by the United States Supreme Court on aids to treaty interpretation, like travaux préparatoires. However, the rationale of the ECtHR in this regard is deeply flawed and the Supreme Court’s reliance on the negotiating history was not misplaced, rather it was their narrow account of that history, bordering on cherry-picking, that was problematic. The downside of the ECtHR’s reasoning is that it is oblivious to the textual ambiguity in Article 33(1): it is not plain from its ordinary meaning whether it applies extraterritorially or not. The court emphasized on the all-encompassing nature of the phrase “in any manner whatsoever” and took it to apply to situations where interceptions of asylum-seekers occur before they reach the receiving state’s territory. However, this is the very phrase that is the root of the problem; this phrase, as it stands, cannot impose a negative obligation on states not to return asylum-seekers to places from where they have escaped before they reached the host country. That, being the essence of the obligation, should have been unequivocal in the text of Article 33(1).

Thirdly, it is appreciated that the ECtHR’s decision is in line with Blackmun J’s dissenting opinion in the Sale judgment who also endorsed the liberal interpretation of Article 33(1). In agreement with Blackmun J’s observations, the ECtHR rationalized that if there is any limitation as to territory in Article 33(1), then it is just on the country to which return is prohibited, not the country from where such return is not allowed.\(^\text{271}\) Therefore, from this argument, the ECtHR rationalized, adopting a flexible line of reasoning that the provision had no bar for it to apply extraterritorially, in the absence of a clear restriction on such application.

Fourthly, the court in this case also relied on the “deliberate insertion of the French word refouler” which it believed was done to accentuate the “linguistic equivalence” between “return” in English and “refouler” in French. While this line of reasoning is logical, it does run in sharp contrast to

\(^{270}\) Ibid, at 67
\(^{271}\) Ibid, at 68.
the court’s second line of reasoning wherein the ECtHR criticised the use of supplementary sources by the United States Supreme Court because it felt Article 33(1) was clear enough. However, the ECtHR ended up relying on fragments of the negotiating history and the rationale behind “refouler”.

The ECtHR therefore found Article 33(1) to have extraterritorial applicability, their conclusion being in consonance with the stance of this article. However, this article does not adhere to the rationales employed by the ECtHR which construe the extraterritorial effect of Article 33(1) as indisputable in its promulgation of the non-refoulement obligation.

3.2 UNHCR Advisory Opinion

This Opinion affirms the liberal and human-rights friendly interpretation of Article 33(1). The analysis of this Advisory Opinion is pertinent because this Opinion affirms the extraterritorial effect of Article 33(1), and criticises the reasoning employed by the majority in Sale. This rejection by the world’s largest refugee protection and assistance organization is proof of the blatant disregard the restrictive interpretation of Article 33(1) has for the indispensable right of a refugee who leaves his state of persecution to not be sent back. While the overall stance taken by the Advisory Opinion is correct, the approaches adopted in reaching its conclusion are ill-reasoned. The two major arguments presented by the UNHCR in favour of the extraterritorial applicability of Article 33(1) shall be presented and it shall be shown how the methodology in forming them is flawed.

Firstly, the UNHCR opined that the non-refoulement prohibition applied to all forms of forcible removal. This would include expulsion, extradition, renditions, informal transfers and non-admission at frontiers. The UNHCR supported this finding by basing it on the wording of Article 33(1), more specifically, its reference to “in any manner whatsoever”.

However, it is submitted that this phrase, while being quite open-ended, is not decisive as to Article 33(1)’s extraterritorial application. The list of forms of forcible removals given by the

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273 Ibid, at paragraph 7
UNHCR needs to be evident on the face of Article 33(1) itself, especially the category of non-admission at frontiers.

Secondly, the UNHCR does reiterate the general stance promulgated by the liberal interpretivists of Article 33(1) that the only geographic restriction it is subject to is with regard to the country where a refugee may be sent to. However, the UNHCR finds this conclusion, again, on the basis of the “clear” text of Article 33(1). While it is clear that refugees may not be “sent to” their countries of origin, Article 33(1) fails to mention the status of the potential host country at all. Its failure to do so cannot be extrapolated to such an extent as to imply an extraterritorial non-refoulement obligation. Thus, this reasoning is stretched on part of the UNHCR, just like it was by the ECtHR.

A unique facet of this Opinion is how it justifies extraterritoriality by reference to the general application of other human rights extraterritorially, as decided by the Human Rights Committee, the International Court of Justice and the European Court of Human Rights. However, these observations have to be treated with caution and this general trend is not the basis for this article’s support for the extraterritorial application of Article 33(1). The factors for each human right to be applied extraterritorially are varied, must be looked at separately, without an overarching principle of extraterritoriality applying to all and any human rights obligations of a state.

