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The COVID-19 Law and Policy Challenge:
Public Health vs. Individual Privacy in the Age of Cyber Surveillance

The COVID-19 Law and Policy Challenge:
Cyber Surveillance and Big Data - Pakistan’s Legal Framework and the Need for Safeguards

The COVID-19 Law and Policy Challenge:
Inter-Provincial Coordination and Planning on Healthcare in Pakistan

The COVID-19 Law and Policy Challenge:
The Future of Global Health Law and Pakistan’s Potential Role

The Universal Periodic Review and the Death Penalty: A Case Study of Pakistan

Community Participation, the Missing Link in Pakistan’s ADR System - The Way Forward

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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. The RSIL Law Review was established in 2017 as a successor publication to the Pakistan Journal of International Law. RSIL’s rapid growth in recent years has allowed us to indigenously fund the Law Review and bring on board highly qualified human resource to serve as dedicated editorial staff who have infused it with a higher standard of academic sophistication.

As the novel coronavirus (COVID-19) continues to create turmoil across the world, states are faced with an unprecedented policy challenge in addressing the pandemic. In response, RSIL is conducting cutting-edge research on how Pakistan can cope in these uncertain circumstances from a law & policy perspective. This volume showcases some of our work in this domain, including the debate on Public Health vs. Individual Privacy and Pakistan’s legal framework on Cyber Surveillance, Big Data and Artificial Intelligence and the need for safeguards. From a governance perspective, we explore the impact of devolution on healthcare in Pakistan with a focus on inter-provincial planning and coordination and highlight the challenges and opportunities of devolution in fighting a pandemic. We also provide our analysis on the future of global health law and the role Pakistan can potentially play in its development in a post COVID-19 reality.

The 4th Edition of the Law Review features articles which have undergone a rigorous peer review from respected professionals in academia and legal practice in Pakistan. This is the first time that the Law Review has gone through the process of peer review and forms part of our commitment to continuously improve the academic quality of this journal. We are indebted to our peer reviewers for generously contributing their time.
and expertise and whose comments and insightful guidance have helped raise the academic standard of this journal. In the months ahead, we will also be seeking accreditation of this journal with the Higher Education Commission of Pakistan.

I would like to acknowledge the hard work and professionalism of our editorial team led by Managing Editor Ms. Noor Waheed and Research Fellow Ms. Ayesha Malik. 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
September 2020

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ABOUT RSIL

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

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

The RSIL Law Review is a journal of international law academia published by the Research Society of International Law (RSIL). It 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 4th Edition of the RSIL Law Review, Volume 1 of 2020. 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.

In 2015, Bill Gates predicted, “if anything kills over 10 million people over the next few decades, it is most likely to be a highly infectious virus rather than a war” followed by the harrowing claim, “we’re not ready for the next epidemic”.

The year 2020 marks an unprecedented period in the twenty-first century with the advent of COVID-19, proving that the world was in fact not ready for a health crisis on a global scale. The importance for continuing innovation in research, and the need for the delineation between the lawful duties of the state and rights of citizens in a state of emergency have been marked with urgency during this time. In response to this, RSIL led the historic initiative devoting its resources to publishing a series of papers covering topics most pertinent to the COVID-19 situation both internationally and, more pressingly, in Pakistan. This collection of research was dubbed the COVID-19 Law and Policy Challenge and it is only fitting that selected papers will be showcased in this edition of the RSIL Law Review.

The first paper from the COVID-19 Law and Policy Challenge series is Public Health vs. Individual Privacy in the Age of Cyber-Surveillance. It covers how cyber-surveillance measures use personal location data to ensure contact tracing via dissemination of health alerts, the use of surveillance in selected countries including via big data and artificial intelligence (AI), the legality of these endeavours, and issues with their applicability in Pakistan.

The second paper delves into Cyber Surveillance and Big Data: Pakistan’s Legal Framework and the Need for Safeguards. It highlights potential legal issues caused by the use of such measures, through an analysis of both the existing legal framework in Pakistan and model legislation. Its recommendations seek to
appropriately balance the need to act in the interest of public health with human rights, specifically individual privacy.

The third paper pertains to Inter-provincial Coordination and Planning on Health Care in Pakistan. This paper aims to shed light on the major challenges of governance, service delivery, health information and policy coordination in the field of health in Pakistan, and its effect on federal and provincial responses to COVID-19.

The fourth paper concludes the series with a discussion of the Future of Global Health Law and Pakistan's Potential Role. The paper explores the structure of the existing global health law regime, paying particular attention to the WHO, and its shortcomings in managing a global health crisis of this scale. The paper also identifies ways in which the situation may be improved to effectively counter pandemics and other health emergencies in the future, within the geo-political context of Pakistan.

In addition to these, the articles selected for this volume cover a breadth of legal disciplines and topics that are of pressing importance in 2020.

Dr. Amna Nazir, (Director of the Center for Human Rights, Birmingham City University) (LL.M (Warwick), Ph.D (Birmingham)), uses Pakistan’s latest Universal Periodic Review (UPR) as a case study to assess the UPR’s engagement with the question of the death penalty. She considers the extent to which this violation of the right to life is challenged and issues recommendations to strengthen the integrity of the UPR.

Dr. Usman Hameed, (Director, School of Law & Policy University of Management & Technology), and Nyma Anwar Khan, (Associate Professor, School of Law & Policy University of Management & Technology), discuss the role and legal standing of Alternative-Dispute Resolution Mechanisms (ADR) in present day Pakistan. They compare the relative success of such mechanisms in other countries and presents recommendations on how the law regarding ADR can be improved.

I am proud to announce that this year’s Review also features a book review by Professor Bushra Khan (Ph.D, LLM (University of Notre Dame)) on Islamic Law and International Law: Peaceful Resolution of Disputes (Oxford University Press 2020) by Emilia Justyna Powell, and a Case Comment by Mehrseen Naushad (LL.M. (George Washington University)) on the case EFU General Insurance Ltd. vs. M’s Emirates Airlines/Emirates Sky Cargo and Others.
The articles in this volume underwent a rigorous peer-reviewed 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.

I would like to extend my sincerest gratitude, on behalf of the Law Review, to our esteemed peer-reviewers:

- Ms. Nighat Dad, Executive Director, Digital Rights Foundation (LL.M (University of Punjab));
- Dr. Usman A Mushtaq (MD. (University of Oslo));
- Barrister Sami-ud-Din, Partner, BNR (Lincoln’s Inn);
- Dr. Sameen Mohsin Ali, Assistant Professor, LUMS, (Ph.D (SOAS));
- Mr. Fahd Qaisrani, (LL.M (Vienna));
- Mr. Usama Khilji, Director, Bolo Bhi (MA (London School of Economics))
  and
- Ms. Minahil Khan, Senior Research Fellow, RSIL (LL.M (Sussex)).

Thank you to my colleagues at RSIL, especially Ayesha Malik, who aided extensively in the editorial process, and to all the people who showed their interest in supporting the publication.

The RSIL Law Review would not be 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*
Managing Editor
RSIL Law Review
September 2020

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THE COVID-19 LAW AND POLICY CHALLENGE:

PUBLIC HEALTH VS. INDIVIDUAL PRIVACY IN THE AGE OF CYBER SURVEILLANCE

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RESEARCH SOCIETY OF INTERNATIONAL LAW

ABSTRACT

Cyber-surveillance is increasingly being used by desperate governments seeking to curb the rising figures of those infected with coronavirus. States are investing in and rolling out smartphone apps to track citizens’ movements, trace locations and map outbreaks in a bid to tackle COVID-19. While not without its benefits, the proliferation of cyber surveillance raises important concerns regarding health rights and privacy of ordinary citizens. This paper explores these concerns and the legality of these measures as well as the issues with their particular application in the Pakistani context.

INTRODUCTION

As States around the world struggle with rising figures of those infected with coronavirus, they are increasingly turning to cyber-surveillance. The use of surveillance to collect data is gaining traction as a useful way to combat the virus in some countries, through information sharing, tracing movements of infected patients or to enforce quarantine. The proliferation of cyber surveillance through smartphone apps to monitor and map the outbreak brings with it a range of challenges and opportunities. This paper will explore the ways in which these measures use personal location data to ensure contact tracing via dissemination of health alerts, the use of surveillance in selected
countries including via big data and artificial intelligence (AI), the legality of these endeavours, and issues with their particular applicability in Pakistan.

1. **What is Contact Tracing?**

When dealing with infectious diseases, public health officials often turn to contact tracing as a strategy for tracking down potential patients, who may or may not be carriers of the disease. The strategy was used extensively in the Ebola crisis in West Africa, and is conducted in tandem with case finding (surveillance) and case investigation processes.¹ In COVID-19, this is critical as the virus has evolved to spread rapidly.² It takes on average between six to fourteen days for an infected patient to develop symptoms. In an alarming number of cases, statistics show that those infected can even remain asymptomatic, and thus be carriers despite showing no symptoms.³ Contact tracing upon case detection and speedy implementation of isolation measures is thus crucial to stemming the spread of COVID-19.⁴

2. **Process of Contact Tracing⁵**

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The detection of an infected patient activates the case investigation process, immediately after this, contact tracing commences. Once a patient has been detected, the WHO lays out three stages to undertake contact tracing:

**Stage 1: Contact identification:** The patient’s contacts are identified by asking about the former’s activities and roles of the people around them since the onset of illness. Contacts can be anyone who has been in contact with an infected person: family members, work colleagues, friends, or health care providers.

**Stage 2: Contact listing:** All persons considered to have contact with the infected person should be listed as contacts. Efforts should be made to identify every listed contact and to inform them of their contact status, what it means, the actions that will follow, and the importance of receiving early care if they develop symptoms. Contacts should also be provided with information about prevention of the disease. In some cases, quarantine or isolation is required for high risk contacts, either at home, or in hospital.

**Stage 3: Contact follow-up:** Regular follow-up should be conducted with all contacts to monitor for symptoms and test for signs of infection.
In practice, once contacts are identified and listed, they should be interviewed by medical professionals or other relevant authorities and tested for COVID-19. In cases where contacts are symptomatic, they should be treated as a patient and transported to the designated quarantine/isolation centers. In cases where a contact tests positive, but is not symptomatic, there remains a chance that the contact will continue to transmit disease and may even develop symptoms later, requiring treatment – thus, they will also be labelled as a patient, and taken to quarantine/isolation.

In cases where contacts are tracked down but test negative for COVID-19 initially, they will still be asked to remain home and self-isolate for 14 days. During this time, the contact may develop symptoms later, in which case they must be tested and if positive, quarantined or isolated with treatment options. If the contact continues to remain symptom-free after self-quarantine, then it is clear that they did not contract COVID-19. Authorities should conduct tests and ensure through follow-ups the status of these contacts, and react to any deterioration of the situation accordingly.

*Chart Modified to fit COVID-19 Context*
https://apps.who.int/iris/bitstream/handle/10665/185258/WHO_EVD_Guidance_Contact_15.1_eng.pdf;jsessionid=0F836B3C1FE835FA6EE2603225884742?sequence=1
3. **From Digitizing Contact Tracing to Cyber Surveillance**

In a bid to contribute to contact tracing, a range of options have been devised that can be used to keep track of patients’ and contacts’ movements to control the spread of COVID-19. Digitizing this response has led to the creation of specific smartphone apps, or gathering of information via mobile data, telecom networks, Bluetooth or big data/ AI.\(^7\) The purpose of these tools can range from managing and enforcing quarantines, to conducting follow-ups with contacts digitally.

Privacy International, in its continued study and analysis of COVID-19 measures around the world, has identified the following needs regarding data collection with respect to the pandemic outbreak:\(^8\)

- **In early stages** of dealing with the pandemic, quick and effective contact tracing is required to curb the spread. This requires the use of data that illustrates interaction, proximity and precise locations of individuals when tracking their field of movements. This will give information regarding who interacted with who else, where and when precisely – all of whom will be contacted later as part of contact tracing.

- **In the containment phase**, tracing is not the highest priority and instead, physical distancing is more valued. In this phase, data can be used to

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monitor, develop policy, and for authorities to enforce lockdowns and quarantines, including tracking movement of people who violate rules and/or gather with others when specific gatherings are outlawed. In this scenario, location data to track fields of movement becomes priority.

- *In the later phases,* contact tracing may again be required once more to re-establish connections with former patients and/or contacts in a bid to follow up, as well as to ensure the enforcement of home quarantines and other mechanisms. Like the first stage, all manner of interactions, proximity to other people and location data will be collected and utilized for these purposes.

Once this data is collected, it is analyzed in the second phase through various data management tools, including big data and artificial intelligence (AI).

4. **Cyber Surveillance and Big Data/AI**

These tools are used to organize, collate, interpret, and use the mass of data gathered through apps, telecom networks, or Bluetooth, and used for effective outcomes.

Big data is defined as the range of tools that analyze, systematically extract information from, or otherwise deal with data sets that are too large or complex to be dealt with by traditional data-processing application software.⁹

⁹ Big Data and Global Development – SAS Analytics
The mass of information gathered using such tools, including structured and unstructured data, are analyzed to determine correlations, generate trends and organize information that normal processing tools cannot handle. With pandemics like the novel coronavirus, these tools have been tailored to serve as excellent sources of information, aiding both policy-making and enforcement, as illustrated below.

Multi-Source Big Data Analogy for COVID-19

However, employing big data and AI to counter the pandemic means understanding the scope of these complex technologies and the feasibility of using such methods in developing and lesser developed country contexts.

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5. **Key Countries Using Cyber Surveillance for Coronavirus**

5.1. **Contact Tracing**

Health authorities and district offices in South Korea have been sending out ‘safety guidance texts’ to the public, detailing the movements of those recently diagnosed with the virus.\(^\text{12}\) They do not specify the names of those diagnosed but do give out some personal information such as gender and age. The country has also created a publicly available map of location data from individuals who have tested positive.\(^\text{13}\) Some of this information sharing has negatively impacted some businesses visited by infected people before they were diagnosed.\(^\text{14}\)

In Israel, Prime Minister Netanyahu has recently passed an ‘emergency decree’ to allow the Israel Security Agency to deploy surveillance technology normally reserved for terrorists to track coronavirus patients.\(^\text{15}\) An app called ‘The Shield’ shares a user’s location data with the health ministry, whilst the ministry promises the information shared is secure, there are worries that the terms of use are far-reaching and allow too much information sharing.\(^\text{16}\)

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\(^\text{14}\) Barrie Sanders (supra n.12)


India has launched an app called Aarogya Setu (translates to bridge to health) which uses Bluetooth and location data to tell users if they have been within 6 feet of someone infected and are at risk.\textsuperscript{17} The app also shares the data with the government. The data shared with the public is anonymised so the name or number of the individual will not be made public. However, the app does collect this information as well as the individual’s gender, travel history and whether they are a smoker.

Germany may track the spread of coronavirus by asking users to voluntarily download an app.\textsuperscript{18} If a person becomes infected, the app will automatically send a push notification to anyone they have crossed paths with in the past two weeks, to warn them of the risk of infection. This approach focuses on attempting to inform persons that they have interacted with an infected person and encourage them to act appropriately, for instance, by self-quarantining. Germany’s Federal Commissioner for data protection has, however, assured citizens that the data would be stored for a limited and clearly defined period in order to fight the pandemic after which it will be deleted.\textsuperscript{19}

5.2. Big Data/AI

In East Asia, a range of cyber surveillance methods involving big data and artificial intelligence (AI) were employed to counter COVID-19. China was

\textsuperscript{17} See BBC Live Updates at https://www.bbc.com/news/live/world-52130552
\textsuperscript{18} The Local, Privacy-mad Germany turns to app to track coronavirus spread, April 2, 2020, https://www.thelocal.de/20200402/privacy-mad-germany-turns-to-app-to-track-virus-spread
\textsuperscript{19} Ibid
“closely monitoring people’s smartphones, making use of hundreds of millions of face-recognising cameras, and obliging people to check and report their body temperature and medical condition”, which allowed them to quickly identify coronavirus carriers and track their movements and everyone they came into contact with. Mobile apps even warned citizens about their proximity to infected patients. A new system called Health Code assigns users colour codes (green, yellow, red) based on travel history, time spent in infection hotspots and potential exposure to virus carriers, and then shares this information with the police. A ‘bad’ red score means you cannot use public transport to go to work or school.

Thermal scanners installed at various subway transit points in China and Taiwan not only actively monitored passengers’ temperatures, but also employed facial recognition software to aid in identifying them, and automatically notifying their contacts if they exhibited symptoms. CCTV footage was used in tandem to track fields of movements of individuals under quarantine. Telecom companies have been providing “travel verification reports” to employers, based on an employee’s location data and local travel

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20 Financial Times, Yuval Noah Harari: the world after coronavirus, March 20, 2020
https://www.ft.com/content/19d90308-6858-11ea-a3c9-1f6fe46575?segmentid=acce4131-99c2-09d3-a635-873e61754ec6

21 Opinio Juris, COVID-19 Symposium: COVID-19, Cyber Surveillance Normalisation and Human Rights Law, Barrie Sander, April 1, 2020,


23 Big Data helps Taiwan Fight Coronavirus, Spectrum, March 2020

24 How China is using AI and Big Data to Combat the Coronavirus, Al Jazeera, March 2020
history charted over 14 days leading up to the Chinese Lunar Year to track intra-state spread of the disease.25 These are separate from the data gathered through voluntarily-installed smartphone apps, or unknowingly monitored through data usage by telecom companies around the world.

Google and Apple have also announced a rare collaboration, where they would integrate contact-tracing programming into smartphones’ operating systems so that no third-party apps need to be installed for the purpose.26 Implementing this would allow these companies to effectively trace and follow-up with more than one third of the global population to tackle COVID-19.27

6. **Public Health v. Individual Privacy**

The use of bio-surveillance to track people’s movements and communications in order to contain the spread of the coronavirus has given rise to concerns that this may lead to unnecessary incursions into the right to privacy. Whilst technology has an important role to play in a global effort to save lives through the dissemination of health messages, awareness campaigns and also increased access to healthcare, heightened surveillance may also threaten privacy in ways which could degrade trust in governments.28

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25 Ibid.
27 Ibid.
Citizen’s personal data is being used to guide policy, contact trace, and enforce lockdowns. The increasingly intrusive means by which this is being done, including through phone records, CCTV, and temperature checkpoints, lends credence to worries of a panopticon which may never be rolled back. In order to ensure that there is not an unnecessary and disproportionate erosion of our right to privacy, there must be oversight and regulation of the measures employed to curb the rate of infection.

This is even more important given that many laws are currently being passed by decree as elected legislatures are unable to sit and hold votes, even emergency ones. These laws are far-reaching and new rules may not be time limited. The expansion of powers which curtail our digital rights is also alarming given the extent to which individuals are online at the moment. With a quarter of the world’s population in some form of a lockdown, we are working, socialising, and engaging almost solely online.

This is the first pandemic of this scale that the world has seen, and therefore while exceptional measures are justified, they cannot unnecessarily and disproportionately violate rights to privacy. The UN High Commissioner for Human Rights has emphasized that ‘human dignity and rights need to be front and [center]’ in the effort to combat the spread of coronavirus. The issue is the appropriate level of interference in the right to privacy that can balance the benefits to public health with continued respect for human rights.

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30 Ibid
7. **IS IT LEGAL?**

International human rights law allows for States to make limitations so long as it is provided by law, undertaken in pursuit of a legitimate aim (such as public health), and are necessary and proportionate to the achievement of that aim. The International Covenant on Civil and Political Rights (ICCPR) identifies legitimate aims which include national security, public safety and public health as grounds for limiting – by law and when necessary and proportionate to such aims – a number of rights. These rights include the right to privacy (Article 17), the freedom to manifest one’s religion or belief (Article 18), freedom of expression (Article 19), freedom of assembly and association (Articles 21-22) and freedom of movement (Article 12). Therefore, any measures taken by states which limit rights under the Covenant must be adopted by law, with the legitimate aim to protect public health and are necessary and proportionate.

The Siracusa Principles of 1985\(^\text{32}\) also detail criteria by which limitations and restrictions on human rights can be lawful requiring that they be:\(^\text{33}\)

- provided for and carried out in accordance with the law;
- based on scientific evidence;
- directed toward a legitimate objective;
- strictly necessary in a democratic society;

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the least intrusive and restrictive means available;

• neither arbitrary nor discriminatory in application;

• of limited duration; and

• subject to review.

The last criterion is crucial and will be increasingly difficult as courts shut in the face of the pandemic. The need for legislation to be subject to review may be enabled by the use of remote courts which can handle litigation and cases through video conferencing.

For cyber-surveillance to be a legal limitation to the right to privacy, a law must be passed in order to allow for it, and the aim it pursues must be legitimate. Further, it has been demonstrated by the scientific community and public health experts that measures to limit social contact are required to limit the spread of the coronavirus. Therefore, laws that deprive individuals of their liberty or privacy in order to enforce these limits may be considered adequate in this situation, and are not arbitrary under Article 9 as well as, not prohibited under Article 17.

This is supported by case law for instance in Big Brother Watch and Others v. the UK, the European Court of Human Rights (ECtHR) held that ‘the decision to operate a bulk interception regime in order to identify hitherto unknown threats to national security is one which continues to fall within States’ margin of appreciation’.\footnote{Big Brother Watch And Others v. The United Kingdom, 58170/13, [2014] ECHR 178} According to the Court, this interception regime constituted ‘a valuable means to achieve the legitimate aims pursued, particularly given the current threat level from both global terrorism and serious crime.’
States can also derogate from treaties. Article 4 of the ICCPR allows for derogations in times of public emergency threatening the life of a nation. However, several provisions cannot be derogated from including the right to life, the probation on torture, slavery, and the freedom of religion. The right to privacy and freedom of expression, however, are derogable rights. Nevertheless, derogations must only be to the extent that they are strictly required.\textsuperscript{35} However, a state’s ability to conduct cyber-surveillance is provided for under the limitations regime without having to resort to derogations.

7.1. Pakistan’s Legal Framework on Privacy and Cyber-Surveillance

The right to privacy is enshrined in Pakistan’s Constitution under Article 14(1), which states that “the dignity of man and, subject to law, the privacy of home, shall be inviolable.”\textsuperscript{36} That said, there are provisions justifying conducting cyber surveillance by the Pakistan Telecommunications Authority (PTA) on the directives of the federal government, usually in the interest of national security (Section 54).\textsuperscript{37} There are concerns that this wide exception to the right to privacy in the Constitution may be prone to abuse.\textsuperscript{38}

8. Implementing Big Data in Pakistan

\textsuperscript{35} See Human Rights Committee’s General Comment No. 29 (at para. 5)
\textsuperscript{36} The Constitution of the Islamic Republic of Pakistan – National Assembly
\textsuperscript{37} Section 54, Pakistan Telecommunication Authority (Re-organization) Act, 1996 (XVII of 1996)
\textsuperscript{38} State of Privacy in Pakistan, Privacy International
https://privacyinternational.org/state-privacy/1008/state-privacy-pakistan
With a population of 220 million, 70% internet penetration, and cell-phone usage at 165 million,\(^9\) there is tremendous potential for big data and AI analytics in terms of sheer data generation. Currently, private telecom companies, multinationals and local banks are amongst some of the biggest users of such software and analytics technologies in Pakistan primarily to serve business interests.\(^{10}\)

At the government-level, certain departments have invested in and utilized such software in a bid to enhance public policy decision-making. National Database and Registration Authority (NADRA) for example, has been working with the US-based data analytics powerhouse, Teradata, to identify population demographics, support intelligence and formal investigations, amongst other uses.\(^{11}\) Similar initiatives were also taken by the Federal Board of Revenue (FBR) to identify tax evaders through AI technology, increase efficiency, speed and accuracy in tax auditing as well as identify potential tax payers to widen the tax net.\(^{12}\)

The recently launched Ehsaas Emergency Cash Program, is also an important example. Launched to ease the financial burden on 12 million families, the program blended eight databases to ensure that the poorest demographic, such as daily wage-earners who are acutely affected by COVID-19, would

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\(^{11}\) Ibid.

receive cash handouts, amounting to nearly Rs 144 billion.\textsuperscript{43} This illustrates political will to move towards such technologies, and a potential for implementing these for cyber surveillance purposes to counter the novel coronavirus.

9. **ISSUES WITH CYBER-SURVEILLANCE**

Despite the plethora of benefits brought about by cyber surveillance technologies – there are issues concerning its usage:

9.1. **Potential Exclusion of Vulnerable Communities**

Poor and vulnerable communities, who often do not have smartphones, may be deprived from receiving information or receiving services equitably. The lack of ubiquity in the use of smartphones also means that the results may be unreliable and therefore useless.\textsuperscript{44} This is a significant issue when it comes to voluntary apps for data surveillance as they are more likely to capture data in affluent communities.\textsuperscript{45} Surveillance may also deter vulnerable groups from seeking healthcare due to, for instance, fears of deportation. In Pakistan, this

\textsuperscript{43} Payments under Ehsaas Program to Begin From Wednesday – Dr. Nishtar, Business Recorder, April 2020
\textsuperscript{44} Barrie Sanders (supra n.13)
may potentially be very acute when it comes to Afghan refugees. It also may push infected people into the shadows which risks worsening the spread.\textsuperscript{46}

9.2. \textbf{Improper Application and Location Thresholds}

Moreover, location data by mobile phone providers has been deemed so inaccurate as to be unsuitable in order to determine possible infections with coronavirus.\textsuperscript{47} There is a danger that inaccurate raw data which is being used to inform policy will create an information overload which will overwhelm users who are given repeated and irrelevant warnings. Experts argue that location tracking based on mobile data is only accurate up to 50 metres, and therefore cannot tell us anything about the interaction between two people.\textsuperscript{48}

9.3. \textbf{Potential of Misuse}

There is also an acute risk of misuse by governments who may normalize the use of surveillance to such an extent that it is expanded beyond the end of this pandemic.\textsuperscript{49} This normalisation may mean it is used for other things after the outbreak is over such as tracking petty crime. Moreover, there is a threat that this data will be vulnerable to hacks or breaches.

\textsuperscript{46} NBC, COVID-19 tracking data and surveillance risks are more dangerous than their rewards, March 20, 2020, https://www.nbcnews.com/think/opinion/covid-19-tracking-data-surveillance-risks-are-more-dangerous-their-ncna1164281
\textsuperscript{48} Noyb, Ad hoc Paper (V0.2) SARS-CoV-2 Tracking under GDPR, March 29, 2020, https://noyb.eu/sites/default/files/2020-03/ad_hoc_paper_corona_tracking_v0.2_5.pdf
\textsuperscript{49} Barrie Sanders (supra n.13)
9.4. Ensuring Data Security

Questions have also been raised regarding the effectiveness of surveillance systems with organisations like Electronic Frontier Foundation and Privacy International stating that there is limited evidence to suggest that it has been useful in tackling Ebola or Middle Eastern Respiratory Syndrome (MERS).\(^5\)

This is in part because of the high number of false positives or false negatives in testing systems. The lack of reliable information will impede the effectiveness of surveillance as well as trust in the government. Moreover, if an AI incorrectly quarantines you, it is difficult to challenge or reverse this automated judgment and this has been a problem in China. Therefore, the lack of accurate and reliable data is a significant setback.

There are also concerns regarding the safety and storage of data systems, including data gathered from third-party apps. Such technologies often rely on cloud computing and storage, amongst other avenues.\(^6\)

Developing countries, like Pakistan, must develop core capacities in these fields to ensure local solutions are available in terms of storing and protecting data. Alternatively, third party-apps present another host of challenges pertaining to privacy, particularly in terms of tracking fields of movements and contacts of individuals.\(^7\) There also remains a risk that collected data could be leaked to other parties, or be hacked/stolen directly. Recently, the Federal Investigation Agency (FIA) in Pakistan was ordered to probe a data breach,

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\(^5\) Ibid

\(^6\) Advanced Analytics for Coronavirus Trends and Predictions, TeraData
https://www.teradata.com/Blogs/Advanced-Analytics-for-Coronavirus-Trends-Patterns-Predictions

\(^7\) Apps and COVID-19, Privacy International.
https://privacyinternational.org/examples/apps-and-covid-19
whereby information from 115 million cell-phone users in Pakistan was stolen and was up for sale on the dark web.\textsuperscript{53} Ensuring protection of such information during data collection and when in storage is thus crucial in successfully implementing such technologies.

