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FOREWORD

In an era marked by rapid modernisation, increasing conflicts, and global deadlocks, the fields of human rights, international humanitarian law, environmental law, and law and technology stand at a critical juncture. The 2023 edition of the RSIL Law Review addresses these evolving and dynamic areas, reflecting on the urgent need for legal frameworks to adapt and respond effectively to the challenges of our time.

The protection mechanisms within human rights and IHL, once pillars of the international legal order, now face a pressing need for overhaul. They seem increasingly inadequate in safeguarding the rights and dignities they were designed to protect. Environmental law, despite its earlier promise, confronts similar deadlocks, with current efforts falling short in averting the catastrophic impacts of climate change. Meanwhile, the intersection of law and technology presents immense potential yet raises significant questions about regulation and ethical use. How can we harness technological advancements for the benefit of humanity without causing harm?

As Pakistan's foremost private sector legal think tank, RSIL is committed to fostering critical thinking and scholarship on these topics, particularly from the perspective of the global south. This year's Law Review is a testament to our dedication to exploring these pressing issues. It features a range of articles that not only analyse current legal frameworks but also propose innovative solutions and reforms.

Under the new editorial leadership of Mr. Raas Nabeel, the Law Review has seen an enhancement in its academic rigour and scope. Mr. Nabeel's dedication, coupled with the expertise of Ms. Ayesha Malik and Ms. Maha Husain, has been pivotal in shaping this edition into a comprehensive and thought-provoking publication. Our gratitude extends to the authors and peer reviewers whose contributions have enriched this edition. Their rigorous analysis and innovative thinking are key to advancing legal scholarship in Pakistan and beyond.

As you engage with this edition of the RSIL Law Review, we hope it sparks new ideas and contributes to the ongoing dialogue on how law can evolve to meet the demands of our rapidly changing world. We welcome your feedback and look forward to your contributions in shaping future dialogues and debates.

Jamal Aziz
Editor-in-Chief
RSIL Law Review 2023

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 specialisations 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 organisational 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 RSIL LAW REVIEW

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

Submissions: The Editorial Team of the RSIL Law Review invites the submission of articles. All submissions must be previously unpublished. The mission of the Review is to publish work that displays written excellence and the highest standard of legal academic analysis. Articles utilising a creative, trans-disciplinary approach or addressing comparative law issues as they relate to international and domestic law are also encouraged. RSIL accepts articles (5000 – 8000 words), book reviews and case comments. All those interested should submit an article for review through the submission form available on our website, https://rsillaw.review or email us at rsil-review@rsilpak.org.

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MANAGING EDITOR'S NOTE

The Research Society of International Law is pleased to present Volume 7 of the RSIL Law Review. The RSIL Law Review was founded in 2017 as the successor publication to the Pakistan Journal of International Law (2012). It was established upon the vision of Mr. Ahmer Bilal Soofi and Mr. Jamal Aziz, who wanted a publication that highlighted the breadth of research into international law and domestic law in Pakistan. Since 2017, the RSIL Law Review has published a diverse range of articles on policy, social issues, economics, national security and international relations.

The articles in this volume cover a range of issues across the breadth of legal and political disciplines which are of pressing importance in 2022. The first article by Muhammad Arsal Kamran evaluates Pakistan's legislative and policy framework on the abolition of bonded labour in light of the country's international obligations. It also examines best practices from Nepal and proposes recommendations to improve abolition efforts.

In the second article, Musa Saeed and Safa Imran examine Pakistan's data privacy legal framework through a thorough legislative analysis. It also examines the EU General Data Protection Regulation (GDPR) as a model law for ensuring data privacy and compares Pakistan's framework to the GDPR.

The third article written by Momal Malik, Hassan Kamal and Muhammad Talha Nazar looks at the development of autonomous weapons systems (AWS) and the challenges it poses to the application and implementation of international humanitarian law (IHL), focusing on Pakistan's stance on the matter.

The fourth article by Ammar Junaid and Zoha Shahzad explores the concept of environmental personhood as a form of transitional justice to ensure the protection of environmental rights for indigenous communities, as well as a means to combatting climate change.

The fifth article by Noor Zafar analyses the doctrine of the margin of appreciation utilised by regional human rights courts to allow domestic States a certain amount of deference to implement their international human rights obligations.

This year's volume also includes a book review by Aly Rashid on *Raise the Debt: How Developing Countries Choose their Creditor* by Jonas Bunte (OUP 2019). It also features a case comment by Sakina Zulfiqar Ali on the Permanent Court of Arbitration's decision on the South China Sea case between the Philippines and China.

The articles in this volume underwent a rigorous peer-review process, with each article being blind-reviewed by two peer reviewers. On behalf of the RSIL Law

Review, I would like to thank our peer reviewers for their time, effort and expertise. The following are our peer reviewers:

- Mr. Muhammad Umar Ali - Visiting Assistant Professor at the Lahore University of Management Sciences (LL.M Fordham, LL.B SOAS)
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- Mr. Rafae Saigal - Partner at Saigal, Tarar & Leghari LLP (LL.M NYU).

Finally, this publication would not be possible without the hard work and dedication of the RSIL Law Review Team. I would like to thank Ms. Ayesha Malik and Ms. Maha Husain who contributed extensively to the editing and reviewing process of this year's volume.

I hope you enjoy this volume of the RSIL Law Review and hope to see your submission for our future volumes.

Raas Nabeel
Managing Editor
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BONDED LABOUR IN PAKISTAN: EXAMINING THE STATE'S FIGHT AGAINST THE PRACTICE

MUHAMMAD ARSAL KAMRAN

Muhammad Arsal Kamran is a lawyer with a Master of Laws (LL.M) in Corporate Law from the University College London and a Bachelor of Laws (LL.B) (Hons.) from the University of London. He has worked at several law firms and think tanks in Pakistan.

ABSTRACT

This article will examine Pakistan's fight against the practice of bonded labour and contend that while Pakistan has attempted to combat the bonded labour regime by enacting legislation and providing for certain enforcement mechanisms and projects, its effort remains insufficient and unsustainable. Bonded labourers have continued to face neglect and have often been overlooked by the State. This article is divided into five chapters; the first illustrating the practice's nature as a form of modern slavery and carrying out a sector-specific study, the second critically analyses Pakistan's legal framework vis-à-vis bonded labour, the third examining enforcement of the concerned legislations, the fourth conducting a comparative study of initiatives undertaken by Nepal concerning bonded labour which will then be utilised to draw out recommendations for Pakistan in the final chapter.

KEYWORDS: bonded labour, abolition, legal framework, labour rights, law reform.

1. INTRODUCTION

Bonded labour, also known as debt bondage, is a manifestation of modern slavery as recognised by Article 1 of the United Nations (UN) Slavery Convention.[1] It is utilised by employers and landlords to provide loans (*peshgi*) to needy workers who repay these loans through labour.[2] This practice, however, has been exploited by employers particularly in South Asian countries, which account for 85% of bonded labourers globally.[3] Pakistan is a party to two International Labour Organisation (ILO) Conventions dealing with forced labour: the Forced Labour Convention (No. 29) and the Abolition of Forced Labour Convention (No. 105). It also prohibits bonded

[1] Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 9 March 1927) UNTS 60, art 1.
[2] Fraser Murray and others, *Modern Slavery in Pakistan* (DAI, 2019) 8.
[3] ibid.

labour both constitutionally and legislatively,[4] and consequently has both domestic and international human rights obligations towards bonded labourers, as well as an obligation to abolish the bonded labour regime.

2. UNDERSTANDING THE SCOPE OF BONDED LABOUR IN PAKISTAN

2.1 A Form of Modern Slavery

The debt bondage system is inherently an exploitative practice. While it may appear to be a normal debtor-creditor relationship on surface level, creditors often make attempts to make the repayment of loans nearly impossible by exploiting the vulnerable conditions of the labourer (many of which may be beyond the latter's control – illness being one example).[5] At times, they may intentionally pick out flaws in their work, and thereby increase the loan or interest price.[6] Due to the labourer's consequential inability to repay the debt, the debt is passed onto their descendants thereby enslaving multiple generations.[7] This gives creditors complete control over the indebted family, and they often exert their control by preventing them from going to school and forcing them into child labour.[8] Thus, this practice becomes a category of modern slavery.

2.2 Prevalence of Bonded Labour in Pakistan

In its World Labour Report 1993, the ILO observed that Pakistan has 'some of the most serious problems of bonded labour.'[9] About 20 million individuals were estimated to be bonded labourers within the country. While the Report recognised that the State was undertaking steps to put an end to the practice,[10] around 3 million Pakistanis were estimated to be in debt

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[4] Aly Ercelawn and Muhammad Nauman 'Bonded Labour in Pakistan: An Overview' (*Pakistan Institute of Labour Education and Research*, June 2001) 3 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_096991.pdf>

[5] Murray (n 2) 8.

[6] ibid.

[7] Siddharth Kara, *Bonded Labor: Tackling the System of Slavery in South Asia* (Columbia University Press, 2012), 21.

[8] Ali Anwar 'Modern-Day-Slaves – The Horror of Bonded Labour in Pakistan' *IVolunteer International* (2021).

[9] International Labour Organisation (ILO), *World Labour Report* (ILO, 1993), 11.

[10] ibid.

bondage in 1993.[11] Although the number has significantly dropped in the past few decades, it remains alarming, particularly in the agriculture, brick kilns and mining sectors.

2.1.1. Agriculture Sector

The agriculture sector of Sindh, Southern Punjab[12] and Balochistan[13] has the greatest number of bonded labourers in Pakistan. While landholdings have decreased and short-term employment contracts have been introduced, landowners have continued to ensure that debt bondage is maintained within their labour force.[14] It must be noted, however, that bonded labourers do enjoy certain benefits that were not available to them previously. For example, they may persuade a 'prospective employer' to purchase their debt from their current employer.[15] This, however, does not ameliorate their position as they are still indebted in bondage, with the creditor status being transferred from the old employer to the new employer.

As per the Asian Development Bank's household survey conducted in five districts of Sindh, 60% of households were bonded labourers.[16] The Hari Welfare Association (HWA) has estimated that there are around 1.7 million bonded labourers within the concerned province, out of which 700,000 are children.[17] Moreover, it has been estimated by agricultural experts that around 0.8 to 1.0 million families in bonded labour 'cultivate land under sharecropping'.[18] The majority of bonded labourers within Sindh are Hindus, which illustrates the low status awarded to religious minorities within Pakistan.[19] Consequently, this makes them even more vulnerable to cruel treatment from landowners and employers. Furthermore, commercial

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[11] Anwar (n 8).
[12] ibid.
[13] Maliha Hussein and others, *Bonded labour in agriculture: a rapid assessment of Sindh and Balochistan, Pakistan* (ILO, 2004), 1.
[14] Murray (n 2) 9.
[15] ibid 8.
[16] Hussein and others (n 13) 8.
[17] Dawn, '700,000 children among 1.7m bonded labourers working in Sindh's farm sector' (*Dawn News*, 13 June 2022) <https://www.dawn.com/news/1694481/700000-children-among-17m-bonded-labourers-working-in-sindhs-farm-sector> accessed 2 December 2022.
[18] Hussein and others (n 13) 8.
[19] Murray (n 2) 13.

agriculture has resulted in seasonal work, forcing many labourers to migrate and find work elsewhere during off-seasons.[20] This further forces them to take more loans and become indebted to multiple owners.

While similar patterns of bondage are observed in Balochistan,[21] there exists a lack of sufficient data to carry out an analysis vis-à-vis the prevalence of bonded labour in the agricultural sectors of Balochistan and Punjab.

2.2.1 Brick Kilns Industry

As per the Brick Kiln Owners Association of Pakistan (BKOAP), there were roughly 15,000 to 18,000 brick kilns within the country in 2015[22] and the number has increased to around 20,000 as of 2023.[23] This kind of bondage is similar to that of the agricultural sector, and it is common for entire families to be held in bondage as family units.[24] A 2016 report estimates 1.2 million men and women currently work within brick kilns as a result of debt bondage.[25] The BROAP observed that 'half of the 60 workers associated with each kiln are women.'[26] Moreover, the Human Rights Commission of Pakistan (HRCP), in its 2011 report, observed that 60% of children who begin working with their families within the concerned industry are below the age of 13.[27] As per the Government of Punjab (GoP) in 2021, 69,100 male and 57,679 female children worked in brick kilns within the province.[28] These

[20] ibid.
[21] Hussein and others (n 13).
[22] Shehryar Warraich, 'Pakistani activists wants kilns to pay working women, not their husbands' (*UPI*, 29 January 2015) <https://www.upi.com/UPI-Next/2015/01/29/Pakistani-activists-want-kilns-to-pay-working-women-not-their-husbands/21417390479106/> accessed 2 December 2022.
[23] Isaiah Reynolds and others, 'Inside Pakistan's brick kilns where millions are trapped in modern-day slavery, working dangerous jobs to pay off snowballing debts' (*Insider*, 15 April 2023) <https://www.insider.com/pakistan-brick-kilns-debt-bondage-modern-day-slavery-2023-4> accessed 2 May 2023.
[24] Nadeem Malik 'Bonded Labour in Pakistan' (2016) 6(4) Advances in Anthropology 131.
[25] Hifza Hammad 'Women in the Brick Kiln Industry in Pakistan' (*UITBB*, 22 December 2016) <https://uitbb.org/women-in-the-brick-kiln-industry-in-pakistan/> accessed 2 December 2022.
[26] Warraich (n 22).
[27] Human Rights Commission of Pakistan, *State of Human Rights in 2011,* (HRCP, 2012) https://hrcp-web.org/hrcpweb/wp-content/uploads/2020/09/2012-State-of-human-rights-in-2011-EN.pdf.
[28] Peace SOS 'Children's Rights in Brick-making Factories (Brick Kilns) in Punjab, Pakistan' (*Peace SOS,* 12 March 2021) <https://peacesos.nl/childrens-rights-in-brick-making-factories-brick-kilns-in-punjab-pakistan/> accessed 5 December 2022.

statistics indicate that an overwhelmingly large number of individuals are enslaved by the regime within the concerned sector.