In conclusion, this section depicted the virtues of the liberal interpretation of Article 33(1) as being in conformity with the overall aim of the Refugee Convention in general and the non-refoulement obligation in particular. Nevertheless, it is submitted that both the ECtHR and the UNHCR erred, to some extents, in their justifications for the conclusions reached. The preferred liberal interpretation adopted was not as evident on the text of the provision as they claimed it was. This precisely is what needs to be made evident.

274 Ibid, at paragraph 26
276 International Court of Justice, Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, General List No 131, 9 July 2004, at 111
4 Incremental Reform of Article 33(1)

4.1 Textual Reform of Article 33(1)

As a starting point, it is proposed that the textual ambiguity within Article 33(1) should be resolved in favour of explicit reference to the extraterritoriality of the non-refoulement obligation. The liberal interpretation of Article 33(1) should be the basis of this textual reform.

This textual reform should be done drawing influence from Article 2(3) of the OAU Convention in the following manner:

<table>
<thead>
<tr>
<th>Article 2(3) of the OAU Convention</th>
<th>Article 33(1) of the Refugee Convention</th>
<th>Proposed amendment to Article 33(1) of the Refugee Convention</th>
</tr>
</thead>
<tbody>
<tr>
<td>“No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.”</td>
<td>“No Contracting State shall expel or return ('refoul') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”</td>
<td>“No Contracting State shall take any measures to reject at or before asylum seekers reach frontiers, expel or return ('refoul') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”</td>
</tr>
</tbody>
</table>

The text of Article 2(3) is evidently wider than Article 33(1) and more importantly makes explicit reference to “rejection at the frontier” unlike Article 33(1)’s silence on the exact scope of such measures in relation to non-refoulement. Moreover, Article 2(3) has comparatively open-ended language where it proscribes measures “such as…” indicating that there are measures other than rejection at frontier, return and expulsion that will be caught by the provision. While Article 33(1) may, prima facie, also seem equally broad with its inculcation
of “any manner whatsoever”, it is submitted that this broadness is deficient in encompassing the notion of extraterritorial non-refoulement. In comparison, Article 2(3) is not just broader, but also provides a much clearer rule on the matter.

Article 2(3) reflects the overall theme of the OAU Convention, which originated premised as a reaction to the refugee problems subsisting in Africa.278 Accordingly, its provisions for the protection of refugees are broad-based and liberal, reflecting the “ideal of solidarity and cooperation among African States.”279 It is appreciated that the aims and objectives of the OAU and Refugee Convention are different. The former was meant to serve as an addition to and for the furtherance of the aims of the latter,280 and not as a replacement of or alternative to it. While the Refugee Convention’s geographical application extended to its 145 signatories and the 146 states parties to its Protocol, the obligations enshrined in the OAU Convention only extend to the 46 African states who have consented to it. Thus, the obligations of states and rights of refugees in the OAU Convention reflect the particular conditions prevailing within African states during the time of the drafting of the instrument. The main group of asylum-seekers during that time were those fleeing conflict zones created during the struggles against colonial powers.281 It was “specifically intended to meet the security concerns” of African states and to “prevent the refugee problem from becoming a source of subversive, inter-state dispute”.282

Set against this background, the wider promulgation of the non-refoulement obligation in the OAU Convention seems well-rationalized and raises the corresponding question: can this liberal meaning be duly extrapolated to the Refugee Convention? It can, despite the differences in backgrounds and contexts of the two instruments. This is because Article 2(3)’s express reference to “measures such as rejection at the frontier” clearly addresses the

278 The Preamble states that, "I. Noting with concern the constantly increasing numbers of refugees in Africa and desirous of finding ways and means of alleviating their misery and suffering as well as providing them with a better life and future .... "
280 Preamble, OAU Convention
bone of contention raised by Article 33(1) of the Refugee Convention.\textsuperscript{283} Therefore, the incorporation of the aforementioned phrase into Article 33(1) will have the effect of making the extraterritoriality of the obligation crystal-clear. It may be legitimately argued that provisions such as those defining who a refugee is under the OAU Convention cannot be projected on to how the Refugee Convention defines him/her because such definitions are directly the outcome of the historic backdrop against which the two instruments were set, both catering to different needs and aspirations of the international community. However, the issue of the extraterritoriality of the obligation of non-refoulement is not a provision which has any bearing on or is sourced from a specific setting. It is a matter of principle which must extend to all uses of the phrase universally. If non-refoulement is to include rejection at frontiers, then that is the understanding that should be obvious on a literal reading of any text containing that obligation.

Apart from importing the phrase “rejection at the frontier” from the OAU Convention into Article 33(1), it is also proposed that Article 33(1) cover the type of situation that arose in R (European Roma Rights Centre) v Immigration Officer at Prague Airport. In that case, the issue was not rejection at UK’s frontier per se, but interception before asylum-seekers even reached that frontier. Because both measures have the same effect of returning asylum-seekers without even giving them a chance to access to a state’s refugee determination procedures, both should be the basis of the non-refoulement provision. Therefore, as mentioned in the table above, Article 33(1) should also extend to refoulement before reaching a state’s frontier.