9.5. State Capacity in Pakistan

The establishment and evolution of NADRA has been a monumental success story which has allowed the government to undertake several effective policy interventions over the years based on big data analytics. However, despite the success of initiatives like the Benazir Income Support Programme (BISP) and the recent Ehsaas Programme, there remain several key challenges in implementing big data analytics for cyber surveillance purposes. Firstly, the health sector needs to be empowered with qualified data scientists for the categorization, collation, analysis and summation of data from COVID-19 cases in real-time.

This is particularly important, as the outbreak of the coronavirus exposed severe deficiencies in the National Institute of Health (NIH)’s data measuring capabilities.\textsuperscript{54} Key statistics were found conflicting with provincial tallies, data-set categories were unaligned with international standards, and new categories were created arbitrarily – creating doubts regarding the authenticity of the data. Daily situation reports commenced nearly two weeks after the first case and were discontinued almost a month later – other official sources

\textsuperscript{53} FIA asked to probe ‘data breach of 115m mobile users’ – DAWN. 20 April 2020

\textsuperscript{54} New COVID-19 Cases as Pakistan Tally Hits 194, Express Tribune, March 17, 2020.
were grossly incongruent with the figures generated by the NIH. Therefore, it is critical to ensure data science capabilities embedded within the public sector to avoid data discrepancies in all departments of federal and provincial governments.

10. **RECOMMENDATIONS ON IMPLEMENTING CYBER-SURVEILLANCE**

In the wake of the outbreak, Pakistan has implemented a mobile phone tracking system which uses geospatial data to identify where coronavirus patients have been during the last 14 days and those who have been in close proximity to them have been sent a text message directing them to self-isolate. These messages have been sent through the Pakistan Telecommunication Authority which stated that it has directed cell phone operators to send 109 million SMS to subscribers regarding preventive measures they should take in light of the outbreak. 170 thousand messages have also been sent to passengers arriving in the country from China and Iran advising them to obtain immediate assistance if they develop virus symptoms.

However, in order to enhance cyber surveillance frameworks, it is necessary to ensure congruence with provisions of privacy and other rights as outlined above. The following options may be considered by stakeholders:

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56 The Conversation, Coronavirus: how Pakistan is using technology to disperse cash to people in need, April 2, 2020, http://theconversation.com/coronavirus-how-pakistan-is-using-technology-to-disperse-cash-to-people-in-need-134873

i. Data security and protection policies need to be well-defined, and enshrined within local legislation and rules of business across the federal, provincial and district levels. With the degree of digitization of records and personal information, it is critical that data protection protocols be implemented with utmost priority. Public bodies in particular, such as NADRA, where computerized NICs are used to determine information ranging from tax records to registering mobile SIMs, need to devise data security protocols, including emergency measures in cases of breaches of sensitive information. Apart from national legislation, data security education and reform needs to occur within all public institutions, mandated by the authorities for assured protection.

ii. Data protection policies and laws that are designed to be enacted within public institutions must be formulated with consultations from private data experts, public stakeholders as well as members of the civil society. Transparency regarding the storage, usage, and protection of data must be maintained, and oversight bodies must be created to ensure that data protection is implemented across all spectrums of public institutions that utilizes or handles personal data.

iii. Given Pakistan’s emerging data capabilities illustrated through the Ehsaas Programme, it will be useful to engage data scientists and engineers to create dashboards that monitor, map, track and record coronavirus cases on real-time dashboards for the NIH and other health agencies in Pakistan. This will create opportunities for public-private collaborations to reach innovative solutions for Pakistan’s
corona-case management and allow for no discrepancies between data collection.

iv. Engaging and empowering the private sector can also be useful as private laboratories and other hospitals are engaged in coronavirus testing, and/or provide intensive care treatments to COVID-19 patients. It is necessary to collate data from these sectors into a real-time dashboard to illustrate a complete picture of all on-ground actors involved in curbing the spread of the coronavirus. The government must also be transparent about any data-sharing agreements with other public or private sector entities.

v. In terms of cyber surveillance and Pakistan’s inherent capacities, specified smartphone apps can also be rolled out, targeting returnees from abroad most of whom have access to smartphones. This is particularly necessary once travel bans and other restrictions are lifted or eased, as Pakistan’s initial wave of coronavirus cases was traced to returnees from abroad, who were neither instructed to quarantine initially, nor told to follow preventive measures.

vi. An ‘infected unless proven healthy’ approach could be adopted which allows individuals to voluntarily download an application which would become a de facto requirement for participation in public life.\footnote{Noyb, Ad hoc Paper (V0.2) SARS-CoV-2 Tracking under GDPR, March 29, 2020, \url{https://noyb.eu/sites/default/files/2020-03/ad_hoc_paper_corona_tracking_v0.2_5.pdf}} For instance, businesses may require consumers to have this app for them to use their services. This approach may allow for a proportionate
interference in people’s lives while circumventing draconian surveillance measures which would be difficult to implement in Pakistan.

vii. In order to avoid breaches of privacy, anonymized data can also be used. The European Commission has requested that mobile carriers provide anonymised and aggregate mobile data. This would ensure that no personal information is included in the data collected, instead unique identifiers are used instead of names in order to pseudonymise the data. However, this may still not be entirely effective in keeping data anonymous as people’s behaviour can be traced back to their homes by, for instance, observing where the device stays at night.  

Location datasets should be treated as private, sensitive information in order to protect people’s privacy to the greatest extent possible.

viii. Data should also be encrypted to ensure recipients can share data without misusing it. The system should also be independently verified to ensure that false information is not provided which can trigger inaccurate notifications.  

There should also be strict time limits so that the data cannot be retained after the pandemic and to ensure trust among users that they are voluntarily giving up their data only in order to contain the pandemic.

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60 Noyb, Ad hoc Paper (V0.2) SARS-CoV-2 Tracking under GDPR, March 29, 2020, https://noyb.eu/sites/default/files/2020-03/ad_hoc_paper_corona_tracking_v0.2_5.pdf
ix. A detailed review of Pakistan’s domestic framework needs to be carried out to consider the legal and constitutional viability of large-scale cyber-surveillance for public health purposes. In our preliminary assessment, legislative changes may be required to ensure compatibility with Pakistan’s human rights obligations and fundamental rights under the Constitution. Further, any laws which give the state surveillance powers should be publicly declared and reported to treaty bodies when fundamental rights are being limited. They should all include protections and safeguards against abusive surveillance and provide access to effective remedies. This could be through the setting up of remote complaints mechanisms to process any grievances against their operation.
THE COVID-19 LAW AND POLICY CHALLENGE:

CYBER SURVEILLANCE AND BIG DATA - PAKISTAN’S LEGAL FRAMEWORK AND THE NEED FOR SAFEGUARDS

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ABSTRACT

The outbreak of the novel coronavirus has led to the adoption and implementation of new technologies to achieve public health outcomes. While useful, the mass surveillance and collection of data has resulted in heightened concerns regarding the sanctity of data rights and privacy. This paper considers the legislation which provides cover for these measures and the potential legal issues raised by their use. It recommends striking a balance between the benefits of surveillance for the protection of individual’s health with their right to privacy.

INTRODUCTION

The on-going effort to curb the spread of COVID-19 has led to the adoption of various technologies in order to achieve public health outcomes. The proliferation of cyber surveillance to monitor and map the outbreak brings with it a range of challenges and opportunities. This paper highlights potential legal issues caused by the use of such measures, by analysing both the existing legal framework in Pakistan and model legislation. This covers laws that enable the adoption of such technologies, laws which protect privacy, and
recommendations to appropriately balance the need to act in the interest of
government health with human rights, specifically individual privacy.

1. Overview of Cyber Surveillance Issues – Health v. Privacy

As discussed in detail in Paper 1 of this series, heightened surveillance under
emergency laws run the risk of being misused and individuals’ right to privacy
violated. It is imperative to balance the level of interference with the right of
privacy and ensure overall adherence for human rights while countering the
pandemic. International law, through the International Covenant on the Civil
and Political Rights (ICCPR)\textsuperscript{61} and the Siracusa Principles of 1985\textsuperscript{62} offer
guidance as to how this balance may be struck. The legitimate aim (i.e. public
health) can limit enjoyment of a right so long as it is done by law and when
necessary and proportionate to such aims. As a result, an ‘infected unless
proven healthy’ approach has been advocated\textsuperscript{63} which would allow individuals
to voluntarily download an application to gather their data, which would be
anonymised and aggregated so that personal identifiers are not used, and
strictly limited in time. This approach would enable the State to effectively
utilise citizens’ data to stem the rate of infection while protecting their data
and privacy by avoiding draconian measures. This paper will chart the State’s
ability to do so through its legal framework, and conclude with
recommendations to bolster the same.

\textsuperscript{61} Human Rights Committee, General Comment No. 16, above, para 7.
\textsuperscript{62} Refworld | The Siracusa Principles On The Limitation And Derogation Provisions In
The International Covenant On Civil And Political Rights’ (Refworld, 2020)
\textsuperscript{63} ‘Sick Until Proven Healthy’: How COVID-19 Pandemic Changes Global Security’ (The
2. **Pakistani’s Legal Framework**

2.1. **The Right to Privacy**

**The Constitution**

The right to privacy is enshrined as a fundamental right in Pakistan’s Constitution under Article 14(1), which states that “[t]he dignity of man and, subject to law, the privacy of home, shall be inviolable.”64 Whilst this provision only refers to the privacy of the home, in order to provide meaningful protection of the right to privacy, the Superior Courts have read it in an expansive manner to include a general right to privacy everywhere.65

A complementary right to privacy, is the right to information which is found in Article 19A: "Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law." This is important in the discussion regarding cyber surveillance because of the sheer volume of data (including private or otherwise sensitive information) collected by state authorities, and thereby empowers citizens to have access to that information under this context.

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64 The Constitution of the Islamic Republic of Pakistan – National Assembly
Federal Laws

Currently, at the federal level, there is no overarching statute that governs cyber surveillance, data collection or the data rights of citizens in Pakistan.

At the time of writing, the **Personal Data Protection Bill 2020** is under consultation from relevant public and private sector stakeholders, but has not as yet been enacted by Parliament. Prior to this, the **Personal Data Protection Bill of 2018** was proposed by the Ministry of Information Technology and Communications (MOITT). The Bill sought to outline the responsibilities of data collectors and processors as well as rights and privileges of consumers while criminalizing misuse of data. However, this was never presented to the Parliament and is now replaced with the 2020 Bill.

Apart from these, the Right of Access to Information Act, 2017, offers some guidance on issues of privacy. As per Section 16(c) of the Act, the disclosure of certain forms of information is exempt if its disclosure would invade the privacy of an identifiable individual other than the requester. Since ‘Right to Information’ is a devolved subject post-18th Amendment, such exemptions are also provided in provincial legislation in Balochistan, Punjab, Khyber Pakhtunkhwa, and Sindh.

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66 Section 16, Balochistan Freedom of Information Act, 2005  
67 Section 13(b), Punjab Transparency and Right to Information Act, 2013  
68 Section 19, Khyber Pakhtunkhwa Right to Information Act, 2013  
69 Section 10, Sindh Transparency and Right to Information Act, 2016
As well, the exceptions are granted under Sections 31 to the federal government in situations, granting it the power to exempt, pose terms and conditions on or revoke any order made under this Act. In Section 38, the federal government is empowered to issue policy directives directly to the Authority, to which the latter will comply. However, both these sections are ambiguous and broad, and may be used to shirk parliamentary scrutiny and accountability.\(^73\) Furthermore, throughout the document, broader “public interest” is invoked in various sections, but the term has not been defined and there is, thus, a chance that it may be misconstrued or misused by authorities.

**The Right to Privacy and the Courts**

In Pakistan, case law pertaining to privacy remains scarce and most cases have little to do with digital, or cyber-surveillance. However, while Article 14 of the Constitution refers to the privacy of the home, the definition and scope of the right has been extensively expanded upon and can now be said to include the right to privacy, as held in Taufiq Bajwa v. CDGK, allowing a person freedom from public scrutiny, provided that the individual does not act in an unlawful manner.\(^74\) The courts have held that since any intrusion into the privacy of a person necessarily violates the privacy of home, and by extension injures the dignity of man, it may only be taken away by the State for extraordinary reasons, such as in cases of national security.\(^75\) The privacy of the home is specifically recognized as a fundamental right and this extends


\(^{74}\) Taufiq Bajwa vs CDGK (2010 YLR 2165)

\(^{75}\) Muhammad Abbas Alias Ajmi v. State, 2005 YLR 3193; Benazir Bhutto v. President of Pakistan, PLD 1998 SC 388
2.2. **Laws Specific to Infectious Diseases and Epidemics**

**Federal Laws**

The only law which applies specifically to diseases in Pakistan is the outdated **Epidemic Diseases Act 1897** which was passed to deal with the bubonic plague epidemic in Bombay (now Mumbai).\(^{81}\) It empowers officials to enter into any house and forcibly examine a suspected sick person, however, it does not authorize the government to enforce a lockdown, screen passengers, or institute any kind of surveillance. The law was amended in 1958 and renamed as the West Pakistan Epidemic Diseases Act, 1958 but the only amendments in the text were to replace the word India with Pakistan.

**Provincial Laws**

As health is a devolved subject after the 18th Constitutional Amendment, the onus of ensuring adequate healthcare in the event of a pandemic falls to the provinces. The question of whether these provincial laws include provisions allowing for surveillance will be analysed in this section.

The Punjab government recently passed the **Punjab Infectious Diseases Prevention and Control Ordinance (2020)**. The ordinance does not include any provisions relating to the role of cyber surveillance mechanisms and only indirectly alludes to data privacy in Section 27, where it states that

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\(^{81}\) The Epidemic Diseases Act, 1958 - (W.P. Act XXXVI of 1958)
any information regarding an infected person will be kept confidential and only released on consent, or to medical practitioners, etc.\textsuperscript{82}

Sindh passed the Sindh Epidemic Diseases Act 2014 which merely grants powers to the Government to take action to counter the spread and the impact of the disease.\textsuperscript{83} There is no mention of collection of data of affected persons or confidentiality thereof.

In Balochistan, there is no dedicated ordinance or statute that defines the legal framework of action that can be undertaken to counter a communicable disease. With the COVID-19 outbreak, District Commissioners of all 33 regions were granted powers to impose penalties including imprisonment and fines to counter the coronavirus under Sections 3 and 4 of the West Pakistan Epidemic Diseases Act 1958.\textsuperscript{84}

The Khyber Pakhtunkhwa Public Health (Surveillance and Response) Act 2017 creates relevant authorities to counter diseases, defines their roles, and lays out the conditions required to announce public health emergencies in KP.\textsuperscript{85} Section 8(b) of the Act states that the Provincial Disease Surveillance Center is responsible for ensuring that after verification, “all information and data with regard to events, diseases and persons affected with notified diseases or other diseases and conditions” be communicated to the public

\textsuperscript{82} The Punjab Infectious Diseases (Prevention and Control) Ordinance, 2020 (II OF 2020)
\textsuperscript{83} The Sindh Epidemic Diseases Act, 2014 (No. VIII OF 2015)
\textsuperscript{84} DCs Empowered to Fight the Coronavirus, Balochistan Express, March 2020
\textsuperscript{85} The Khyber Pakhtunkhwa Public Health (Surveillance and Response) Act, 2017 (No. XXX of 2017)
health committee for further assessment. With regards to the privacy and protection of this data, Section 13(2) states:

“(2) In protection of public health, the Government shall ensure maintenance of secrecy of personal health information and data of the citizens in a manner that the same is not disclosed to any person so as to cause any damage to the respect, dignity and reputation of the citizens.”

However, no specific penalties are laid out in this Act in the instance of breach of privacy or data leaks.

The **Khyber Pakhtunkhwa Epidemic Control and Emergency Relief Ordinance 2020**\(^{86}\), similar to the Punjab Ordinance 2020, only briefly alludes to the treatment of information collected on persons affected by COVID-19. Section 37 of the Ordinance states that information regarding an infected person will be kept confidential and only released on consent, or to medical practitioners, etc.\(^{87}\)

Therefore, while provincial laws exist which would govern the local government’s handling of the pandemic, with the exclusion of Khyber Pakhtunkhwa, they do not include provisions relating to surveillance or to the privacy of patient data. KP’s law is a welcome step in that regard as it provides for the privacy and protection of patient data, however, the lack of penalties for a breach of privacy is problematic.

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\(^{86}\) Khyber Pakhtunkhwa Ordinance XI of 2020  
\(^{87}\) The Punjab Infectious Diseases (Prevention and Control) Ordinance, 2020 (II of 2020)
2.3. **Laws on Cyber-Surveillance**

In Pakistan, laws that pertain to or otherwise incorporate elements of cyber surveillance in its clauses usually do so from a criminal investigation perspective. Mass gathering of data for the purpose of disease or epidemic surveillance does not exist within the ambit of the current legislation, as illustrated below.

A number of laws do allow for agents of the state to engage in cyber-surveillance. Section 54(1) of the of the Pakistan Telecommunications (Re-organisation) Act, 1996 provides that, “in the interest of national security or in the apprehension of any offense,” the federal government may authorise any person to intercept calls or messages, or to trace calls made through any telecommunications system for national security reasons or for the investigation of any crime.\(^88\) This allows the government to authorise surveillance. Section 57(2)(ah) authorises the Federal Government to make rules on the interception of communications without setting any standards. Under Section 8 of the Act the Federal Government may issue legally binding policy directives to the PTA in relation to certain telecommunications matters, including the requirements of national security.

This power, however, is not without limits, as set out by the Islamabad High Court:\(^89\)

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\(^88\) Pakistan Telecommunications Act 1996 (Act No. XVII of 1996)
\(^89\) CM Pak Ltd. v. Pakistan Telecommunication Authority, 2019 (PLD 2018 Islamabad 243)
“apprehensions relating to public safety, law and order or the happening of an untoward incident can by no stretch of the imagination attract Section 54(2) [of the Pakistan Telecommunications (Re-organization) Act, 1996] ... and it can only be invoked if there is a Proclamation of Emergency by the President pursuant to powers vested under Part X of the Constitution...”

It is also of note that Article 260 of the Constitution of Pakistan, which defines the term “Security of Pakistan”\(^\text{90}\), does so while specifically excluding matters pertaining to “public safety”, and therefore any reliance placed on national security provisions within the Pakistan Telecommunications (Re-organization) Act, 1996, as a means of surveilling the population at large, would seem to be contrary both to the ordinary constitutional construction, and to the Act itself. As individuals are entitled to be dealt with in accordance with the law\(^\text{91}\)—especially when governmental action might be detrimental to the life, liberty, body, reputation, or property of any person—it is necessary that any actions taken, even in situations such as the present one, where mass surveillance might serve an ostensible purpose, be done within the limits of applicable law.

The **Investigation for Fair Trial Act, 2013** allows for access to data, emails, telephone calls, and any form of computer or mobile phone-based communication, subject to a judicial warrant.\(^\text{92}\) A warrant can be requested

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\(^{90}\) Article 260, Constitution of Pakistan, 1973: “Security of Pakistan” includes the safety, welfare, stability and integrity of Pakistan and of each part of Pakistan, but shall not include public safety as such;

\(^{91}\) Article 4, Constitution of Pakistan, 1973

\(^{92}\) Investigation of Fair Trial Act, 2013 (Act No. 1 of 2013)
wherever an official has ‘reasons to believe’ that a citizen is, or ‘likely to be associated’ with, or even ‘in the process of beginning to plan’ a terrorism or terrorism-related offence under Pakistani law. However, this would require the citizen to be specified, and in any case, the Act also allows for a judge to recommend departmental action against an officer if the judge is of the opinion that the warrant resulted in an undue and inappropriate interference of privacy, which necessarily limits the use of this Act as a tool for mass surveillance.\(^93\)

Section 32 of the **Prevention of Electronic Crimes Act, 2016** requires telephone and Internet Service Providers to retain traffic data for at least one year.\(^94\) Law enforcement bodies can demand access to that data subject to a warrant issued by a court. This may allow the government to access swathes of data for surveillance purposes. Section 30 allows courts to issue a warrant to a law enforcement officer to search and seize any data that "may reasonably be required" for a criminal investigation. However, Section 41 of the Act punishes unlawful disclosure of seized data with imprisonment of up to 3 years, and a fine of PKR 1 million.\(^95\) Given that any disclosure in the context of the COVID-19 epidemic would fail to meet the standard of having been lawfully shared in the course of a criminal investigation, this does not provide for an avenue of mass surveillance.

Pakistan also has laws which impose regulations on social media and may be used to spread the curb of disinformation. The **Citizens Protection Rules (Against Online Harm) 2020** require social media companies to establish

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\(^{93}\) Section 15 of the Investigation of Fair Trial Act, 2013  
\(^{94}\) Prevention of Electronic Crimes Act, 2016 (Act No. XL of 2016)  
\(^{95}\) Section 41 of the Prevention of Electronic Crimes Act, 2016
representative offices in Pakistan, to remove any ‘unlawful content’ within 24 hours, to prevent live streaming of any content “related to terrorism, extremism, hate speech, defamation, fake news, incitement to violence and national security.”\textsuperscript{96} If a company does not comply, its services can be blocked and it may face fines of up to 500 million rupees. This is important for the current COVID-19 crisis due to firstly, the proliferation of misinformation regarding the disease on social media platforms; and secondly, to potentially collate information gathered through such mediums for the detection of outbreak clusters.

The \textbf{National Disaster Management Authority Act, 2010} passed after the 2010 floods, aims to establish robust mechanisms to handle future disasters in a coordinated manner.\textsuperscript{97} To that end, it calls for the establishment of a number of authorities and commissions to counter disasters. These authorities collectively have served as the focal point in governmental responses to the COVID-19 epidemic, with District Authorities empowered to prevent and mitigate the effect of the pandemic in the form of directing local authorities,\textsuperscript{98} stockpiling\textsuperscript{99} and distribution of relief goods and other resources,\textsuperscript{100} controlling movement of persons,\textsuperscript{101} as well as taking any additional steps that are warranted.\textsuperscript{102}

Given the extraordinary nature of the powers granted by the Act and the extraordinary circumstances that are currently present, it is conceivable that

\textsuperscript{96} Citizens Protection Rules (Against Online Harm), 2020  
\textsuperscript{97} National Disaster Management Act, 2010 (Act No. XXIV of 2010)  
\textsuperscript{98} Section 20(2)(e) of the National Disaster Management Authority Act, 2010  
\textsuperscript{99} Section 20(2)(p) of the National Disaster Management Authority Act, 2010  
\textsuperscript{100} Section 22(a) of the National Disaster Management Authority Act, 2010  
\textsuperscript{101} Section 22(c) of the National Disaster Management Authority Act, 2010  
\textsuperscript{102} Section 22(m) of the National Disaster Management Authority Act, 2010
controlling and recording of traffic in real-time, that they maintain a complete record of all communication signals (including for, but not limited to, billing purposes) and that they maintain a complete list of all Pakistani customers and their details. Pakistan has since set up a Web Monitoring System (WMS), which aims to systematically accomplish the aims of the Regulation.

The Punjab Safe City Authority (PCSA) established under the **Punjab Safe Cities Ordinance 2015** also invested heavily in big data/AI technologies to ensure the effective monitoring of citizens in the city of Lahore. In the Lahore Safe City Project, an integrated, city-wide communications and surveillance system brought together information from 15 Emergency Control and Despatch Control suites, 8000 CCTV cameras, specialized traffic monitoring systems, road side variable messaging systems and utilised 4G networks.\(^{105}\)

Some of the functions of these technologies included face recognition and vehicle tracking (with access to NADRA records), with the capacity to track individuals, record and transmit that data to be used by others for more than one purpose for an extended period of time. Although the PSCA has developed clear data protection policies and its Privacy Policy is publicly available, there have still been reports of leaked footage and misuse of images which breach individual privacy.\(^{106}\)

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According to Privacy International, data protection frameworks “protect people’s data by providing individuals with rights over their data, imposing rules on the way in which companies and governments use data, and establishing regulators to enforce the laws”.\textsuperscript{108} The idea is to integrate and connect the discourse around digital rights to fundamental rights, with private individuals having access and control over the scope of its usage, and an option to opt out of it - as per their consent. With technologies evolving rapidly, it is essential to introduce legal safeguards, statutes, and laws that outline digital rights of the individual.

\textit{Digital Rights Around the World: Examples from the EU and the US}

Having charted the scope of cyber surveillance laws in Pakistan, it is useful now to compare it with global best practices, and to review pieces of legislation that progressively integrate data rights amidst the broader discourse of surveillance. The European Union’s General Data Protection Regulations (GDPR) 2018, and the California Consumer Privacy Act (CCPA) 2018 provide guidance on not just the scope of rights enjoyed by data subjects, but also introduces safeguards and criminalizes malicious breaches of data while providing remedies to affected users of modern technologies.

\footnote{\textsuperscript{108} Data Protection - Privacy International \hfill \url{https://privacyinternational.org/learn/data-protection}}
EU: GDPR

The European Union’s GDPR regime was intended to allow “EU citizens to better control their personal data”, as well as update and unify privacy rules allowing businesses to reduce red tape and to benefit from greater consumer trust. The General Data Protection Regulations (GDPR), were passed in 2016 and entered into force in 2018. It defines “Personal Data” as “information relating to an identified or identifiable natural person” including sensitive data such as racial or ethnic origin, political opinions, religious beliefs, criminal records, membership of trade unions, genetic and biometric data, health information, and data around a person’s sex or orientation.

Key Principles

Article 5 of the GDPR lays out seven key principles on how individual data can be handled:

1. Lawfulness, fairness and transparency.

2. Purpose limitation: “collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes”.

111 Ibid.
112 Ibid.
thereby empowered to adopt temporary rules that expand access while still preserving key GDPR protections.

**US: CCPA**

The *California Consumer Privacy Act (2018)* or the CCPA covers data protection in the State of California. Passed unanimously, it is regarded as the first law in the United States that frames a comprehensive set of rules around consumer data.

**Application and rights:**

The CCPA applies to any company that operates in California and either makes at least $25 million in annual revenue, gathers data on more than 50,000 users, or makes more than half its money off of user data. The primary purpose is to create new rights to be exercised by Californian citizens over their data. The most significant categories include “the right to know” (right to be informed) and “the right to say no” (opt out). This enables users to see what data companies have gathered about them, have that data deleted, and opt out of those companies selling it to third parties.

The CCPA does not specifically focus on accountability-related obligations as in the GDPR - instead, CCPA focuses more on transparency obligations, with provisions preventing companies from selling information, providing consumers with the right to opt-out at times of mergers and acquisitions.

In terms of data rights, the CCPA empowers consumers to receive compensation or sue companies, directly for failure of taking action to prevent data breaches. But apart from that, making sure companies comply with the CCPA is the sole province of the attorney general’s office, which will be able to investigate only a few cases each year.

Charting Digital Rights under GDPR and CCPA:

The table below compares the scope of rights afforded to data subjects/users under each of the above legislations:

<table>
<thead>
<tr>
<th>Data Categories</th>
<th>GDPR</th>
<th>CCPA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right to be Informed/Consent</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Right to Access</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Right to Portability</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Right to Correction</td>
<td>✓</td>
<td>X</td>
</tr>
<tr>
<td>Right to Stop Processing/Opt Out</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Right to Stop Automated Decision-Making</td>
<td>✓</td>
<td>X</td>
</tr>
<tr>
<td>Right to Erasure</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Right to equal services and price</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Private right of suing for damages</td>
<td>X</td>
<td>✓</td>
</tr>
<tr>
<td>Regulator enforcement penalties</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Emergency provisions (such as for COVID-19)</td>
<td>✓</td>
<td>X</td>
</tr>
<tr>
<td>(Rules TBD)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Concerns regarding Data Rights in Pakistan

In Pakistan, breaches of data in both the public and private sector are becoming alarmingly frequent. In May 2018, NADRA’s CNIC records were hacked while coordinating with the Punjab Information Technology Board to digitize records.114 The resulting breach saw personal data and other information being sold online by hackers, with no legal recourse provided to individuals who were affected.