2.2.2 Mining Sector

The mining sector within Pakistan has enjoyed healthy growth in gold, coal, and copper mining.[29] While this is beneficial for Pakistan's economy, it has also generated opportunities for the exploitation of bonded labourers working within the sector. Around 70% of the miners come from Khyber Pakhtunkhwa (KPK)[30] and many of them are induced into bonded labour.[31] This is partly due to the perception that they are 'hardier' and adept for working in cumbersome conditions as a result of living in mountainous regions such as Dir.[32]

3. PAKISTAN'S LEGAL ARCHITECTURE IN RELATION TO BONDED LABOUR

3.1 Domestic Legal Framework

3.1.1 Constitution of the Islamic Republic of Pakistan, 1973

Article 11 (2) of the Constitution of Pakistan states that '[A]ll forms of forced labour and traffic in human beings are prohibited.'[33] Although its broad wording indicates a possibility for one to escape liability by contending that bonded labourers enter into the regime by will, the concerned practice has been recognised as forced labour by the State and the international community. In *Darshan Masih v The State*,[34] the Supreme Court of Pakistan held that bonded labour is a violation of Article 11 of the Constitution.[35] It is observed that bonded labourer's desperation for survival leaves them no choice but to enter into it with the false promise made to them regarding the termination of that labourer upon the payment of debt – this hardly leaves

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[29] Murray (n 2) 9.
[30] Ahmad Saleem, 'A Rapid Assessment of Bonded Labour in Pakistan's Mining Sector' (2004) ILO), 8 https://www.ilo.org/global/topics/forced-labour/publications/WCMS_082032/lang--en/index.htm.
[31] Murray (n 2) 10.
[32] ibid.
[33] The Constitution of Islamic Republic of Pakistan (1973), art 11(2).
[34] *Darshan Masih v the State* (PLD 1990 SC 513).
[35] ibid.

them with free choice. Moreover, the contested argument holds no value against the descendants of bonded labourers who were born into the regime to pay their predecessors' debt. The wide scope of clause (2) merits appreciation for serving as an umbrella term to all forms of forced labour, thereby not only prohibiting existing fashions of forced labour but those that may be developed in the future.

3.1.2 Pakistan Penal Code (Act XLV of 1860)

Section 374 (1) of the Pakistan Penal Code, 1860 (PPC) punishes the compelling of an individual to labour against their will with imprisonment of up to five years, or a fine, or both on the compeller.[36] Similar to the criticism of Article 11 (2) of the Constitution, the broad wording of the section serves as an umbrella term to cater to any novel manifestations of forced labour that may emerge.

3.1.3 Bonded Labour System (Abolition) Act, 1992

Upon holding the practice of bonded labour unconstitutional in *Darshan Masih v the State*, the Supreme Court ordered the passing of legislation that abolishes the practice altogether.[37] Two years later, the Parliament passed the Bonded Labour System (Abolition) Act, 1992. Section 4(1) of the Act retrospectively freed and discharged all bonded labourers from any obligation rendered to them (at the time of passing) and criminalised the entire regime.[38] Section 4(2) further prohibits any attempts to compel a person to render bonded labour.[39]

Although the automatic criminalisation of the regime and freedom of its victims are praiseworthy, questions arise to its practicability. Section 10 (1) of the Act imposes a duty on the District Magistrate, who has been authorised by their concerned Provincial Government under section 9 of the Act,[40] and any officer designated by them, to ensure that the welfare and economic

[36] Pakistan Penal Code, 1860, s 374(1).
[37] *Darshan Masih v the State* (n 34).
[38] Bonded Labour System (Abolition) Act, 1992, s 4(1).
[39] ibid s4 (2).
[40] ibid s 9.

interests of freed bonded labourers are secured and that there exists no reason forcing them to render bonded labour in the future.[41] Additionally, section 9(2) of the Act obligates the concerned District Magistrate and any officer designated by him/her to maintain a check on whether employers are engaged in bonded labour within their jurisdiction.[42]

Moreover, section 5 of the Act renders any contract, tradition, practice, or agreement that was 'entered into or executed before or after the commencement of this Act'[43] void. Furthermore, section 6(1) of the Act removes all liability on bonded labourers to repay the debt.[44] The automatic voidance of the contracts and freedom from debt is a significant burden removed from the shoulders of bonded labourers. Additionally, section 6(2) retrospectively sets aside any suits lying within civil courts, tribunals or 'any other authority' for the purposes of recovering bonded debt,[45] and section 6(3) renders any unmet decree on the payment of bonded debt to be 'fully satisfied.'[46]

Furthermore, section 6(4) of the Act protects the proprietary rights of bonded labourers by mandating the return of their property within 90 days of the commencement of the Act (hence being retrospective) if it was 'forcefully taken' to recover debt.[47] Additionally, section 7 of the Act immediately releases properties from mortgage, lien, charge 'or other encumbrance' that may be connected to the repayment of bonded debt – this merits appreciation for extensively protecting proprietary rights of the bonded labourer and freeing them of any proprietary burdens.[48] While the Act largely appears to be retrospective in nature, that retrospectivity does not extend to decrees made by the Courts to sell the properties for the purposes of repaying bonded debt.[49] However, this is understandable in light of the time and cost that retrospectivity would require for the concerned provision. The Act further

[41] ibid s 10(1).
[42] ibid s 10(2).
[43] ibid s 5.
[44] ibid s 6(1).
[45] ibid s 6(2).
[46] ibid s 6(3).
[47] ibid s 6(4).
[48] ibid s 7(1).
[49] ibid s 6(5).

provides bonded labourers with the option to seek recourse from the Court if there is an omission to return the concerned property,[50] or release from the mortgage, lien, charge, or burden,[51] within 90 days of its commencement.

The Act incorporates several punitive provisions; however, the stipulated fine amounts have not been updated since 1992 to account for inflation. Under section 11 of the Act, a violation of sections 4 and 5 of the Act is punishable with imprisonment for a period of two to five years, or a minimum fine of 50,000 rupees, or both.[52] Additionally, failure to comply with section 6(4), concerning proprietary rights, will render a person liable to imprisonment extendable to one year, an extendable fine to 1000 rupees, or both. The Court is to make payment to the bonded labourer at the rate of ten rupees per day for the duration the property was not restored to the bonded labourer.[53] However, at the stipulated rate, the fine is no longer as severe as it was in 1992.

Lastly, section 18 of the Act stipulates that if a corporation commits an offence, individuals in charge of, or responsible to, that corporation at the time of the offence will be liable to punishment.[54] If the concerned offence is committed with the assent of the 'director, manager or other officer' of that corporation, he/she will be held liable for the offence.[55] This provision deserves appreciation as it makes room for direct liability of corporations, thereby acting as a deterrent against the utilisation of bonded labour within their supply chains.

The concerned Act appears to give extensive retrospective and prospective protection to bonded labourers. It ensures that their economic position is ameliorated and their proprietary rights are protected. It provides a legal framework if creditors fail to cooperate and imposes punishments to deter future debt bondage. The Act also provides for the establishment of district vigilance committees (DVCs) to uphold the welfare of bonded labourers,

[50] ibid s 6(7).
[51] ibid s 7(2).
[52] ibid s 11.
[53] ibid s 13.
[54] ibid s 18(1).
[55] ibid s 18(2).

advise District Administration on the Act's implementation and constantly seek to improve the law.[56]

3.2 Provincial Legal Framework

Pakistan's fight against the bonded labour regime benefits from having provincial acts, alongside the federal act, as they provide for specific resource allocation at provincial levels and generate greater efficiency. The provincial Governments of Pakistan have also enacted Acts for the abolition of bonded labour at a provincial level. It is crucial to shed light on these Acts, as they play a significant legislative role in combating the bonded labour regime and assess their merits and demerits.

3.2.1 The Sindh Bonded Labour System (Abolition) Act, 2015

The Sindh provincial Act has inherited the provisions of the Federal Act with minor changes. While the Federal Act empowered the District Coordination Officer to secure the welfare and interests of freed bonded labourers,[57] the provincial Act imposes this duty on the Deputy Commissioner.[58] Moreover, section 11 of the Sindh Act punishes bonded labour by imprisonment of between two and five years, or with a minimum fine of 100,000 rupees, which is double that of the Federal Act.[59] Furthermore, section 12 of the Sindh Act stipulates the same punishment as the Federal Act for enforcing 'any custom, tradition, practice, contract, agreement or other instrument' as a result of which one may be required to 'render any service' under the regime of bonded labour with an increase in the fine to a minimum of 100,000 rupees.[60] The foregoing increase in fine deserves appreciation in light of Pakistan's devaluing currency which has decreased the deterrent effect of the minimum fine of 50,000 rupees under the Federal Act.

[56] ibid s 15.
[57] ibid s 10(1).
[58] The Sindh Bonded Labour System (Abolition) Act 2015, s 10(1).
[59] ibid s 11.
[60] ibid s 12.

3.2.2 The Punjab Bonded Labour System (Abolition) Act, 1992

The Punjab Act, like its Sindh counterpart, has inherited provisions from the Federal Act with several amendments. One notable addition is under section 7, wherein a bonded labourer, upon resignation, retirement, retrenchment, discharge, dismissal, termination or 'otherwise occupying residential accommodation by his employer' cannot be evicted by the employer for a duration of two months after the occurrence of the foregoing situations, failing which the bonded labourer to receive compensation from the employer.[61]

However, the minimum fine punishing the enforcement of bonded labour under section 11 of the Punjab Act continues to be 50,000 rupees like the Federal Act.[62] In light of today's economy, it does not act as a strong deterrent against the practice. However, the fine for employing on the basis of bonded labour under section 12 has been increased to 350,000 rupees[63] which is a significant increase from the amount stipulated under the Federal Act.

One of the most condemned amendments by the Punjab Act is the reintroduction of *peshgi*. Section 4(3) of the Punjab Act prohibits employers from making or receiving *peshgi* which is 'inconsistent with, or in violation of' the law.[64] However, subsection 4 stipulates that the *peshgi* may be recovered by the employer in 'such manner as may be prescribed'[65] and subsection 5 entails the employer to maintain a record of the *peshgi* made to or received by them.[66] The reintroduction of *peshgi*, which is the mechanism utilised by employers to induce bonded labourers into the bonded labour regime is counterproductive to the intentions of the Act and is highly problematic. The HRCP has rightfully criticised it for being 'deplorable' and asked for it to be 'rolled back immediately.'[67]

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[61] The Punjab Bonded Labour System (Abolition) Act 1992, s 7(1).
[62] ibid s 11.
[63] ibid s 12.
[64] ibid s 4 (3).
[65] ibid s 4(4).
[66] ibid s 4(6).
[67] Human Rights Commission of Pakistan, *State of Human Rights in 2022* (HRCP, 2023), 273.

3.2.3 The Khyber Pakhtunkhwa (KPK) Bonded Labour System (Abolition) Act, 2015 and The Balochistan Employment of Children (Prohibition and Regulation) Act, 2021

The KPK and Balochistan Acts have also inherited provisions from the Federal Act with certain amendments. While the Acts prohibit *peshgi* under sections 3(2)[68] and 6(1) respectively,[69] they stipulate for extending *peshgi* as interest free in a prescribed fashion.[70] The *peshgi* shall not exceed three times the rate of minimum wage[71] and a second *peshgi* cannot be given until the first one has been recovered.[72] Moreover, the instalments of the *peshgi* cannot exceed one fourth of the worker's wage[73] and the employer is required to maintain a record of the *peshgi* extended to workers.[74] By prohibiting *peshgi* on one hand and permitting it on the other, the KPK and Balochistan Acts create confusion regarding the intentions of the State in banning bonded labour; while an interest-free *peshgi* is better than one which comes with an interest, it is nonetheless dangerous.