\textbf{4.2 Independent International Judicial Commission}

Once the textual ambiguity in Article 33(1) is resolved, the next step towards ensuring optimum effect of an extraterritorial non-refoulement obligation is the creation of an independent International Judicial Commission. The proposal for this Commission has is

based on North and Chia’s paper on the matter, the specifics of which shall be explored henceforth.

This would be an international platform for the analysis of different interpretations of Article 33(1), with the eventual aim of ensuring a convergence in interpretation. While the International Commission proposed by the aforementioned paper is tasked with ensuring an overall consensus on the interpretation of all contentious provisions of the Refugee Convention, for the purposes of the present article, the focus remains on the task of ensuring uniformity in the interpretation of the non-refoulement obligation only.

The Commission should be established under the auspices of the UNHCR, comprising of highly qualified jurists, experts and lawyers of refugee law. The composition of the adjudication panel for this Commission is important. Some of the most groundbreaking and decisive interpretations regarding the extraterritoriality of the non-refoulement obligation have been made by adjudicatory bodies. Therefore, the most effective manner of change in interpretations is through such a body itself, “best equipped to persuade judges” of national jurisdictions. The presence of experts in this judicial body is significant because of the peculiar nature of the non-refoulement obligation, and refugee law in general. It cuts across traditional confines of humanitarian and international law. This requires “sophisticated analysis” and deeper understanding better suited to the mandates of experts of refugee law than to sole confines of judges.

In conformity with the original proposal, the involvement of states in the process of the creation and running of this Commission is also supported. Without the inclusion of states, who are the subjects of international law, there can be no potential for enforcement or recognition of the decisions or declarations of such a commission. Moreover, states eventually make domestic refugee policies so their participation in such a commission is indisputably necessary. However, caution needs to be taken and a balance will need to be

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284 Supra note 224
285 Namely, the supervisory mandate of the UNHCR enshrined in Article 8 of its Statute.
286 Supra note 224
287 Ibid, at 245
288 Ibid
struck between participation of states and any excessive, detrimental interference or for that matter, monopoly of power for any state or group of states. The Commission would be charged with providing opinions and deciding on the correctness of varying interpretations of Article 33(1). In consonance with the underlying tenet of international law being consensual in nature, it is clear that this body’s declarations would be neither binding nor enforceable. They will, however, be highly persuasive in so far as their “institutional mandate and intellectual and practical quality” is concerned.\(^\text{289}\) There exists precedent for the establishment of such bodies for various human rights instruments. For example, the Human Rights Committee is a group of independent experts which oversees the enforcement of the \textit{International Covenant on Civil and Political Rights}\(^\text{290}\) by its State parties. It has done so, for instance, in relation to Article 19 of the Covenant.\(^\text{291}\)

The ultimate aim of this Commission would be to ensure the maximum possible convergence in interpretation of the non-refoulement obligation among states parties to the Refugee Convention. This is crucial because without a certain standard of uniformity in the way states perceive their non-refoulement obligations, some states will continue to suffer from unfair burdens while others enjoy undue latitude. Uniformity of interpretation is all the more important when the subject matter is an “international treaty designed to offer universal protection” where it is critical to not overlook the fundamental “principle of justice”.\(^\text{292}\) Because the object or the beneficiaries of the non-refoulement obligation are refugees themselves, a certain level of equality between the interpretations states give to their non-refoulement obligations in relation to these beneficiaries is important.\(^\text{293}\) Refugee law, generally, is an area where the balance between consistency and divergence in interpretation needs to be struck overwhelmingly in favour of the former, because of the important consequences it has for the plight of refugees.\(^\text{294}\)

\(^{289}\) Ibid, at 215.
\(^{291}\) UN Human Rights Committee (HRC), \textit{General comment no. 34, Article 19, Freedoms of opinion and expression}, 12 September 2011
\(^{292}\) Supra note 224, at 217
\(^{293}\) Supra note 224, at 218
\(^{294}\) Supra note 224, at 225
It is appreciated that a consensus in interpretation of Article 33(1) will not solve practical divergences in refugee determination laws of different states parties, which does affect the “principle of justice” underlying the Refugee Convention. However, as with the first phase of reform, this judicial body of experts will help strengthen and promote the extraterritoriality of the non-refoulement obligation for all states-parties alike, and that will serve as the foundation for justice in refugee determination laws of these states as well.

CONCLUSION

It is appreciated that the debate surrounding the extraterritoriality of non-refoulement cannot be divorced from its political aspects. Rejection at frontiers is an inherently political exercise of a state’s sovereignty, especially if mass influx situations are concerned where threats to state security tend to tilt the balance in favour of preservation of state sovereignty. It is recognised that practical realities of the way non-refoulement plays out are much more complex than what is shown on paper or pronounced in judicial decisions.