Later that year, the Federal Investigation Agency (FIA) confirmed that “almost all” Pakistani banks were hacked in a sophisticated cybersecurity attack, with hackers stealing millions of dollars through debit and credit card information, before further selling the stolen data on the dark web.115

As recently as April 2020, a data cache of 115 million Pakistani mobile users was found to be pawned online, with the FIA and PTA leading the investigation into the alleged data breach.116

These examples merely present the tip of the iceberg when it comes to the lack of security offered to citizens’ data. The use of surveillance techniques (including Big Data/AI) to monitor and collect citizens’ data in order to pursue an ‘infected until proven healthy approach’ is, in our view, a necessary

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response in order to combat the outbreak. However, its use does raise concerns regarding fundamental rights to privacy and therefore needs a legal framework with the requisite procedural safeguards. With medical health records and other geospatial information now being gathered to counter COVID-19, it is critical that elements of data security and protection are integrated into our existing legal framework.

3. **RECOMMENDATIONS**

These recommendations aim to address potential concerns in undertaking cyber surveillance in Pakistan and suggest mechanisms to ensure such surveillance is conducted while protecting rights to the greatest extent possible:

- Federal and provincial laws should be enacted which establish surveillance powers for the purposes of countering pandemics and allow for information sharing with public health committees. These laws should include safeguards for citizens’ privacy and ensure that all data collected is anonymised and pseudonymised and held for only as long as absolutely necessary. A specified upper limit for holding such data should also be included in any such legislation. These legislative changes may be accomplished by insertion into the Personal Data Protection Bill of 2020.

- The provisions in Punjab and Khyber Pakhtunkhwa’s laws which stipulate that the government is to ensure maintenance of secrecy of personal health information and data, and not disclose it to any person which may damage the respect, dignity and reputation of citizens are
encouraging. However, such provisions should be strengthened in legislation going forward and specific penalties for the breach of privacy or data leaks should be incorporated. They should also establish an authority which can provide oversight and monitor the implementation of these laws. All laws should include a right to a remedy in case of breaches of data privacy in order to promote accountability and transparency.

- The apps and software should be rolled out in accordance with the prescribed legislation or rules framed thereunder. Third parties may be consulted and contracted to provide data analytics services or for technologies for support or surveillance. Any third-party contracts must ensure that these third parties abide by data security protocols when storing data, and that the data must not be processed or otherwise used for purposes other than the original purposes and aims of the contract. There have been cases where this data has either been leaked, sold or used outside the scope of what the data subject had consented to. In such cases, legal recourse must be made available to data subjects to obtain compensation for such breaches, and relevant accountability provisions must be included in the law to ensure that all third parties abide by their contracts. A commission which can exercise oversight over third parties should be established which is able to adequately scrutinise these entities, this may be accomplished through additions to the Personal Data Protection Bill of 2020.

- Mass awareness campaigns must be conducted in which it is emphasised that the data collected will not be misused, repurposed or shared with the private sector without their knowledge or consent. All
personal data will be anonymised and deleted once the outbreak is over. In order to facilitate accurate data collection, any public messaging regarding the app will emphasise that the data is being collected for public health reasons and that the submitting of false information will only have adverse health impacts. This will be particularly important for refugee or vulnerable populations who may withhold or submit false information due to fears about their immigration status or other such concerns. These awareness campaigns are important as individuals should be made aware of the laws under which their data is being collected and the objective of this collection. It should also be made clear that measures are being taken to protect privacy and data as far as is possible.

- Citizens may also file freedom of information requests in order to establish whether their personal data is being collected. It should therefore be made clear within the legislation and in the awareness campaigns that all data which is to be collected will be anonymised and no personal identifiers will be used. However, in instances where public authorities have data on a specific individual (for instance, medical records), they should be shared with the requester. This should be done with the understanding that the data was collected due to the highly infectious nature of the disease and the severity of the harm caused by transmission but every effort was made to ensure that non-anonymous data was shared only with the relevant authorities on a strict need-to-know basis and was not made public.

- Other forms of data collection will have to be engaged in, for those who do not possess a smartphone perhaps in the form of manual data
collectors or paper ‘immunity passports’ which will perform a similar function in providing access to public services. This may be accomplished through already existing infrastructure, such as lady health worker staff, basic health units, and polio vaccination staff. It should also be emphasised that there will be no penalties for not having a phone or the app and nobody is compelled to upload their data or symptoms or contacts unless necessary by law.

- Technical Advisory Panels should be established which include policy makers, lawyers, civil society members, and computer scientists meet regularly in order to review and address issues in the roll out of cyber-surveillance. There should be a form of shared custody of this policy among the relevant stakeholders so that they can share information, inform the strategy, and ensure its success.

- Individuals should also have the ‘right to be forgotten’ even if they were infected with the disease. Legislation should therefore include provisions allowing for data to be deleted beyond a certain time limit and enable individuals to apply for their data to be deleted after the pandemic is over. This could be in part to avoid the stigma of having contracted the virus, this is particularly acute for instance for those in the medical profession, and to protect from future identification as a case.

- In instances where false categorisations have taken place during cyber surveillance, such as when a healthy person has been declared infected (either through faulty data collection, or through flawed automated decision-making via AI), individuals must have the right to rectification
THE COVID-19 LAW AND POLICY CHALLENGE:

INTER-PROVINCIAL COORDINATION AND PLANNING ON HEALTHCARE IN PAKISTAN

JAMAL AZIZ | MEHREEN NAUSHAD | SHAYAN AHMED KHAN | ZOHA SHAHID

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ABSTRACT

The SARS-CoV-2 (COVID-19) outbreak has highlighted the need for better inter-provincial coordination and planning within Pakistan’s devolved system of Government. The devolution of certain powers to provincial governments through the 18th Amendment has had a significant impact on Pakistan’s healthcare management systems. This paper explores the challenges of governance, service delivery, health information and policy coordination at federal and provincial levels.

INTRODUCTION

The SARS-CoV-2 (COVID-19) outbreak has highlighted the need for better inter-provincial coordination and planning within Pakistan’s devolved system of Government. Devolution of certain powers to provincial governments through the 18th Amendment has had a significant impact on Pakistan’s healthcare management systems. While the provincial governments have attempted to adjust to their new responsibilities – with varying degrees of success - hurdles in coordination between the federal, provincial, and local
governments obstruct their progress, as dialogue between state entities and institutions is only triggered by crises.

As an immediate response to the COVID crisis, Pakistan developed a National Action Plan on Coronavirus Disease which establishes inter-provincial and federal-provincial coordination as a strategic goal to be achieved for the purposes of containment of the disease.

The aim of this paper is to shed light on the major challenges of governance, service delivery, health information and policy coordination in the field of health in Pakistan and its effect on federal and provincial responses to COVID-19. While the current crisis undoubtedly poses a potentially overwhelming challenge to Pakistan’s beleaguered healthcare system and has further exposed its shortcomings, it also provides policymakers with an opportunity to address longstanding issues of coordination, capacity and regulatory enforcement which can lead to improved healthcare governance in the country.

1. **Devolution and Pakistan’s Healthcare System**

Healthcare in Pakistan is constitutionally the concern of the provincial government. Prior to the 18th Constitutional Amendment however, health was a subject of the concurrent legislative list, which allowed for a fluctuating sharing of powers between the federal and provincial government.\(^{117}\)

\(^{117}\) The Federal and provincial legislatures could both legislate on matters on the Concurrent List, including but not limited to, Item 22: “Prevention of the extension from one Province to another of infectious or contagious diseases or pests affecting men, animals or plants”, and Item 25: “Population planning and social welfare” of the Constitution of Pakistan, 1973.
The 1973 Constitution envisioned a bifurcation of roles whereby, the provision of health services would be the primary responsibility of the provincial government, while stewardship of policy remained the responsibility of the federal government. This meant that the provincial governments were responsible for planning, management and oversight, financing, implementation, medical education and training, monitoring and supervision, and regulation of health services. The federal government on the other hand would cater to health policy and strategy development, service delivery programming, monitoring and evaluation, health communication, formulation of technical values and guidelines, and the prevention of communicable diseases.

However, over time the federal government’s role increased beyond oversight into funding and management of preventive programmes, and construction of large hospitals and medical colleges at the provincial level. At the same time, the role of the provincial government began to recede to administration of health facilities and programmes.\(^{118}\)

In 2010, Parliament passed the 18\(^{th}\) Constitutional Amendment which devolved or transferred significant legislative, operational and financial responsibilities of the federal government to the provinces.\(^{119}\) The spirit of the 18\(^{th}\) Amendment was devolution of power from the center to the


provinces and the creation of empowered and responsive local government. A major constitutional surgery took place and resulted in the devolution of 47 subjects and 18 federal ministries to the provinces. Most significantly, the Concurrent Legislative List was abolished in favor of the Federal Legislative List that demarcated federal and provincial constitutional purviews.\textsuperscript{120}

As a result, the Federal Ministry of Health was abolished, and its stewardship role was reassigned to other federal entities, such as the Inter-Provincial Ministry and the Planning Commission. However, the abolishment of the Federal Health Ministry raised acute challenges, especially in relation to national and international coordination for health commitments, drugs licensing, and regulation of delivery systems and human resources. Accordingly, in 2013, the Ministry of National Health Service Coordination and Regulation (MONHSRC) was established with a revised mandate.\textsuperscript{121}

Today, MONHSRC’s role, \textit{inter alia}, is to enforce drug laws and regulations, coordinate national efforts in health care, coordinate with international actors and to oversee regulatory bodies in this sector. Meanwhile, its financial role was eased to co-financing preventive vertical programmes such as the Family Planning and Primary Health Care Program, Tuberculosis Control Program, and regulation of health insurance.


All other matters have been devolved to the provinces which have been given the responsibility to formulate policies, strategies, plans, and legislation in the health sector. In governance, the provincial governments are primarily responsible for strategic purchasing, regulation, and accountability. They can also supervise the development of programming and its implementation. In fiscal matters, their authority extends to developing curative and preventive programmes, and to making financing arrangements. The provincial governments are also involved in the planning, management, and deployment of human resource.

The provincial governments are mandated to conduct market surveillance and operate the supply system of drugs. They are also responsible for monitoring and evaluating, and conducting surveillance of the health information system.\textsuperscript{122}

It is evident that the 18\textsuperscript{th} Amendment drastically shifted the balance of power in favor of the provinces in the field of health. While the aims and objectives behind this exercise were commendable, the process of transitioning of power was quite abrupt. The aftermath of a major constitutional surgery and the dissolution of the Ministry of Health resulted in no plan for managing the transition. A single workshop was conducted wherein the future of National Institute of Health was discussed after the devolution, and the federally managed tertiary institutes were largely ignored.\textsuperscript{123} The provinces, thus, found

\textsuperscript{122} Federal Legislative List I and II of the Constitution of Pakistan, 1973
themselves with a huge increase in their responsibilities without the necessary resources and capacity for implementation.\textsuperscript{124}

In the intervening years, the provincial governments have attempted to adjust to their new role and have supported the proliferation of healthcare initiatives. However, the last decade has not witnessed transformative change in the health care system which was envisioned by devolution. A major debilitating factor appears to be the lack of proper planning and coordination at the various tiers of government at the federal and provincial level. Currently, there is a lack of strong leadership that addresses outstanding issues, coordinate on a common national direction and allow sharing of resources, planning and lessons to be shared across provinces.\textsuperscript{125}

A decade after devolution, the healthcare structure remains vague and unsettled till today and issues such as resourcing and administrative responsibilities continue to be unclear.\textsuperscript{126} Dialogue between federal government and provincial governments remains ad hoc, and is usually triggered by crises and outbreaks such as COVID-19.

This lack of planning, coordination and institutionalized mechanisms in Pakistan’s healthcare system can become a critical stumbling block in the fight


\textsuperscript{126} See Section 3.3
against COVID-19 and needs to be addressed on a war footing in Pakistan’s response to this crisis. These are explored in further detail below.

2. **Key Challenges to Planning and Coordination Following Devolution**

2.1. **Federalism and Provincial Centralization**

The experience of the last decade has made it evident that the aims and objective of the 18th Amendment have not been implemented in spirit. The trickle-down effect of vertical devolution has not been felt by the lower tiers of the government such as districts and tehsils. The distribution of power is less than equitable by the provincial capitals, as all fiscal and policy powers are concentrated in the provincial legislatures and executives.\(^\text{127}\) Furthermore, the scope and scale of decentralization of power differs from province to province.

To a large extent, this issue is prevalent across all devolved subjects, but its effects have been acutely felt in the field of health. Local governments face centralization and struggle to secure adequate political, fiscal, and administrative power to achieve their functions from their provincial governments.\(^\text{128}\) This indicates poor coordination between provincial and

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\(^\text{127}\) “Five Years of the 18th Constitutional Amendment: Federalist Imperatives on Public Policy and Planning,” *Development Advocate Pakistan* 2, no. 1 (April 2015).


local governments, and a lack of oversight in policy implementation for healthcare systems at tehsils and districts.

Khyber Pakhtunkhwa is the only province that has conducted an extensive decentralization of power, going beyond district and tehsil level of local government to lower levels of village councils. In addition to this, they have also allocated over 30 percent of provincial budget to local governments. In contrast, Sindh and Punjab enjoy a purely asymmetrical relationship with their local governments, and the laws are more centric in nature.

At the same time, vertical programs by the federal government such as on malaria control and the Expanded Program on Immunization, further muddies the waters, and in the absence of robust policy planning and direction, threaten to undermine the role of the provincial governments.

Although the devolution of power in the health sector has yielded mix results, the emergence of COVID-19 has highlighted the importance of decentralization of power to local governments where cases can be quickly identified and treated at the ground level, and responses tailored to the needs of each area. According to the World Health Organization (WHO), the Chinese experience has shown that a differentiated, location-specific response to limiting transmission has been highly effective. This allowed

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129 Khyber Pakhtunkhwa Local Government Act 2013
132 'China Shows COVID-19 Responses Must Be Tailored To The Local Context' (Euro.who.int, 2020). http://www.euro.who.int/en/health-topics/health-
the Chinese to implement public health measures which were tailored to the differing realities on the ground, e.g. measures in Wuhan being very different from those implemented in other places such as Shanghai or Chengdu. This framework also allowed for an agile and responsive approach where experiences and updates were rapidly collated to understand and contain the virus nationwide.\textsuperscript{133}

Important lessons can be taken from the empowerment of municipal governments in China in containing COVID-19, and providing an interesting avenue for further research in the context of Pakistan.

2.2. Policy and Regulatory Standards

The devolution of powers resulted in major irregularities in areas such as drug supply, pharmaceutical regulations, and standards for consumer product safety. The devolution of these areas of healthcare to the provinces caused confusion and created contradictions regarding standards.\textsuperscript{134}

A longstanding demand of health professionals and experts in Pakistan has been the development of an adequate health policy framework which sets


norms and standards.\textsuperscript{135} While the 18\textsuperscript{th} Amendment empowered the provinces to develop their own healthcare strategies, the lack of inter-provincial harmonization on national health policy development only creates hindrance in developing substantive healthcare strategies.\textsuperscript{136} Experts have argued for federal institutional mechanisms that provide provincial health departments with technical assistance, cooperation, and support in discharging their responsibilities effectively.\textsuperscript{137}

Despite the regulatory role of the MONHSRC, the provision of healthcare and coordination amongst stakeholders remains fragmented for a range of institutions and provincial departments. Within the Provinces, differing responsibilities have been delegated to district and tehsil level local governments, while no uniform policy has been introduced for effective oversight of coordination amongst all institutions.\textsuperscript{138}

This lack of institutional regulation raises grave challenges within the COVID-19 context. Beyond the containment process, Pakistan now has to move along the global movement towards discovering potentially promising drugs and vaccines to treat COVID-19. Within this, a uniform policy which establishes regulatory standards to conduct trials, mass productions and

\textsuperscript{135} Dr. Babar Tasneem Shaikh, 'Devolution in Health Sector: Challenges & Opportunities for Evidence Based Policies' (\textit{Lead Pakistan}, 2013).
\textsuperscript{136} Dr. Babar Tasneem Shaikh, 'Devolution in Health Sector: Challenges & Opportunities for Evidence Based Policies' (\textit{Lead Pakistan}, 2013).
licensing of safe drugs will be required. The WHO has advised that States must take adequate steps to ensure availability for promising drugs, and hoarding must be avoided.\textsuperscript{139} To this end, the Drug Regulatory Authority Pakistan has allowed for priority approval and registration of drugs and has published an advisory circular\textsuperscript{140} for medical professionals regarding interaction of experimental drugs in treating COVID-19. While these guidelines are welcomed, rigorous regulatory standards to ensure steady supply of safe and effective drugs remain lacking. In such a situation, Provincial Governments will look up to the Federal Government for adequate guidance which must be readily available.

2.3. **Budgetary Constraints and Provincial Capacity**

Pakistan’s meagre spending on healthcare has been a well-documented issue for decades.\textsuperscript{141} At the time when the WHO recommended\textsuperscript{142} that the government must allocate at least 6% of the GDP to improve the health sector, Pakistan’s spending was 0.49% of the total GDP.\textsuperscript{143} Presently, Pakistan’s spending on the health sector remains under 1% of its


GDP.¹⁴⁴ These budgetary constraints continue to hinder provincial progress in health planning and service delivery. It has been reported that much of the provincial budget is spent towards provision of salaries which leaves policymakers with no fiscal space for meaningful reform initiatives.¹⁴⁵

Budgetary constraints also lead to a lack of provincial capacity in identifying problem areas, and in developing adequate policies for reform. Policy framework for reform of public sector hospitals, and effective regulation of private sector hospitals remains missing across all provinces. All the while, the restructuring of public health has been carried out in Punjab and Khyber-Pakhtunkhwa but remains lacking in Sindh and Balochistan.¹⁴⁶

Further, the devolution of substantive fiscal and administrative power is essential to the effective functioning of local governments and can greatly improve their responsiveness and effectiveness to health emergencies such as COVID-19. However, prior to the delegation of the said powers, there is a strong need to operationalize and develop the technical capacity of the local governments.¹⁴⁷ While the capacity and performance of local governments is beyond the scope of this paper, it is important to highlight that issues of

¹⁴⁵ 'Health Systems Changes After Decentralisation: Progress, Challenges and Dynamics In Pakistan' (Gh.bmj.com, 2020). https://gh.bmj.com/content/bmjgh/4/1/e001013.full.pdf.
revenue generation and capacity are interconnected since evidence suggests that technically proficient local governments are better able to generate their own resources and address the needs of the locality including health care systems.\textsuperscript{148}

2.4. **Innovation and Planning Initiatives**

Following the devolution, provinces were required to formulate sector-wide policies and strategic plans to develop their respective provincial health systems. Decentralization allows space for greater tailor-made policies that are better adapted to the needs of the local population. Furthermore, it promotes innovation through competition between provincial and local authorities, and in the absence of a central direction, greater variation in policies and delivery systems may emerge from which best practices can evolve.

However, the provinces lack adequate resources, requisite policy expertise, institutional capacity and vision which have resulted in largely ineffective planning and policy initiatives. Instead, an offsetting negative effect that seems prominent is the duplication of policy reforms, and outliers in performance. At present, Sindh and Khyber Pakhtunkhwa have developed district action plans for the purposes of health planning whereas Punjab and Balochistan have developed wide sector strategies only.\textsuperscript{149} Not only does this


\textsuperscript{149} 'Health Systems Changes After Decentralisation: Progress, Challenges and Dynamics in Pakistan' (\textit{Gh.bmj.com}, \textit{2020}). \url{https://gh.bmj.com/content/bmjgh/4/1/e001013.full.pdf}
lead to a lack of dissemination of information on best practices but the same also results in low quality standards being met.

These challenges will only be compounded by COVID-19, which will require a high degree of policy expertise and institutional capacity by the provincial governments in the coming months and years. However, the lack of streamlined processes and uneven policy expertise is already clearly visible by the largely arbitrary and ad-hoc response to containing the virus across the country.

1.1. Disease Surveillance and Response Systems and Information Sharing Mechanisms

Institutional capacity to address public health emergencies and disease security is strongly dependent on collated information systems, where the primary purpose is to collect, collate, analyze and disseminate information for evidence-based policy and practice.\textsuperscript{150}

A critical challenge for Pakistan in the post devolution scenario is the lack of integrated disease surveillance and response systems and lack of inter-provincial information sharing mechanisms. An integrated surveillance or information sharing system refers to the strategy for multi-disease investigation and observation of selected priority diseases. This mechanism allows the effective use of resources for disease control and prevention by

\textsuperscript{150} Dr. Babar Tasneem Shaikh, 'Devolution in Health Sector: Challenges & Opportunities for Evidence Based Policies' (Lead Pakistan, 2013).
linking the public with healthcare providers at district, provincial and national levels.\textsuperscript{151}

In Pakistan, health information and disease surveillance activities are carried out through several mechanisms, which include decentralized District Health Information Systems in the provinces and vertical management information systems for programs such as Malaria, HIV/AIDS, TB, Dengue etc. among others at the federal level. However, these systems are fragmented with no horizontal linkages, and solely serve the health programs that created them. They are also focused entirely on the public sector and fail to capture the larger private sector.\textsuperscript{152} The absence of collated provincial information systems and irregular reporting mechanisms from health facilities are key constraints in informed decision making by provincial stakeholders and coherent resource allocation for priority interventions.\textsuperscript{153}

The International Health Regulations, 2005 further obligate Pakistan to have in place adequate mechanisms for disease surveillance and rapid response. Over the years, several initiatives have been piloted for integrated disease


\textsuperscript{152} “Pakistan – Health Information System” World Health Organization (Emro.who.int, 2020) http://www.emro.who.int/pak/programmes/health-management-information-system.html

surveillance and response systems in KP\textsuperscript{154} and Punjab\textsuperscript{155 156}. At the Federal level, the Field Epidemiology & Disease Surveillance Division at the National Institute of Health gathers and analyzes disease surveillance data from relevant available sources and periodically disseminates the epidemiological information to the relevant stakeholders.\textsuperscript{157}

Nevertheless, these mechanisms have been found wanting in the current crisis and health departments are under fire for not developing automated systems to help actively report cases, analyze data and provide timely information to relevant stakeholders so that quick decisions could be made on where and what type of response is required.\textsuperscript{158}

As a result, confusion prevails on the size and spread of the coronavirus-infected population in Pakistan, undermining the provision of effective and speedy delivery of health services and resources to those infected. This confusion also undermines public credibility in the government’s


\textsuperscript{155} “Division of Integrated Disease Surveillance and Response” Punjab Public Health Agency \url{http://www.ppha.punjab.gov.pk/our-divisions/division-integrated.html}

\textsuperscript{156} “Disease Surveillance System” Punjab Information Technology Board (\textit{pitb.gov.pk}, 2020) \url{https://www.pitb.gov.pk/dss}


management of the pandemic,\textsuperscript{159} which can lead to poor compliance by the public to policies by the government and health service systems.

2. **THE COVID-19 CRISIS AND PAKISTAN’S RESPONSE**

The challenges of an imperfect devolved system have been further highlighted during the current crisis. The initial response saw the MONHSRC taking the lead through the National Institute of Health (NIH) and the National Disaster Management Authority (NDMA) at the Federal level, whereas each Province established their own core committees to deal with issues of containment. Through the NIH, the MONHSRC established an emergency operation center and developed a National Action Plan for Corona Virus Disease Pakistan (NAP)\textsuperscript{160}, which aimed to strengthen inter-governmental and sectoral coordination within the government, as well as with the private sector and civil society, in order to provide improved strategic, technical and operations support.\textsuperscript{161}

At the provincial level, the Government of Sindh established a Central Control Cell\textsuperscript{162}, and established quarantine centers, while leading a public awareness campaign to contain the crisis.\textsuperscript{163} Similarly, the Government of


Punjab set up a cabinet committee\textsuperscript{164} to ensure coordination between relevant departments, and declared a complete lockdown of the province.\textsuperscript{165}

The Governments of Khyber Pakhtunkhwa (KP) and Balochistan also introduced several measures and policies for the containment of the disease. The KP Government declared an emergency and established standardized protocols\textsuperscript{166} to deal with positive cases while releasing funds of Rs. 100 million to the Health Department to make arrangements for setting up isolation wards at all district levels.\textsuperscript{167} The Balochistan Government on the other hand, allocated Rs. 500 million to improve the quarantine centers established in Quetta and Taftan.

However, challenges pertaining to service delivery, policy formulation and lack of information sharing continued to persist. The challenges already affecting the healthcare system which were briefly discussed above were brought into focus with the initial response to the COVID-19 crisis by the Federal and Provincial governments. This led to creation of the National Coordination Committee (NCC) through which the Federal Government aimed to streamline and coordinate the national response.

\textsuperscript{165} ‘Notification issues as complete lockdown in Punjab for 14 days’ (92news.bd.tv, 2020) https://92newshd.tv/notification-issued-as-complete-lockdown-in-punjab-for-14-days/
Consisting of both civil and military representatives, the NCC was constituted by a decision of the National Security Committee.\textsuperscript{168} The National Command and Operation Centre\textsuperscript{169} (NCOC) was then established as a supplemental body for implementation and coordination between federal and provincial governments.

The NCOC faces the daunting challenge of dealing with a pandemic in a devolved structure lacking comprehensive health information sharing and integrated disease surveillance mechanisms. However, the NCOC aims to collate, analyze and process information based on digital collection and human intelligence through-out Pakistan on an emergency basis.

The ‘Test, Track and Quarantine’ strategy established by the NCOC is an example of an innovative planning initiative which has been able to establish clear lines of communication between all tiers of provincial and local governments and the federal government. The Committee aims to further bridge the gap between all levels of government and since its establishment has ensured effective daily communication with all provincial governments.\textsuperscript{170}

The ‘Test, Track and Quarantine’ strategy has also been successful\textsuperscript{171} in improving health related information sharing in Pakistan and has established a central intelligent design information management system (IDIMS) which

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allows authorities at all levels of government to trace new patients and to determine virus hotspots to ensure ‘smart containment.’

In addition to this, the NCOC has also made recommendations to improve the use of technology in providing effective healthcare. In its recommendations to the NCC, it stated that the development of five different types of ventilators by the Pakistan Engineering Council is underway which will be tested clinically. In addition to this, the Ministry of Science and Technology is working towards developing innovative ways for local production of testing kits.\(^{172}\)

3. CONCLUSION AND RECOMMENDATIONS

While all aforementioned\(^{173}\) developments are to be welcomed, it also indicates that Pakistan’s focus on public health preparedness is only triggered during times of crises.\(^{174}\) Since devolution, challenges such as lack of institutional capacity, budgetary constraints, lack of an integrated disease surveillance system and absence of use of technology within health related mechanisms have led to a fractured healthcare system – mired with political differences, lack of inter-provincial coordination and absence of political will. These challenges are now leading to greater issues as witnessed in the continued tension between the Federal and Provincial Governments. Devolution of the healthcare system to provincial governments brought with


\(^{173}\) See Section 4

it a degree of autonomy which would have greatly improved Pakistan’s capacity to deal with the COVID crisis if the transfer of powers had been dealt with effectively at the time of devolution or after it.

Notwithstanding the above, this crisis provides Pakistan with a unique opportunity to address issues of coordination, capacity, and regulatory enforcement in its healthcare system. These have been on the backburner for years, but the current emergency can provide the impetus for allocation of resources and the necessary political will for meaningful reform on a war footing. Some of the steps which can be considered by policymakers are set out below.