Section 14 of the KPK and Balochistan Acts continue to have the minimum fine, against the enforcement of bonded labour, as 50,000 rupees[75] which is not a sufficient deterrent. However, the minimum fine, against the employment of a bonded labourer under section 15, has been increased to 100,000 rupees.[76]

[68] The Khyber Pakhtunkhwa Bonded Labour System (Abolition) Act, 2015; The Balochistan Employment of Children (Prohibition and Regulation) Act, 2021, s 3(2).
[69] ibid s 6(1).
[70] ibid s 6(2).
[71] ibid s 6(3).
[72] ibid s 6(4).
[73] ibid s 6(5).
[74] ibid s 6(6).
[75] ibid s 14.
[76] ibid s 15.

4. ENFORCEMENT OF THE LEGAL FRAMEWORK

4.1 State Intervention and Lack of Interest

4.1.1 The Bonded Labour System (Abolition) Rules, 1995

For three years after the adoption of the Federal Act, the Government played no role towards its enforcement.[77] After receiving significant pressure, it established the Bonded Labour System (Abolition) Rules, 1995. The Rules direct provincial Governments to inspect places where bonded labour was reported to have occurred and set up DVCs for the purposes of identifying, freeing, and rehabilitating bonded labourers.[78] Moreover, Rule 9 establishes a fund for bonded labourers which, as per Rule 9(2), is dedicated to financing projects for the rehabilitation and welfare of bonded labourers, as well as providing them legal assistance.[79]

While the 1995 Rules appeared satisfactory on paper, their implementation, as observed by the Lahore High Court in *Muhammad Siddique v Mansha*,[80] was unsatisfactory. Moreover, the three-year delay in concocting the Rules affirms the government's lack of interest in actively eradicating bonded labour.

4.1.2 National Policy and a Plan of Action for the Abolition of Bonded Labour and Rehabilitation of Freed Bonded Labourers (NPPA)

The adoption of the NPPA in 2001 was a significant move towards developing enforcement mechanisms for the Act and thereby eradicating bonded labour within Pakistan.[81] It established the State's commitment to eliminating bonded labour and provided for a relief package to assist bonded labourers in securing food, shelter and basic amenities.[82] It also called for the

[77] Javed Jabbar and others, *Hope for the Bonded Laborers* (Society for Protection of the Rights of the Child, 2015) 46.
[78] ibid.
[79] Bonded Labour System (Abolition) Rules 1995, rule 9 (2).
[80] *Muhammad Siddique v Mansha* (PLD 1997 Lah 428).
[81] Human Rights Commission of Pakistan, *Abolition of Bonded Labour in Pakistan* (HRCP, 2003) 9.
[82] ibid.

training of officials and provision of resources.[83] However, the fact that the NPPA came almost a decade after the came into force illustrates the lack of priority given to the grievances of bonded labourers by the State.

4.1.3 District Vigilance Committees (DVCs)

Section 15 of the Bonded Labour (Abolition) Act, 1992 requires the establishment of DVCs to safeguard the aid to and welfare of bonded labourers, as well as to advise the District Administration on the implementation of law.[84] Nonetheless, DVCs have hardly been functional since their establishment[85] – 14 DVCs were constituted in Sindh in 2022 but remained dysfunctional.[86] The presence of DVCs appears to be more 'on paper'[87] than in practice as there is hardly any intervention by them on record.[88] The lack of funds and resources continues to be a problem for the workability of DVCs[89] which has significantly impaired the monitoring of the implementation and enforcement of the Act.

4.1.4 Fund For Education of Working Children and Rehabilitation of Freed Bonded Labourers

In 2000, the Federal Government established a fund to educate children involved in labour and rehabilitate freed bonded labourers.[90] The initial amount of 100 million rupees was donated by *Bait-ul-Mal* (an autonomous body established under the Pakistan Bait-ul-Mal Act, 1991); however, that money was not utilised for the rehabilitation of bonded labourers.[91] This

[83] Zulfiqar Shah, *Effectiveness of Interventions for the Release and Rehabilitation of Bonded Labour in Pakistan* (Pakistan Institute of Labour Education and Research, 2008), 28.
[84] Bonded Labour System (Abolition) Act, 1992, s 15.
[85] Business Recorder, 'Bonded labour has surged in Sindh, say analysts' (*Business Recorder,* 17 November 2022) <https://www.brecorder.com/news/40209238/bonded-labour-has-surged-in-sindh-say-analysts> accessed 5 April 2023.
[86] HRCP 'Abolition' (n 81) 25.
[87] Hafeez Tunio 'Bonded labour vigilance committees missing' (*The Express Tribune*, 11 August 2022) <https://tribune.com.pk/story/2370452/bonded-labour-vigilance-committees-missing> accessed 5 April 2023.
[88] Shah (n 83) 28.
[89] ibid.
[90] ibid.
[91] ibid.

serves as further indication of Pakistan's negligence towards the issue of enforcing the law on bonded labour.

4.1.5 Police Intervention

The police has often failed to discharge its duty, demonstrating a hesitance in playing an active role in releasing bonded labourers.[92] Despite the issuance of many First Information Reports (FIRs) against landlords, and those aiding them to employ bonded labourers, there is rarely any action taken against them.[93] Iqbal Datho, the National Programme Manager of the Society for the Protection of Rights of the Child (SPARC), criticised the police force for being ignorant about the laws prohibiting bonded labour.[94] He highlighted the failure of the police force in applying the provisions of the Act when dealing with cases of bonded labour.[95]

Moreover, stakeholders at a meeting conducted by the Government of Sindh in collaboration with the ILO in 2011 blamed the ignorance of the police force for allowing 'this curse to exist'[96] which continues to be the case today. The ignorance of the concerned law enforcement body and its hesitation to register FIRs is further testament to the State's lack of interest in actively eradicating bonded labour.

4.1.6 Welfare Schemes

In 2005, the Government of Punjab started the *Sasta Atta* Scheme to provide low-cost flour to individuals struggling due to increasing prices of everyday commodities. However, bonded labourers did not benefit from this scheme.[97] Similarly, the *Parha Likha* Punjab scheme, which sought to increase the enrolment of children attending schools in rural areas did not benefit the

[92] ibid 29.
[93] ibid.
[94] Dawn, 'Lack of will, police ignorance encouraging bonded labour' (*Dawn News*, 26 March 2011) <https://www.dawn.com/news/616090/lack-of-will-police-ignorance-encouraging-bonded-labour> accessed 7 April 2023.
[95] ibid.
[96] ibid.
[97] Shah (n 83) 30.

children working as bonded labourers.[98] The failure of these governmental schemes strengthens the observation that there is a significant lack of enforcement of the legal framework against bonded labour on the State's part.

4.2 The State in Collaboration With ILO

The ILO has collaborated with Pakistan on various projects to ameliorate the grievances of bonded labourers to improve the enforcement of the law to safeguard their interests. The two most prominent projects will be discussed below.

4.2.1 Promoting The Elimination of Bonded Labour in Pakistan (PEBLIP)

PEBLIP was a project aimed to address issues concerning capacity building and policy within Pakistan. The project resulted in an increase in the allocation of budget to initiatives carried out by provincial Governments to eliminate bonded labour.[99] The Government of Punjab allocated 123 million rupees to its Annual Development Programme between 2010-2011 for the education, health, skills training, social protection, social security benefits and citizenship to brick kiln workers.[100]

Moreover, PEBLIP has benefitted over 1800 children and 300 adults from non-formal education and adult literacy programmes, and more than 3500 bonded labourers were given health facilities and medical aid.[101] Furthermore, adults were registered with the National Database and Registration Authority (NADRA) in order to empower them on a social and legal level.[102] Additionally, bonded labourers were also given skills-based training to help them in the longer term as it would enable them to pay off their debts and prevent them from going back into bondage.[103]

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[98] ibid.
[99] ILO, 'Promoting the Elimination of Bonded Labour in Pakistan (PEBLIP)' (*ILO*, 2010) <https://www.ilo.org/islamabad/whatwedo/projects/WCMS_125694/lang--en/index.htm> accessed 14 April 2023.
[100] ibid.
[101] ibid.
[102] ibid.
[103] ibid.

4.2.2 Enrolment Campaign

In collaboration with the Government of Punjab, the ILO launched an enrolment campaign in 2015 to provide education to children of bonded labourers.[104] More than 600 children were enrolled by the end of the year, and the Minister of Labour announced that free education, books and school bags would also be provided to children.[105] This campaign catered to the long-term benefits of bonded labourers and their children and tackles one of the biggest reasons for debt bondage (lack of education). Francesco d'Ovidio, head of the Solutions and Innovation Unit of the ILO, praised the Government of Punjab for fulfilling its promise.[106] However, it must be noted that the monitoring of the concerned initiative is to be carried out by DVCs,[107] which, as highlighted before, are barely functional. The Government will also have to ensure that finance and other resources are made available for the campaign to run successfully for several years.

While the two foregoing projects were successful, Pakistan's projects with ILO are limited and difficult to sustain due to funding limitations and poor implementation. As a result, they cannot be solely relied upon to aid bonded labourers, especially given the high number of persons enslaved under the regime, and cannot be used to cover the disregard Pakistan has had for enforcing the law and ameliorating the grievances of bonded labourers.

4.3 Judicial enforcement

The judiciary of Pakistan has played an active role in giving relief to bonded labourers and enforcing the law when met with cases concerning the bonded labour regime. Moreover, it has continuously instructed Governments to enforce the law and concoct mechanisms to prevent individuals from turning towards the regime in times of desperation.

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[104] ILO, 'Efforts launched to combat child labour in Punjab's brick kilns' (*ILO*, 2015) <https://www.ilo.org/islamabad/info/public/pr/WCMS_396171/lang--en/index.htm> accessed 14 April 2023.
[105] ibid.
[106] ibid.
[107] ibid.

In October 2005, the Federal Shariat Court dismissed eight petitions filed by brick kiln owners contending that certain provisions of the Act were unacceptable in Islam.[108] The decision of the Court is commendable as it safeguarded the Act from incurring any scrutiny in the name of religion and further illustrates the Court's willingness to enforce the Act.

Moreover, the Supreme Court freed 18 brick kiln bonded labourers in 2006 who were illegally confined by brick kiln owners in the district of Muzaffargarh.[109] The Court stipulated directives for the adoption of mechanisms to register brick kilns, a record be maintained of the labour at brick kilns and introduction of campaigns by the Chief Secretaries to combat bonded labour within their concerned provinces.[110]

Furthermore, the Court, in *Shabbir Hussain v Government of Pakistan*, criticised the lack of enforcement of the Act by the Governments and urged them to protect labourers from the regime.[111] Additionally, in 2007, the Supreme Court freed the applicant's family of 11 bonded labourers including six children under the age of 15 years, upon a raid conducted subsequent to receiving the complaint.[112] A second raid recovered seven bonded labourers among whom one was merely a year and a half old. This shows that the judiciary has actively played its role in freeing bonded labourers; however, it also highlights the continuous neglect incurred by them from the Government and its little interest in implementing rules and legislation against the practice.

Moreover, around 3486 bonded labourers were freed by the Punjab judiciary between 1997 to 2007.[113] The Sessions Court dealt with 143 cases of bonded labour between 2000 to 2004, with 87% of these cases resulting in the freedom of bonded labourers.[114] In another case, 63 bonded labourers were

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[108] Shah (n 83) 22.
[109] ibid.
[110] ibid.
[111] *Shabbir Hussain Kazmi and others v Government of Pakistan* (PLC 2006 CS 49).
[112] *Case no.5091 2006*, (PLD 2007 SC 232).
[113] Shah (n 83) 22.
[114] ibid.

granted liberty from a brick kiln in Basir Pir Ismail, located near Multan, after a writ petition was filed by the HRCP before the Lahore High Court's Multan Bench in 2019.[115] Similarly, 43 bonded labourers were freed in November 2021, in the district of Khuzdar, after the HRCP filed a petition to the Balochistan High Court.[116] Additionally, 78 bonded labourers, located in the district of Shaheed Benazirabad, were freed in 2019 and 15 in 2021.[117] These statistics illustrate a clear and active enforcement of the law by the Courts.

More recently, the Islamabad High Court appointed a Commission to assess the enforcement and violation of labour laws within the brick kiln industry and provide recommendations.[118] The appointment of the Commission by the Court is further indication of the serious attitude of the judiciary to enforce the legal framework against bonded labour.

4.4 The Role of Non-Governmental Organisations (NGOs)

In light of the government's negligent attitude towards bonded labourers, NGOs have stepped in to aid bonded labourers attain freedom. These NGOs have often held the State accountable for its lack of interest and issued multiple reports thereby holding the State accountable to some degree, albeit not enough.