This article has not deflected those realistic concerns. It has, in fact, highlighted one of the textual loopholes which can (and has) led to the abuse of the notion of state sovereignty and a manifestation of those concerns. There is a considerable amount of uncertainty and ambiguity regarding the geographic limitations of Article 33(1) of the Refugee Convention: does it apply extraterritorially to cover measures such as rejection at frontiers or not? This question has been answered both in the positive and negative by the ECtHR and the US Supreme Court respectively. However, this article has proposed that the answer by judicial bodies ought to be positive (given the fact that the non-refoulement obligation is in one sense the core of the refugee protection regime), and that the way of ensuring this is by reforming Article 33(1) and introducing a regime that brings about uniformity of interpretation.

Unless and until such clarity is achieved, the modern refugee protection regime will run a full circle and go back to where it started from – states across Europe using all measures to disable the entry of Jewish refugees within their territories. Thus, in the words of Carl Levy,
whatever happens, it is absolutely essential to “fight for the principle of non-refoulement”. If fundamental principles of the refugee protection regime, such as non-refoulement, are foregone with impunity by states, then this in turn also affects the pace and substance of policy initiatives at the international level. Finally, as Wesley Hohfeld’s characterisation of “jural correlative” goes, a “right” cannot be operationalized without a corresponding “duty” on the state. Thus, the right of refugees not to be refouled to their states of origin is rendered hollow and meaningless if there is no concrete, clear duty preventing states from doing so.

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UPHOLDING THE INTERNATIONAL RULE OF LAW

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(with supervision from Mr. Ahmer Bilal Soofi)

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ABSTRACT

The Higher Judiciary in Pakistan, has occasionally referred to international law treaties and instruments when resolving issues that have some relevance with international law. These references were predominantly drawn from private international law as in majority of these cases, the international law of arbitration was referred to and discussed. Related concepts like sales of goods, international letter of credit were the most leaned upon areas of international law but this was predominantly what we referred to as the ‘private international law basket’. Seldom, references from public international law domain were also discussed but the only area that attracted attention from public international law was the law of human rights; in-fact one notices frequent references to the United Nations Human Rights Declaration (UNDHR), International Covenant of Civil and Political Rights (ICCPR) and other HR instruments when the courts were seized on matters relating to the interpretations of fundamental rights provided under all the Constitutions of Pakistan including the 1973 Constitution. However, recently the Superior Courts have shown more interest in other areas of international law such as the ‘use of force’, interpretation of the UN Charter, particularly in light of the implementation of Chapter VII, the law of conflict and some UNSC resolutions. This article examines and maps the recent and novel trend of the judiciary’s reliance upon principles of public international law; in-fact their judgments cover large swaths of the legal landscape from intellectual property law to environmental law to international trade law.

INTRODUCTION

In Pakistan the three organs of the state coexist interdependently and even though the Judiciary is independent from the state, it is a subset of the state and thus plays a vital role in the legal policy making of the state. The influence of the Superior Courts in the State’s institutional function is evident via their realization that the Rule of Law does not only imply domestic law but international law as well; this includes upholding international norms and obligations and complying with international treaties that Pakistan is a signatory to.

Interestingly, as mentioned in the abstract, the Superior Courts of Pakistan have engaged with the subject of private international law since the last 70 years and there is
considerable jurisprudence\(^{298}\) on arbitration, transnational sales of goods, joint venture agreements, agency agreements and international letters of credits.

In the realm of private international law, the Chief Justice of Pakistan (CJP) in a 2016 judgment,\(^{299}\) while shedding light upon the extent of the jurisdiction of Pakistani courts, pronounced that:

> “it is incumbent upon the courts of Pakistan to keep the principles of Conflict of Laws or Private International Law in mind whilst dealing with matters involving questions of cross-border succession. These principles are based on mutual respect for and recognition of, the judicial systems and the laws of other countries”

Some of the footnoted judgments below reflect the erudite competence of the superior courts in the arena of Private International law. However, in case of Public International law, the superior courts have mostly confined to references related to human rights treaties and human rights conventions. Consequently, the human right treaties are the most quoted in public international law jurisprudence and documents by the Superior Courts of Pakistan.

Nevertheless, in the last five years the Supreme Court has in particular begun to take note of other public international law treaties and subject areas such as trade and tariff agreements pertaining to the World Trade Organization (WTO) regime, wild life related treaties, intellectual property law, transnational terrorism and crime, movement of narcotics, ILO Conventions and international humanitarian law etc. Interestingly, the Superior Court has been at the forefront of promoting harmonization of domestic law and its application with international law standards and treaties ratified by Pakistan.