3.1. The 18th Amendment and Healthcare

It is clear by now that the vision for healthcare in Pakistan envisioned by devolution has not been achieved and there are critical stumbling blocks to the implementation of the 18th Amendment which are detrimental to efficient healthcare governance in the country. COVID-19 has exposed the fault lines in governance and fiscal arrangements which is leading to growing calls to revisit the 18th Amendment. In our assessment, it would be premature and imprudent to consider this option without first considering objectively what is needed to make devolution work from a governance perspective. While this issue is beyond the scope of this paper and will be explored in greater detail in subsequent papers by RSIL, certain immediate measures can be taken in the law & policy realm:

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i. It is necessary to conduct a thorough mapping and review of the mandate for health at the federal, provincial, local government level including statutory & autonomous bodies, attached departments, subordinate offices etc. to identify the precise responsibilities of each entity and consider whether there is an overlap in their jurisdiction/mandates.

ii. This should be followed by a review of the budgetary allocations made to each entity, its revenue streams and annual utilization of funds, infrastructure, human resource, and technical capacity etc. The objective of this exercise would be to see whether each entity has reasonable funding, resources, infrastructure, and technical capacity to implement its mandate to a functional extent and where the largest gaps lie between mandate and resources. This will also help in providing a clearer picture of the governance bottlenecks in healthcare.

iii. COVID-19 will require Pakistan to shake-up its healthcare agenda, including uniform health policies and regulatory standards, universal health coverage, health security and disease surveillance and implementing the NAP on coronavirus. The refocused set of activities at the federal and provincial level will require new structures, roles, relationships, and linkages among all the organizations engaged in policy making, funding, delivering services, or managing performance.

iv. Based on the above, an exhaustive analytical exercise must be carried out which aims to see whether it is legally and fiscally feasible and technically viable to tackle governance bottlenecks and restructure roles and relationships within the current constitutional rubric. Major
transformations in healthcare governance should not be made without exhaustive prior study which analyze whether an entity is best suited to carry out a particular role, whether activities or programs could be transferred in whole or in part to the private sector and what programs and activities are affordable in the current economic crisis.

v. The measures above are indicative of only some of the questions and issues which must be carefully explored before reforming healthcare governance in the country. The experience of the 18th Amendment and legislative reforms in recent years, including counter-terrorism and FATA merger etc., has shown a disturbing tendency of policymakers to implement major reforms without adequate debate and study on its consequences and implementation and which have suffered from glaring legislative defects and shortcomings. COVID-19 must not become the basis for another rushed constitutional reform effort which yields no tangible benefits in the long run.

3.2. Revamp Pakistan’s Health Security Framework

The WHO defines global public health security as “the activities required to minimize the danger and impact of acute public health events that endanger the collective health of populations living across geographical regions and international boundaries.”176 The current international framework on health security is governed by the WHO’s International Health Regulations, 2005 (IHR) which reflect an agreement by 196 countries to report public health

176 “Health Security” World Health Organization (Who.int, 2020) https://www.who.int/health-topics/health-security/#tab=tab_1
threats and cooperate to stop their spread. As a governance regime, it lacks
significant enforcement authority and requires states to self-report their
preparedness. Even then, an overwhelming majority of states have fallen
short in meeting its requirements.

This lack of preparedness has clearly been exposed in the disappointing
international response to COVID-19. It is highly likely that the first order of
business in international relations will be an overhaul of the global health
security regime. This can be through multilateral forums like the WHO to
weave together the disparate strands of global health security into an
unbreakable chain and create a comprehensive framework for epidemic and
pandemic preparedness. Alternatively or additionally, unilateral
frameworks may also be created by powerful states like the United States and
China with stronger enforcement mechanisms. Some indications of this trend
are evidenced by the US decision to withdraw from the WHO and tabling of
the Global Health Security and Diplomacy Act 2020 before the US Senate.

In either case, it is clear that the global health security regime will have much
stricter enforcement mechanisms and can witness the creation of ‘task forces’
which set standards and monitor progress in improving capacity to prevent,
detect and respond to infectious diseases, similar to the Financial Action Task
Force (FATF). The Global Health Security Agenda (GHSA) and the Global
Health Security Index are already a clear step towards this experimentalist
form of global governance. 178

177 Micheal Igoe, “How to Build a Global Health Security Movement” (Devex.com, 2020)
178 The Global Health Security Index rates Pakistan at 105 out of 195 countries in its ability
to prevent, detect and respond to infectious disease. See “2019 GHS Index Country Profile
i. Pakistan must therefore invest heavily in its health security framework and review its legislative framework to cater to national health emergencies. According to WHO’s 2017 Report on the Joint External Evaluation of IHRs Core Capacity, while Pakistan has a substantial legal framework in place for most technical areas of health, crucial legislative gaps exist in the areas of directing emergency responses and implementing containment measures during a public health crisis. In the absence of a specific law, the Government of Pakistan has relied on the NDMA Act of 2010 for controlling and treating COVID-19. While the NDMA has done a commendable job in organizing relief and logistics on a fast-track basis, the medical side of an emergency, especially pandemics do not fall within its core expertise and mandate.

ii. As such, a federal law which sets out the procedure for activating a public health emergency, creates institutionalized emergency coordination mechanisms between federal and provincial entities and sets out special powers for emergency response, resource mobilization

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and procurement etc. may be a prudent option to explore from a legal perspective.

iii. The MONHSRC must also work towards a major overhaul of the Directorate of Central Health Establishments (DoCHE) and the National Health Emergency Preparedness & Response Network (NHEPRN), which have an essential role in combating pandemics but appear to be severely underutilized and under-funded.

iv. The revamping of Pakistan’s national health security framework is a major undertaking which will require significant inter-provincial planning, coordination, and strategic planning. However, it is an essential investment to prepare the country from the crippling effects of future pandemics.

v. From a strategic perspective, the rapid evolution of the global health security governance regime may result in more stringent country evaluations and reporting requirements like the FATF framework for which the state machinery in Pakistan must be prepared.

3.3. Revisit the National Health Vision 2025

In late 2016, the Government of Pakistan released the National Health Vision (NHV) 2025 which aimed to provide an ‘overarching national vision’ for health while ensuring provincial autonomy. Its key objectives were to build coherence in federal and provincial responses and facilitate coordination for regulation, information collection, surveillance, and research for improved
health systems.\textsuperscript{182} Nearly four years later, it is imperative to take stock of the implementation strategy for NHV 2025 and identify the major obstacles at the federal and provincial level. Further, NHV 2025 will have to be revised to accommodate the post-COVID reality.

3.4. Implementing the National Action Plan on COVID-19 in Pakistan

The Government of Pakistan must remain committed to implementing its comprehensive NAP on COVID-19 which sets out a holistic vision for reforming organizational, structural and coordination mechanisms for public health emergencies and contributing towards a robust health security agenda for the country. It aims to improve governance structures, existing capacities and resources and strengthen coordination mechanisms at the provincial and federal level for long-term preparedness. However, the Government of Pakistan has a disappointing history in following through on its action plans and national policies which are often created in times of crisis and wither away once out of the political spotlight.\textsuperscript{183} With the establishment of the NCOC, references to the NAP have reduced in government media communications, making its implementation status already unclear.


3.5. **Develop Integrated Disease Surveillance and Response Mechanisms and Robust Health Information Systems**

The consequences of fragmented health information systems at the provincial and federal level and a failure to comply with the IHR 2005 commitment to develop integrated disease surveillance and rapid response mechanisms for infectious diseases are readily apparent today. The confusion on the size and spread of COVID-19 in Pakistan is undermining the NCOC’s response to the crisis and negatively impacting compliance by the public to government policies and SOPs.

i. Nevertheless, the current crisis is an opportunity to develop robust health information systems at the provincial level capturing both the public and private sector, which are integrated through technology and will feature real time reporting mechanisms. At the federal level, better guidance and coordination is required from the Health Planning, System Strengthening & Information Analysis Unit (HPSIU) at the MoNHSR&C while the National Health Information and Resource Centre (NHIRC) needs to be revamped to better perform its mandate.

ii. Further, the Government of Pakistan must immediately seek to deploy an Integrated Disease Surveillance and Response System (IDSRS) through which it can combat COVID-19 by capturing data from Points of Entry, quarantine centers, testing laboratories and hospitals using standardized mechanisms. Patient reports from these sources should be matched with the availability of beds, doctors, and ventilators at the nearest treatment facilities. The IDSRS modeling should also be available to automatically detect emerging clusters along with real time
dashboards on compliance with SOPs, contact tracing input and send out push notifications to concerned officials at the provincial and district level. An innovative, technology driven IDSRS will prove to be an invaluable tool for strategic decision making at the NCOC level.

iii. There exist several federal and provincial entities specifically mandated for disease surveillance and outbreak response which are technically qualified and playing an important role in managing the COVID crisis despite lack of adequate funding and infrastructure. These include provincial and federal Disease Surveillance and Response Units (DSRU’s) and the Field Epidemiology & Disease Surveillance Division (FE&DSD) at the National Institute of Health. These entities should be provided additional resources, infrastructure, and training support on a priority basis to improve national capacity in disease surveillance and outbreak response.

3.6. **Create Uniform Regulatory Standards for Development of COVID-19 Vaccines & Treatment Drugs**

The global focus now is on promising treatments for COVID-19 and the development of vaccines. A uniform policy with rigorous regulatory standards must be in place for conducting clinical trials, production, and licensing of safe drugs. Proactive steps are needed to ensure availability of promising drugs as they become available and prevent hoarding at all costs. The Drug Regulatory Authority Pakistan has allowed for priority approval and registration of drugs and has published an advisory circular for medical professionals regarding interaction of experimental drugs in treating COVID-19. While these guidelines are welcomed, rigorous regulatory standards for
ensuring the steady supply of safe and effective drugs remain lacking. Federal institutional mechanisms must also provide provincial health departments with technical assistance, cooperation, and support in discharging their responsibilities effectively.

3.7. Contribute to Global Discourse on Equitable Distribution and Plan in Advance for Expedited Domestic Distribution of a Vaccine

Pakistan must plan for expedited distribution and delivery of a vaccine developed abroad. At the strategic level, Pakistan should advocate for the equitable, global distribution of a vaccine which should not simply be sold to the highest bidder. One way to provide financing for the purchase of vaccines by low-income countries could be a bond structure backed by OECD countries that would allow the money to be raised in capital markets, with OECD countries making a legally binding commitment to pay investors in the bonds over time.¹⁸⁴ Domestically, reliable supply chains must be established and mechanisms created in advance for distribution of vaccines across the country. Biometric ID’s using NADRA’s database will also provide the government with an invaluable digital mechanism for combating leakage, corruption, and accidental duplication.

3.8. Aggressively Pursue Universal Health Coverage

COVID-19 has brought into focus the critical need for Universal Health Coverage (UHC). UHC forms part of the UN Sustainable Development

Goals (SDG) agenda\textsuperscript{185} which Pakistan has committed to achieving by 2030, a formidable challenge in the current economic crisis.

i. The Sehat Sahulat Program (SSP) in Pakistan has shown promise with 6.6 million families enrolled and more than a million visits covered by state funded insurance so far.\textsuperscript{186} In Khyber-Pakhtunkhwa (KP), SSP has undoubtedly been a significant step towards UHC,\textsuperscript{187} providing significant financial coverage and access to secondary and tertiary facilities to nearly 70\% of the population.\textsuperscript{188} The COVID pandemic demands that the SSP model be consistently implemented across the country with technical experts leading the way on lessons learned from the KP experience and the potential for expansion.

ii. There is no overarching legal framework for ensuring UHC in Pakistan nor is access to healthcare guaranteed as a fundamental right under the Constitution. Since the SSP is a massive initiative covering millions of people for hundreds of conditions, it may be prudent to explore the

\textsuperscript{185} UNDP, Sustainable Development Goals, “Goal 3, Target 3.8 - Achieve universal health coverage, including financial risk protection, access to quality essential health-care services and access to safe, effective, quality and affordable essential medicines and vaccines for all.” (UNDP.org) https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-3-good-health-and-well-being.html#targets


possibility of legislative cover and constitutional guarantees for SSP\(^{189}\) in the post-COVID reality.

iii. As countries around the world converge on the goal of UHC, common challenges have emerged on how to ensure coverage of the informal sector, designing benefit packages which are responsive, appropriate and fiscally sustainable, and ensuring supply-side readiness.\(^{190}\) However, the response to these common challenges has been varied and highly context-specific in different countries, especially in Asia. Researchers and policy-makers in Pakistan will therefore need to assess these different approaches and contextualize them to the Pakistani context rigorously and regularly.\(^{191}\)


\(^{190}\) Caryn Brederkamp, Timothy Evans, Leizal Lagrada, John Langenbrunner, Stefan Nachuk and Toomas Palu, “Emerging Challenges in Implementing Universal Health Coverage in Asia,” Social Science and Medicine, Vol. 145, Pages 243-248, November 2015 (Scien
direct.com, 2015)

direct.com, 2015)
THE COVID-19 LAW AND POLICY CHALLENGE:

THE FUTURE OF GLOBAL HEALTH LAW AND PAKISTAN’S POTENTIAL ROLE

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ABSTRACT

The management of the novel coronavirus has raised key questions regarding whether the international health law regime is able to adequately handle an outbreak of this magnitude. The structure and framework applicable to the international health law as well as the World Health Organization’s constitution will be explored in this paper. The criticisms heaped on to the WHO and this framework for being ineffective and unable to deal with this outbreak will be considered. The paper will also identify ways in which the regime may be improved to effectively counter pandemics and other health emergencies, and will contextualise this within the ambit of Pakistan.

INTRODUCTION

The management of SARS-COV-2 and associated COVID-19 has raised key questions regarding whether the international health law regime is able to adequately handle a pandemic of this magnitude. In a highly fragmented and polarized geopolitical scene, the structure and operational proceedings of the World Health Organization (WHO) have been particularly criticized by some countries as partisan and ineffective in curtailing global pandemics. Some countries are withdrawing membership or cutting funding, while others flout the body for becoming politically motivated for other reasons. Moreover, the
International Health Regulations (2005) have been considered by some to leave too much to national discretion. These critiques necessitate a deeper understanding of the global health governance framework and the ways in which it falls short. This paper will also identify ways in which it may be improved to effectively counter pandemics, and other health emergencies and will contextualize this within the ambit of Pakistan.


*Constitution of the World Health Organization*

The World Health Organization (WHO) is a United Nations specialized agency, armed with a wide mandate that includes coordinating international action to boost public health and enable “the attainment by all peoples of the highest possible level of health.” However, it differs from other international organizations (IOs) and specialized agencies because its Constitution allows it unique legislative and quasi-legislative powers, as well as the ability to pass resolutions through the World Health Assembly (WHA).

Article 19 of the Constitution provides the authority for the WHO (via the WHA) to adopt conventions or agreements with respect to any matter ‘within the competence of the Organization.’ This provides the WHO with the authority to exercise its wide-ranging constitutional objectives and functions within the health sphere.\(^{192}\) Currently, the only conventions and treaties that

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have been successfully negotiated has been the Framework Convention on Tobacco Control (FCTC) in 2003 and the International Health Regulations (IHR), which were widely ratified and implemented by UN member States. The Pandemic Influenza Preparedness (PIP) Framework, developed following the H5N1 influenza outbreak in 2007, was passed unanimously by 194 State Parties at the World Health Assembly in 2011, is largely considered a positive step in promoting cohesion among states to overcome sovereignty constraints in favour of effective disease surveillance and response via a common virus-information sharing systems. While a welcome addition to the global health governance architecture, the PIP Framework is not considered “legally binding” within international law, as the WHO deliberately did not make use of its constitutional powers to give it such stature.\(^{194}\)

Article 21 of the Constitution allows the WHA to adopt regulations concerning “(a) sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease; (b) nomenclatures with respect to diseases, causes of death and public health practices; (c) standards with respect to diagnostic procedures for international use; (d) standards with respect to the safety, purity and potency of biological, pharmaceutical and similar products moving in international commerce; (e) advertising and labelling of biological, pharmaceutical and similar products moving in international commerce.”

\(^{193}\) Pandemic Influenza Preparedness (PIP) Framework - World Health Organization (WHO), https://www.who.int/influenza/pip/QA_Flyer.pdf?ua=1

Article 22 states that these measures will come into force for all members after due notice, unless some states express reservations or rejection within a designated period. According to Alison Lakin, these “regulations” are closer to treaties than broader recommendations in the sense that they create legal rights and duties which are binding on States, yet States are also granted enough latitude to give effect to the regulation domestically.

Article 23 empowers the WHA “to make recommendations to Members with respect to any matter within the competence of the Organization.” There is some confusion as to the precise legal nature of recommendations, i.e., whether they are persuasive with binding legal force. Some experts assert that recommendations carry “a measure of legality.” However, it is useful to consider the ways through which the WHO issues these recommendations and the degree of their binding legality. These include: WHA Resolutions (no legal obligation, but a contractual obligation exists), codes of conduct (no legal obligation for implementation), technical standards (more pragmatic and expert oriented than political/legal) and other recommendations (WHO publications and existing corpus of technical rules – not binding).

According to Lakin, recommendations have broadly been the preferred choice of WHO in using its powers to attain its objectives and there are virtually no limits on the issuance and use of recommendations.

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195 Ibid.
Articles 61-62 of the Constitution, create an obligation for each member to “report annually on the action taken and progress achieved” by the people as well as in terms of implementing recommendations, conventions, agreements and regulations. However, States conform to this obligation erratically and there is little willingness to compel States by the WHO.

*International Health Regulations (2005)*\(^{198}\)

The International Health Regulations (2005) are a legally binding instrument of international law that aim to assist countries to work together to save lives and livelihoods endangered by the international spread of diseases.

They entered into force in June 2007 creating a global framework to prevent, detect, assess and provide a coordinated response to events that may constitute a Public Emergency of International Concern (or PHEIC).\(^{199}\) Article 1 of the IHR defines a PHEIC as, “an extraordinary event which is determined to constitute a public health risk to other States through the international spread of disease and to potentially require a coordinated international response.”\(^{200}\) Thus, a PHEIC denotes not only the increased susceptibility of disease spread across borders, but that it requires a timely, multifocal and coordinated response from States and the WHO. International public health security relies on the appropriate and timely management of public health risks, which in turn depend on effective national capacities and

\(^{198}\) International Health Regulations (2005) – World Health Organization Publications
https://apps.who.int/iris/bitstream/handle/10665/246107/9789241580496-eng.pdf;sequence=1
\(^{199}\) Ibid.
\(^{200}\) Ibid.
international and inter-sectoral collaboration. The IHR comprise a legal instrument specifically designed to support the attainment of this goal.

The IHR focuses on critical areas of work that broadly revolve around four themes: fostering global partnership, strengthening national capacity, preventing and responding to PHEICs and legal issues and monitoring.\footnote{Areas of Work – World Health Organization \url{https://apps.who.int/iris/bitstream/handle/10665/69770/WHO_CDS_EPR_IHR_2007.1_eng.pdf?sequence=1}}

The articles contained within the IHR not only create obligations on States towards the provision of health services, but also strengthens the functions of the WHO, particularly its global alert and response systems, and the management of risks.


According to Article 3, States must adhere to the full spectrum of human rights and the guidance provided by the Charter of the United Nations and the Constitution of the World Health Organization. This ensures that fundamental rights of the affected, as well as other segments of the public, such as travelers, vulnerable demographics or those at risk, are protected in light of the WHO and the broader UN Charter. In addition, States have the right to legislate and implement legislation in pursuance of health policies while “upholding the purpose of the IHR” as per the principles of international law. This means that while the IHR provides recommendations and regulations to be implemented by States, the States can choose to adopt these in line with their own domestic legal and governance systems, socio-
political contexts and policies. In implementation of health measures broadly, States are obligated to uphold the rights of travellers and ensure international traffic is not disrupted; in case of disruptions are unavoidable, research-backed evidence of human risk to human health and other data must be shared with the WHO authorities.

According to Article 5, States are mandated to develop core capacity requirements to “detect, assess, notify and report events in accordance with the regulations” within the ambit of wider disease surveillance. The WHO can further assist in State Parties to develop, strengthen and maintain these required capacities if requested. Article 6 further obligates State Parties to report by the most efficient means of communication, all events which may constitute a public health emergency of international concern (PHEIC) within its territory within 24 hours of its assessment. Following this, the State is required to maintain close communication with the WHO regarding the spread of the disease, measures employed, difficulties encountered, and other information. The aim is to create a robust system of reporting in PHEICs and other potential outbreaks in order to “respond promptly and effectively to public health risks.” In case of unprecedented outbreaks of a novel disease, States are obligated to notify the WHO and share all relevant information in a timely manner to garner effective response.

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203 International Health Regulations - Toolkit for Legislative Implementation, World Health Organization (WHO)
https://www.who.int/ihr/Toolkit_Legislative_Implementation.pdf?ua=1
204 Article 43, International Health Regulations (IHR) - (2005). World Health Organization
http://www.who.int/ihr/publications/9789241596664/en/
http://www.who.int/ihr/publications/9789241596664/en/
206 Article 7, International Health Regulations (IHR) - (2005). World Health Organization
http://www.who.int/ihr/publications/9789241596664/en/
Article 54 creates obligations on State Parties for reporting and review of implementation of IHR in the WHA.\textsuperscript{207} The WHO is also empowered to periodically conduct studies to evaluate the functioning of the Regulations, submitting these to the WHA for review and deliberation. Article 56 governs dispute settlement mechanisms. According to this, in case of a dispute regarding the IHR, State Parties are mandated to resolve the dispute through negotiation or any other peaceful means of their own choice, including good offices, mediation or conciliation. If the dispute is not settled, the States Parties may refer the dispute to the Director-General, who shall make every effort to settle it, or refer to arbitration. In case the dispute is between the WHO and State Parties, the matter shall be submitted to the WHA.

2. KEY CONCERNS UNDER THE CURRENT FRAMEWORK

*Poor Monitoring and Accountability of Member States*

Despite extended compliance deadlines, no Member State is in complete compliance with the IHR’s core competencies - including detection, assessment, notification, reporting and responding to public health risks.\textsuperscript{208} Europe achieved the highest level of compliance at 72% across all competencies, and Africa ranked the lowest at 44% according to the WHO’s State Parties Self-Assessment Annual Reporting Tool (“SPAR”).\textsuperscript{209} Notably,

however, the SPAR (discussed below) has been criticized for its lack of independent validation. National evaluation of compliance is also seen as inconsistent, presenting challenges in implementing the IHR regimes.  

According to the Report of the High Level Panel, only a third of the 196 State Parties to the International Health Regulations have reported compliance to the IHR core capacity requirements. However, despite having 128 non-compliant countries, the WHO has no enforcement mechanisms in place to ensure the implementation of the IHR framework, primarily due to the absence of an effective review mechanism.

Key:
AFRO = WHO Regional Office for Africa;
AMRO = WHO Regional Office for the Americas;
EMRO = WHO Regional Office for the Eastern Mediterranean;
EURO = WHO Regional Office for Europe;
SEARO = WHO South-East Asia Regional Office;
WPRO = WHO Regional Office for the Western Pacific.


There are predominantly three reasons for the weak monitoring and evaluation mechanism – the voluntary nature of self-assessments by member States, the lack of financial assistance to support implementation in poorer countries, and the absence of sanctions for non-compliance.\textsuperscript{212} In terms of financing particularly, it is important to note that imposing similar sanctions upon developing and developed nations for non-compliance will set unreasonable standards and expectations. Not only have previous efforts\textsuperscript{213} to reinforce compliance via sanctions such as trade tariffs and embargoes proved unsuccessful,\textsuperscript{214} but it is also irrational to expect countries with limited resources to build core capacities such as, surveillance and laboratory services, without financing or technical support. In case any State is in violation of any recommendation of the WHO that has been issued during a PHEIC, that can be challenged both under the IHR and the World Trade Organization (WTO)\textsuperscript{215} dispute settlement procedures outlined in Article 53 of the IHR. The WTO has created exceptions for restrictions on trade under Articles XX-XXI of the General Agreement of Trade in Services (GATS) in cases of threats of health and safety, applicable to PHEICs. No case has been brought before the WTO for adjudication for reasons pertaining to the measures taken by a member State in a PHEIC.\textsuperscript{216}

\textsuperscript{212} Ibid.
\textsuperscript{213} Past efforts have included discussions circulating the plausibility of imposing sanctions. (A joint study by the WHO and WTO Secretariat)
\textsuperscript{216} Ibid.
The IHR Core Capacity Monitoring Framework 2010 accompanied by the IHR Monitoring Tool identifies 8 specific core capacities (Laboratories, Human Resources, Surveillance, Preparedness, Response, Risk Communication, Coordination and National IHR Focal Point (NFP), National legislation, policy and financing), as well as 5 other capacities concerning points of entry and specific hazards. For evaluation of implementation of these 13 capacities, member states are expected to assess their own compliance to them and then report it to the WHO. Under the IHR Monitoring tool, the State Parties were expected to issue formal reports to the WHO in 2012 (with additional reports in 2014 and 2016 for governments that requested extensions) in light of their compliance to the IHR regulations. However, in 2014 only 64 State Parties reported meeting core capacities while 48 countries failed to respond to the WHO.\textsuperscript{217} The Reporting did indicate a significant increase after Self-Assessment Annual Reporting Tool (SPAR) was introduced but still did not reflect complete compliance.\textsuperscript{218} Nevertheless, even if the countries had managed to report in a timely manner, the crux of the problem lies in the voluntary self-assessment mechanism of the evaluation that has prevented states from issuing an objective evaluation of their national preparedness plan. Self-Assessments are deemed to be “inherently self-interested and unreliable, absent rigorous independent validation.”\textsuperscript{219}

\textsuperscript{218} Ibid.
SPAR (Self-Assessment Annual Reporting Tool) and its Challenges

The IHR Monitoring and Evaluation Framework consists of four components; the State Party Self-Assessment Annual Report, (annual reporting is mandatory as per Article 54 of the IHR (2005)) and three voluntary assessments namely Joint External Evaluation (JEE), after action reviews and simulation exercises. For the COVID-19 pandemic, a monitoring and evaluation (M&E) framework has been prepared to facilitate monitoring at the global and national level. The SPAR tool consists of 24 indicators for the 13 IHR capacities needed to detect, assess, notify, report and respond to PHEIC.220 While annual reporting is mandatory, the use of the SPAR tool is completely voluntary.221 However, the biggest problem in the implementation of this approach lies in the coordination and collaboration of the national focal points with other sectors. In fact, the challenges to the multi-sectoral action may be more acute in low-income and middle-income countries, where the institutions are relatively more fragile and the governance structure is more fragmented; these factors undermine multi-sectoral pro-activity and progress.

Recently, self-reporting tools have been recently gaining currency as useful mechanisms for ensuring States comply with their international human rights obligations.222 A study analyzing compliance to the UN Convention against

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221 Ibid.
torture concluded that self-reporting tools resulted in improved human rights outcomes.\textsuperscript{223} However, sovereignty and lack of transparency continue to pose the greatest challenge to effective self-reporting and compliance.\textsuperscript{224} Due to the voluntary nature of self-reporting measures, States may simply omit reporting on its adherence to core capacities, and because of a lack of external assessments to independently evaluate capacities, such States will not be held accountable. With the outbreak of pandemics like COVID-19, this can particularly result in flawed coordination and responses, exacerbating the spread of the virus. False estimates, or untrue reporting results in overstated competence of States in terms of preparedness and response capacity. In March 2020, the WHO launched a Strategic Preparedness and Response Plan for countering COVID-19, which evaluated which countries are at highest risk of becoming epicenters, based on reporting of compliance with IHR core capacities.\textsuperscript{225} In such situations, faulty reporting can impact not just the risk categorization of pandemic spread, but also confound policy recommendations and prevent the WHO from effectively making decisions such as declaring a PHEIC in a timely fashion (as discussed below).