4.4.1 Drafting and Publication of Data and Provision of Education

The Hari Welfare Association (HWA) is an NGO operating in Sindh for the welfare of bonded labourers, including children and women. It has played an active role in drafting and publishing data on the state of bonded labourers and has continuously raised its voice against the injustices suffered by them.[119]

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115 Mehdi Hasan, 'HRCP secures release of bonded workers' (*HRCP*, 2019) <https://hrcp-web.org/hrcpweb/hrcp-secures-release-of-bonded-workers/> accessed 6 May 2023.
116 Hina Jilani '43 bonded labourers released from Khuzdar after HRCP Petition' (*HRCP*, 2021) <https://hrcp-web.org/hrcpweb/43-bonded-labourers-released-from-khuzdar-after-hrcp-petition/> accessed 6 May 2023.
117 Business Recorder (n 85)
118 Malik Asad 'IHC forms commission to examine labour laws' violation in brick kilns' (*Dawn News*, 3 January 2021)
<https://www.dawn.com/news/1599377> accessed 24 April 2023.
119 Hari Welfare Association, 'Peasant and Labour Rights' (*Hari Welfare Association,* n.d)
<https://hariwelfare.org/peasants-and-labour-rights/> accessed 6 May 2023.

Moreover, the NGO runs seven schools within different districts of Sindh providing free education to the children of bonded labourers.[120]

4.4.2 Large-Scale District-Specific Studies

The Rural Support Programmes Network (RSPN) is an NGO located in Islamabad which undertook a study of bonded labour within the district of Umerkot in 2009[121] and recently initiated a project to legally empower bonded labourers within the districts of Tando Mohammad Khan and Tando Allahyar in Sindh. It also conducted surveys to better understand the position of bonded labourers within the concerned districts.[122] The surveys were then utilised to generate a report apprising concerned bodies about the situation of bonded labourers within those districts and further provide recommendations.[123] The project facilitated greater data accuracy for the concerned area, thereby aiding concerned bodies in appropriately tackling the practice and ensuring that the needs of those geographically specific bonded labourers were met. However, such large-scale research projects, focusing on specific districts, are rarely conducted by NGOs.

4.4.3 Legal Aid and Annual Reports

The HRCP is an NGO with offices in all provinces in Pakistan that has helped free bonded labourers all across the country. It has constantly urged civil society and political leaders to play their role in eradicating the practice of bonded labour.[124] Moreover, it issues annual reports apprising considered bodies about the status of human rights violations within Pakistan, including those incurred by bonded labourers, and therefore continues to play a pivotal role in combating the practice.

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120 Hari Welfare Association, 'A Brief of Hari Welfare Association' (*Hari Welfare Association*, n.d) <https://hariwelfare.org/about-us/> accessed 6 May 2023.
121 Farhan Sami Khan and others, *Bonded Labour District Umerkot* (Rural Support Programmes Network, 2009) 6.
122 Rural Support Programmes Network, 'Study on Bonded Labour Practices: Tando Muhammad Khan and Tando Allahyar Districts, Sindh' (Islamabad: Rural Support Programmes Network, 2018) 1-5 .
123 ibid 12-26.
124 Dawn, 'Hyderabad: Steps urged to eradicate bonded labour' (*Dawn News*, 26 February 2006) <https://www.dawn.com/news/180418/hyderabad-steps-urged-to-eradicate-bonded-labour> accessed 10 May 2023.

While other small NGOs are also working towards the same goal, they often lack funds to continuously carry out their work. Moreover, the majority of NGOs within Pakistan focus on other areas of human rights; therefore, bonded labourers often feel a sense of disinterest from NGOs as well.[125]

5. INITIATIVES FOR BONDED LABOURERS IN NEPAL

In light of Pakistan's lack of effort towards eradicating bonded labour, this chapter will refer to initiatives undertaken by Nepal and use them to subsequently draw out recommendations for Pakistan in the final chapter.

5.1 Bonded Labour in Nepal

Over 230,000 Nepalese are enslaved under the bonded labour regime,[126] and the most common forms of bonded labour within Nepal are the *Kamaiya* and *Haliya* systems.[127] However, the UN International Children's Emergency Fund (UNICEF) has applauded Nepal for making 'remarkable progress in fighting traditional bonded labour practices.'[128] Reference will be made to both the systems alongside initiatives concocted to fight the practice.

5.1.1 The Bridge Project

The ILO, in collaboration with Nepal's government, launched the Bridge Project in 2021. This was a rehabilitation programme offering skills training to over 700 freed bonded labourers. It polished their labour skills, provided them with an increased income,[129] linked them to the job market through

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[125] Business Recorder (n 85).
[126] The Kathmandu Post 'Over 230,000 Nepalis living in modern day slavery' *The Kathmandu Post* (Kathmandu, 2 June 2016) <https://kathmandupost.com/national/2016/06/02/over-230000-nepalis-living-in-modern-day-slavery> accessed 15 May 2023.
[127] Birendra R. Giri 'The Bonded Labor System in Nepal: Exploring Haliya and Kamaliya Children's Life-worlds' (2010) 29 Himalaya: The Journal of the Association for Nepal and Himalayan Studies 29.
[128] UNICEF, 'Ending forced and child labour in Nepal's brick industry – Need for a holistic approach' (*UNICEF*, 28 January 2021) <https://www.unicef.org/nepal/press-releases/ending-forced-and-child-labour-nepals-brick-industry-need-holistic-approach> accessed 15 May 2023.
[129] 50 for Freedom 'Eliminating Bonded Labour in Nepal: The Example of the Bridge Project' (*ILO*, 2021) <https://50forfreedom.org/blog/stories/eliminating-bonded-labour-in-nepal-the-example-of-the-bridge-project/> accessed 22 May 2023.

work placements and gave them additional support to facilitate their self-employment.[130] The project further economically and socially empowered women by training them and developing their skills in non-traditional arenas such as carpentry and masonry. While jobs in the concerned sectors were usually taken up by men, as a result of these trainings, women are now working in these sectors and able to provide for their families, and thereby avoid going back into bonded labour.[131] Although Pakistan has undertaken similar projects with the ILO, none have specifically focused on economically and socially empowering women, and no such project has been reported within the last five years.

5.1.2 Sustainable Elimination of Child Bonded Labour (SECBL)

The ILO also launched the SECBL initiative in 2001 in collaboration with the Nepalese government to free children from bonded labour.[132] The first phase of the project focused on the *Kamaiya* system of bonded labour and was eventually expanded to other systems of bonded labour during its second phase between 2008 and 2010. The project's second phase aided over 9600 children, 7000 parents and 3400 families.[133] It provided formal and non-formal education, training and employment options. It also facilitated the unionisation of agricultural workers to introduce changes to wages paid to them.[134] As union members, they were empowered to raise their concerns at the central policy and executive level regarding working hours, minimum wage, and social protection. They were further able to work together to exercise vigilance against the bonded labour regime.[135]

Moreover, community chiefs and other community leaders with influential roles in their communities who formerly encouraged participation of children in bonded labour, were apprised of the legal, moral and ethical implications

[130] ILO, 'Breaking bonded labour and gender roles in Nepal' (*ILO*, 2018) <https://www.ilo.org/asia/media-centre/articles/WCMS_619926/lang--en/index.htm> accessed 22 May 2023.
[131] ibid.
[132] IPEC and SECBL, 'Successful Strategies and Experiences in Combating Child Bonded Labour in Nepal' (ILO, 2011) 4.
[133] ibid.
[134] ibid.
[135] ibid 26.

of doing so. Large awareness campaigns were undertaken by the project on the harms of bonded labour.[136] Furthermore, the project involved various ministries in 'reviewing, drafting and enforcing' the necessitated legislative measures to eliminate the practice.[137] The project undertook actions directly targeted towards the beneficiaries alongside indirect actions through policy reforms and capacity building.[138] The foregoing strategies and initiatives undertaken by the project were successful in providing long-term relief to bonded labourers.

Although Pakistan has undertaken similar initiatives within its projects, and bonded labour has a history of unionisation through organisations such as the Bonded Labour Liberation Front and Pakistan *Dehati Mazdoor Tanzeem*, there have been no reports of educating community leaders playing a significant role in its rural areas.

5.1.3 Crime Against the State

Gokarna Bista, the former Minister for Labour, Employment and Social Security for Nepal, recognised bonded labour as a crime against the State and renewed the Government's pledge to eradicate the practice in 2019.[139] The concerned declaration serves as an evidence of Nepal's determination to eradicate bonded labour and aids in educating the public about the grave nature of the practice.[140] While such a declaration may not be an effective deterrent for the practice, it does give the issue attention within the media and increases awareness about its harms.

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[136] ibid 17.
[137] ibid 4.
[138] ibid.
[139] Chandan Kumar Mandal, 'Nepal reaffirms commitment to eliminating forced labour, human trafficking and child labour' *The Kathmandu Post* (Kathmandu, 21 November 2019) <https://kathmandupost.com/national/2019/11/21/nepal-reaffirms-commitment-to-eliminating-forced-labour-human-trafficking-and-child-labour> accessed 2 June 2023.
[140] ibid.

5.1.4 *Kamaiya* System

In 2019, around 100,000 Tharu people were estimated to be bonded labourers under the *Kamaiya* bonded labour system in Nepal.[141] The Nepalese Government abolished the *Kamaiya* system through a declaration in 2000, which was further reaffirmed by the Bonded Labour (Prohibition) Act, 2002.[142] The Act freed the *Kamaiya* families and offered them 679-1690 square meters of land for them to build their own homes.[143] While the provision of land may only be the first step towards rehabilitating freed bonded labourers, it aids in eradicating bonded labour since land ownership strengthens one's economic position in society, enables them to cultivate that land for the purposes of farming and also provides shelter.

In comparison, Pakistan's projects have primarily focused on education and skills training, and have not focused on providing land to freed bonded labourers which would have aided the State in fighting the practice significantly.

5.1.5 *Haliya* system

Anti-Slavery International, alongside the Nepal National Dalit Social Welfare Organisation (NNDSWO), launched a project to monitor the application of the government's rehabilitation programme to ensure that it meets the needs of *Haliya* people.[144] Furthermore, the project aimed to free 36,000 *Haliya* people from bonded labour and informed them of their rights and provided them access to education alongside skills to attain economic stability.[145] Young people were also provided vocational training, skills development in literacy, finance, and mathematics together with start-up support. It further aimed to provide tuition classes, books, uniforms, and transition support to

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[141] Leah M. Metzger 'Modern Slavery: An Analysis of the Kamaiya System in Nepal' (2019) Orphans and Vulnerable Children Student Scholarship 1, 4.
[142] ibid 9-10.
[143] ILO, 'Breaking bonded labour and gender roles in Nepal' (n 130)
[144] Anti-Slavery International, 'Nepal: tackling bonded labour' (*Anti-Slavery International*, n.d) <https://www.antislavery.org/what-we-do/nepal-bonded-labour/> accessed 7 June 2023.
[145] ibid.

over 3000 children and ensure that they remain within schools to break the inter-generational loop of bonded labour.[146]

Pakistan has undertaken similar initiatives in its limited projects; however, it has not launched projects to specifically monitor the application of the Act, which would have otherwise added pressure on the Government to enforce the law and thereby been fruitful.

6. RECOMMENDATIONS FOR PAKISTAN

The following are some recommendations for Pakistan in light of its current legal framework on bonded labour.

6.1 Establishing Functional Oversight Mechanisms

A three-tiered oversight mechanism consisting of a national task force and provincial and district committees should be established. The national task force should be headed by the Federal Secretary of the Ministry of Human Rights and have one representative of the HRCP, the Ministry of Law and Justice, the Ministry of Interior and civil society. One member from the proposed provincial committees should also be a part of the national task force to facilitate the coordination between the national task force and provincial committees. Parties to the three-tiered mechanism should work towards policy framework and monitoring the enforcement of legal provisions on bonded labour. Funds, offices, transportation, professional manpower and other necessary resources should be allocated for them to carry out their role effectively. Moreover, lawyers, NGOs and human rights activists should hold the heads of these committees accountable.

6.2 Revision of the Act and Rules and The Need For A New Action Plan

The Federal Act 1995 Rules and the NPPA were passed several decades ago and have not been updated to account for inflation and changing political structures. The Act, and section 374 of the PPC, should be amended to

[146] ibid.

introduce a greater sentence of imprisonment[147] and fines should be increased to a minimum of 500,000 rupees in light of international best practices. While the provincial Acts have increased the fine, in comparison to the Federal Act, their fines should be further increased in light of Pakistan's devaluing currency. An increase in prison sentence and fine will act as an effective deterrent to the practice.

Moreover, the Punjab, KPK and Balochistan Acts should be amended to completely prohibit *peshgi* as it is counterproductive to the abolition of the regime. Furthermore, the 1995 Rules should be revised in order to set up a monitoring committee to examine each DVC's performance. While Pakistan's National Action Plan on Business and Human Rights 2021 tackles the issue of bonded labour,[148] the State should concoct a new action plan solely against the bonded labour regime in order to provide special protection to bonded labourers. Vulnerable groups, considering international best practice, benefit from instruments that solely focus on them. Moreover, a new action plan against bonded labour will ensure its relevance and practicability which the NPPA fails to do given the changes in the bonded labour regime.