\(^{298}\) Examples of some of the judgments on P.v.t International Law have been reproduced hereunder:
Famous Judgment on Reko Diq that involved a comprehensive discussion on various international law issues including whether the Chagai Hills Exploration Joint Venture Agreement (CHEJVA) was processed under the Foreign Private Investment Act of 1976, the scope of enforceability of an award under the New York Convention etc, *PLD 1968 Karachi, 480, 1998 SCMR 1618, PLD 2000 SC 841,*
\(^{299}\) *PLD 2016 SC, 174*
This is partially also due to the 18th amendment and the strengthening of entry No. 3 of the Federal Legislative List (FLL) Part 1 through the introduction of Item 32 (in the FLL (Part 1)) that enables states to legislate at a federal level on the subject that is related to an internationally binding treaty, even if the said subject is devolved to a province.

**JURISDICTIONS UPHOLDING INTERNATIONAL RULE OF LAW IN PAKISTAN: A BREAKDOWN**

1. **LABOUR LAW**

In a recent judgment300 issued by a three-member bench, headed by the former Chief Justice of Pakistan, Mian Saqib Nisar, and comprising of Justice Mushir Alam and Justice Sajjad Ali Shah, the Court upheld the rule of international law while addressing the moot question of whether the Federal Legislature possessed the legislative competence and the authority to enact laws related to trade unions and labour disputes at trans-provincial level.

The judgment while examining if the Industrial Relations Act (IRA 2012) was a valid piece of legislation or not, noted that “through the 18th amendment the Concurrent Legislative List (CLL) (Entries No. 26 and 27 whereof covered the subjects, inter alia of labour disputes and trade unions) was abolished from the Constitution”301 but as mentioned above Entry No. 3 was strengthened via Entry, No. 32 in Part-1 of the Federal Legislative List (FLL) that dealt with subjects related to international treaties, conventions and agreements and international arbitration.302 Thus, Entry No. 32 read in light of Entry No.3 grants wide-scope powers to the Federal Legislature to regulate and enact laws governed by International instruments that Pakistan has ratified; in this context the international law being, the International Labour Organization’s Conventions No. 87.

300 Civil Appeals No.1583 to 1598 of 2014
301 id at p 46
302 Item No. 32 of the Federal Legislative List, Part 1
303 This refers to item No.3 of the Federal Legislative List, Part 1

“External affairs; the implementing of treaties and agreements, including educational and cultural pacts and agreements, with other countries; extradition, including the surrender of criminals and accused persons to Governments outside Pakistan”
Hence, the recent judgment has far-reaching consequences with regard to the emphasis laid down by the Superior Judiciary in underlining Pakistan’s responsibility as a state in discharging its international obligations. Furthermore, this ruling also sheds clarity upon the ambiguity of the 18th amendment (that affected the balance of power between the Federal and Provincial Legislatures).

Interestingly, this nascent trend is also reflected through recent judgments that elucidate Pakistan’s obligations as an international state in light of the international treaties ratified by Pakistan.

2. **INTERNATIONAL TRADE LAW**

In a petition filed by Pakistan Banaspati Manufacturers Association (PVMA) in 2017 the Islamabad High Court directed the Ministry of Science and Technology (MoST) to take remedial steps to ensure that the Punjab Food Authority (PFA) was fulfilling its commitments in compliance with the World Trade Organization (WTO) and in line with the WTO regime in relation to the standards of ghee and cooking oil. As per Article 2 and 3 of the Technical barriers to Trade Agreement (“TBT” Agreement) to which Pakistan is a signatory, each Member State is expected to ensure that inter alia the local government bodies are complying with the TBT Agreement’s rules and conditions. However, since the PFA had been regulating practices in contravention to the standards set out by the Pakistan Standards Quality Control Authority (a Federal Body); the PFA was deemed to be violating Pakistan’s international commitments. Hence, the above mentioned direction was issued by the federal government.

Another noteworthy 2017 judgment, via a majority opinion delivered by Shahid Jamil Khan highlighted significant principles related to International trade law while discussing the scope of the ‘Free Trade Agreement between Pakistan and China (FTA), under Article 8, that ‘envisaged progressive elimination of customs duties on import of goods originating in

305 2017 PTD 1796
the territory of the other party’. The predominant question to be answered was whether the FTA was to be considered as an offshoot of the General Agreement on Tariff and Trade (GATT) and based on that proposition could an exemption of Regulatory Duty be justified or not under Section 18 (5) of the Customs Act 1969. The Court held that ‘an agreement which is essentially bilateral cannot be given multilateral hue especially when it is between two nations’ and hence since FTA is a bilateral agreement it could not be read in light of Section 18(5).

3. **Drug Regulation and Narcotics**

Justice Dost Mohammad, senior judge of the Supreme Court has often advocated the utility of international law principles in domestic law. In a 2016 judgment\(^{306}\) that dealt with the subject of narcotic substances and more specifically the definition of ‘poppy straw’, the minority opinion led by him stated, that since Section 2(t) of the Control of Narcotic Substances Act, 1997 was misleading, the “Government and the Legislature may take guidance from the international conventions and expert research opinions to amend definition clauses”\(^{307}\) in the Act of 1997.