\textsuperscript{225} Strategic Preparedness and Response Plan for COVID-19, March 2020 - World Health Organization

A global health architecture can only better respond to a health crisis if it has sufficient financial resources. Unfortunately, the WHO’s financial reserves are not adequate to cater to the demands of the current pandemic and in fact necessitate a funding requirement of US$ 1.74 billion till December 2020. The WHO has received 37.8% of the designated funding and there is a 48.7% gap that remains to be fulfilled. It is important to note that most of these contributions have been received from regional organizations or donations vis-à-vis Member States; the World Health Organization slashed assessed contributions (member state dues) by twenty percent (20%) between 2010-2015. A factor for this could be the failure on part of the states to recognize international health financing as a global public good. Health Security preparedness for pandemic threats, has never been ‘the highest priority for the health community nor the security community’ and currently there are very few incentives at the country level to prioritize pandemic preparedness for international or domestic budgeting cycles. These heightened financial pressures have increased the dependency of the WHO on voluntary funds: One of the biggest threats to WHO’s success is that less than 20 percent of

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the budget comes in the form of flexible assessed contributions\textsuperscript{230} with almost 80 percent of the budget coming in from extra budgetary sources, of which 93 percent is earmarked by donors for specific programs.\textsuperscript{231} For example, the polio eradication campaign utilizes 25 percent of the WHO budget\textsuperscript{232} and if the campaign were to succeed in achieving its goals, the organization would get bankrupt. Moreover, the political rivalry between the U.S and China may likely affect the funding operations of the WHO as the U.S who is the largest donor of the agency has threatened to ‘make a temporary freeze of the American funding to the WHO permanent’.\textsuperscript{233} Trump had already frozen about USD\$ 400 million of the funding and taking away all of its funding (approximately USD\$ 900 million worth of contributions every two years)\textsuperscript{234} would definitely result in a massive financial vacuum for the agency.

The Report of the Panel suggests that in order to redress these financial challenges of the WHO, the multilateral structure ought to mobilize funds for the agency, there needs to be a 10 percent increase in the organization’s assessed funding, and a further 1 billion should be invested in the organization for supporting measures that will assist the strategic coordination of existing resources. All these measures will eventually result in


\textsuperscript{231} Ibid.

\textsuperscript{232} Ibid.


the WHO being better equipped financially to fight future pandemics, implement the IHR core capacity regime and support the research and development fund. In light of these recommendations, issued in 2016, a WHO Contingency Fund for Emergencies (CFE) was set up that was to be financed fully by the member states according to the scale of their current assessment. The CFE has released nearly 9 million to support the preparedness and response activities carried out during the COVID-outbreak\textsuperscript{235} but the stats of the required funding suggest that further financial aid is still required. The COVID-19 Strategic Preparedness and Response Plan (SPRP) suggests, that the US$ 1.74 billion demand\textsuperscript{236} includes the agency’s requirements under the Global Humanitarian Response Plan (GHRP) with over US$ 550 million allocated for operations in countries with ongoing or new humanitarian or refugee response crises.\textsuperscript{237}

In an effort to broaden its funding base, the WHO on the 27\textsuperscript{th} of May 2020, announced the creation of a foundation (WHO Foundation) that will invite funding from international major donors, the private sector and the general public.\textsuperscript{238} This fund is legally separate from the WHO and from the COVID-19 Solidarity Respond and aims to implement the organization’s general programming needs. An average of 70% to 80% of the funds will be directed


\textsuperscript{236} Ibid.


\textsuperscript{238} The WHO chief added that the WHO is one of the few international organizations that has not received any funding from the general public.

towards the WHO secretariat while the remaining amount shall be handed to its implementing partners. While the Foundation’s mandate is broader than the Covid-19 pandemic, yet its creation has been a result of the looming threat of the WHO’s funding issues.

Furthermore, innovative collaborations such as Access to COVID-19 Tools Accelerator (ACT-A), which represents a concert between States, supranational organizations such as the European Union, as well as other global health organizations, are also being undertaken to diversify funding pathways for a common goal, such as countering COVID-19. ACT-A brings together governments, scientists, businesses, civil society, and philanthropists and global health organizations with the aim of “accelerating development, production, and equitable access to COVID-19 tests, treatments, and vaccines” around the world.

*Problematic Procedure of Declaring a Public Health Emergency of International Concern (PHEIC)*

One issue that has been the subject of much speculation in the COVID-19 outbreak is the limitations around the WHO’s emergency alert system, including the mechanisms behind the declaration of a public health emergency of international concern (PHEIC).

\[^{239}\text{Ibid.}\]
\[^{240}\text{World Health Organization – ACT-A Initiative } \text{https://www.who.int/initiatives/act-accelerator}\]
\[^{241}\text{Ibid.}\]

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Under Article 1\textsuperscript{243} of the IHR, a PHEIC is defined by two characteristic features: international spread of the disease and need for an internationally coordinated response. Concurrently, Article 12 and Annex 2 of the IHR account for the risk of interference with international traffic as an important part of determining a PHEIC. These can conflict – as was the case in the COVID-19 response – causing confusion regarding the imminence of the disease and its spread. The same article further requires the Director-General of the WHO to consider the information provided by the reporting state, apply scientific principles in assessing the available evidence, assess the risk to human health and of international spread of the disease, and the risk of interference with international traffic – before announcing a PHEIC.

Generally, the WHO has been credited with creating provisions that prioritize scientific evidence (and not political clout) in its decision to declare a PHEIC. Furthermore, the WHO can also rely on unofficial reports of disease-spread in cases where member states in question are unwilling to comply. However, this is constrained by verification provisions – any information gained from unofficial sources needs to be verified by the Member State before effective action can be taken. This is particularly true in the case of Iran during COVID-19, as it allegedly failed to report the scale of its coronavirus outbreak even to local health authorities in order to conduct elections and religious proceedings as planned.\textsuperscript{244} This resulted in the country becoming an

\textsuperscript{243} See Annex for IHR Articles
http://www.who.int/ihr/publications/9789241596664/en/

epicenter for disease spread to parts of the Middle East and South Asia. Similar claims have been made against China, the original hub of the coronavirus outbreak, that it delayed informing the WHO of the scale of the initial outbreak, confounding the decision of declaring a PHEIC.\textsuperscript{245} Even if a State Party does not corroborate an unofficial source, the WHO must be empowered to undertake its own analysis, sharing information transparently to the fullest extent possible in accordance with Article 11 of the International Health Regulations.\textsuperscript{246} The World Health Assembly could also amend the decision instrument to reduce States Parties’ reporting discretion, avoiding delayed notification or verification by expanding the list of diseases that require automatic notification to expedite the process.

Furthermore, the WHO’s emergency response and emergency declaration frameworks must be integrated with International Health Regulations’ processes to minimize confusions and increase coordinated action. Presently, the WHO uses the Emergency Response Framework to inform the international community of an outbreak in an incremental manner. However, during the H1N1 and EVD outbreaks, the WHO’s use of this framework and the IHR declaration resulted in confusion from decision-makers leading the organization.\textsuperscript{247} At this stage, it would be pertinent to integrate a gradient system in the International Health Regulations through the WHA, or develop clear guidelines under Article 11. These would streamline the process of


\textsuperscript{247} Ibid.
declaring a PHEIC and allow for more cohesive and decisive action from the multilateral institution during disease outbreaks.

Lack of reform of WHO and its Constitution

Despite the enactment of the IHR and other recommendations, some claim that the WHO’s structure is in need of dire reform. In the 2000s, with the rise of non-communicable diseases with zoonotic origins and now, the COVID-19 outbreak, there need to be broader frameworks and additional mechanisms that can compel states to abide by their reporting requirements, as well as implement broad-scale reforms across its health sector.

This can be achieved by either engaging the WHO’s law-making powers, while the FCTC and the IHR are welcome exceptions, the WHO has been averse in using its legal powers and its forums such as the WHA in impacting actionable response.248 Alternatively, it can also be achieved by amending the WHO Constitution. Any amendments to the WHO Constitution present an arduous and cumbersome process. However, if undertaken as part of a systematic development of the normative function of the WHO, it could be helpful in boosting the organization’s international role and significance,249 especially in the post-pandemic world. This can involve mandating external assessments from independent evaluators to effectively sanction or penalize States that were not compliant with IHR core competencies. Alternatively, legal amendments can also be introduced to penalize delayed reporting of

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249 Ibid.
novel disease outbreaks of zoonotic origins, which have the potential to turn into epidemics or pandemics.

It is further noted that especially after the Ebola crisis, the case for reform at the WHO revolved exclusively around emergency responses, underplaying the need for strengthening health sectors broadly. All reforms have been centered around preparing the WHO and other agencies to tackle a crisis-ridden outbreak, akin to disaster preparedness at a time where the approach needed to be even more robust investment in strengthening national health systems. At the multilateral front, funds and donors too organized around the need for emergency health planning, and instead of overhauling and empowering existing institutions, erected new ones (such as the World Bank’s Pandemic Emergency Facility), to tackle problems that seemingly arise out of a common origin. As Meisterhans purports, “crisis management underscores the importance of strengthening primary health care and public health systems,” and it is critical to reform the WHO response mechanism to underpin the tenets of broader reform.²⁵⁰

*Broader political challenges to the IHR/WHO*

The IHR provides a framework for countries across the world to coordinate responses against infectious diseases and generally strengthen health services for their citizens. However, it is now clear that sustained multilateral and bilateral partnerships are needed for low-income countries to make progress with their capacity to detect and contain global health threats due to funding

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constraints.\textsuperscript{251} But while overcoming the financial barriers to achieving the IHR is fraught with difficulties, overcoming political obstacles may present a yet more daunting challenge.

Time and time again, it has been clear that the WHO mechanism is fraught with political considerations. In 2007’s World Health Assembly (WHA), member States rejected Taiwan's bid to gain membership to WHO, largely because of China's concerns about the application – as the latter feared it would be a step in recognizing Taiwan as an independent state.\textsuperscript{252} In 2020’s WHA, in the midst of the COVID-19 pandemic, the forum emerged as a battleground between the United States, who sought to undermine the multilateral WHO; China, who was blamed for spreading the pandemic; and EU states that demanded independent evaluation of the COVID-response.\textsuperscript{253} At the conclusion of this year’s WHA, the WHO had agreed to a comprehensive, independent evaluation of its coronavirus response, while China agreed to provide USD 2 billion in aid to countries struggling to contain the pandemic.\textsuperscript{254}

Global political considerations have never been fully divorced from the functioning of the WHO and IHR. Thus, building a global consensus and fostering global political will is critical in implementing the IHR, organizing

\textsuperscript{252} Ibid.
funding channels and creating effective and impactful North-South and South-South exchanges to bolster national core capacities of developing and LDCs.

3. PAKISTAN AND THE WHO

Assessing Pakistan’s Health Care Regime

After the passing of the 18th Amendment, healthcare policy and rule-making was devolved to provincial governments. The Federal Ministry of Health was dissolved, with its functionary roles being assigned to other entities, mainly provincial ministries. Theoretically, such an arrangement is designed to give provinces the freedom to design health-based policies in accordance to the specific needs and requirements of the province and its demographics. With the outbreak of COVID-19, Pakistan developed a National Action Plan for COVID-19, establishing inter-provincial and federal-provincial coordination as “a strategic goal to be achieved for the purposes of containment of the disease.”

Joint External Evaluation of IHR Core Capacities in Pakistan (2016)

The joint external evaluation (JEE) is a voluntary, collaborative, multi-sectoral process to assess country capacities to prevent, detect and rapidly respond to public health risks whether occurring naturally or due to deliberate

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or accidental events. The JEE helps countries identify the most critical gaps within their human and animal health systems in order to prioritize opportunities for enhanced preparedness and response.

In Pakistan’s context, a Joint External Evaluation of IHR Core Capacities (JEE) was conducted in May 2016, charting Pakistan’s compliance across 19 technical indicators passed on prevention, detection, and response to emerging diseases. The evaluation concluded that “despite multiple efforts, [Pakistan] has yet to meet the required core [IHR] capacities,” which could adversely affect the travel and trade. It was further noted that Pakistan was “not fully prepared to prevent, detect and respond to health threats to protect its population, irrespective of whether the threats arise internally or externally.”

Moreover, while the JEE covered 19 technical areas, in relation to the national legal framework, the Ministry of National Health Services Regulations & Coordination was tasked with identifying gaps in the legal framework. Alarmingly, however, the JEE noted that “most actions appear to be restricted by current legislation and administrative orders.”

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259 Ibid.
Based on the JEE findings and recommendations, the Ministry of National Health Services, Regulation, and Coordination conducted seven consultative workshops (one for each province/region and one national) to tailor provincial responses to the JEE findings. Based on these consultations, a national, five-year costed roadmap and National Action Plan were prepared and launched at the end of 2017. Experts claim that this exercise has been key in investing in prevention and surveillance capacities, bolstering them to counter the current pandemic.261 However, the 2017 NAPHS ends in 2022 and, given the devastating impact of the COVID-19 pandemic, concerted and timely efforts must be made to ensure that any subsequent National Health Security policy addresses the shortcomings already highlighted in the JEE.

_Tackling COVID-19 in Pakistan – Impact of Smart Lockdowns_

The Government of Pakistan, averse to complete lock downs, banked on localized “smart” lock downs to counter the spread of COVID-19. This approach emphasizes using limited scale lock downs in localities serving as disease hot-spots, while letting the remainder of the city function with normal social distancing rules. When modelled scientifically, such measures have shown promise with reduced infections262 and healthier outcomes263 overall. A limited pilot conducted in Islamabad also bore positive results, with daily

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infections decreasing from 700 to 300.\textsuperscript{264} Weeks of full-scale implementation country-wide, resulted in a sharp decline in COVID-19 spread within six weeks. This brought international acclaim to the approach, citing that a dire crisis was prevented through the innovative practice.\textsuperscript{265}

Within this framework, Pakistan can exhibit leadership and help deepen expertise in innovative containment measures. The IHR competency framework can be further deepened to include SOPs and frameworks pertaining to implementing localized lockdowns for population-dense centres. This can include creating toolkits for implementing smart lockdowns with multiple dimensions, such as designing appropriate legal provisions for enforcement, enhanced surveillance protocols, data-gathering and analysis tools, etc. Particularly for the WHO’s Eastern Mediterranean and South-East Asia Region, with similar demographics and high population density, this can be especially useful. This, coupled with enhanced tracking, tracing and testing competencies can serve as critical additions to the IHR review process, further enhancing States’ ability in countering novel diseases, such as COVID-19.

4. RECOMMENDATIONS AND CONCLUSION

The outbreak of COVID-19 has exposed the fractured nature of global health governance. Critical to IHR is the obligation for all States Parties to establish


core capacities to detect, assess, notify and report events, and to respond to public health risks and emergencies.\textsuperscript{266} In an evaluative 2014 Report,\textsuperscript{267} progress was noted by countries in implementing the IHR, as well as efforts to build surveillance systems and the importance of lessons learnt over recent years. However, NFPs reported insufficient authority/capacity, limited involvement/awareness of other governmental sectors, limited investment of national financial and human resources, ongoing emergencies/conflict, extensions of deadlines rather than expanding capacities, and limited efforts to support the weakest countries in building capacities.

States Parties’ self-assessment of their implementation of the IHR is limited by the variable quality and reliability of information that is provided, and the self-evaluation cannot be independently evaluated. These challenges remain outstanding in most of the developed world today, which have enabled responses to the coronavirus to be haphazard, reactive and incongruent to the best practices purported by the WHO. For overpopulated centers, such as Brazil and India, this translates into stretching the state’s health sectors to the maximum while struggling to increase its internal capacities and implement other measures to contain the virus spread.\textsuperscript{268}

\begin{flushleft}
\textsuperscript{266} World Health Organization
\textsuperscript{267} Ibid.
\textsuperscript{268} Global Worries as Infections Spike in Russia, Brazil and India, Voice of America News, July 2020
\end{flushleft}
The 2014 Report identified specific recommendations to counter the above. However, they are severely limited in scope owing to the structure of the recommendation-based structure of the IHR regime and are thus weak in promoting adherence to the regime. Most of the recommendations revolve around merely commending parties on meeting the minimum requirement for core capacities, granting extensions to countries who have not met them, reminding countries of the importance of transparency and encouraging other states to provide technical and financial assistance as needed.\textsuperscript{269} These recommendations are inherently weak, provide little by way of guidance, and create no oversight mechanisms that can compel States to adhere to these recommendations.

Therefore, it is critical that international organizations, especially those armed with more powers than usual such as the World Health Organization, are reformed and restructured to better tackle common health challenges in the modern era.

After analyzing the structure of the WHO/IHR regime and highlighting problematic areas, we propose the following solutions:

- **Strengthening the Structure of the WHO:** Specifically, strengthening its monitoring and accountability mechanisms, mandating independent evaluations, and penalizing continued lack of compliance to the IHR regime. This can be achieved by updating

\textsuperscript{269} World Health Organization
recommendations and if required, even amending the WHO Constitution to ensure that adherence and compliance is prioritized.

- **Implementing Periodic Review Mechanisms:** For the countries under review, the WHO should arrange for an independent field-based assessment and this should be presented to the World Health Assembly (or a committee created for this purpose) along with a self-assessment report. Post-review, the WHO Secretariat may develop a cost-action plan on the basis of the costing tool along with a public report that outlines the implementation strategy with requirements for international assistance. This is considered to be more effective in identifying gaps and obtaining support from the international community as required.

- **Creating a High-Level Panel:** Usually formed only in response to crisis events such the EVD outbreak, a permanent high-level council on global public health crisis must be created to better respond to a public health crisis. Instead of focusing on health crises, this panel is recommended to regularly monitor and manage issues related to external factors that affect the preparedness and prevention of an epidemic. Such a body can report to the General Assembly in a timely manner, and be representative of Member States while issuing actionable recommendations to target both health emergencies as well as ensure building of IHR core competencies.

- **Integrating Risk and a One-Health Approach to WHO Evaluative Frameworks:** Integrating risk assessment approaches has
been linked with effective IHR outcomes in prior WHO reports.\textsuperscript{270} Such approaches should not only be mandated, but the evaluative process must evolve from mere “checklists to a more action-oriented approach.”\textsuperscript{271} Furthermore, integrating a “One Health” approach is also critical.\textsuperscript{272} This approach combines the study of zoonotic (originating from animals) and human-based infectious diseases such as influenza, polio, MERS-CoV, Ebola and COVID-19. This approach promotes animal health as well as health of individuals, and will prevent novel diseases from forming in the first place.

- **Deepen Funding Pathways to the WHO:** With an operational budget comparable to that of “a medium-sized hospital,” and a mandate as broad as the “attainment of health of all peoples,” the WHO budget is spread over 194 countries, often working to eradicate diseases and ensure immunization in the most vulnerable communities of the world.\textsuperscript{273} While funding concerns have always been a problem, the proliferation of global health initiatives outside of the WHO framework, such as the Bill and Melinda Gates Foundation, the GAVI Alliance, Global Fund, etc. have redirected funds, adversely impacting direct funding to the WHO.\textsuperscript{274} It is critical to fund and empower the WHO to regain back this space from private actors and further invest

\textsuperscript{270} Ibid.
\textsuperscript{271} Ibid.
\textsuperscript{272} Ibid.
in reforming broader healthcare sectors particularly in the developing world to prevent outbreaks such as COVID-19 from occurring.\textsuperscript{275}

- **Empowering the WHO Regional Network for Local Solutions:**

Promoting regional actors to come up with data-backed solutions and other protocols is essential in countering common threats. Pakistan’s effective use of ‘smart lockdown’ strategy, complemented by effective contact tracing and containment measures prevented the country from becoming a major COVID-19 hotspot, similar to Brazil and India.\textsuperscript{276} WHO Regional Offices should incentivize such innovative practices, and streamline the process for such solutions to be disseminated to regional partners in the form of recommendations, SOPs and/or toolkits for enhanced implementation.

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\textsuperscript{276} Global Worries as Infections Spike in Russia, Brazil and India, Voice of America News, July 2020
THE UNIVERSAL PERIODIC REVIEW AND THE DEATH PENALTY: A CASE STUDY OF PAKISTAN

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ABSTRACT

Acclaimed as an innovative mechanism of the UN Human Rights Council, the Universal Periodic Review (UPR) was introduced by General Assembly Resolution 60/251 in 2006. It appraises the human rights record of each UN Member State, every four and a half years, in an attempt to further the global promotion and protection of human rights. The third cycle of the UPR has been underway since April 2017 and will conclude in November 2021. Using Pakistan’s latest review, held in 2017, as a case study, this article assesses the mechanism’s engagement with the question of the death penalty. In doing so, it evaluates each stage of the process and considers the extent to which this violation of the right to life is challenged and issues recommendations to strengthen the integrity of the UPR.

INTRODUCTION

Since April 2006, pursuant to subsection (d) of Resolution 60/251, the Human Rights Council (HRC) has been mandated with the responsibility of monitoring Member States’ compliance with human rights obligations and commitments. This is to be implemented through the Universal Periodic Review (UPR), a peer-review mechanism based on:

objective and reliable information...in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an
interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs.\textsuperscript{277}

Resolution 5/1, also known as the ‘Institution Building Package’ (IBP), provides an overview of the UPR’s modalities and further expands upon Resolution 60/251. According to the IBP, the following human rights commitments and obligations are to be relied upon to form the basis of a State’s review: the Charter of the United Nations, the Universal Declaration of Human Rights, human rights instruments to which a State is party to, and voluntary pledges and commitments made by States. The review criteria also include applicable international humanitarian law due to its complementary and mutually interrelated nature with international human rights law.\textsuperscript{278} The inclusion of legally binding and non-legally binding human rights instruments as the basis of the review indicates its comprehensiveness, allowing it to build upon the universality, indivisibility, and interrelatedness of human rights.

Each Member State is reviewed every four and a half years. The review itself begins with national consultations in the country concerned and concludes with implementation of recommendations and follow-up. Using Pakistan’s third UPR, held in 2017, as a case study, the question of the death penalty is assessed in each stage of the mechanism below. The article considers the extent to which this violation of the right to life is challenged and issues recommendations to strengthen the integrity of the UPR.

\textsuperscript{277} UNGA Res 60/251, ‘Human Rights Council’ (3 April 2006) UN Doc A/RES/60/251, para 5c.

4. **THE UNIVERSAL PERIODIC REVIEW**

4.1. **National Consultations**

The first stage of the UPR involves a national consultation process. The State under Review is encouraged to prepare its national report “through a broad consultation process at a national level with all relevant stakeholders”\(^{279}\). The consultations, which generally begin ten to twelve months before the actual review,\(^{280}\) allow relevant stakeholders to make significant contributions in increasing awareness and knowledge of the UPR mechanism. This, in turn, allows key human rights issues, such as the death penalty, to be brought to the forefront.

Stakeholders include NGOs, national human rights institutions, human rights defenders, academic and research institutions, regional organisations, and civil society representation.\(^{281}\) Civil society engagement in the UPR helps provide a balance to the State’s performance by including independent and impartial perspectives. Moreover, it gives a voice to the marginalized and vulnerable groups which highlights the universality and indivisibility of human rights and, therefore, has an effective role to play when a State’s human rights record is being reviewed.

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\(^{279}\) ibid para 15(a).

\(^{280}\) Lisbeth Arne Nordager Thonbo, ‘The Role of the State’ in Lis Dhundale and Lisbeth Arne Nordager Thonbo (eds), *Universal Periodic Review First Cycle: Reporting Methodologies from the Positions of the State, Civil Society and National Human Rights Institutions* (The Danish Institute for Human Rights 2011) 17.

The concept of national consultations adheres to the principle that the UPR must, “ensure the participation of all relevant stakeholders, including nongovernmental organizations and national human rights institutions”. No detailed instructions, however, are provided on the format that the consultative national process should take. As a result, only a small number of submissions have identified the specific nature of consultations such as the time, location, and/or number of participants. This was reflected in Pakistan’s second UPR where the State listed the date and location of its consultations with government departments and civil society organisations, but failed to disclose their identities or the number of organisations actually involved. Surprisingly, moving one step backward, its third UPR simply observed that “all stakeholders were involved” and consultative meetings were arranged “with the participation of the government officials and CSOs for seeking their input, and finalization of responses”. No further details were forthcoming. Consequently, the true level of cooperation and engagement with stakeholders cannot be determined and can include stifling effective interpretation on the death penalty.

282 ibid para 3(m).
286 ibid.
4.2. Submission of Reports

The next stage in the process involves the collation of reports. The review of a State is based upon three documents: 1) national report prepared by the State concerned; 2) summary of stakeholder reports, and; 3) compilation submitted by the Office of the High Commissioner for Human Rights (OHCHR) on relevant official United Nations documents [hereinafter UN report].

4.2.1. National Report

The State under Review must submit a national report, the structure of which can follow the General Guidelines adopted by the Human Rights Council. The outcome should be an evaluative report that provides a detailed analysis of a country’s human rights record, both the positive and the negative, paving the way for future compromises and assistance from other countries.

288 OHCHR, ‘Guidance Note on 3rd Cycle National Reports’ available at <www.upr-info.org/sites/default/files/general-document/pdf/ohchr_guidance_national_report_3rdcycle_en.pdf>. Tentative deadlines are included in the calendar of the cycle as posted on the OHCHR website. For States considered at the early session of the year, the deadline for submission is usually set for October of the previous year. For States considered at the April-May session, the deadline is usually set for January-February of the same year. For States considered at the October-November session, deadline is usually set for July-August of the same year.
Pakistan’s national report\textsuperscript{290} is devoid of any reference to the death penalty suggesting that its attitude to capital punishment is seen as a matter of State sovereignty as opposed to a question of human rights. This is reflected in its voting pattern on the UN General Assembly Resolutions on the moratorium on the use of the death penalty and the accompanying note verbale of disassociation.\textsuperscript{291} Pakistan has consistently voted against these resolutions,\textsuperscript{292} including the most recent resolution in 2018, and endorsed the note verbale each year which emphasises that capital punishment is “first and foremost an issue of the criminal justice system and an important deterring element vis-à-vis the most serious crimes”.\textsuperscript{293}

The note further claims that “[e]very State has an inalienable right to choose its political, economic, social, cultural, legal and criminal justice systems, without interference in any form by another State”\textsuperscript{294} and that:

All Member States are acting in compliance with their international obligations. Each Member State has decided freely, in accordance with its own sovereign right established by the United Nations Charter, to determine the path that corresponds

\begin{itemize}
\item \textsuperscript{291} The note verbale declares that, ‘[t]he permanent missions wish to place on record that they are in persistent objection to any attempt to impose a moratorium on the use of the death penalty or its abolition in contravention of existing stipulations under international law’. See UN Doc A/62/658.
\item \textsuperscript{293} UN Docs A/62/658; A/63/716; A/65/779; A/67/841; A/69/993.
\item \textsuperscript{294} ibid.
\end{itemize}
to its own social, cultural and legal needs, in order to maintain
social security, order and peace. No Member State has the right
to impose its standpoint on others.\footnote{ibid.}

Clear principles of sovereignty and criminal justice are reflected in the above statement and are being used to prevent scrutiny of States’ practice of the death penalty. Moreover, to assert that all States are adhering to their right to life obligations is a bold claim to make, and the UPR process itself demonstrates that this is not accurate. The UN and stakeholder reports for Pakistan, as discussed below, are a case in point. Furthermore, respecting human rights does not deprive a State of its sovereignty and is a false antithesis to claim otherwise. Whilst all States have the right to punish, including the use of religion to set criminal sanctions which Pakistan employs, there are limits defined by international human rights; and a true application of Islamic criminal sanctions is reflective of the ideology of promoting the right to life.\footnote{For a comprehensive analysis of Islamic law and the death penalty, see Amna Nazir, \textit{Islamic Member State and the Scrutiny of the Death Penalty within the Universal Periodic Review} (PhD thesis, Birmingham City University and University of Birmingham 2019).}

Whilst a lack of discussion on the right to life could be justified on the basis that the review is expected to focus on accepted recommendations from the previous cycle and Pakistan did not accept any death penalty recommendations in its second review, the report must still discuss any challenges the State under Review faces in its implementation of human rights. This includes safeguarding the right to life.
4.2.2. **Stakeholder Report**

The second report is a summary of all stakeholder submissions to the UPR, presented in a summarized manner owing to word-limit constraints. Stakeholder submissions must be submitted six months before the State under Review’s UPR and they can either be an independent individual report, not exceeding 2815 words, or a joint stakeholder report limited to 5630 words.\(^{297}\) All submissions are made available on the OHCHR’s website which adds to the transparency of the whole process.\(^{298}\) A joint stakeholder submission increases the visibility of the submission and is afforded a greater sense of credibility as it implies that participating stakeholders were able to reach a consensus on particular issues and propose recommendations to ameliorate the human rights situation in the State under Review.\(^{299}\) Non-State contributions such as those by national stakeholders are accommodated as official documents in the review process which prevents any hierarchy among the different inputs.\(^{300}\) In the instance of Pakistan, a total of 20 joint submissions were recorded during its third review. An example of this was Joint Submission 4 (JS4), on the State’s use of the death penalty, comprising of Reprieve, World Organisations Against Torture, Justice Project Pakistan and World Coalition Against the Death Penalty.