6.3 Media's Attention

The media has often underreported the prevalence of bonded labour within the State and the civil society, as a result, lacks awareness about its severity and degree of prevalence within Pakistan (many being entirely unaware of the practice). Given the strong role the media plays in disseminating information to the public, Pakistan should incentivise the industry to play an active role in highlighting the practice. The media should actively conduct interviews with freed bonded labourers, host talk shows with lawyers and NGOs working against the regime and create public mobilisation and support in order to generate policy changes.[149] This will not just help influence the civil society in standing up against the practice but also add pressure on political leaders and

[147] National Action Plan on Business and Human Rights, (Ministry of Human Rights, 2001) 41 https://portal.mohr.gov.pk/wp-content/uploads/2021/11/NAP-BHR.pdf.
[148] ibid 41-42.
[149] ILO, 'Media Reporting on Forced Labour and Fair Recruitment' (*ILO*, 2018) <https://www.ilo.org/global/topics/labour-migration/events-training/WCMS_634739/lang--en/index.htm> accessed 7 June 2023.

hold law enforcement accountable for a lack of enforcement of the existing legal provisions prohibiting bonded labour.

6.4 Increased Literature

The literature on bonded labour within Pakistan continues to be limited as few academics, think tanks, NGOs and human rights activists focus on the issue. Pakistan is advised to mobilise the foregoing persons and bodies to carry out thorough research on bonded labour within the State, together with generating reports, books, and journal articles aiming to provide an accurate and geographically-specific understanding of the practice. These will assist in creating awareness among students and the general public and add pressure on the Government to enforce the law.

6.5 The Need for Recent Projects

Pakistan has not reported any recent projects, either independent or in collaboration with local or international NGOs, which is a consequence of the lack of priority given to bonded labourers. This enables current and future Governments to continue ignoring their plight. The Government, especially the Ministries of Labour and Human Rights, should undertake new initiatives to ameliorate the grievances of bonded labourers and ensure that the statutes are enforced. Moreover, they should collaborate with international organisations to generate resources and implement effective mechanisms to eradicate the practice.

6.6 Unionisation of Bonded Labourers and Provision of Land

The unionisation of Nepalese bonded labourers and provision of land raised their position within the society and empowered them to fight for their rights. Taking from this, keeping in mind its own history of unionisation of bonded labourers, Pakistan is advised to continue encouraging and including unionisation of bonded labourers and provision of land as two of the aims of its projects and action plans in order to socially, economically, and politically empower them within the State.

6.7 Political Interest and Declaration of the Act as Crime Against the State

While bonded labour has been continuously condemned by Pakistani judges, lawyers, human rights activists and NGOs, political leaders have often turned a blind eye towards it.[150] In light of Nepal's example, Pakistan is advised to recognise bonded labour as a crime against the State as it will increase the severity of a violation of the Acts. Moreover, its political leaders should actively condemn the practice in order to show the State's continued disapproval of bonded labour and be held accountable by the judiciary, NGOs and opposing parties, for not actively enforcing the Act.

6.8 Registration of Bonded Labourers with NADRA

Many Pakistani bonded labourers are unregistered as citizens with NADRA[151] which prevents them from voting in elections and deprives them of many other rights. Pakistan is advised to launch mass registration projects in order to register them with NADRA thereby permitting them to vote for political leaders that promise to safeguard their interests. This will further give them a greater footing within the society as their unregistered status is often utilised by employers to exploit them. Moreover, NADRA should generate a digital database of people involved in bonded labour (bonded labourers and employers), together with FIRs lodged and cases against employers and access to this database should be given to the proposed national, provincial and district committees. This will increase efficiency, help the committees evaluate progress and ensure accountability.

7. CONCLUSION

Although the number of bonded labourers has decreased over time, the practice continues to be widespread within Pakistan. Despite significant legal and policy initiatives to eradicate the practice, it still persists. Pakistan undertook several independent, and collaborative, initiatives; however, these

[150] Ercelawn and Nauman (n 4).
[151] Rehan Piracha, 'Kiln Workers Not Bound To Repay Vicious Debt: Athar Minallah' (*VoicePK*, 3 February 2021) <https://voicepk.net/2021/02/kiln-workers-not-bound-to-repay-vicious-debt-athar-minallah/> accessed 14 June 2023.

have been limited and lack sustainability. While judges have played an active role in enforcing the law, the Government and law enforcement bodies have often shown neglect towards and ignorance for it. Moreover, most DVCs continue being dysfunctional and lack resources; only a handful of NGOs are focusing on the regime and its victims. Additionally, the media has often underreported the grievances of bonded labourers and the lack of enforcement of the law thereof. These, alongside a lack of accountability, have significantly hindered Pakistan's abolition efforts. It may be contended, however, that the recent enactment of provincial legislation abolishing bonded labour indicates a shift in the State's attitude and a demonstration of its willingness to eradicate the regime, however, no governmental initiatives have been reported in the past five years. To effectively fight against the practice, Pakistan should take into consideration the recommendations made in the final chapter of this article.

CHARTING THE DIGITAL SURVEILLANCE MACHINERY OF PAKISTAN

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ABSTRACT

This article identifies the form of surveillance carried out and establishes the surveillance network of the Pakistani State. The modes through which this surveillance is carried out is meticulously analyzed, from phone and wire-tapping to surveilling data from service providers like telecom companies and internet service providers. All these State actions are legitimated through the country's legislative framework and this has had adverse implications for human rights and democratic processes. To combat this, there is a need for a consolidated national data protection act with stringent enforcement mechanisms that strike a balance between the right to privacy and necessary State surveillance for national security purposes, bringing Pakistan in line with its international human rights obligations.

KEYWORDS: Surveillance, surveillance network, privacy, PECA, PTA, FTA, GDPR, national security, state interests, international human rights law.

1. INTRODUCTION

Defining mass surveillance is complex. Simply put, it can be defined as a focused and systematic effort to obtain information for 'tactical and strategic purposes'.[1] In the age of surveillance, States have formulated a variety of modes of survey.[2] For the purposes of this article, the type of surveillance that best fits the phenomenon we are studying is dataveillance. Computer scientist Roger Clarke introduced the term 'dataveillance', which he defines

[1] SE Costanza 'Surveillance' in A. Javier Trevino (ed), *The Cambridge Handbook of Social Problems Volume 2* (Cambridge University Press 2018).
[2] Margaret Hu 'From the National Surveillance State to the Cybersurveillance State' (2017) 13 Ann. Rev. of L. & Soc. Sci. 161, 163.

as the 'systematic use of personal data systems in the investigation or monitoring of the actions or communications of one or more persons'.[3] Dataveillance essentially 'provides a method by which all aspects of a person's life and identity may be transformed into digital data ready for analysis', and David Lyon elucidates upon 'the relationship between dataveillance and surveillance, explaining that dataveillance also automates surveillance'.[4]

The Pakistani State's digital surveillance methods can be seen as dataveillance as they heavily rely upon the data repositories from private service provider companies, CCTV cameras and social media companies in order to create their complete surveillance network. These repositories are large pools of digital data that are ready to be accessed and analyzed, and the system of collecting the data into the repository is entirely automated as computer systems receive and process this data continuously. In the effort to create and sustain this surveillance network, the right to privacy is disregarded by the State. This article shall demonstrate that Pakistan, as a surveillance State, is heavily invested in creating an extensive digital surveillance network through phone and wiretapping, partnerships with private service provider companies, access to CCTV footage and social media platform monitoring. The current legislative framework legitimates these State actions and provides them with a broad range of powers to carry out their surveillance methods, going against international obligations set for data protection and negatively impacting citizens. In the end, it will suggest how a comprehensive data protection bill can mitigate some issues and protect citizens' privacy.

1.1 The Constitutional Right to Privacy

In essence, privacy means freedom from unauthorised intrusion.[5] A foundational understanding of the right to privacy was first articulated in the 1890s, and it was described as the 'the right to be let alone'.[6] From that genesis

[3] ibid.
[4] ibid.
[5] Sabrina De Capitani Di Vimercati et al, 'Data Privacy: Definitions and Techniques' (2012) 20(6) International Journal of Uncertainty, Fuzziness and Knowledge-Based Systems 793 <https://doi.org/10.1142/S0218488512400247>.
[6] Samuel D. Warren and Louis D. Brandeis 'The Right to Privacy' (1890) 4(5) Harvard Law Review 193 <https://www.jstor.org/stable/i256795>.

it has now developed to broadly be known as the freedom from any form of unwarranted interference or surveillance by any entity - State or private, and it is considered to be a fundamental right that is integral to human dignity and autonomy.[7] In Pakistan's Constitution, the right to privacy has been enshrined as a fundamental right under Article 14(1), which states that '[t]he dignity of man and, subject to law, the privacy of home, shall be inviolable'.[8] The Supreme Court, in the seminal judgment of *Mohtarma Benazir Bhutto v President of Pakistan*[9] further enhanced this right by applying the protection of the term 'privacy' to all facets of the lives of Pakistani citizens and not just restricting it to the home by taking a literalist approach to the Constitution's text. Instead, the judgment noted that it refers to 'the privacy, which is sacred and secure like the privacy a person enjoys in his home.' A person is entitled to such privacy of home wherever he lives or works, inside the premises or in open land. A person's privacy cannot be intruded,[10] unless 'grave risk to the security of the country is involved'.[11] Therefore, it was upheld that the emphasis of the right to privacy was not limited only to a person's home but could be enjoyed wherever the person may be. It also affirmed that the inviolability of privacy is inextricably linked to the dignity of man:

> If a man is to preserve his dignity, if he is to live with honor and reputation, his privacy, whether in home or outside the home has to be saved from invasion and protected from illegal intrusion. The right conferred under Article 14 is not to any premises, home or office, but to the person, the man/woman wherever he/she may be.[12]

Extending this definition to the digital sphere, the privacy of communications entails the security and privacy of mail, email, telephones and forms of communications. Information privacy involves the establishment of rules

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[7] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR'), art 17(1).
[8] The Constitution of the Islamic Republic of Pakistan 1973 ('Constitution'), art 14.
[9] *Mohtarma Benazir Bhutto v President of Pakistan* (PLD 1988 SC 388).
[10] ibid [29].
[11] Divya Srinivasan and Gayatri Khandhadai 'Jurisprudence Shaping Digital Rights in South Asia' (2020) Association for Progressive Communications 32 <https://www.apc.org/en/pubs/jurisprudence-shaping-digital-rights-south-asia> accessed 29 December 2022.
[12] ibid 30.

governing the collection of handling of personal data such as credit information and medical records.[13]

Although the right to privacy has been expressly provided by the Constitution of this country and upheld by its Supreme Court, there is a severe lack of safeguards regarding privacy that does little to curb the dataveillance carried out by the State. To date, Pakistan lacks a consolidated national statute which governs the process of personal data collection, retention, processing, transfer, use and protection. Moreover, even concerning the laws regulating the right to communications privacy, the Pakistani government possesses overarching and opaque powers to surveil telephonic, email and other communications.

1.2 Pakistan's Surveillance Network

In Pakistan, Article 14(1) of the Constitution (right to privacy and dignity) contains a caveat: 'subject to law.'[14] This exception erodes the right to privacy entirely, as the country's current legislative framework allows the State to surveil and consequently discipline their citizens as extensively as they desire. While some data is obtained by consent, such as data obtained by social media and telecommunications companies, the law allows for data to be extracted and used in ways that the data subjects have no control over.

To understand the surveillance network, this section will be looking at various parts of the Prevention of Electronic Crimes Act, 2016 (PECA), the Punjab Safe Cities project, and other legislative provisions in relation to State control and national security, focusing on provisions laying down surveillance techniques.