4. **International Humanitarian Law (IHL)**

Ever since the commencement of military operations authorized under Article 245 of the Constitution, the legality of these operations became shrouded ambiguity. Initially these operations were over-simplified and categorized as counter-terrorism or law enforcement measures. Furthermore, the narrative of the non-state actors being dismissive about the Constitution and the law had also created difficulty in putting the non-state actors into a legal category of “terrorists” “criminals” “offenders” “miscreants” “foreign-funded agents” “enemy agent”; In fact the Prime Minister had gone so far as to say that Pakistan was at war so as to constitute the operations as an executive determination. The judiciary, on the other hand, was also creating confusion in determining the legal nature of these non-state actors and it is at this point that the Supreme Court grappled with this position. It relied upon

\(^{306}\) 2016 SCMR 621

\(^{307}\) *id*
public international law principles within the international humanitarian law (IHL) paradigm and decided to construct an authentic assessment of the legal conditions relating to the law of war for the first time.

The principal judgment that explicated the international humanitarian law paradigm, and Pakistan’s responsibility within it in countering non-state actors engaged in the acts of terrorism, was delivered in a majority opinion by Justice Azmat Saeed on August 2015. While illuminating the notion of “threat of war” and upholding the establishment of military courts under the 21st amendment he held that:

“A perusal of Article 245(1) reveals that the Armed Forces of Pakistan, to achieve the ends mentioned therein i.e. the Defence of Pakistan shall act on the direction of the Federal Government. Broadly speaking two sets of eventualities have been catered for in the said Article. First the event of “external aggression” or “threat of war” and the second eventuality to “act in aid of civil power”.

Furthermore, it was elaborated that:

“The gravity of the current situation and the intensity of the armed conflict, warrants its description as a “threat of war” permitting the trial of civilians by Court Martial”. He held that these “people, claiming to be a member of a terrorist group or organization, using the name of religion have created the warlike situation; the gravity whereof cannot be squeezed into the narrow confines of a state of affairs where mere acting in “aid of civil power” by the Armed Forces would suffice. It is in the above backdrop in order to deal with the current situation, an additional tool to counter the situation has been provided by way of the questioned Amendments in the Constitution and the Pakistan Army Act.”

The concurring opinion by Justice Umar Ata Bandial leaned upon canons of international law particularly of the rights enjoyed by ‘captured insurgents’ mentioned in the Geneva Convention. The opinion highlighted that:

308 PLD 2015 SC 401
309 id at Para 145 of Azmat Saeed’s, J at para 135.
310 id
311 District Bar Association Rawalpindi case at Para 143 of Azmat Saeed’s judgment, J
312 District Bar Association Rawalpindi case at Para 144-145 of Azmat Saeed’s judgment.
“The treatment of belligerent citizen and unlawful combatants in custody who have waged war against the State is not just a matter of municipal law. The subject attracts the principles of International law on armed conflict of war”.

He added that:

The terrorist militants fighting against Pakistan captured by the Armed Forces of Pakistan may be considered for protection under the 4th Geneva Convention dealing with civilians in the captivity of a party to the conflict of which they are not nationals. However, under the exclusionary Article 5 of the 4th Geneva Convention, a belligerent civilian who has committed hostile acts against the detaining State may forfeit certain human rights privileges under the said Convention; however he still remains entitled to a fair and regular trial prescribed by the said Convention.

In light of the IHL framework, another significant judgment, that served a reminder to Pakistan and the international community, particularly the U.S, to be mindful of its international legal obligations, was delivered by Justice Dost Mohammad, then functioning as the Chief Justice of Peshawar High Court. While relying upon the U.N Charter and Conventions, the Peshawar High Court declared the drone strikes carried out by CIA and the U.S Authorities were a 'war crime and a blatant violation of the the basic human rights protected under the international law'.

5. **Nuclear Non-Proliferation**

Ever since the episode of the clandestine nuclear market of Abdul Qadeer Khan, Pakistan has been under immense pressure to ensure its compliance under UNSC resolution 1540. Adhering to its domestic and international needs, a new overarching nuclear control programme operating under the National Command Authority was brought in place.

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313 District Bar Association Rawalpindi case at Para 19 of Umar Ata Bandial, J
314 District Bar Association Rawalpindi case at Para 21-22 of Umar Ata Bandial, J
315 Writ Petition No. 1551-P/2012, p 17
Consequently, the National Command Authority Act enacted in 2010 significantly outlined the statement of objects and purposes of the UNSC resolution 1540.