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\(^{298}\) NGO submissions can be located on each country’s page on the OHCHR website dedicated to the UPR: www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx. After selecting the relevant country, click on the footnote at the end of the title ‘Summary of stakeholders’ information’.


\(^{300}\) Abebe (n 8) 11.
In order to improve the efficacy of written submissions, the OHCHR has introduced new guidelines for stakeholders for the third cycle onwards.\textsuperscript{301} One such example being the introduction of “matrices of recommendations of countries to be reviewed during the third cycle of the UPR”\textsuperscript{302} The aim of the matrix is to record precise and specific information regarding the State under Review’s implementation of previously supported and noted recommendations. It offers a list of thematically clustered recommendations, such as the death penalty, and provides space for ‘assessment/comments on level of implementation’\textsuperscript{303}

Stakeholders are advised to download their country matrix, complete the relevant section, and submit it as an annex to the main submission.\textsuperscript{304} Pakistan’s review had a total of 43 submissions, but no stakeholder made use of the matrix. There seems to be little engagement with the matrix which needs to be utilised by civil society in order to identify “challenges or needs of technical cooperation”\textsuperscript{305} where recommendations have not been implemented and to ensure submissions remain relevant and specific.

\textsuperscript{301} OHCHR, ‘Universal Periodic Review (Third Cycle): Information and guidelines for relevant stakeholders’ written submissions’, paras 5-6. The guidelines strongly encourage stakeholders to specifically tailor their submissions for the UPR and ensure that they contain reliable and credible information on the State under Review. They should identify issues of concern, possible recommendations and/or best practices, cover a maximum period of four years, and not contain abusive language.

\textsuperscript{302} The table of matrices is available from the OHCHR website at <www.ohchr.org/EN/HRBodies/UPR/Pages/NgosNhris.aspx>.

\textsuperscript{303} ibid. The matrices clearly identify each recommendation (HRC report, cycle, paragraph number, recommendation number and recommending country) which will contribute better to report on the status of implementation and follow-up to the preceding reviews.

\textsuperscript{304} OHCHR, ‘Universal Periodic Review (Third Cycle): Information and guidelines for relevant stakeholders’ written submissions’, para 5e.

\textsuperscript{305} ibid para 5d.
After receiving all stakeholder submissions, the OHCHR compiles them into a single summary report and lists the human rights issues thematically. For a more in-depth consideration of a particular issue, individual submissions should be consulted. The question of the death penalty was raised by JS4, Unrepresented Nations and Peoples Organization (UNPO), and Child Rights International Network (CRIN) in Pakistan’s UPR.\(^{306}\)

UNPO and JS4 drew attention to Pakistan’s decision to lift a seven-year moratorium on the death penalty in December 2014 despite repeated recommendations from many States to the contrary. Furthermore, the stakeholders noted that the State under Review had extended resumption of executions to cover all 31 offences carrying the death penalty, such as kidnapping and drug-trafficking.\(^{307}\) JS4 also noted an absence of legislative provision to expressly protect people with psycho-social disabilities from the death penalty in Pakistan.\(^{308}\)

According to CRIN, the juvenile death penalty had been imposed since the lifting of the moratorium in clear contravention to international human rights law. JS4 was also concerned about the lack of birth registration which continued as a major obstacle to juvenile justice. The police often recorded the age of the defendant based on a cursory visual assessment.\(^{309}\)

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\(^{307}\) ibid para 25.

\(^{308}\) ibid para 27.

\(^{309}\) Para 26; see also CRIN report p5
4.2.3. **UN Report**

The third report is compiled by the OHCHR on information contained in the reports of human rights treaty bodies, Special Procedures, and other relevant UN documents. This report is also restricted to ten pages.\(^{310}\) In Pakistan’s UN report, the High Commissioner for Human Rights voiced concern at the lifting of the 2008 moratorium on the death penalty and urged Pakistan to reimpose the moratorium. Whilst it had initially been lifted for terrorism-related crimes only, it was lifted generally in March 2015.\(^{311}\) A group of special rapporteurs also warned against the resumption of the death penalty for terrorist acts.\(^{312}\)

Three main themes were identified regarding the State’s use of capital punishment: execution of juveniles, faith-based killings, and execution of persons with disabilities. The High Commissioner noted that approximately ten percent of individuals on death row had reportedly been juveniles at the time of the commission of the offence.\(^{313}\) Moreover, the Committee on the Rights of the Child expressed alarm at reports that a number of individuals had been executed for offences committed when they were under the age of 18 years or when the age of the individual was contested.\(^{314}\) The Special Representative of the Secretary-General on Violence against Children and a group of Special Rapporteurs also condemned the execution of juveniles.\(^{315}\)

\(^{310}\) UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1, para 15(b).


\(^{312}\) ibid.

\(^{313}\) ibid para 24.

\(^{314}\) ibid para 25.

\(^{315}\) ibid.
The Special Rapporteurs on Freedom of Religion and Belief, Minority Issues, and Extrajudicial, Summary or Arbitrary Executions all called upon Pakistan to adopt urgent measures to end faith-based killings and protect the rights of its religious minorities such as the Ahmadiyya community. The Special Rapporteurs expressed concern that such violence was only exacerbated by existing blasphemy laws that targeted minorities. The Human Rights Committee noted severe penalties, including the mandatory death penalty, under the State’s blasphemy laws which reportedly had a discriminatory effect particularly on Ahmadis.

Concerning persons with disabilities, a group of Special Rapporteurs urged Pakistan to stop the executions of such individuals, noting that “persons with psychosocial disabilities frequently face the risk of being sentenced to death and executed in breach of international standards.” The Human Rights Committee echoed these views and advised the State to establish an

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316 ibid para 43. See also “Stop faith-based killings” – UN rights experts urge Pakistan to protect Ahmadiyya Muslim minorities (OHCHR, 2 June 2014) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14658&LangID=E>.

317 A body of 18 experts that monitors implementation of the ICCPR by its States Parties. Under Article 40(4), the Committee has issued a number of ‘General Comments’ which help States Parties to fulfil their reporting obligations ‘by sharing the experience gleaned from the many periodic reports already studied, drawing attention to insufficiencies, and suggesting improvements’.


319 Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Special Rapporteur on the independence of judges and lawyers; and Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

independent mechanism to review all cases where there is credible evidence that death row prisoners have such disabilities and to review the mental health of death row inmates.\textsuperscript{321}

The Human Rights Committee further recommended that Pakistan reinstate the moratorium on the death penalty with a view to abolition. If the death penalty was to be maintained, Pakistan should ensure that it was reserved only for the ‘most serious crimes’ involving intentional killing, that it was never mandatory, that pardon or commutation of the sentence was always available, that it was never executed in contravention to the ICCPR and fair trial guarantees. Moreover, it should not be imposed by military courts, in particular respect to civilians, and that no person who was below the age of 18 years at the time of the commission of an offence was subjected to the punishment.\textsuperscript{322}

What emerges is a polarisation of attitudes as demonstrated by the State in its national report and the Special Procedures in the UN report. This demonstrates a superficial engagement with the UPR process as the State is failing to acknowledge its limitations in protecting the right to life or the occurrence of unfair trials which are facilitating the application of the death penalty.


4.3. **Interactive Dialogue**

Following the submission of the reports, the UPR takes the physical form of an interactive dialogue which is held in Geneva where the Universal Periodic Review Working Group conducts a three and a half hour review.\(^{323}\) The Working Group is composed of all Member and Observer States in the Human Rights Council and is chaired by the Council’s President.\(^{324}\) Pakistan’s third UPR was held on 13 November 2017. The delegation of Pakistan was headed by the Minister of Foreign Affairs, Khawaja Muhammad Asif.

An interesting aspect of the interactive dialogue is that it helps normalise the discussion of human rights at the international level thereby reducing any perceived sensitivities. Roland Chauville argues that it “challenges the notion that human rights are a matter of domestic policy and that the involvement of the international community is akin to interfering with the sovereignty of the State being reviewed”.\(^{325}\) Therefore, statements encouraging retentionist countries to “preserve the death penalty given their cultural, political and legal specificities”\(^{326}\) can be respectfully questioned at the UPR; challenging the ideology that capital punishment is underpinned by State sovereignty and criminal justice, and help solidify the argument that it is a question of human rights.

\(^{323}\) The time allocated for reviews was originally three hours but was later extended for a further half hour. Compare UNHRC Res 5/1 (18 June 2007), at para 22 and HRC Presidential Statement 8/1, (2008) UN Doc HRC/8/PRST/1 at para 7 with UNHRC Dec 17/119, at paras 3-4 and Annex II, and UNHRC Res 16/21, at para 11.
\(^{324}\) UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1, para 18.
\(^{326}\) A/HRC/28/16, para 165.
The dialogue is made accessible on the OHCHR website and webcasted live, keeping with the principles of transparency, non-selectivity, and equal treatment. Stakeholders with ECOSOC status are able to attend the session but are not provided with any speaking time and are therefore prevented from directly interacting in the review dialogue. Whilst this is a drawback to the Universal Periodic Review, it signifies the ideology that the review is a State-led process.

The review is guided by the troika which is a group of three Member State Rapporteurs chosen by the drawing of lots. The State under Review can request that one of the three troika members is from its own region thereby allowing the State to have “a regional ally that understands its cultural sensitivities and/or issues relating to capacities for human rights protection and promotion”. Conversely, a State that is selected to be part of troika can recuse itself from the position. This occurred in 2008 where Pakistan declined to serve as a troika member for India’s review due to the history of political

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329 UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1, para 18(d).
tension between the two countries. The troika selected to facilitate Pakistan’s third review comprised of Egypt, Iraq and Latvia.

The interactive dialogue has two main features: a presentation by the State under Review and a question and answer session with other Member States. The State under Review presents its national report regarding the country’s human rights situation and responds to advance written questions submitted to it through the troika. Germany, Sweden, Czech Republic, Norway, and the United Kingdom all submitted questions to Pakistan on its use of the death penalty however these were not adequately answered, if at all. In its opening presentation, Pakistan simply acknowledged that:

One consequence of the counter-terrorism challenges Pakistan had been facing was the decision to implement the death penalty. Mounting public pressure in the wake of the Peshawar school

333 ‘Considering the end of the moratorium on executions was presented as a measure against terrorism, while many inmates on death row were sentenced for crimes not related to terrorism: Has the Pakistan taken any steps to reduce the number of crimes for which the death penalty is imposed?’
334 ‘What legal measures is the Government of Pakistan taking to restrict the use of the death penalty and ensure that it is applied in accordance with international law?’
335 ‘Is the Government considering re-establishing a moratorium on the death penalty, which had been lifted in 2014?’
336 ‘Which steps will Pakistan take to ensure due process in trials where the death penalty is an option, especially in the military courts?’
337 ‘What steps is Pakistan taking to ensure that its application of the death penalty complies fully with international norms and obligations, including juveniles and persons with disabilities?’
attack had forced the Government to lift the moratorium on the death penalty. Pakistan imposed the death penalty in line with its Constitution and international norms for only the most serious crimes, with due process of law and fair trial standards followed diligently.\textsuperscript{338}

The State under Review did not, for example, address steps it had taken to limit recourse to the death penalty, or what steps it had taken to ensure compliance with international human rights obligations when imposing the death penalty, and whether it would consider reinstating a moratorium. Furthermore, contrary to its statement above, the use of the death penalty in Pakistan is not an exceptional measure with as many as 31 offences carrying the punishment including non-lethal offences such as kidnapping, blasphemy, and narcotics offence. Some offences such as blasphemy and adultery carry a mandatory death sentence which is in contravention to the ‘most serious crimes’ principle. In fact, stakeholder JS4 detailed how Pakistan was acting in violation of ICCPR Articles 6(2), 6(4), 6(5), as well as Article 7 (freedom from torture or cruel, inhuman or degrading punishment) and Article 14 (right to a fair trial).\textsuperscript{339} This divergence of perspectives is a common pattern that seems to transpire in the UPR process.


4.3.1. The Issue of Recommendations

Following the State under Review’s presentation, Member and Observer States are then provided the opportunity to take the floor and pose questions, present observations, or make recommendations. Member States are restricted to three minutes of speaking time whilst Observer States are given two minutes. A total of 111 States took the floor during Pakistan’s review issuing a sum of 302 recommendations. The Working Group grouped similar recommendations together resulting in a total of 289 recommendations which is the official figure listed in its report. Of these 289 recommendations, 168 were supported and 121 noted.

The quality of recommendations received during a State’s review can have varying effects on its human rights situation. This is supported by Edward McMahon’s comprehensive study on the evaluation of recommendations in the UPR. McMahon has categorised recommendations on a scale of 1 to 5 depending on the verb that is used in each recommendation:

1) Category 1: these recommendations require minimal action in comparison with other categories. They call upon the State under Review to seek international assistance or share best practices (verbs in this category would include ‘call on’, ‘seek’, and ‘share’).

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For example, Albania to Pakistan: “Strengthen its efforts to promote food security and eradicate all forms of malnutrition, and ensure quality education to all children through inclusive policies”\(^{343}\)

2) Category 2: these recommendations encourage continuity of actions and/or policies (‘continue’, ‘maintain’, ‘persevere’, ‘pursue’). These recommendations are fairly easy to implement as they do not demand any change however, they can be challenging when the State under Review is faced with political insecurity, economic cuts or conflict.

For example, Morocco to Pakistan: “Continue strengthening the operational efficiency of various human rights institutions”\(^{344}\)

3) Category 3: recommendations to consider change (‘analyse’, ‘consider’, ‘envisage’, ‘explore’, ‘reflect upon’, ‘review’). Such recommendations are generally issued when the subject matter is controversial and does not enjoy State support.

For example, Spain to Pakistan: “Ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights in order to definitively abolish the death penalty”\(^{345}\)

4) Category 4: recommendations that contain a general element. As a result of being so broad, they can cause frustration to both the State

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\(^{344}\) ibid recommendation 152.47.

\(^{345}\) ibid recommendation 152.3.
under Review and relevant stakeholders as they lack clarity in regards to the method of implementation or measurable outcomes.

For example, Paraguay to Pakistan: “Pursue the efforts to remove all measures that could give rise to situations analogous to torture or cruel or inhuman treatment from its national legislation”. 346

5)  Category 5: these recommendations require specific actions and ‘demand certain tangible or measurable outcomes’. Recommendations on the death penalty predominantly fall within this category.

For example, United Kingdom to Pakistan: “Set a clear timeline for the review of legislation carrying the death penalty with the aim of limiting the scope of crimes to which it applies”. 347

Pakistan received 35 death penalty recommendations and noted all of them. Angola, Spain, Uruguay, Cote d’Ivoire and Portugal all recommended Pakistan to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) Aiming at the Abolition of the Death Penalty. 348 The vast majority of recommendations simply required the State to ‘abolish the death penalty’, ‘reinstate the moratorium on the death penalty’ or ‘establish a moratorium with a view to abolishing it’. These were issued by Iceland, Estonia, France, Czechia, Lithuania, Montenegro, Brazil, Greece, Norway, Switzerland, Cyprus, Luxembourg, Chile, Portugal, Slovakia, Italy,

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346 ibid recommendation 152.135.
347 ibid recommendation 152.124.
348 ibid recommendations 152.2-152.5, 152.7.
Sweden, New Zealand, Austria, Moldova, Mexico, Germany and Namibia.\textsuperscript{349} Whilst it is commendable that these are category 5 recommendations demanding specific action, they lack a measurable outcome and fail to acknowledge the review criteria as laid down in Resolution 5/1 which States that the review is based upon five elements: the UN Charter, UDHR, voluntary pledges and commitments, human rights instruments the State has ratified, and applicable international humanitarian law. Failing to cite the source of the recommendation implies that the recommending State is not overly familiar with the UPR framework, and/or has not invested time and effort to formulate a concrete and specific recommendation which is in line with the objectives of the UPR. In Pakistan’s case, the relevant review criteria would be Article 3 UDHR and Articles 6, 7 and 14 ICCPR.

Belgium was the only State to base its death penalty recommendation on the review criteria, recommending Pakistan to:

Immediately repeal legislation that provides the possibility to impose the death penalty for freedom of speech-related cases, in particular section 295-C of the Penal Code, in order to ensure compliance with Articles 6 and 19 of the International Covenant on Civil and Political Rights.\textsuperscript{350}

Furthermore, the United Kingdom’s recommendation also made good use of the S.M.A.R.T principle requesting Pakistan to “set a clear timeline for the

\textsuperscript{349} ibid recommendations 152.103-152.121; 152.123; 152.125; 152.126; and 152.129.
\textsuperscript{350} ibid recommendation 152.122.
review of legislation carrying the death penalty with the aim of limiting the scope of crimes to which it applies”.

In response to concerns raised by Member States such as Germany who noted the lifting of the moratorium on the death penalty followed by executions “as a significant retrograde step”, Pakistan responded by citing the ICCPR which forms part of its review criteria (i.e. human rights instruments the State has ratified), an approach that the recommending States should have adopted. It asserted that “the application of death penalty was in full compliance with the ICCPR. It was applicable only for the most serious crimes. It could not be imposed on an individual under the age of 18”.

Nonetheless, such an answer demonstrates that retentionist States like Pakistan seem to be disconnected from the evolving human rights jurisprudence on the right to life, particularly when considering the Secretary-General’s quinquennial reports, the Human Rights Committee’s General

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351 ibid recommendation 152.124.
352 ibid para 77.
353 ibid para 123.
354 ECOSOC, by its Resolution 1745 (LIV) of 16 May 1973, invited the Secretary-General to submit to it, at five-year intervals starting from 1975, periodic updated and analytical reports on capital punishment. Under Resolution 1995/57 of 28 July 1995, it recommended that the quinquennial reports of the Secretary-General should continue to cover also the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty. There have been nine quinquennial reports to date. See UN Docs E/5616 (covering period 1969-1973); E/1980/9 (covering period 1974-1979); E/1985/43 (covering period 1979-1983); E/1990/38/Rev.1 (covering period 1984-1989); E/1995/78 (covering period 1989-1993); E/2000/3 (covering period 1994-1998); E/2005/3 (covering period 1999-2003); E/2010/10 (covering period 2004-2008); E/2015/49 (covering period 2009-2013).
Comment No. 36,\textsuperscript{355} and its concluding observations on the implementation of the ICCPR.\textsuperscript{356}

The Human Rights Committee has addressed the meaning of ‘most serious crimes’ in the most recent Draft General Comment No. 36 stating that the term must be read restrictively and relate to crimes of extreme gravity, such as premeditated murder or genocidal killings. It States in length that:

\begin{quote}
Crimes not resulting directly and intentionally in death, such as drug offences, attempted murder, corruption, armed robbery, piracy, abduction, repeated evasion of compulsory military service and sexual offences, although serious in nature, do not manifest the extraordinary high levels of violence, utter disregard for human life, blatant anti-social attitude and irreversible consequences that could conceivably justify the imposition of the death penalty as a form of legal retribution.\textsuperscript{357}
\end{quote}

Therefore, States Parties that retain the death penalty for these offences are in violation of their obligations under Article 6 ICCPR. This also means that States, such as Pakistan, which criminalise apostasy, blasphemy and adultery as capital offences are not adhering to international law standards. Another

\textsuperscript{355} This General Comment replaces earlier General Comments No. 6 (16th session) and No. 14 (23rd session) adopted by the Committee in 1982 and 1984, respectively.

\textsuperscript{356} See eg, ‘Concluding observations on the initial report of Pakistan’ (27 July 2017) UN Doc CCPR/C/PAK/CO/1.

4.4. Adoption of Universal Periodic Review Outcomes

4.4.1. Adoption by the Working Group

Following the interactive dialogue, the troika prepares a report of the Working Group which includes a summary of the proceedings, the issues raised in the interactive dialogue, the recommendations submitted by participating Member States, and voluntary commitments made by the State under Review. There is a forty-eight hour time frame between the interactive dialogue and the adoption of the outcome report. The Working Group adopted the report on Pakistan at its 17th meeting held on 16 November 2017.

The outcome report details both accepted and noted recommendations by the State under Review. Attribution of recommendations was another challenge faced by the Human Rights Council. Egypt contended that “it is a violation of the sovereign rights of States” to suggest that all Working Group members have agreed upon a recommendation which in fact has only been proposed by one State. The notion of ascribing a recommendation only to the State which proposed it gained favour in the international

358 The paragraph reads: [s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
360 Redondo (n 46) 732.
361 Abebe (n 8) 16.
community.\textsuperscript{362} This is particularly useful for States who may not agree with recommendations such as those which may conflict with their own cultural or religious norms. Hence Angola’s recommendation to Pakistan to “Ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty”\textsuperscript{363} would not be endorsed by States such as Saudi Arabia, Iran, Afghanistan, or Sudan who are death penalty retentionists.

Recommendations are therefore viewed as “bilateral recommendations made through the multilateral forum of the Universal Periodic Review”.\textsuperscript{364} This approach is reflected in the wording articulated at the end of all outcome reports which states that, “[a]ll conclusions and recommendations contained in the present report reflect the position of the submitting States and the State under Review. They should not be construed as endorsed by the Working Group as a whole”\textsuperscript{365}

4.4.2. Adoption by the Human Rights Council

Three to five months after the Working Group session, the Human Rights Council will conduct a plenary session to adopt the Working Group’s outcome report. This stage provides the State under Review to respond to any issues that were not adequately addressed during the interactive dialogue.

\textsuperscript{362} ibid.
\textsuperscript{364} Alex Conte, ‘Reflections and Challenges: Entering into the Second Cycle of the Universal Periodic Review Mechanism’ (2011) 9 New Zealand Yearbook of International Law 189, 195.
This is generally preceded by an addendum to the outcome document which details whether any additional recommendations have enjoyed State support between the time of the review and the adoption of the outcome report.\[366\]

The discussion of the Working Group documents is approximately one hour. The time is equally distributed (20 minutes each) between the State under Review, Member and Observer States, and stakeholders to express their views. It provides the opportunity for relevant stakeholders to comment on the outcome report and those States whose recommendations were noted can restate their proposals, after which the plenary adopts the outcome report.\[367\]

During the adoption of Pakistan’s report, Greece reiterated its recommendation to the State to abolish the death penalty as did the stakeholders, British Humanist Association and International Federation for Human Rights Leagues.\[368\]

Whilst this stage has been described by Alex Conte as “little more than a formality and ... somewhat of a rubber-stamping exercise”\[369\], it holds more weight than this. This is the only stage where stakeholders are offered a platform to speak and it is essential their voices are given prominence, going beyond writings on paper, in order to make violations of the right to life more transparent.

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\[367\] Abebe (n 8) 17.

\[368\] UNHRC, ‘Report of the Human Rights Council on its Thirty-Seventh Session’ (14 June 2018) UN Doc A/HRC/37/2, paras 789 (Greece); 802 (British Humanist Association); 806 (International Federation for Human Rights Leagues).

\[369\] Conte (n 74) 198.
4.5. Implementation and Follow-up

The UPR extends beyond mere reaffirmation of human rights standards by requiring States to explicitly accept or note recommendations. As a result, the State under Review is faced with expectations that it will take progressive steps to implementation. The subsequent review focuses on the extent to which the previous cycle’s recommendations have been implemented.

The third cycle of the UPR has laid particular emphasis on the implementation of accepted recommendations from previous cycles. The OHCHR now sends letters to each Minister of Foreign Affairs after the HRC adopts the UPR outcomes. These letters, which are publicly available in a spirit of transparency, are sent as part of a constructive engagement with Member States and identify 10-15 areas for attention and action in advance of the next UPR cycle. In his letter to Pakistan, the High Commissioner encouraged the State to submit a midterm report by 2020 and highlighted areas in need of particular attention, such as safeguarding the right to life by encouraging the State to, “[r]e-impose the moratorium on the death penalty and consider abolishing it. Should it be maintained, it may be applied only to the ‘most serious crimes’.”

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371 UPR: Overview of the Voluntary Fund for Implementation, 5.
Implementation is one of the fundamental challenges facing the Universal Periodic Review. The UPR needs to promote human rights on the ground level and ameliorate violations by “translating the recommendations and commitments made...into measurable improvements”.373 Recommendations on the death penalty, therefore, need to be S.M.A.R.T374 in order to facilitate implementation. For example, a recommendation to simply, ‘consider restricting the death penalty’ lacks any specificity for application. Rather, this could be replaced with a recommendation to ‘adopt the punishment only for the “most serious crimes” under Article 6(2) and present to Parliament a motion for a moratorium within two years’ which is both measurable and achievable.375

Unfortunately, tracking implementation is not a straightforward task as there is no formal guidance or official mechanism in place. This hinders the ability to engage with the extent to which the State under Review, such as Pakistan, has implemented recommendations relating to its use of capital punishment. One way to counter this is through the submission of a midterm report which all States are encouraged to provide, on a voluntary basis, to the HRC in relation to the accepted recommendations.376 Whether Pakistan submits a midterm report remains to be seen; however, based on its failure to produce one for its previous two UPRs, this seems unlikely.

373 Conte (n 74) 201.
374 Specific, Measurable, Achievable, Relevant, Time-bound.
5. CONCLUSION

The UPR provides a constructive and transparent platform for the international community to engage in human rights issues such as those pertaining to the right to life. This article analysed the question of the death penalty in Pakistan’s third UPR by considering each stage of the mechanism and the extent to which this human rights issue is effectively challenged in the process.

During its review, Pakistan remained, for the most part, silent on the issue of the death penalty. This is reflective of States presenting a sanitized version of their human rights record in the international community. The state narrative justified the imposition of the punishment as part of its counterterrorism strategy, however, the application of the death penalty has broadened to cover a range of offences including those which are non-lethal.

It responded to Member State recommendations to abolish the punishment by arguing that its application was consistent with the ICCPR and reserved for the most serious crimes. This demonstrates the State’s dissonance with the evolving human rights jurisprudence on the death penalty such as the Secretary-General’s quinquennial reports and the Human Rights Committee’s General Comment no. 36. Furthermore, the State needs to engage with the midterm reporting process to illustrate its progress on the implementation of recommendations and its commitment to the UPR mechanism as a whole.

Stakeholder engagement provides a more balanced perspective, and this was highlighted in Pakistan’s UPR where civil society made right to life violations more transparent. Pakistan’s adherence to its international human rights
obligations such as Articles 6, 7, and 14 of the ICCPR was challenged as was the State’s execution of persons with psychosocial disabilities. Whilst civil society contribution increases awareness and exerts more pressure on the State under Review to address its human rights shortcomings, they also need to make effective use of tools at their disposal such as the matrices developed by the OCHR to ensure stakeholder submissions, such as those concerning the death penalty, remain relevant and specific.