The underlying theme behind the promulgation of the PECA was to 'keep a check on digital harassment, curb hate speech and control the proliferation

[13] David Banisar 'Privacy & Human Rights - An International Survey of Privacy Laws and Developments' (1999) 18 The John Marshall Journal of Computer and Information Law <https://www.researchgate.net/publication/242448871_Privacy_human_rights-an_international_survey_of_privacy_laws_and_developments>
[14] Constitution, art 14.

of extremist content.'[15] However, the Act has given 'ample leeway to the government to silence dissent'[16] through the broad powers it grants the State to access data through authorised agents appointed by the Federal Investigation Agency (FIA).[17] In situations where a warrant is obtainable but not without the 'apprehension of destruction, alteration or loss of data…devices or other articles', agents can still conduct searches and seizures without a warrant.[18] Section 35 goes on to further detail the powers of the authorised officer, including but not limited to accessing and inspecting information systems, obtaining and copying relevant data from these systems, requiring persons with decryption tools of an information system to grant access to encrypted information and require persons to give technical assistance in retrieving data and information.[19]

Information systems that generate this data, such as telecom companies and internet service providers (ISPs), are mandated under PECA to retain specified traffic data for at least one year.[20] The Monitoring and Reconciliation of Telephony Traffic Regulations Act, 2010 also 'obliges each local and international service provider to ensure the monitoring [and storage] of all data'.[21] With this requirement in place, the State can expand its network through dataveillance by having a readily accessible pool of data collected and retained by private service providers. It would be difficult for the State to have sufficient resources to establish an extensive surveillance network hence, its partnership with private companies allows it to access data that it otherwise would not be able to cultivate. In return, these companies and service providers are protected through a legal liability limitation per Section 38 of the PECA, a feature missing in the EU's General Data Protection Regulation

[15] Yasir Abbas 'Comparative Analysis: Digital Media Regulatory Landscape in Pakistan' (2022) Media Matters for Democracy <https://mediamatters.pk/wp-content/uploads/2022/10/Digital-Media-Regulatory-Landscape-in-Pakistan.pdf> accessed 29 December, 2022
[16] Shmyla Khan 'Year in Review: PECA' (*Digital Rights Foundation* n.d) <https://digitalrightsfoundation.pk/year-in-review-peca/> accessed 29 December 2022.
[17] Prevention of Electronic Crimes Act, 2016 ('PECA'), s 31(1).
[18] ibid s 33(2).
[19] ibid.
[20] ibid s 32(1).
[21] Dr. Akbar Nasir Khan, *Privacy & Surveillance Public Preferences in Pakistan* (1st edn, IRD 2021) 57.

(GDPR) which places complete liability for any breach of consumer data on data controllers and processors.[22]

Therefore, PECA provides legislative backing for the State to surveil and curtail dissent by having broad and invasive access to digital and electronic data. Its implementation is seldom concerned with the original legislative intent behind why the Act was promulgated; rather, it is now another tool of surveillance and control. For instance, in May 2017, 'a list of 200 social media activists was forwarded by the Interior Minister' to the National Response Centre for Cyber Crime for 'defaming the army.'[23] These actions implicate private citizens and criminalise them for exercising their right to free speech, with the potential to impact journalism.[24] It interferes with democratic processes as most of these activists were members of opposition parties, indicating that the Act is utilised as a tool for political victimisation.[25]

1.2.1 The Punjab Safe Cities Authority

With the current legislative framework and the State's partnership with private service provider companies discussed, another mode through which surveillance is carried out is through the widespread use of CCTV cameras and their collected footage, all of which operate under the mandate of the Punjab Safe City Authority (PCSA).

In Pakistan, the first Safe City Project was deployed in Islamabad in May 2015, and by October 2016, the Lahore Safe City Project was also operationalised.[26] Following these developments, the government launched

[22]Article 82 of the GDPR contains numerous provisions dealing with data controller and processor liability. Article 82(1) establishes the right of the data subject to claim compensation from data controllers/processors if they have suffered material or non-material damage as a result of an infringement of the GDPR. Article 82(2) holds that a controller involved in data processing will be responsible by the damage caused by processing that infringes the GDPR. Article 82(4) imposes joint liability for controllers and processors where both have been involved. While limited liability is a question in data protection, the GDPR makes its stance clear and attributes complete liability in order to uphold its high data protection standards.

[23] Khan (n 16).

[24] Furqan Mohammed 'PECA 2015: A Critical Analysis of Pakistan's Proposed Cybercrime Bill' (2016) 15 UCLA Journal of Islamic and Near Eastern Law 71 <https://escholarship.org/uc/item/14x2s9nr> accessed 29 December 2022.

[25] Khan (n 16).

[26] Akbar Nasir Khan, *Privacy & Surveillance Public Preferences in Pakistan* (1st edn, IRD 2021) 56.

seven more such projects in major city centres, which upon being implemented will potentially result in almost 40% of Punjab's population being surveyed through CCTV cameras.[27] The presence of CCTV cameras as a mode of public surveillance is particularly troubling, considering how it has allowed for an unprecedented level of intrusion in the lives of citizens in the public sphere.[28] While a variety of cogent justifications exist advocating for the use of CCTV cameras primarily in crime deterrence and aiding investigations, there is a unique risk presented by these cameras that host a vast pool of surveillance footage and facial-recognition tools which requires an enhanced mechanism for the protection of data gathered by them.[29] Under Article 5, the GDPR mandates that this footage is 'processed lawfully, fairly and in a transparent manner' and is not used for purposes beyond the scope of its objective.[30] Moreover, the data collector is mandated by the GDPR to maintain the security of CCTV cameras, and routinely delete footage.[31]

While the PSCA does try to protect privacy rights and provide data sharing and handling guidelines[32] through their Data and Privacy Protection Procedures (DP3),[33] these guidelines are inadequate due to the absence of national data protection regulations that can mandate how Safe City stores and uses data.[34]

Jannat Ali Kalyar, a lawyer and advocate who has previously worked as a Legal Officer in the Digital Rights Foundation and has been a Legal Executive in the Ministry of Information Technology and Telecom, Pakistan, states that during her years of practice, she has seen cases where PSCA officials have been involved in blackmailing private citizens through CCTV footage.

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[27] ibid 56-7.
[28] IFSEC Insider, 'Role of CCTV Cameras: Public, Privacy and Protection' (IFSEC Insider, 1 Jan 2021) <https://www.ifsecglobal.com/video-surveillance/role-cctv-cameras-public-privacy-protection/> accessed 20 November 2023.
[29] ibid.
[30] Muhammad Waqas Javed, Nazar Hussain, Muhammad Arbab Maitla 'CCTV Cameras Surveillance, Data Protection & Privacy Under International Human Rights Law' (2021) 3(2) Journal of Law and Social Studies 174, 181.
[31] ibid 182.
[32] Nasir Khan (n 21) 88.
[33] Nabeel Ahmed, 'The Promise and Peril of 'Safe City' Initiatives in Pakistan' (*Digital Rights Monitor*) <https://digitalrightsmonitor.pk/the-promise-and-peril-of-safe-city-initiatives-in-pakistan/> accessed 29 Dec 2022.
[34] ibid.

Officials capture videos of private citizens in compromising positions, trace their identity using car number plates and facial recognition technology in these cameras, and then extort the concerned individuals. While these specific actions may be committed by certain PSCA employees and not necessarily the State, it still highlights the ease with which CCTV data can be misused, especially where PSCA's project of setting up thousands of cameras across Punjab has inadvertently established a robust surveillance network. Even the State has certainly been involved in accessing footage from these cameras. Current IGP Islamabad, Dr Akbar Nasir Khan, writes that 'many senior officers in important organisations who were trying to enhance their control' have requested video data streaming from PSCA both through formal and informal means and upon refusal to disclose this data, he was placed under pressure and criticism for not indulging these 'mighty officers'. In one instance, he was even transferred from his position so that unauthorised access to data could be given to the establishment.[35] Ultimately, devising laws for regulating and protecting data is insufficient, as the PSCA lacks meaningful implementation of these rules and does not apply the DP3 in letter and spirit.[36]

These instances of State surveillance through PSCA CCTV cameras are described clandestinely, and there are hardly any publicly available resources that document the misuse of these cameras. This showcases that the State has created a sophisticated, tiered system of surveillance that is often well-concealed from the public eye, and there is a lack of coherent understanding of the scale of the State's surveillance machinery.

1.2.2 Surveillance and National Security

All States and their branches of government carry out surveillance to varying extents to protect State interests. It is natural for a State to be concerned with matters that they deem relevant to national security and their sovereignty, and surveillance is a tool through which they can track dissent and developments they perceive as threats. Ultimately, the issue arises when the ambit of national security and State interests is so broad that it creates an overreach in State

[35] Nasir Khan (n 21) 101.
[36] ibid.

powers; a 2013 UNSR report upheld that vague restrictions in the name of 'national security' could be used by the State as justifications to survey citizens and manipulated to target vulnerable groups.[37] That, alongside laws that legitimate State surveillance creates an environment where the fundamental rights of citizens are infringed upon, civil society members are under threat, and opposition can be politically victimised.

The State is concerned with preserving its authority, compelling it and its appointed agents to create a surveillance network upheld and regulated by law to bolster its legitimacy. Article 54(1) is profoundly important in the Pakistan Telecommunications Act as it reflects this concern. It creates an exception for national security, stating that '...in the interest of national security or the apprehension of any offence, the Federal Government may authorise any person or persons to intercept calls and messages or to trace calls through any telecommunication system'.[38] What the statute considers a State of 'national security' is unclear as the term remains undefined. Due to the broad and vague nature of the term with no limitations on its use, the State is empowered to carry out wiretapping across any telecommunication system for reasons they deem fit, which is another way to expand their surveillance network.

Wiretapping violates the fundamental human rights guaranteed under the Constitution of Pakistan. It is ultra vires to the right to privacy and dignity of citizens, enshrined in Article 14. The landmark *Benazir Bhutto* case dealt with the 'issue of tapping the telephones of judges, political leaders and military officials by the ruling government', and it was held in the judgment that 'tapping of phones and eavesdropping on citizens is a violation of the right to privacy guaranteed under Article 14 of the Constitution', and if tapping were to be allowed legally, it can be done when the country's security is under risk.[39] The Court upheld the dissolution of Bhutto's government. In their individual opinions, Justices Akhtar and Ilahi Khan ordered that since the existing Telegraph Act failed to regulate phone tapping, 'any communications

[37] Noor Ejaz Chaudhry, 'Big Brother: Mapping State Surveillance of Citizen Online and Offline' (*Digital Rights Monitor*) <https://digitalrightsmonitor.pk/pakistan-as-big-brother-mapping-state-surveillance-of-citizens-online-and-offline/> accessed 30 December 2022.
[38] Pakistan Telecommunication (Re-organization) Act, 1996, s 54(1) ('PTA').
[39] Srinivasan and Khandhadai (n 11) 32.

surveillance carried out by the government in the future must be done with the prior permission of the Supreme Court or by a Commission constituted by the Supreme Court which shall examine each case on its merits.'[40] Although this judgment has a progressive stance on the right to privacy and condemns surveillance overreach by the State, it cannot be read without keeping the country's political context in mind.

Advocate Kalyar shared her insight regarding the Benazir Bhutto case, which she stated was a progressive judgment 'on paper' but in actuality was likely politically motivated, keeping in mind the political turmoil in the 1990s that saw a constant tussle of power between the PML-N and PPP governments. What gives more evidence to the assumption that the judgment was not very concerned with curbing State surveillance is that it has not been followed up on nor been a part of mainstream discourses around privacy and surveillance. The safeguards outlined by the Justices have not been enforced; successive acts do not adopt those safeguards. In Advocate Kalyar's words, the Benazir Bhutto case can be considered 'irrelevant' to the discourse around digital rights and State surveillance today.

Ultimately, bounds to State surveillance must be established and enforced, and national security and State interests must be well-defined and well-articulated terms in order to strike a balance that allows for the State to be vigilant and protect national interests in a manner that doesn't infringe upon human rights and democracy.

2. STRIKING A BALANCE: THE RIGHT TO PRIVACY AND SURVEILLANCE

2.1 International Analysis

The protection of privacy is a significant consideration for any guiding international law frameworks, and hence, surveillance mechanisms established by countries should aim to be aligned with the standards set by international law. The International Covenant on Civil and Political Rights (ICCPR) does not explicitly define privacy as Article 17(1) mentions that

[40] ibid.

everyone is protected from unlawful interference with their 'privacy, family, home or correspondence'.[41] However, the Human Rights Council has issued recommendations that ensure that States comply with the principles of 'legality, necessity and proportionality' when interfering with citizens' privacy.[42] As such, legislation must specify the detailed circumstances in which privacy can be breached. Interference is only allowed if it is considered not to be arbitrary or unlawful. The Council defines these terms further and mentions that interference becomes arbitrary or unlawful in two circumstances: when the law does not sanction it, or when the interference or the law sanctioning it conflicts with the ICCPR. Hence, a breach of privacy becomes legitimate if it is in line with the law and the principles of the Covenant, necessary and proportionate to achieve a legitimate outcome, and the least intrusive option available. Such a framework treats privacy as the centre of all surveillance networks rather than as an expendable part of it.