Moreover, the National Command Authority Act was also the subject of a judgment delivered by Justice Ejaz Afzal Khan, where he not only underscored Pakistan’s international legal obligation under United Nation Security Council Resolution 1540 but also drew a link between Pakistan’s domestic legal obligations and Chapter VII of the U.N Charter. The pleading counsel, representing the National Command Authority (NCA), advocated to have the status of the organization declared as non-statutory in light of Pakistan's compliance towards its international legal obligations. Currently, a review petition has been filed against this decision but the final verdict pertaining to this case will have far reaching consequences keeping in mind the international law paradigm.

6. FOREIGN RELATIONS AND LAW OF THE ENDANGERED SPECIES

The significance of international law in the realm of foreign relations law and in maintaining effective bilateral relations between Pakistan and other states can be underscored via the recent judgment on the Houbara bustard hunting by the Supreme Court of Pakistan. The Court ordered that neither the Federal Government nor a province could grant license to permit hunting of the bird under the Federal Government’s obligations under the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) and the Convention on Migratory Species of Wild Animals (CMS). Earlier this year, the Chief Justice of the Lahore High Court temporarily stopped the hunting on the bird by relying on an international environmental law principle i.e. the precautionary principle.

317 2016 PLD 377
318 UNCS resolution 1540 stipulates that states “shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport or use nuclear, chemical or biological weapons...”
319 Recently, Marshall Islands (RMI) filed a case against Pakistan and a few other states before the ICJ alleging that Pakistan had violated its international law obligations under customary international law and hence should cease its arms race and ensure nuclear disarmament. Even though the case was ruled in favour of Pakistan, yet it signifies not only the extensive debate over the nuclear arms race but the necessity of Pakistan adhering to its international legal stipulations coupled with equipping itself with a comprehensive understanding of the international law framework.
320 2016 SCMR48 & 2016 PLD 421
However, in order to promote bilateral ties between the Gulf States and Pakistan, the ban was recently lifted to issue hunting permits to foreign dignitaries.

7. **Environmental Law**

Pakistan’s environmental law jurisprudence is acclaimed for generating discourse on international law principles. In a recent 2018 judgment, Mansoor Ali Shah once again applied the internationally recognized ‘precautionary principle’ in addressing the issue of pollution and the hazardous smog in the city of Lahore. Moreover, Justice Ayesha. A. Malik of the Lahore High Court elaborated upon the above-mentioned acknowledged principle in an environment case related to the legality of the power exercised by the Environment Protection Agency (EPA) under Section 16 of Environment Protection Act, 1997. The Court held that the ‘spirit of section 16 is based on the Precautionary Principle and Pakistan’s commitment to uphold sustainable development and the Precautionary Principle was affirmed through its ratification of the Rio Declaration and other international instruments’.

Another environmental law case that enunciated principles of Public international law was the renowned Orange Line case. It highlighted the significance of preservation and maintenance of historical heritage by relying on the World Cultural and National Heritage Convention that recognizes the duty of the “international community as a whole to protect the World Heritage and the Member States to ensure protection, conservation of heritage sites and its transmissions to the future generations”.

Furthermore, a distinguished Lahore High Court judgment, further expanded the judiciary’s ambit of reliance on Public International law principles when adjudicating upon the issue of including people with disabilities or persons in the upcoming National Population Census. The CJ of Lahore High Court articulated that since the United Nations

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321 PLD 2018 Lahore 1
322 2017 CLC 772
323 2016LHC2454 delivered by Justice Abid Aziz Sheikh
324 *id* at pg. 37
325 PLD 2017 Lahore 558 delivered by Justice Mansoor Ali Shah
Conventions on the Rights of Persons with Disabilities (CRPD) was ratified by Pakistan in 2011, the state was mandated to collect appropriate information regarding persons with disabilities “in order to formulate and implement policies to give effect to the purposes of the Convention”. The Honourable Court also referred to the United Nations Principles and Recommendations for Population and Housing Census to assert the significance of collecting information on persons with disabilities through the census data for general strategy planning and services and ‘monitoring selected aspects of disability trends in the country’.

8. Health Law

The Sindh High Court, has frequently placed reliance on different principles of Public international law. In 2017 judgment the Court in an opinion delivered by Justice Zulfiqar Ahmad Khan, expounded upon the interpretation of the right to health, while dealing with the subject of access to affordable medicine. The judiciary held that the right to health was contained in the penumbra of the right to life, enshrined under Article 9 of the Constitution of Pakistan and safeguarded by various international instruments “including the International Covenant of Economic, Social and Cultural Rights (ICESCR) ratified by Pakistan, that recognizes the rights of nationals to the enjoyment of the highest attainable standard of physical and mental health”. The judgment also accentuated Pakistan's responsibility as an international state player under Article 12.1 of the ICESCR to provide essential drugs and facilitate access to health facilities to its population; a denial of which could be “considered non-overt discrimination based on wealth.”