As the UPR is a State-led process, recommending States should issue specific and measurable recommendations to the State under Review, and desist from issuing vague and generic comments that risk undermining the process and detract from the main issues at hand. In Pakistan’s case, reliance on relevant articles of the ICCPR and CRC would strengthen recommendations on removing the sovereign State’s right to apply the death penalty.
COMMUNITY PARTICIPATION, THE MISSING LINK IN PAKISTAN’S ADR SYSTEM – THE WAY FORWARD

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ABSTRACT

Alternate Dispute Resolution (ADR) plays a vital role in serving the interests of justice, especially when people start to lose faith in the formal justice system due to the slow pace and ever-increasing cost of the latter. The primary objective of ADR was to supplement the regular courts in minimizing the backlog of cases. However, its ultimate beneficiaries turned out to be the poor and the disadvantaged, as it provided them with a forum to resolve their disputes informally through mutual understanding, without hiring expensive attorneys and waiting needlessly to get their cases heard by the regular courts.

Responding to the acute need for alternate methods of dispute resolution, Pakistan adopted several ADR enabling laws. This paper will suggest that the laws in question may not bring about the desired results, as they promote state driven, instead of community-driven ADR. The reason for the success of ADR in developing countries like Bangladesh has been due to the involvement of the local community and consequently the idea of a state driven ADR goes against its true spirit.

The purpose of this paper is to address the current loopholes in ADR-related laws in the country and to suggest possible reforms.

INTRODUCTION

Pakistan adopted the Alternative Dispute Resolution Act 2017 with a view to reduce the backlog of cases pending in the courts, and to provide a second
forum to its citizens for them to obtain affordable and speedy justice. Both these factors were serious enough to necessitate positive efforts for building a credible ADR system that was based on the needs and aspirations of the people. For example, before designing such a program, a survey should have been conducted to determine what kind of alternative disputes mechanisms were most needed, keeping in mind the local requirements. In addition to this, people should have been educated and trained through awareness campaigns and workshops before the ADR system was formalized. The involvement of the community would have been beneficial to have an understanding of the system and to figure out the kind of cases that were best suited to the application of different ADR techniques. Unfortunately, these issues were left largely unaddressed while launching the system; as a result of which the present ADR system may not be deemed to be effective, nor ideal in the context of Pakistan.

There are two major flaws in the existing ADR model. First, it gives a needless supervisory role to the courts, on nearly every stage of proceedings. Secondly, the participation of the local community has not been encouraged. The first may cause further over-burdening of the courts, while the second may keep the public disinterested in ADR. This paper suggests that both of these weaknesses should be addressed in order to reduce the backlog of cases and make people trust the system, giving it preference over traditional litigation.

For convenience sake, the paper is divided into three parts. Part I considers the meaning of ADR and its different iterations. Part II examines ADR in Pakistan. Part III underscores the importance of focusing on community-based ADR in Pakistan.
PART I – WHAT IS ALTERNATE DISPUTE RESOLUTION?

Alternate Dispute Resolution (ADR) methods have emerged as a substitute to traditional litigation for a multitude of reasons. While many credit the growth in the popularity of ADR methods to the growth of commercial litigation needing speedy resolution, poorer litigants remain wary of the formal justice system, preferring informal methods of resolution as the latter is thought to give unfair advantage to the rich and resourceful. According to DK Sampath, ‘the poor lose in a conflict because they have nothing, no will to fight to finish, no stamina to sustain the fight and no ability to take advantage of the system.’ Powerful litigants routinely exploit the procedural complications of traditional litigation to make the system work in their favour. On the other hand, the weak and vulnerable having no knowledge of the procedure or simply lacking the will or resources to fight for such a prolonged period of time, generally do not get outcomes in their favor. Against this backdrop, alternative dispute resolution methods provide a justice delivery mechanism which is more equitable in the sense that it is non-adversarial, consent-based, and free of procedural complications. The adversarial process in common law jurisdictions such as Pakistan has been criticized for encouraging litigants to be as combatant as possible in both the civil and criminal arenas. In the United Kingdom, which can be credited for the laying for foundations of the common law legal system, the famous Woolf

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378 DK Sampath, ‘Mediation Concept & Technique in Support of Resolution of Disputes’ 45 (Bangalore: Legal Service Clinic, National Law School of India University 1991).
Report noted that an uncontrolled adversarial process can lead to an environment where questions of delay, expense, compromise and fairness become a rather low priority.\textsuperscript{381} Since the goal of ADR is to effect compromises thereby protecting the essential interests of the parties contrary to strictly enforcing their legal rights, it works equally well to the advantage of both the weak and the resourceful. In addition to reducing the backlog of cases, ADR also helps alleviate the suffering of the poor by making them feel empowered in letting them decide their outstanding disputes for themselves.\textsuperscript{382}

According to \textit{Halbury's Laws}: ‘Alternative Dispute Resolution (ADR) describes the processes of resolving disputes in place of litigation and includes mediation, conciliation, expert determination, and early neutral evaluation.’\textsuperscript{383} The aforementioned techniques are deemed to be inexpensive, interest-based, non-adversarial, confidential, and procedurally less complicated.\textsuperscript{384} Hence, employing one of these, depending on the nature of the case, can assist the disputant to obtain the kind of equitable justice that the formal justice system lacks the capacity to deliver.


\textsuperscript{384} DK Sampath, ‘Mediation Concept & Technique in Support of Resolution of Disputes’ 71 (Bangalore: Legal Service Clinic, National Law School of India University 1991).
Moreover, the format of various ADR techniques reinforces the belief that ADR stands for justice by the people and for the people in a non-adversarial, inexpensive, and friendly setting. This argument draws support from the work of Professor Riskin and Westbrook who outline five points of justification for ADR:

‘Five motives, often intermingled, five most of the current interest in alternatives to traditional litigation: (1) Saving time and money, and possibly rescuing judicial system from an overload; (2) Having “better” processes, more open, flexible and responsive to the unique needs of the participants... (3) Achieving ‘better’ result-outcomes that serve the real needs of the participants or society; (4) Enhancing community involvement in the dispute resolution process; and (5) Broadening access to “justice.”

The resolution of disputes through ADR has also been advocated by scholars of social behavior. For instance, Lee has emphasized the need to bring about harmony in society by settling conflicts through community participation. Similarly, Laura Nader elaborated the meditational practices of the Zapotec Indians and concluded that disputes are inevitable in human interactions, and the best way to resolve them is through community support. In the shape of ADR, poor and disadvantaged members of the society are given a choice

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to protect their essential interests by engaging in dialogue with their adversary to secure a mutually satisfactory compromise.

The most frequently used ADR methods have been briefly discussed below.

1.1. Various Methods of ADR

The ADR method of negotiation facilitates disputants to settle their dispute voluntarily, through an informal discussion between the rival parties trying to reach a mutual settlement. Consequently, this creates a win-win situation for both sides and achieves the objective of protecting their essential interests. However, when negotiation does not bear fruit, the intervention of a neutral third party may facilitate the resolution of the dispute. This neutral party will be able to convey the interests and demands of the parties to each other and may also recommend solutions with reference to the dispute. This procedure of dispute resolution is known as conciliation and this ancient method was introduced in the sub-continent through the institution of panchayats, which are gatherings of community members headed by a respectable elder called Sarpanch or Mukhia. Disputes in panchayats were largely determined and settled on the basis of prevailing social norms and customs.

Another method of dispute resolution is that of mediation; a non-binding dispute resolution mechanism that also involves a neutral third party who

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tries to help the disputants reach a mutually-agreeable solution.\textsuperscript{391} A Mediator may require the parties to spell out their differences in order to identify the issues between them and to further discuss their options; however, he cannot impose a settlement on them. As is apparent, the definition of mediation is quite similar to that of conciliation, which is why these two terms are frequently used interchangeably.\textsuperscript{392} However, it is important to note that while the two techniques involve identical procedures, there does remain a slight distinction; conciliation is mostly used as a statutory term, whereas mediation is largely considered to be a synonym for a non-statutory conciliation.\textsuperscript{393}

Lastly, arbitration is a method of ADR, which is closest to litigation because of its binding nature. It is mainly used for the resolution of disputes involving commercial, contractual, employment-related and labor management issues, although mediation, conciliation, adjudication, negotiation, expert determination are all widely used in these areas as well. In arbitration, the disputing parties refer their dispute to a third party chosen by them to make a binding settlement.\textsuperscript{394} The arbitration proceedings are kept confidential and in many jurisdictions including Pakistan, courts have a supervisory role in arbitral proceedings.\textsuperscript{395}

\textbf{PART II – DISPUTE RESOLUTION IN PAKISTAN: AN ANALYSIS}

\textsuperscript{393} Alfred W. Meyer, \textit{To Adjudicate or Mediate: That is the Question}, 27 Valparaiso University Law Review 357 (1993) at 373.
\textsuperscript{394} The Arbitration Act 1940.
5.1. The Formal Justice System in Pakistan and the Role of ADR

The principles of justice emerge from social norms. As said by John Rawls: ‘Justice is the first virtue of social institutions, as truth is of systems of thought.’

It has been suggested that the formal justice system, in particular that of developing countries, lacks the capacity to deliver justice on its own. Several factors are responsible for this, such as the overburdening of courts, the cost of proceedings, the delay in the disposal of cases, and procedural complications. Due to this overburdening, even personal disputes of petty nature are often dragged on for years, leading to mistrust in the judicial system and its effectiveness. Additionally, women endure severe distress during the entire process of trying to get justice through the formal justice system given that they are denied a level playing field in Pakistan’s predominantly patriarchal culture. Similarly, minorities are often at a disadvantage in a typical adversarial setting where public support of the majority’s viewpoint could virtually dictate court decisions.
Pakistan has been struggling to enhance the capacity of its judicial system since its birth as a sovereign state. As a result of the current procedural technicalities\(^1\) and the slow pace of proceedings, millions of cases remain pending in the courts of Pakistan.\(^2\) Instead of disputes being resolved, further frustration is caused to the litigant public.\(^3\) In 2016, Punjab lawyers went on a strike in order to express their discontent over the ineffectiveness of the court system.\(^4\) The high pendency of cases mostly impacts the less privileged who consequently have to incur heavy financial costs till the time their cases are finally decided. Despite the cost barrier, even if they somehow manage to approach the courts, procedural mechanisms are likely to work against them if their adversary is financially strong.\(^5\) Therefore, access to justice is greatly hampered due to these factors.

Considering the multifarious problems associated with Pakistan’s formal justice system, ADR can allow for an alternative path for the resolution of disputes. Access to justice is a fundamental right of all citizens of the country. The concept entails that people should have the ability to seek and attain not

\(^{1}\) C.M.A No. 10314/2018 in Constitution Petition No. 05/2018 titled Umer Ijaz Gillanin v. Law and Justice Commission of Pakistan. Available at http://ljcp.gov.pk/tg/order.pdf. This report recognized that the Code of Civil Procedure Amendment Act 2018 had a number of amendments to the current Code that could address delays in resolution of civil disputes such as process of summons, strict time limits in providing written statements, and the recording of evidence through commissions.


\(^{4}\) Id.

\(^{5}\) DK Sampath, ‘Mediation Concept & Technique in Support of Resolution of Disputes’ 45 (Bangalore: Legal Service Clinic, National Law School of India University 1991)

just a remedy but a solution to disputes which is speedy, fair, and equitable. Consequently, it can be stated that inaccessibility to justice is a violation of this right. In such a situation, ADR can offer a viable solution.\footnote{Mary Anne Noone, ‘Public Interest Law and Access to Justice: The Need for Vigilance’ 37 Monash U. L. Rev. 57 (2011)}

Following other countries, Pakistan introduced ADR mechanisms through multiple enactments. So far, this step has not yielded the desired results as there seems to be reluctance on the part of Courts to utilize these mechanisms.\footnote{Justice Tassduq Hussain Jillani, ‘Delayed Justice and the Role of ADR’ available at \url{http://www.uop.edu.pk/resources/1.pdf}} As most of these mechanisms rely on the adoption of a state-driven method of dispute resolution instead of a community-centric one, when institutions are reluctant or unable to utilize them, fewer litigants will have cause to turn to them either. The country may need to reform its ADR system to win the confidence of people so that it may serve as a true complement to regular courts.\footnote{Chaudry Hassan Nawaz, ‘Delay Reduction with Effective Court Management’ available at \url{www.fja.gov.pk/.../DELAY%20REDUCTION%20WITH%20EFFECTIVE%20COURT} [Date Accessed 02.04.19].}

5.2. Reliance on the Informal Justice System in Pakistan

As mentioned earlier in Part I of this article, the most common form of informal justice systems in Pakistan is that of a \emph{panchayat} or a \emph{jirga}. These are traditional community-based councils usually comprising of a “council of elders headed by a respectable elder called \emph{Sarpanch} or \emph{Mukhia}”. Disputes in \emph{panchayats} are largely determined and settled on the basis of prevailing social norms and customs.
A study by Community Appraisal and Motivation Programme (CAMP) in 2015 showed that there was more reliance on such informal justice systems than the formal court system in civil matters. Additionally, the majority of Pakhtuns were of the opinion that the informal justice system provided a speedy resolution.

However, it is important to recognize that these systems are not without their own shortcomings, which create another barrier to access to justice in the country. When people are forced to take the law into their own hands, they tend to retreat to such methods of dispute resolution that have no set of rules or directives, resulting in decisions which are blatantly discriminatory towards minorities and women. Wani, for example, where a minor girl is given or married off in compensation to a member of the victim’s family, is a common way of resolving disputes. Perhaps for this reason, it was interesting to note that despite the reliance on such informal justice systems, the majority of the respondents in the study by CAMP also felt that the informal justice system in Pakistan did not have the proper authority to implement its decisions, and voiced their general mistrust in the panchayat and the jirga system. It was further observed that the majority of disputes were being taken to these forums by members of the extended family and those in the neighborhood,

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409 Naveed Ahmad Shinwari, Understanding the informal justice system: opportunities and possibilities for legal pluralism in Pakistan, Community Appraisal and Motivation Programme (CAMP) 2015, Page 04.
410 Id, Page 05.
412 FN 26, Page 70.
413 Id, Page 85.
which meant that the respondents preferred to resort to those informal institutions which were accessible to them. The results of these responses are interesting as even as they conveyed their dissatisfaction with the informal system of panchayat and jirga, this did not convince the participants to turn to the formal justice system for relief. Instead, participants seemed to rely even more heavily on close and trusted members of their families and community members for resolution of their disputes. This clearly conveys that the common public relies extensively on the participation of its close family and community in resolving their disputes. This seems to suggest that in order for any ADR mechanism to be successful it must be based on community participation in which members of the community are directly involved as mediators, arbitrators, and conciliators as opposed to being a process that is controlled by the formal justice system.

5.3. Community Participation and State Controlled or Mandated ADR

Court controlled or mandated ADR often refers to dispute resolution where the court directs or recommends alternative dispute resolution after the parties have filed the case. Community participation in ADR on the other hand, while not capable of one specific definition, is usually described as the ability of community members to appropriate the ability to resolve conflicts in order to restore relations among community members. In this regard community members are also at times provided with some basic training in conflict resolution. While court-controlled ADR is often presented as a

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414 Id, Page 06.
process where the courts are helping the parties to negotiate an interest-based solution, it has been seen that ADR that is focused on involving and empowering local communities to take the lead in deciding how to settle their own conflicts as opposed to court connected dispute resolution, has proven to be a much more effective way of ensuring equitable and speedy resolution of disputes."\textsuperscript{416}

The reasons for this are that community-based processes can serve to address conflict resolution rather than strictly dispute resolution. This means that the conflict does not have to be defined in legal terms and the parties do not need to engage lawyers or restrict the case to the limitations of the legal system by excluding issues of a more personal nature or by restricting participants in conflict resolution to those defined as parties by law.\textsuperscript{417} The results, therefore, could be more satisfactory as a broader range of remedies and solutions could be found. However, as in the court-controlled process, the Court decides the issues to be resolved by the parties, it returns them to the adversarial arena forcing parties to reach a conclusion that is based solely on the legal process and the law. It has been observed that community participation serves to provide greater chances of meaningful participation for disadvantaged groups in the process of the resolution of a dispute.\textsuperscript{418}

The engagement of community members carries significance because people generally feel comfortable in presenting their cases to those living around

\textsuperscript{417} Ibid
them.\textsuperscript{419} Also, the settlement reached through community participation is mostly honored because people tend to respect undertakings given amidst community gatherings.\textsuperscript{420}

Regrettably, as mentioned above, Pakistan’s ADR laws are heavily subject to court or state control, while the experiences of other developing countries like Nepal and Bangladesh suggest that the key to success of any ADR model is its segregation from regular courts. Also, the system must be community focused and community driven.\textsuperscript{421} Although Pakistan has adopted a multitude of ADR enabling laws, people are more interested in getting their disputes resolved through litigation as they see little or no participation of the local community in resolving their disputes through ADR. Instead, ADR appears to them as another forum organized, managed, and controlled by the state or judicial bureaucracy.

5.4. Framework of ADR in Pakistan

The framework of ADR in Pakistan is informed by the province or territory in which it exists. Many laws in Pakistan contain ADR enabling clauses.\textsuperscript{422} In

\textsuperscript{420} Id at 3.
addition to this the Federal Government and the Province of Punjab have adopted some new laws and made a number of amendments in its existing laws to incorporate ADR enabling clauses. For example, the Code of Civil Procedure 1908 now contains Order X, Rule 1(a) which provides that the Court may adopt, with the consent of the parties, any alternative method of dispute resolution, including mediation, conciliation or any such other means for expeditious disposal of cases.\textsuperscript{423}

The country’s superior courts are also in favor of promoting alternative dispute resolution mechanisms. The Lahore High Court, for example has time and again stressed the need to adopt alternate dispute resolution to prevent the wastage of time and resources of the ordinary litigants, and to reduce the burden of the courts. In fact, in 2016, the then Chief Justice of Lahore High Court, Justice Mansoor Ali Shah introduced the slogan ‘\textit{muqadmadazi nahi - musalibat},’ which means ‘choose settlement over litigation.’\textsuperscript{424} Although the adoption of new laws on ADR is a welcome step in the right direction, the content of such laws need to be re-examined and refined further in order to achieve the goals of ADR. In the first place, the statutes mentioned above are all state driven as the interference of the courts can be seen at every step of the process, from referral of the case to determination of its final outcome. If the people have to go to courts first to trigger the mechanism of ADR, they are unlikely to take it as a system of justice managed and controlled by them, as it has been observed that


involving and empowering local communities to take the lead in deciding how to settle their own conflicts as opposed to court connected alternative dispute resolution, has proven to be a much more effective way of ensuring equitable and speedy resolution of disputes.\textsuperscript{425} Additionally, if the disputes are referred to ADR centers instead of being referred to community representatives then people are going to perceive it as another layer of bureaucracy where the rich and resourceful are likely to be facilitated rather than the weak and vulnerable.\textsuperscript{426}

A long-awaited and laudable step was taken by the parliament of Pakistan in 2017, when it adopted the Alternative Dispute Resolution Act, which has been passed to the extent of the Federal Capital Territory. However, the promulgation of this Act was not without controversy,\textsuperscript{427} because when the bill was first introduced it recognized \textit{panchayats} to be a legitimate alternative dispute resolution mechanism. It held that where a \textit{panchayat or jirga} system has been established under any law, it was to facilitate the amicable settlement of civil disputes and compounding of offences, as specified by the Act itself. As mentioned earlier, while \textit{panchayats} are traditional community-based councils usually comprising of a “council of elders” that resolve disputes in a particular region, they have been criticized for giving decisions that are not only illegal, but in many instances inhumane and in gross violation of the fundamental rights enshrined in the Constitution.\textsuperscript{428} For this reason, it is

interesting to note that the final version of the Act passed in 2017 omitted all previous reference to such systems. The neglect of the legislature in recognizing the importance of community led dispute resolution, when enacting the aforementioned Act, is another glaring omission on their part.

Therefore, while the intention of the legislature in passing this Act was grounded in the admirable goal of assisting the courts in reducing the backlog of cases thereby saving time and precious resources of the state and litigants, it seems that the Act’s focus on giving the court a preeminent role at every step of ADR proceedings is unlikely to produce the outcome desired.

An example of this can be seen in Section 3 of the Act, which provides that the court shall refer every civil matter (mentioned in the Schedule) for ADR except where the court is satisfied that the matter could not be settled through ADR, or where an intricate question of fact or law is involved. The court may even frame issues for resolution of the dispute before referring the case to ADR. Clearly, as per this scheme, the road to ADR passes through the court system, which works against the objective of lessening the burden of courts and allowing the people to settle their disputes by themselves. This also indicates that even in matters of procedure, the courts, rather than the parties themselves, are in charge.

Likewise, Section 10(5) of the Act provides that if the disputants reach an agreement they will have to satisfy the court as to its voluntariness in order to get a decree in terms of the compromise. This clause could potentially be abused by a party which considers itself a loser in the bargain in order to delay
execution. Section 12 provides that where the parties have directly approached an ADR center before initiating the matter in the court, and such a center has failed to bring about a settlement, no legal proceedings shall be initiated in respect of the matter in question, unless the parties concerned have brought the failure of settlement into the notice of the court. Correspondingly, section 13 provides that execution of an order or decree following ADR shall be made in the manner prescribed by the Act or in the manner prescribed by the relevant law. All of the above sections demonstrate that the legislature failed to consider that voluntary settlements reached through alternative dispute mechanisms are honored because they are made in the presence of community members.

The ADR Act 2017 does not include any such provision that utilizes community participation in the dispute resolution process and nearly all stages of the ADR process are accorded to court control and approval. The earlier proposed Bill contained provisions relating to panchayats, providing that where a panchayat is established, the same shall facilitate settlement of civil disputes and compounding of offences as per the provisions of this Act. However, the problem with these provisions was two-fold. First, it was confined to a small geographical area, where the system of panchayat was already in place. Secondly, even these scanty panchayats were subjected to state control, as the final order was to be issued by the court after satisfying itself as to voluntariness of the agreement. Unfortunately, even these scanty allusions to the principle of community participation were altogether dispensed within the Act that was ultimately promulgated.

More recently, however, Punjab passed the Punjab Alternative Dispute Resolution Act, 2019. This Act has mostly followed along the lines of its
federal counterpart; it has left more room for there to be community participation in the process.

Nevertheless, the ADR system in Pakistan is seen to make its way through the formal justice system and is to a very large extent still controlled by the courts. This does not bode well for the future of ADR in Pakistan, as its judicial system is considered to be expensive, cumbersome, adversarial, procedurally complicated, and extremely slow-paced.\textsuperscript{429} Thus, designing an ADR model that was initiated and controlled by the Courts was not expected to win public confidence. The way out of the impasse was to explore alternative methods of dispute resolution which focus on community participation, however, the current scheme of ADR disregards the fact that out of court settlement means ‘beyond the court’ by the parties themselves or ‘through their community representatives’.\textsuperscript{430} Perhaps the resistance of the legislature in accepting, adopting and utilizing community-based dispute resolution systems is that they remain suspicious of informal ADR mechanisms. Even the Supreme Court of Pakistan, in a judgment\textsuperscript{431} passed as recently as this year has ruled on the legality of such mechanisms and found these systems to be in violation of Articles 4, 8, 10-A, 25 and 175(3) of the Constitution. It held that panchayats do not operate under the Constitution or any other law to the extent that they attempt to adjudicate on civil or criminal matters. However, it also clarified that the panchayats may operate within the

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\textsuperscript{431} National Commission on Status of Women through Chairperson and others v. Government of Pakistan through Secretary Law and Justice and others, PLD 2019 Supreme Court 218.
\end{footnotesize}
permissible limits of the law to the extent of acting as arbitration, mediation, negotiation or reconciliation forums.

This is not to say that there is no support for court-controlled ADR in scholarly writing. In fact, it has been suggested that in the context of developing countries, supervisory control over ADR should essentially rest with the court to make the parties keep their promises or to assure enforcement of settlement agreements.432 However, this line of argument, nonetheless discounts the fact that the reason that decisions made through ADR are enforceable, is because such settlements are mutually beneficial to both parties in the dispute. ADR, especially mediation, aims at a win-win situation for both parties, contrary to one party defeating another in a typical adversarial setting. Therefore, when people enter into voluntary bargains they rarely apprehend non-fulfillment of promises by their adversary because both parties surrender something with a view to gain something in return, and to continue their relationship. The argument can also be countered by giving examples of successful ADR models in place in developing countries like Bangladesh and Nepal; they all have community centric ADR designs disconnected from the courts.433

PART III – NEED FOR COMMUNITY-BASED ADR AND THE BANGLADESH MODEL

One of the purposes of adopting community-driven ADR is to help vulnerable segments of society get access to justice, who would otherwise be unable to approach the courts due to financial hardship or would be discriminated against on the basis of gender or social status.\textsuperscript{434}

To establish an effective ADR program, it is necessary to reflect upon the needs and aspirations of the people of the area where the program is sought to be launched.\textsuperscript{435} Moreover, the program must take into account the strength of potential political opposition to ADR; the sophistication of its constituents; and the knowledge and sensitivity of the experts who might otherwise design the program as per their whims.\textsuperscript{436} In simple terms, the functions and interests of the program must be made abundantly clear to avoid future resistance. Setting up the ADR program becomes easier when all the aforementioned factors are addressed.

It has been suggested that community centric ADR programs can be more successful in developing countries.\textsuperscript{437} In such a design, more than one mediator from the same community, as that of the disputants can be appointed. These mediators should be well-trained by an ADR professional.

\textsuperscript{434} Id.
\textsuperscript{435} Id.
This enables the disputants to relate to the mediators and the former would be more at ease while presenting their issue.

A model example of such a community driven-ADR system has been established and is running successfully in Bangladesh. The country faces problems similar to Pakistan with its formal justice system. Community mediation in Bangladesh stems from the traditional informal justice system of shalish which is similar to the jirga system in Pakistan. Rulings by shalish were mostly issued by village elders, comprising of an all-male committee. This system reflected their traditional way of settling disputes, in which the local mediators were approached by aggrieved persons for redressal of their grievances. The mediators in turn delivered notice of mediation upon the opposite party, and if they agreed, mediation took place under the auspices of local elders. As in the case of jirgas, shalish has also been criticized for issuing rulings that discriminate against women and minorities and therefore, in time, this system lost credibility.  

In order to counter the situation where the locals in Bangladesh were either forced to approach the courts for justice or to let go of their disputes entirely, a legal aid organization by the name of Madaripur Legal Aid Association (MLAA) was formed. This was an NGO devoted to the promotion of ADR in the region. The MLAA of Bangladesh launched several public awareness campaigns before it actually began its operations on the ground. It reached

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438 Dr. Sumaiya Khair, Alternative Dispute Resolution: How it works in Bangladesh, The Dhaka University Studies, Part-F ol, XV (1), June 2004, Page 59.
out to the masses and educated them about the advantages of the system of alternative dispute resolution and its existence in their country. This allowed people to understand and appreciate the merits of ADR. As many were disillusioned with a corrupt and sluggish justice system, they readily accepted the program.