The EU's General Data Protection Regulation (GDPR) is a model framework for protecting citizens' privacy[43] by focusing on 'lawfulness, fairness and transparency of processing; purpose limitations; data minimisation; accuracy; storage limitation; integrity and confidentiality; and accountability'.[44] While not *ipso facto* binding on Pakistan as the country is not a signatory to it and nor an EU Member State, the regulations set a 'new threshold for international good practices' as it builds on existing OECD Privacy Principles and hence acts as an 'important reference point for global work in this area.'[45]

Under the GDPR, personal data directly or indirectly identifying an individual 'must not be collected, stored, or processed' without an appropriate legal

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[41] American Civil Liberties Union, *Informational Privacy in the Digital Age* (ACLU, New York 2015) <https://www.aclu.org/documents/human-right-privacy-digital-age>

[42] Human Rights Council, 'Human Rights Council Holds Clustered Interactive Dialogue on the Right to Privacy and on Cultural Rights' (*UN Office of the High Commissioner of Human Rights*, 1 March 2019) <human-rights-council-holds-clustered-interactive-dialogue-right-privacy-and>

[43] Jannat Ali Kalyar, 'Protecting the Data A Comparative Analysis of Pakistan's Personal Data Protection Bill, 2020' (2021) *Media Matters for Democracy* <https://mediamatters.pk/wp-content/uploads/2021/02/Comparative-Analysis-of-Personal-Data-Protection-Bill-2020.pdf>

[44] Colin J. Bennet 'The European General Data Protection Regulation: An instrument for the globalization of privacy standards?' (2018) 23 Information Polity 240 <https://web.archive.org/web/20180720050914id_/https://content.iospress.com/download/information-polity/ip180002?id=information-polity%2Fip180002>

[45] Julia Clark, 'Practitioner's Guide: Data protection and privacy laws' (*The World Bank, Identification for Development* n.d) <https://id4d.worldbank.org/guide/data-protection-and-privacy-laws>.

basis.[46] Article 6 of the GDPR lists six bases upon which data controllers can lawfully process personal data. First, as per Article 6(1)(a), data can be lawfully processed with 'freely given, specific, informed and unambiguous' consent,[47] separately obtained for each processing action.[48] For special data categories, explicit consent needs to be given in writing.[49] Secondly, under Article 6(1)(b), data can be processed when necessary for a contract's performance. To this end, it must be objectively necessary in order to execute the performance of a contract,[50] or where a formal contract does not exist but the subject intends for it to and they request the controller to process the data before entering into the contract.[51] Thirdly, processing is allowed when it is necessary for compliance with a legal obligation the controller is subject to.[52] 'Legal obligations' can mean common law or statutory principles.[53] For this, personal data must be strictly required, and controllers should be able to specifically point out what legal obligation makes it necessary for them to obtain personal data.

Next, personal data can be processed when it is necessary to protect the interests of the data subject or any other natural person.[54] For this, the controller should prove that they are not able to reasonably protect the subject's vital interests in some other way. But this can be bypassed in cases of emergencies, such as if a health risk is involved. Fifth, personal data can be processed when it is necessary to carry out a task in the public interest or official duty.[55] To this end, the controller must point to a benefit to society rather than a benefit to a specific interest or individual.[56] Lastly, personal data

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[46] Elena Gil Gonzalez and Paul de Hart, 'Understanding the legal provisions that allow processing and profiling of personal data—an analysis of GDPR provisions and principles' (*ERA Forum*, February 2019) <https://link.springer.com/article/10.1007/s12027-018-0546-z#citeas>.
[47] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1 ('GDPR').
[48] Gonzalez and de Hart (n 46).
[49] GDPR, art 9.
[50] Privacy Research Team, 'Article 6 of the GDPR: Explained' (*Securiti*, 24 June 2022) <https://securiti.ai/blog/article-6-gdpr/>.
[51] Ibid.
[52] GDPR, art 6(1)(c).
[53] Privacy Research Team (n 50).
[54] GDPR, art 6(1)(d).
[55] GDPR, art 6(1)(e).
[56] Privacy Research Team (n 50).

may be processed necessary for legitimate interests pursued by the controller or a third party, except when the interests conflict with the data subject's fundamental rights, especially when they are a child.[57] Here, 'interest' qualifies as the 'intention' the controller wishes to fulfil with the information, and legitimacy comes from it respecting not just data protection laws but all laws. To this end, it must be 'real, present, and articulated'.[58]

The controller must inform data subjects about the legitimate interest[59] with a necessity and balancing test in place to justify the legitimacy of the interest. The balancing test involves weighing the requestor's interest on one side and the data subject's on the other.[60] Necessity denotes that the data processing be directly linked to achieving the interest and that no other less intrusive way is available; however, if the other way is deemed to require a disproportionate effort, then the process can still be considered necessary. These six exceptions provide comprehensive protection for citizens' privacy rights in the face of data collectors working for different organisations.

A critique can be made that the GDPR does not apply to mass-scale government surveillance; State agencies can access personal data without consent if a concern relates to 'national security', 'defence', or 'public security'.[61] However, the EU's Court of Justice has established that these terms do not provide carte blanche for countries to obtain any kind of data however they please.[62] They are still subjected to national and international human rights laws and national regulations that do not go against EU regulations.[63] Each EU member State is given the liberty to balance national security with data protection provided any limitation on privacy rights is 'necessary and proportionate'.[64] A core issue addressed by the court was how

[57] GDPR, art 6(1)(f).
[58] Gonzalez and de Hart (n 46).
[59] ibid.
[60] ibid.
[61] Human Rights Watch, 'The EU General Data Protection Regulation' (*Human Rights Watch*, 6 June 2018) <https://www.hrw.org/news/2018/06/06/eu-general-data-protection-regulation>.
[62] ibid.
[63] ibid.
[64] Kerry CF and others, 'The Court of Justice of the European Union in Schrems II: The Impact of GDPR on Data Flows and National Security' (*Brookings*, 9 March 2022) <https://www.brookings.edu/articles/the-court-of-justice-of-the-european-union-in-schrems-ii-the-impact-of-gdpr-on-data-flows-and-national-security/>.

national security agencies can balance security interest with adequate data protection consistent with the GDPR. To this end, it was examining the US government's access to EU citizen's personal data for national security purposes, alongside their right to judicial review or redressal in the US. It held that transfer of data to a third country, even if for national security reasons, is still governed by the GDPR, therefore, whenever an EU citizen's data is transferred abroad, they must be afforded the same protections, rights, and liabilities they are guaranteed in Europe. It further concluded that US national security requirements infringed on the fundamental rights of individuals whose data was transferred there. The principle of proportionately was not satisfied either as US surveillance was not only conducted when 'strictly necessary'.[65]

When such a framework is applied to States, their mechanisms for protecting privacy rights are enhanced. In a study conducted by Comparitech, it was found that countries in the European Union improved data safeguards provided by the government and adopted more equitable regulations, mainly due to the implementation of the GDPR.[66]

The GDPR has been implemented successfully outside the EU as well. In Norway, companies have begun to invest more in compliance efforts, and there is a more receptive attitude towards data protection.[67] Due to stricter regulations, the country's DPA imposes fines on public sector entities who process data without following guidelines, therefore not adhering to the condition of only doing so on a legal basis. For example, a private sector organisation was fined for sending data obtained from illegal camera surveillance to China without a proper 'data processing agreement'.[68] Fines were also issued to companies in the United States; for example, the dating

[65] ibid.
[66] Paul Bischoff, 'Data privacy laws & government surveillance by country: Which countries best protect their citizens?' (*Comparitech*, 15 October 2019) <https://www.comparitech.com/blog/vpn-privacy/surveillance-states/>.
[67] Pat Brans, 'Four years into GDPR, Norway hopes for safer data transfer to US' (*Computer Weekly*, 31 August 2022) <https://www.computerweekly.com/news/252524408/Four-years-into-GDPR-Norway-hopes-for-safer-data-transfer-to-US>
[68] ibid

network Grindr was fined €6.5m by the DPA for sharing user data with unknown third parties without user consent.[69]

3. THE RIGHT TO PRIVACY WITHIN PAKISTAN'S SURVEILLANCE FRAMEWORK

As mentioned earlier, Pakistan's surveillance framework consists of numerous statutes, mainly the PECA, and projects under the mandate of the PSCA. All these statutes, projects and actions present different modes by which the State machinery carries out surveillance and how this surveillance is protected under the law. After analysing how an appropriate balance can be struck between the right to privacy and State surveillance through international examples, such as GDPR, we can begin to dive into the discussion of how the Constitutional right to privacy is not adequately protected within Pakistan's surveillance framework, with a focus on specific provisions of the PECA, the Pakistan Telecommunications Act, and Fair Trial Act that infringe upon the right to privacy.

3.1 The Pakistan Electronic Crimes Act, 2016

Various provisions of the PECA disregard privacy rights, and this can be seen through a mix of unfettered powers given to authorised agents, a lack of protection protocols, and weak implementation of clauses that intend to protect privacy. Section 32 allows service providers to retain specified traffic data for at least one year or any other time that the Pakistan Telecommunication Authority (PTA) deems fit.[70] Furthermore, section 32(2) mentions that service providers must follow retention guidelines given under sections 5 and 6 of the Electronic Transactions Ordinance, 2002 (ETO). [71]

The problem here is two-fold. First, the section sanctions retention without mentioning any data protection protocols that would dictate how this information is kept secured. This means the data retained for a year is susceptible to breaches. As it is sensitive data, it represents an individual's

[69] ibid
[70] PECA, s 32.
[71] ibid s 32(2).

digital footprint that can be used to ascertain their location, communicate with others, etc.[72] The value of this data was affirmed by the Supreme Court of the Philippines, which struck down the data retention requirement in their cybercrime law as it held that the requirement infringed on the privacy of the users and the data was too telling to be kept without proper safety protocols.[73]

Secondly, there is a lack of clarity concerning when this data can be extracted. The section mentions that it can be retained whenever required; however, there is no expansion as to what warrants keeping this data. Section 32(2) references the ETO, but the relevant sections only provide details on what constitutes legitimate data. For example, section 6 mentions that the requirement that certain data be retained in electronic form is fulfilled if its contents remain accessible for 'subsequent reference' if its content and form can accurately represent its original form, and if the data can enable the identification of its origin and destination, etc.[74] A plain reading shows that this only refers to the form in which the data should be, not the criteria under which it can be taken. Furthermore, a purview of case law shows us that the ETO 2002 sections mentioned serve evidentiary rather than substantive purposes.[75] In this way, we are left with no understanding of what situations or circumstances allow one's right to privacy to be breached by keeping their data for a year, especially with no protection protocols in place.

Section 39 of the PECA allows for the real-time collection and recording of information for seven days that can be extended. For this, the court requires information from an authorised officer who has reasonable grounds to believe that any data is required for a specific criminal investigation.[76] While the section extensively mentions the substantive and procedural grounds needed for an application to collect real-time data and the importance of protecting the privacy of other users, customers, and third parties, it leaves

[72] Bolo Bhi, 'Major Contentions: PECA' (*Bolo Bhi*, 2016) <http://bolobhi.org/wp-content/uploads/2016/10/Major-contentions-PECA-2016.pdf>.
[73] *Disini v The Secretary of Justice* [2014] 727 Phil. 28.
[74] Electronic Transactions Ordinance, 2002, s 6.
[75] *Alamgir Khalid Chughtai v The State* (PLD 2009 Lah 254).
[76] PECA, s 39(1).

out the limits of this data collection on the data subject.[77] In this way, local law enforcement can use invasive measures to monitor citizens. Due to PECA not mentioning the scope of this collection, the section enables various unchecked modes of surveillance that disregard one's right to privacy.

Furthermore, section 42 of the PECA mentions international cooperation and lists down how the government would cooperate with a foreign government if they made a data request.[78] While the section establishes reasons for the government refusing a request, there is no mention of the decision-making process for accepting requests. This lack of transparency leaves citizens vulnerable to surveillance from foreign governments.[79]

3.2 The Pakistan Telecommunication (Re-organisation) Act, 1996

Section 54 of the Act allows the Federal Government to authorize any person or person to intercept calls and messages or to trace calls in the interest of national security.[80] Interestingly enough, the Act does not define national security. However, section 54(2) mentions that the Federal Government will have 'preference and priority' over telecommunication systems in the event of war or any other hostilities in Pakistan.[81] With this, the State obtains unbridled legal powers to obtain any data from telecommunication companies under the guise of national security. Due to this, there is no check-and-balance over what kind of information the State machinery is extracting, and there is no expansion of what constitutes national security within statutes. The concern over government actions under the guise of national security have been raised even in the Apex Court, with a five-member bench affirming that the government cannot commit constitutional breaches and escape scrutiny under the claim of national security, unless these concerns are evidenced and well-defined.[82] As a result, we see the ambit of national security being misused to infringe on people's right to privacy and prosecute them for

[77] Media Matters for Democracy 'White Paper on Reforms for the Prevention of Electronic Crimes Act (PECA) 2016' (Media Matters for Democracy, May 2020) <https://www.cpdi-pakistan.org/wp-content/uploads/2021/01/WPPecaReforms-refined.pdf>
[78] PECA, s 42(1).
[79] Media Matters for Democracy (n 77).
[80] PTA, s 54.
[81] ibid s 54(2).
[82] *Pakistan Peoples Party Parliamentarians v Federation of Pakistan* (PLD 2022 SC 574).

crimes such as blasphemy and sedition, that may arguably be of concern for State interests but absolutely do not fall under the ambit of national security. Hence, surveillance can be carried out that infringes upon the privacy of citizens and policies and punishes them on the basis of vague terminology that encompasses a vastly wide variety of matters empowering the State to take any action it deems fit.