9. Police and Criminal Law

Moreover, the expansive role of the public international law framework was reiterated in another recent 2017 judgment delivered by Justice Muneeb Akhtar and that predominantly encircled the issue of the inept state of policing in Karachi. In light of the background of the

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326 id
327 PLD 2017 Sindh 157
328 id
329 id
330 CP D-7097 of 2016 & CP D-131 of 2017
case, it is important to touch upon the principal facts of the case. Post the 18"th amendment, 
the Sindh Act, 2011 repealed the Police Order 2002, reviving the Police Act of 1861 and the 
Petitioners had challenged the 2011 Sindh Act as being unconstitutional and invalid as it 
“substantially eroded and compromised the efficacy and availability of the fundamental 
rights in the Province”. The Court while declaring that the legislative competence of the 
police was in the exclusive “provincial domain”\textsuperscript{331} and that the Sindh Act and therefore 
Police Act, 1861 was \textit{intra vires} of the Constitution, remarked that for purposes of giving 
directions and making orders for the enforcement of fundamental rights, the Police Act was 
to be interpreted using the ‘\textit{Ghaidan}\textsuperscript{332} approach as applied by the House of Lords in reading 

\textit{“So far as it is possible to do so, primary legislation and subordinate legislation must be read 
and given effect in a way which is compatible with the Convention rights”}

Thus, in order to grant expansive and wide scope meaning to a few challenged sections of 
the Police Act, 1861 for the purpose of enforcement of fundamental rights, the Court drew a 
nexus between the Convention rights and the rights guaranteed under the Pakistani 
Constitution. It further explicated just how the Convention rights were applied in the 
seminal \textit{Ghaidan v Mendoza}\textsuperscript{333} case to interpret certain words of the Rent Act, 1977, where it 
was ruled that the Constitutional rights guaranteed under Article 9, 10, 14, 15 and 16 may be 
applied and interpreted to the Police Act to enforce the positive obligations of the police 
force.

10. \textbf{Education}

A seminal judgment\textsuperscript{334} that utilized public international law as an effective tool to validate its 
ruling, covered the subject of the dissemination of the fundamental right to education up to 
the intermediate school level. The two judge bench observed that since Pakistan was a

\textsuperscript{331 id} at para 103,  
\textsuperscript{332 id} at para 101(j) Ghaidan V Mendoza (2004 UKHL 30)  
\textsuperscript{333} 2004 UKHL 30  
\textsuperscript{334} PLD 2015 Sindh 118 delivered by Justice Shaukat Ali Memon
signatory to the Universal Declaration on Bioethics and Human Rights adopted by UNESCO it made it incumbent upon states to ensure dissemination of information to its citizens. Hence, the provincial education department was directed to devise its future education policies in accordance with its international legal obligations.

11. **Intellectual Property Law**

In the arena of intellectual property law, a 2015 judgment,\(^\text{335}\) issued by Justice Aamer Raza Naqvi, asserted Pakistan’s obligation to comply with international patent and trademark laws and standards as it had acceded to the Paris Convention for the Protection of Industrial Property (Paris Convention), 1983. The Court ruled that since the appellant company fell within the definition of Section 86 (1) (a) and (b) of the Trademark Ordinance 2001\(^\text{336}\) and because its trademark was a ‘well known trademark’, therefore the appellant company was entitled to protection as Pakistan was a Convention Country.

12. **Citizenship**

Currently, in Pakistan the controversy over dual citizenship and undeclared offshore assets may invite debate over international law principles and the interaction of the international law framework with the state fraternity. The notion of Dual Citizenship is emerging as a novel international law issue and while some advocate that it should be protected as a human right, yet dual nationality can be argued to destabilize inter-state relations. Consequently, the Chief Justice of Pakistan (CJP) has remarked that even though the officers holding dual nationality will not be punished, they would not be able to hold important positions as that would be detrimental to national interest. With regard to the illegal offshore assets being held by Pakistanis the CJP has formed a committee to prepare a legal framework for the provision of information regarding foreign accounts. However, the domestic legal guidelines can only be constructed on the footing of a comprehensive understanding of the international law paradigm.

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\(^{335}\) 2015 CLD 1108

\(^{336}\) Section 86 (1) and (b) of the Trademarks Ordinance 2001 state that
CONCLUSION

Keeping the above jurisprudence in mind, this article clearly discerns that international law plays a pivotal role in regulating Pakistan’s domestic law and its application in the state framework. Moreover, this article also provides an insight into the evolution of Pakistan’s issues under the banner of public international law and consequently heightens Pakistan’s responsibility as a global actor coupled with obligation of the subsets of the state in upholding the rule of international law.

Furthermore, this article maps a new precedent set by the Superior Judiciary of Pakistan, which is a welcome development given that a major portion of our federal and provincial legislations are linked with any one of Pakistan’s numerous ratified treaties. While we are a common law country the courts are progressively discussing, relying and enforcing PIL treaties that are beneficial for Pakistan, not only in terms of domestic law but also with respect to compliance with its international commitments and obligations.