Unlike, the traditional shalish system, the new system attempted to ensure that everyone was provided with equal opportunities to plead their case and that discrimination on the basis of gender and caste was limited. It did so by training members of the committees in courses related to human rights and the law, as well as ensuring the representation of women in the committees themselves.\textsuperscript{442}

In order to break through the traditional shalish system, whose committee had exclusively male members and whose decisions were in gross violation of human rights, training sessions are held every year for the members of the mediation committees. These sessions revolve around training mediators on the applicable laws and carrying out the entire mediation process. This in turn ensures that there are no human rights violations during this process. The MLAA has also established a training center that arranges for workshops which raise awareness regarding rights of women and children.\textsuperscript{443} Additionally, when women form part of the mediation committee it ensures that the decisions are not discriminatory. Women, as mediators, dispel the

\textsuperscript{442} Id, Page no 6.
\textsuperscript{443} Id, Page 7.
impression of gender discrimination; this makes the female disputants comfortable in presenting their case.444

The ADR design in Bangladesh is multi-tiered. In this design, the disputants first approach the specially trained mediator at the village level. The mediator helps the disputant to fill essential forms and notify the rival party of his/her intention to attempt an out-of-the-court settlement. If mediation does not succeed at village level, the case is referred to the central union, then to the ‘thana’, after that to the district, and finally to the head office. If the case is of a complex nature and cannot be resolved through mediation, then the MLAA itself refers the same to an appropriate court and the cost is borne by the association.445

The model of community mediation is extensively relied on by the local population; over 5000 disputes are resolved each year through this process. It allows the parties to successfully resolve their disputes in a peaceful manner without incurring a substantial loss of earning. This design became so popular that when some decades later the government tried to establish its control over the program, the people of Bangladesh showed strong disapproval. In addition to this, the success of the Bangladeshi model led to other countries adopting their own community-based mediation system, similar to the ones found in Bangladesh. Nepal for example, with the aid of The Asia Foundation, established their own models with a view to counter the problems of the formal justice system. By 2014, 4,200 community mediators

445 Id.
were offering their services and till September 2013, 22,400 cases of mediation had already been received by the mediators.446

3.1. Implementation of Community Mediation within Pakistan

It can safely be concluded that both formal and informal mechanisms of dispensing justice in Pakistan are ineffective in resolving disputes. This leads to the question as to why there exists a general disinclination towards the system of ADR, despite the inherent problems of the court system. Litigants, on the other hand, appear to be suspicious of the efficacy of the informal system.447 Likewise, lawyers are unwilling to implement informal mechanisms as, from their perspective, it casts doubt on their professional competence and has a detrimental impact on their earnings.448

The examples of Bangladesh and Nepal both suggest that such community-driven dispute resolution mechanisms can be successful if properly adopted in Pakistan. This is due to the fact that prevailing traditional dispute resolution mechanisms that the initiatives in Nepal and Bangladesh have expanded upon, are strikingly similar to those that operate in Pakistan. In fact, we have seen that when efforts are made to enhance community participation in informal dispute resolution mechanisms within Pakistan itself, they have had a largely positive impact. For example, a project by the UN Development Program (UNDP) was introduced in Pakistan in 2006, based on utilizing the

446 The Asia Foundation, Community Mediation in Nepal, 01/2014, Page 2.
448 Id.
jirga system to provide justice to victims of violence through the principles of community participation. The program unfortunately came to a stop when the local government system became dysfunctional, however, as per the report of the Asia Foundation on the Muslahathi Committees built under this program, these committees were preferred over the traditional informal justice systems. The report further suggested that it was crucial to distinguish between the two, as the former was a platform for the vulnerable, women, and minorities, while the later benefited largely the rich and resourceful. Therefore, community participation in any ADR system seems to be imperative as it not only offers an alternative path from courts, but also looking at the manner in which Bangladesh sought to overcome the shortcomings of their shalish system, also demonstrates that the problems that have come to be associated with traditional panchayat and jirga systems are capable of being tackled.

In addition to the above, while budgetary constraints are a common concern when introducing any new program, by working in conjunction with organizations who have already successfully implemented such programs, these concerns can also be addressed. For example, in Nepal, this program was introduced with the support of its Ministry of Local Development and was funded by the Hewlett Foundation and The Asia Foundation in three districts. It was later expanded to eight districts with further funding from the USAID, while in Bangladesh, MLAA was able to eventually expand and begin training other NGOs as well. 33% of the budget of the project in

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450 Id.
451 Id.
452 Id, Page 1.
Bangladesh came from The Asia Foundation and USAID and 60% from the Ford Foundation.\footnote{Scott Brown & Christine Cervenak, ‘Alternate Dispute Resolution Practitioner’s Guide’ (Technical Publication Series, Centre for Democracy & Governance, Washington DC 1998), Page 1.} From 1996-1997 the budget of the project was $70,000 and it was later increased to $94,315 for the subsequent year.\footnote{Id.}

The above discussion reveals that the situation in Pakistan is similar to that of Bangladesh, prior to the introduction of MLAA sponsored mediation. Sadly, Pakistan has failed to counter the problems of the formal justice system and unlike Bangladesh, has not implemented a parallel system which can substantially reduce the case load on the courts. No awareness campaign was launched by the government before or after the adoption of ADR laws in Pakistan. The NGO initiative, as adopted in Bangladesh, was obviously out of question because Pakistan’s model was court supervised in lieu of community-based ADR. Even if some awareness raising was attempted, it remained confined to the training of lawyers and judges, disregarding the general public who was to be the intended beneficiary.\footnote{Sc. 4, The Alternative Dispute Resolution Act 2017.}

3.2. Conclusion

Considering the foregoing, it is desirable that community mediation be experimented in Pakistan instead of placing too much emphasis on court controlled or mandated ADR as this design is more likely to resolve the disputes more efficiently. Even developed states have embraced community mediation to resolve certain types of disputes. As an illustration, matters like child custody, maintenance, and the distribution of assets amongst spouses...
can now be resolved through mediation centers in the UK. For this reason, it is essential to launch a nationwide awareness campaign to publicize that the poor and disadvantaged people of society have an alternative forum to get justice, where they shall be attended to by the community members whose aim will be to strike a bargain between the parties on voluntary basis and where both parties would come out as winners.

Unfortunately, the current design of ADR in Pakistan brings us back to the court system and downplays the importance of community participation in resolution of disputes. This is unfortunate as community participation would allow people to feel empowered as stakeholders in the system.\footnote{DK Sampath, ‘Mediation Concept & Technique in Support of Resolution of Disputes’ 45 (Bangalore: Legal Service Clinic, National Law School of India University 1991.)}

3.3. Recommendations and Key Points

In the light of above, the alternative dispute resolution mechanism must be re-assessed and revisited:

1. To incorporate community participation into it.

2. To enable and encourage people to choose mediators, conciliators, and arbitrators from amongst members of the local community.

3. To minimize the role of courts in determining the procedure of the ADR, considering the voluntariness of agreements, and execution of settlements.
4. To make it compulsory for the government to provide ADR training to respectable and elder members of the local communities.

5. To oblige the government to launch awareness campaigns with respect to ADR.

6. To abandon the system of notifying mediators from amongst judges and lawyers.
BOOK REVIEW:

ISLAMIC LAW AND INTERNATIONAL LAW: PEACEFUL RESOLUTION OF DISPUTES BY EMILIA JUSTYNA POWELL

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International dispute resolution is an area of international law that implicates the entire world in one way or another. Nevertheless, approaches towards international conduct in regard to dispute resolution are not uniform. A variety of factors influence a state’s choice of procedure or forum of dispute resolution. While discussions on forum shopping are not new, the uniqueness of this work lies in its choice of subject. Powell pioneers in discursing on how the Islamic legal tradition influences a state’s choice of forum for resolution of its international disputes. Moreover, Powell’s work represents a valuable addition in the international legal scholarship propounding the compatibility and promoting a much-needed dialogue between Islamic law and international law. Premised on a rigorous analysis of what the author labels “Islamic law states” or ILS, she maintains that the complexity and uniqueness of ILS underscore the need for a refined theory of Islamic peaceful dispute resolution. Not only does the book offer its reader an empirical analysis of patterns of behavior prevalent in ILS, and the theoretical framework for peaceful resolution of disputes, but also touches upon policy considerations to be borne in mind while dealing with the ILS.
Touching upon a myriad of issues, at the very outset Powell addresses whether international law’s cardinal notion of plurality is challenged by an intrinsically religious legal system. Bearing in mind the historical and philosophical multiformity of Islamic legal thought, the author proposes that the Islamic legal tradition is not fundamentally opposed to international law. Both systems, the book argues, commit to upholding the rule of law, value justice and lay emphasis on the peaceful resolution of disputes. While going through the chapters, the reader gets a sense of the painstaking amount of work and effort that has been put into it. Through an empirical study of thirty Islamic law states, the author journeys to discover patterns of common behavior among these states at the international forums.

Powell manages skillfully to highlight the lack of inclusivity of international law. Her contention on the lack of pluralism relies on the jurisprudence of the International Court of Justice (ICJ). Examining numerous contentious cases and advisory opinions of the ICJ, Powell notes that the court sought reference to Islamic law only once (in the Bahrain Qatar dispute). Such alienation of the Islamic legal tradition plays a crucial role in shaping the ILS’s perception of the ICJ.

Powell uses the state practice of the ILS and their attitude towards international law, in general, and peaceful resolution of disputes, in particular, for gauging compatibility of the Islamic legal tradition with international law. It is through such analysis that Powell highlights the inherent diversity of the ILS contrary to the popular belief of a monolithic Islamic legal tradition. Through an in depth look at Islamic law, as practiced in the ILS, the author reveals how it is interpreted in different ways depending on the country, its
culture and the very people conducting the interpretation. This diversity, she argues, makes room for accommodating principles of international law by the ILS.

This in-depth analysis of ILS helps Powell establish two important facts i.e. the governance of each of these states is structured on a mix of religious and secular laws and this fusion is what allows the ILS to interact with international law. An understanding of domestic legal systems of the ILS, Powell insists, is crucial in determining how they conduct themselves internationally. In this regard, the nexus between Islamic and secular elements within an ILS’s domestic legal system is studied to determine its receptiveness towards various modes of international dispute resolution.

The study contends that an ILS’s choice of forum for international dispute resolution is determined by the degree to which the Sharia controls and is incorporated into its legal system. On the one hand, supremacy of Sharia within the jurisdiction of an ILS, this work illustrates, is what causes it to gravitate more towards informal and non-binding modes of dispute resolution such as conciliation and mediation. Echoing the concept of *sulh* (amicable settlement), one that underpins the Islamic law paradigm of dispute resolution, these less adversarial modes become the obvious choice for Sharia embedded ILS. On the other hand, ILS whose domestic legal systems are accommodating of secular features tend to lean more towards legalistic and confrontational approaches, such as arbitration and adjudication.

This work may well be viewed as an important starting point into discussions on ILS approaches towards international dispute resolution. Through conducting a thorough inquiry into the role played by Islamic law within
domestic legal systems and its general esteem within the Islamic milieu, Powell successfully propounds a theory of Islamic international dispute resolution.

In all, the book is not only authentic but also the first of its kind on an issue of contemporary significance. It enriches the reader's understanding of Islamic law by collating data from a considerably large cluster of Sharia compliant domestic legal systems. It will undoubtedly appeal to students and academics of Islamic and international law as well as those tasked with legislation and policy making in Muslim states.
CASE COMMENT:

EFU GENERAL INSURANCE LTD., VS. M/S. EMIRATES AIRLINE / EMIRATES SKY CARGO AND OTHERS

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INTRODUCTION

On June 8, 2014, 10 militants disguised as security forces attacked the cargo terminal at Jinnah International Airport, Karachi. The gunmen fired automatic guns and used hand grenades in the six-hour long attack before the army regained control of the terminal. A total of 36 people were killed and the Tehrik-i-Taliban Pakistan (TTP) claimed responsibility for the attack. In 2016, a number of cases were filed by insurance companies claiming compensation against airline carriers for destroyed cargo during the attack. The airline carriers argued that they were exempt from liability because the attack constituted an armed conflict. This article will discuss the judgment of the Sindh High Court of May 6, 2020, *EFU General Insurance Ltd., vs. M/s. Emirates Airline / Emirates Sky Cargo and Others*, in which these cases were decided. The court held that Pakistan was involved in a non-international armed conflict against the TTP at the time of the attack and that, therefore, airline carriers were precluded from liability.
1. **Main Issues**

Under Rule 18(2)(c) of the Carriage by Air Act 2012, airline carriers are not liable for destroyed cargo if it has resulted from an act of war or armed conflict. The carriers argued that the attack constituted an armed conflict under this provision. However, the insurance companies contended that it was not an armed conflict but a terrorist attack. The key issue, then, before the court was to determine whether the attack was an act of terrorism to which international humanitarian law (IHL) did not apply or whether it constituted or was part of a non-international armed conflict to which Pakistan and TTP were party.

2. **Act of Terrorism or an Armed Conflict?**

In order to determine which regime of law applies to the situation, it is necessary to state the requirements for application for each framework.

**IHL - Threshold of Application**

IHL affords protection on the basis of a person’s status and the type of armed conflict in question. It distinguishes between international armed conflicts (IACs) and non-international armed conflicts (NIACs).

An **international armed conflict** occurs when there is a:

a. resort to force between states; \(^{457}\)

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\(^{457}\) See Common Article 2 of the Geneva Conventions (1949)
b. partial or total occupation of one state’s territory by another state even if the occupation meets with no armed resistance;\textsuperscript{458} and 
c. conflict between people fighting against colonial domination and alien occupation against racist regimes in exercise of their right to self-determination.\textsuperscript{459}

Non-international armed conflicts occur on the territory of a state between its armed forces and dissident armed forces or other organized groups. However, it does not include internal disturbances and tensions such as riots, isolated and sporadic acts of violence. The existence of a non-international armed conflict is determined by there being protracted armed violence by an armed group which is sufficiently organized to conduct hostilities.\textsuperscript{460}

The Legal Framework Applicable to Terrorism

The UN’s counterterrorism regime consists of treaties in the form of 13 Terrorism Suppression Conventions and Security Council Resolutions. Common elements of terrorist crimes in these Conventions include the prohibited means or method (such as bombing or hostage taking); a prohibited target (such as internationally protected persons or civil aircraft); or some combination thereof and also in some cases a terrorist purpose. The Suppression Conventions also regulate matters not covered by IHL such as terrorist financing. The framework is rather fragmented and shares a confused relationship with IHL. There is no comprehensive terrorism

\textsuperscript{458} Ibid.
\textsuperscript{459} See Article 1(4) of Additional Protocol I (1977) to the Geneva Conventions (1949)
\textsuperscript{460} Prosecutor vs. Dusko Tadić (Appeal Judgement), IT-94-1-A, (ICTY), 15 July 1999
convention largely because the definition of terrorism and its scope of application has been contentious, particularly on the subject of whether the treaty would apply to freedom struggles.

However, Trapp offers a useful definition of terrorism as; ‘any act falling within the scope of a Terrorism Suppression Convention’, in addition to:

any act intended to cause death or serious bodily injury, or extensive damage to property, when the purpose of such act, by its nature or context, is to intimidate a population, to provoke a state of terror in the general public, a group of persons or particular persons for political purposes, or to compel a government or an international organisation to do or abstain from doing any act’. ⁴⁶¹

Although, a terrorist attack may give rise to, or occur in the context of situations of armed conflict, the concepts of terrorism and armed conflict are different. A significant blurring of the lines between armed conflict and acts of terrorism have led to confusion in determining which legal framework applies to such incidents.

3. TERRORISM IN AN ARMED CONFLICT

IHL prohibits acts that would be designated ‘terrorist’ if committed in peacetime. Under the principle of distinction, the parties to the conflict must at all times distinguish between civilians and civilian objects and combatants

and military objectives.\textsuperscript{462} Attacks may only be directed against combatants and military objectives and must not be directed against civilians or civilian objects. Any direct and deliberate targeting of civilians or civilian objects are criminalized as war crimes under the law of armed conflict.

The two Additional Protocols prohibit ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population’.\textsuperscript{463} This prohibition enjoys customary status in IACs and NIACs.\textsuperscript{464} The International Criminal Tribunal for the Former Yugoslavia also convicted Stanislav Galić for unlawfully inflicting terror on the civilian population by conducting a shelling and sniping campaign in the city which was indiscriminate and disproportionate.\textsuperscript{465}

Furthermore, Article 33 of the 1949 Geneva Convention IV also prohibits ‘collective penalties and likewise all measures of intimidation or terrorism’ against protected persons. Article 4(2)(d) of Additional Protocol II applicable to NIACs also prohibits ‘acts of terrorism’ which ‘covers not only acts directed against people, but also acts directed against installations which would cause victims as a side-effect’. This protects members of the armed forces or armed groups who are no longer participating in hostilities.

Acts of terrorism that transpire within an armed conflict are subject to IHL even if the act happens in a territory where the conflict is not taking place.\textsuperscript{466}

\textsuperscript{462} Article 48, Additional Protocol I
\textsuperscript{463} Art. 51(2), Additional Protocol I and Art. 13(2), Additional Protocol II
\textsuperscript{464} ICRC Customary IHL, Rule 2
\textsuperscript{465} Prosecutor v Galic, Appeals Chamber Judgment, Case. No. IT-98-29-A, 30 November 2006
\textsuperscript{466} Prosecutor v Dusko Tadic (Opinion and Judgment) ICTY IT-94-1-T (7 May 1997) para 70.
It is sufficient for the incident to be linked to the existing armed conflict\footnote{Prosecutor \textit{v} Dusko Tadic (Opinion and Judgment) ICTY IT-94-1-T (7 May 1997) para 572.} and such acts also do not change the legal status of the conflict\footnote{http://www.cidh.org/Terrorism/Eng/part.b.htm#_ftn164. Para 73.}. An act of organized violence may, in certain circumstances, serve as a trigger for an armed conflict or such an act may also take place as an isolated incident inside an armed conflict.

4. \textsc{Lex Specialis Approach}

It has in fact been argued that a \textit{lex specialis} approach be adopted with regards to terrorism and armed conflict wherein terrorism laws apply during peacetime and IHL applies during an armed conflict. This is supported by the exclusion clause in Article 19(2) of the 1997 Convention for the Suppression of Terrorist Bombing which states that “The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention…” The use of the term armed forces here is understood to refer to both state and non-state forces. The combination of Art. 2(1)(a) and art. 21 of the Terrorist Financing Convention has the same effect.

However, there is not yet clarity in international law on whether these two regimes operate mutually exclusively. This uncertainty was addressed by the UK Supreme Court in \textit{R. v. Gul} in which it stated that “while international law “has developed so that the crime of terrorism is recognized in situations where there is no armed conflict”, it “has not developed so that it could be
said there is sufficient certainty that such a crime could be defined as applicable during a state of armed conflict”.469

If we adopt the *lex specialis* approach then if the incident was an act of terrorism occurring in peacetime then IHL would not apply and an armed conflict would not exist under Rule 18(2)(c) of the Carriage by Air Act. If it was an attack which started or occurred during an armed conflict then airline liability would be precluded and IHL would apply.

5. DEFINING A NON-INTERNATIONAL ARMED CONFLICT

Common Article 3 of the 1949 Geneva Conventions (Common Article 3) refers to non-international armed conflicts as those “occurring in the territory of one of the High Contracting Parties”.470 It recognises a low threshold of violence, as it does not impose any criteria about what may constitute as a non-international armed conflict. The only condition it stipulates is that the conflict must take place within the territory of a state, and the conflict must not be of an international character. It implies that the provision applies to disputes between non-governmental armed forces and state forces; or between two or more such groups.471

The 1977 Additional Protocol II to the Geneva Conventions of 1949 (Additional Protocol II) classifies non-international armed conflicts as hostilities between State forces and armed dissident groups or other organised

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469 R v Gal [2013] UKSC 64 [35]
armed units, who exercise control over a large part of the territory that allows them to carry out ‘sustained and concerted’ military attacks.\textsuperscript{472}

The restrictive nature of this definition is evidenced by three requirements and all prerequisites need to be satisfied cumulatively: (1) non-state actors must exercise control over a sufficiently large territory that allows them to carry out coordinated military operations; (2) only applicable to conflict between rebel forces and government troops; and (3) the conflict must take place in the territory of the State that has ratified Additional Protocol II.\textsuperscript{473}

However, the leading criteria for what may constitute a non-international armed conflict is found in the jurisprudential authority of the International Criminal Tribunal for the former Yugoslavia (ICTY) in \textit{Prosecutor v Dusko Tadić}. A non-international armed conflict exists where there is “protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.”\textsuperscript{474} This statement allows the division of qualification of non-international armed conflict into two key criteria:

(a) The hostility must reach a minimum level of intensity – a succession of attacks conducted over a large disputed geographic area that is ‘regionally disparate and temporarily sporadic’ cannot amount to an armed conflict.\textsuperscript{475}

(b) There must be involvement of an organised armed group - those party to the conflict i.e. non-state actors must possess a structured armed force that can sustain and mount a coordinated military operation.

\textsuperscript{472} Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, Art. 1.
\textsuperscript{474} Prosecutor v Dusko Tadić (Opinion and Judgment) ICTY IT-94-1-T (7 May 1997) para 561-62.
\textsuperscript{475} Prosecutor v Fatmir Limaj et al (Judgement) ICTY IT-03-66-T (30 November 2005) para 168.
a. **Intensity of Violence**

The ICTY has provided several indicators upon which could reliance could be placed to enable a determination regarding the intensity of the fighting such as:\(^{476}\)

- The number, duration, and intensity of armed confrontations (including whether there has been an increase in clashes)
- Whether the fighting is widespread (including whether towns are besieged or supply routes blocked and roads closed)
- The types of weapons and equipment used
- The number and caliber of munitions fired
- The number of fighters and type of forces participating in the fighting
- The number of military and civilian casualties
- The extent of material destruction
- The number of civilians fleeing combat zones

While the threshold in a NIAC must be distinguished from isolated acts of terrorism, in the *Boškoski* case, the ICTY Trial Chamber held that protracted terrorist acts are relevant in assessing whether the level of intensity has been reached.\(^{477}\) It noted that ‘terrorist acts may be constitutive of protracted violence’ and ‘while isolated acts of terrorism may not reach the threshold of armed conflict, when there is protracted violence of this type, especially where


\(^{477}\) Prosecutor vs. Boškoski, Case No. IT-04-82-T, Judgment, (ICTY July 10, 2008)
they require the engagement of the armed forces in hostilities, such acts are relevant to assessing the level of intensity with regard to the existence of an armed conflict.\textsuperscript{478}

b. Level of Organization

The ICTY has also elaborated indicators to assess the level of organization of non-state groups:\textsuperscript{479}

- The existence of a hierarchical command structure (this includes the existence of staff, spokespersons, or high command, internal regulations, issuing of political statements or communiqués, and identifiable ranks and positions)
- The ability of the group to plan and launch coordinated military operations (including to define a unified military strategy, use military tactics, carry out large-scale or coordinated operations, control territory and territorial division into zones of responsibility)
- The capacity to recruit, train and equip combatants
- The existence of an internal disciplinary system on which trainings are held
- The group’s ability to act on behalf of its members (including its ability to conclude cease-fire agreements and speak with one voice)

However, whether a situation amounts to a non-international armed conflict is a matter of fact, and is decided purely on a case by case basis. Therefore,

\textsuperscript{478} Ibid
\textsuperscript{479} See Tadic
an objective assessment of what may constitute as a non-international armed conflict is required.  

6. ANALYSIS OF THE SINDH HIGH COURT’S JUDGMENT

The High Court of Sindh in its judgment ruled that the attack at the Karachi Airport was not an isolated act of terrorism, but rather a concerted incident within the context of a non-international armed conflict, or a hybrid of a terrorist attack and armed conflict i.e. where recurring acts of violence further the defined objectives of a proscribed organization translates into a non-international armed conflict. As a result, the airline carriers were not liable to pay compensation.

The court acknowledged that acts of terrorism are distinguished from the definition of an armed conflict and stated that most actions against terrorist groups are not part of an armed conflict. The counsels before the court had rather alarmingly at one point referred to dictionary definitions for the terms ‘terrorism’, ‘armed’, and ‘conflict’. However, the court later did rely on secondary source material for the definitions of an armed conflict. The judgment does not, disappointingly, refer to the Tadić case but rather to an ICRC report which provides the criteria mentioned above for the existence of a NIAC. It held that the attack was committed by an organised group which had engaged in a series of hostilities spread over many years, therefore, the criteria stand fulfilled. The court also ended the judgment with the rather

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abstract conclusion that the country was in a state of war with terrorist militias.

However, no adequate analysis of the existence of a non-international armed conflict under the Tadić criteria was undertaken. Instead the court appears to place much importance on the fact that the TTP is a proscribed terrorist organisation. This ignores the fact that a group’s designation as ‘terrorist’ under the framework applicable to terrorism does not factor into the IHL qualification for a NIAC. While TTP’s ability to sustain and mount coordinated operations in Pakistan meets the ICTY’s criteria of the degree of organisation required from a non-state armed group, the requirement that hostility must attain a minimum level of intensity remains unfulfilled. The judgment relies on the Supreme Court’s decision in the District Bar Association vs. Federation of Pakistan, 2015 and instances such as the attack on the Army Public School in Peshawar in December 2014 to fulfill the requirement of intensity of violence. However, these are all acts that took place after the attack on Karachi Airport. Therefore, they cannot be used to satisfy the intensity requirement retroactively.

The Pakistani Armed Forces launched a full military operation against Tehrik-i-Taliban Pakistan in North Waziristan and Khyber Tribal Agency on June 15, 2014, in response to the attack. It may then be argued that the attack on Karachi Airport sparked the non-international armed conflict in the Federally Administered Tribal Area. However, the attack on Karachi airport should be

considered individually or holistically with acts of violence prior to June 8, 2014 to establish the existence of non-international armed conflict. Its subsequent incitement of an armed conflict in a geographically distant location would arguably not satisfy the criteria under Tadić.

As far as the argument that the airport attack was part of a pre-existing non-international armed conflict goes, Pakistan has seen numerous displays of violence since as early as 2002 between the State’s Security Forces and non-state actors. However, it may be argued that such acts of violence were isolated and sporadic in nature, and thus do not fall within the purview of non-international armed conflict and instead are mere instances of terrorist violence. The judgment itself reproduces an ICRC report which states that terrorist attacks after 9/11 were not treated as an armed conflict but as crimes.

Another argument that may be made is that the frequency of fighting over time and spread out over territory, given the number, duration and intensity of individual confrontations, have resulted in a non-international armed conflict. In 2007 and 2009, Pakistan’s Armed Forces started military operations in the Federally Administered Tribal Area and Khyber Pakhtunkhwa to break the power of Tehrik-i-Taliban Pakistan and other affiliated organizations in the region. The engagement of State Forces and Non-State Actors may signify the attainment of the level of intensity of the hostility. Furthermore, due to the nature of the conflict in the Federally Administered Tribal Areas, and the gravity of military action that took place points to the presence of a non-international armed conflict in Pakistan. It satisfies the criteria set under Common Article 3 of the Geneva Conventions 1949; the Additional Protocol II of 1977 and ICTY’s judgment in Tadić. However, these active hostilities ended in 2010, therefore, it is unlikely that
they could be linked to an attack four years later given the requirement under Tadić that they be ‘protracted’.

Moreover, the judgement relies on the *Abella Case* to establish the existence of a non-international armed conflict. In that case, 42 armed persons had attacked a military barracks at La Tablada, Buenos Aires on January 23, 1989 which was followed by intense combat between the attackers, and the Argentine military in which 29 people died. According to the appreciation of the facts by the Inter-American Commission on Human Rights, the attack could not be characterized as a situation of internal disturbance. The conflict was a direct confrontation between non-state actors and government armed forces. The armed attack on the base was diligently planned, coordinated and executed. The Commission held it was significant that the conflict was ‘...a military operation, against a quintessential military objective - a military base.’ The Commission held that even though the violent attack lasted for only 30 hours, it was of such intensity that it triggered the application of Common Article 3.484

However, there are major differences between the attack on La Tablada military base and Karachi Airport. While the conflict was between the armed forces of Pakistan, and an organised armed group, the attack was against a civilian airport rather than a military base. Moreover, the duration of the two attacks significantly differ. The clash at La Tablada military base lasted for 30 hours, whereas the violent act at Karachi airport lasted a mere six hours.

7. Conclusion

In sum, determining the threshold of application for a non-international armed conflict requires an objective assessment of the criteria as established by IHL and jurisprudence from international courts and tribunals. This assessment is often a difficult task given the many factors which should be considered in making such a determination. The lack of a clear demarcation between terrorist incidents and sufficiently protracted violence by an organized armed group contributes to this difficulty. While the Sindh High Court attempted to grapple with these issues the judgment rendered falls short in adequately clarifying the law and its application in this particular case. The lack of reliance on primary source material as well as interaction with the criteria outlined above has resulted in a largely confusing and wanting order which may raise more questions than it answers.