3.3 The Investigation for Fair Trial Act, 2013

This Act intends to provide a framework for the collection of evidence through evolving techniques that regulate the powers of law enforcement and intelligence agencies. Ultimately, it sets up ways that user data can be accessed and circumstances in which the right to privacy can be breached in the interest of gathering evidence and providing for a fair and speedy trial. Section 5 allows any official or applicant to prepare a report with supporting material looking to obtain a warrant for surveillance on someone that they feel is likely or going to commit a scheduled offence.[83] Subsequent sections lay out the procedure for doing so and mention that the officer must go to the Minister through the Head of the Department before obtaining the warrant. Section 9, however, mentions that an officer can obtain a warrant for surveillance from a judge in their chambers.[84] The conditions for this warrant being granted are listed in section 10. The entire Act is meant to bypass a citizen's right to privacy and enable surveillance without considering the interests of the data subject. While some sections do lay out a thorough procedure where the report goes through multiple checks, section 9 sanctions secret warrants to be given in the judge's chamber, bypassing approval from department heads or ministers.[85] This Act is another example of how a breach of the right to privacy is justified under the guise of national security without taking into consideration the plethora of boundaries and procedures that other frameworks, such as the GDPR, take when allowing for data processing.

[83] Investigation for Fair Trial Act, 2013 ('FTA'), s 5.
[84] ibid s 9.
[85] ibid.

4. THE WAY FORWARD

When compared with the kind of considerations that the international human rights privacy framework incorporates, it becomes clear that Pakistan's surveillance framework fails to uphold the constitutional right to privacy.

The three legislative documents analysed for this paper exhibited the State's prioritisation of self-interest over the rights and freedoms afforded to protect the privacy of its citizens. When compared with the GDPR, the FTA 2013 and PTA 1996 do not address the data subject's consent. PECA 2016 mentions this in section 41, however, it is seldom implemented.[86]

Furthermore, unlike the GDPR, there are no tests available to determine whether surveillance is necessary for a situation and if the rights and interests of the data subjects have been balanced against those of the State. The crucial test of seeing whether there are alternative, less intrusive ways of obtaining data is also missing within all the legislative frameworks we analyzed. As such, we see that vital considerations to protecting privacy rights while maintaining the need for State security are absent within the frameworks in Pakistan, and as a result, we see the right to privacy shrinking within society.

4.1 Data Protection Bill

In order to reform the current framework, Pakistan can look towards a comprehensive data protection bill. Currently, there are numerous sections in multiple acts that regulate data protection indirectly. For example, section 36 of the ETO criminalizes accessing or trying to access unauthorised data; the Ordinance also mentions the establishment of a body that can make regulations for the protection of its users.[87] Similarly, section 17 of the Freedom of Information Ordinance exempts certain forms of information from disclosure if it would lead to the breach of an individual's privacy other than the requester. Moreover, case law gives us valuable examples of the

[86] Hija Kamran 'Privacy-in-Law: How safe is your data?' (*Digital Rights Monitor,* 27 September 2019) <https://digitalrightsmonitor.pk/privacy-in-law/>.
[87] Electronic Transaction Ordinance, 2002, s 43(2)(e).

increasing recognition of privacy.[88] Notably, in *M.D. Tahir, Advocate v The Director, State Bank of Pakistan, Lahore and 3 others,* the court held that presenting the private information of bank holders to tax authorities, with no allegation of wrongdoing, was illegal, as the individuals had trusted the bank under a fiduciary relationship.[89] Even though data protection is recognised through various avenues in the law, there is a need for a codified document that can act as the authority on this matter.

Since 2018, legislators have been attempting to introduce a law that directly addresses data protection through the Personal Data Protection Bill (PDPB). The fifth iteration of the Bill,[90] introduced in 2023, takes extensively from the GDPR and presents a comprehensive set of provisions that touch on various issues. The PDPB is arranged in sections specifically touching upon the obligations of data controllers and processors, the rights of data subjects, processing of children's data, requirements for processing sensitive and critical personal data, transferring personal data outside Pakistan, exceptions, and penalties. While it has rectified mistakes from previous editions, the 2023 draft has alarming provisions allowing governments to survey citizens without respect for their privacy, particularly through supervisory authorities, data localisation, ambiguous data and security definitions, and irregular processes surrounding consent.

4.2 Supervisory Authorities (National Commission for Personal Data Protection)

While the PDPB has been modelled on the GDPR since its inception, certain provisions stand out as going against international data protection standards. Take the example of Supervisory Authorities (SA). Recital 117 sets out an integral part of the GDPR: States should establish Supervisory Authorities, and 'exercise their powers with complete independence…'.[91] This is to ensure that governments do not intervene in data protection infrastructures to serve

[88] Freedom of Information Ordinance, 2002, s 17.
[89] *M.D. Tahir, Advocate v The Director, State Bank of Pakistan, Lahore and 3 others* (2004 CLC 1680)
[90] Personal Data Protection Bill, 2023 <https://moitt.gov.pk/SiteImage/Misc/files/Final%20Draft%20Personal%20Data%20Protection%20Bill%20May%202023.pdf> ('PDPB').
[91] GDPR, recital 117.

their own benefits. Its independence is necessary as it is responsible for hearing complaints from data subjects regarding data protection and possesses a series of authoritative, advisory, investigative and corrective powers.

To this end, SAs are meant to be 'independent public authorities' responsible for protecting the fundamental rights of data subjects.[92] In exercising this role, they should 'remain free from external influence' and not 'take instructions from anybody'.[93] The government has to ensure that the SA chooses its staff, which is 'subject to the exclusive direction' of its members. Members of the SA should be appointed by the Parliament, Government, Head of State, or any independent body entrusted with the appointment, but by 'means of a transparent procedure'.[94]

Chapter 8 of the PDPB 2023 fulfils the SA requirement with the National Commission for Personal Data Protection (NCPDP). Section 35(2) holds that the Commission 'shall be an autonomous body under the administrative control of the Federal Government'.[95] While this is a practice followed by EU Member States as well, problems arise when we come to the workings and composition of the Commission. As mentioned earlier, the GDPR makes it imperative that the selection process for the Commission is transparent. However, the PDPB 2023 mentions no selection process, simply stating that the Chairman and four full-time Members will be appointed on the Federal Government's recommendation.[96] The vague wording for selection goes against international principles to uphold a transparent selection criteria. In comparison, the United Kingdom publishes a report on the appointment of the Information Commissioner, detailing how the selection was made, the criteria followed, the number of applicants, and reasons for selecting the preferred candidate.[97]

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[92] ibid art 52.
[93] ibid.
[94] ibid.
[95] PDPB, s 35(2).
[96] ibid s 36(1).
[97] House of Commons Culture, Media and Sport Committee, *Appointment of the Information Commissioner* (House of Commons Second Report of Session 2015-16, 2016).

Furthermore, sections 36(4) and 38(3) mention that all members and staff of the Commission will be considered public servants, meaning that they will be subject to all the conditions imposed on public servants. The implications of this are broad, as public servants are often at the government's mercy and must adhere to directives and policies. By making members and staff of the Commission public servants, the government takes away the impartiality required by international data protection standards. The independence of the Commission is further challenged in section 43 which empowers the Federal Government to 'issue policy directives' to the Commission on matters regarding data protection 'as and when required'.[98] The Federal Government 'mandates' the Commission to follow these directives. Under a government that prioritises national security over data protection, such vague clauses can lead to selfish misuse, harming citizens' right to privacy, particularly because section 44(3) allows the government to request any information from the Commission, the nature of which has no restriction. The lack of independence can also hamper international collaboration as section 47 holds that the Commission can only cooperate with foreign authorities and international organisations on matters of data protection, privacy, and theft, subject to the approval of the Federal Government.

4.3 Critical and Sensitive Personal Data

The PDPB 2023 creates two categories of data: 'critical personal data' and 'sensitive personal data'. The former is unclearly defined as personal data retained by the public service provider (any entity that has and deals with personal data while working with the government) and classified as such by the Commission or relates to international obligations. The latter takes from the GDPR and is defined as personal data referring to financial information, health data, CNIC or passport, biometric data, genetic data, religious beliefs, criminal records, political affiliations, caste or tribe, and ethnicity.

Apart from keeping the definition of critical personal data particularly vague, the State limits its processing to servers located within Pakistan.[99] This data localisation requirement allows governments to exhibit control over this data

[98] PDPB, s 43.
[99] ibid s 31(2).

and the service providers controlling it.[100] Critical personal data is anything that the Commission identifies as such. Since the Commission is closely tied to the government and can be mandated to reflect its interests, the government can surveil citizens by declaring data as critical personal and requiring that it remain in the country. Then, using the Commission's access it can obtain citizen data. This complex surveillance mechanism goes against both the right to privacy enshrined in the Constitution and upheld by various judicial opinions and international obligations found in the GDPR and ICCPR. Talking to advocate, data expert, and former visiting faculty at LUMS, Hassan Niazi, we learnt that Pakistan's intention with data localisation has historically been purely for national security reasons, making the localisation requirement much more alarming.

Surveillance of sensitive personal data is more explicit as section 32(2) empowers the Commission to conceive a mechanism to share the data with the government for public order or national security. Concerns regarding the definition of national security have been brought up in this paper and by other academics throughout previous iterations of the PDPB, and the 2023 edition fails to rectify this. This provision allows the government to obtain sensitive personal data at will and without facing accountability because national security is a term defined to serve whatever interest it is pursuing.

4.4 Withdrawal of Consent

Article 7 of the GDPR mentions that the withdrawal of consent shall be as easy as giving consent, often done through one-step and accessible systems. The spirit behind this is to ensure there are no hurdles in withdrawal for a data subject. Although the PDPB 2023 has significantly improved in incorporating international obligations surrounding consent, this principle is missing. Section 6(1) says that a data controller must obtain an individual's consent but does not mention how it should be done and only refers to the fact that it must be 'free, specific, informed, and unambiguous'.[101] In contrast, section 23(1) requires a data subject to give a written notice if they want to withdraw consent.

[100] Mian Sami ud-Din, 'State on Surveillance' *The News* (9 August 2023)
[101] PDPB, s 6(1).

The vague wording leaves the process of procuring consent unclear; if the procurement process is not specified, how will an adequate standard of consent be guaranteed? This leaves citizens' right to privacy prone to surveillance as a manipulation of the process could lead to their data being used without approval. Moreover, the inconsistency between the obtainment and withdrawal processes goes against the requirements set by the GDPR and limits the accessibility of withdrawal. The requirement of a written notice excludes those who are illiterate making it more difficult to withdraw consent than obtain it.

5. CONCLUSION AND RECOMMENDATIONS

Pakistan's surveillance machinery exists so that the State can maintain its overreaching authority through dataveillance and wield the information gained from it to dispense discipline and control. Within this monopoly of power, legitimated by a legislative framework, it is clear that the right to privacy for citizens remains unprotected. All these surveillance actions are justified by the State under the guise of national security and protecting State interests. There are no checks and balances that can regulate State overreach and protect the fundamental human rights of citizens. Moreover, more cognisable effort is required to bring Pakistan's laws in compliance with international human rights standards such as those set out in the ICCPR or the recommendations made by the Human Rights Council that act as guiding principles for States when intruding on citizens' privacy.

On a judicial level, it is integral to establish the necessity and balancing tests with PDPB. With the GDPR, this has become a practice, hence its absence in the Pakistani bill can cause discrepancies. A legal framework influenced by jurisdictions, such as India, can be followed. In *Justice K.S.Puttaswamy (Retd) v Union Of India*, the importance of the right to privacy was acknowledged and a three-fold test was laid down for its restrictions.[102] The test involved checking into the legality of the restriction, checking the need (usually defined

[102] *Justice K.S.Puttaswamy (Retd) v Union Of India* [2017] AIR SC 4161

by the State in their aims), and checking proportionately.[103] Justice Kaul added a fourth dimension: 'procedural safeguards against abuse of interference with rights'.[104]

On another front, removing these laws of State interests requires complicated amendments only possible in a regime concerned about data protection, and even then the process is arduous, dependent on parliamentarians, and can take considerable time to bear fruit. Instead, it is more useful to focus on bridging the gap between the data protection bill and international obligations.

The glaring issue of an independent commission needs to be addressed. According to Advocate Niazi, transparency is an essential ingredient to an equitable data protection framework.[105] He mentions that activists have routinely submitted RTI applications[106] to bodies such as the PTA, but have not gotten any responses due to the lack of an accountability framework through which citizens can exercise agency over these bodies. Such legislative errors cannot be repeated with the new data protection framework.

Advocate Niazi holds that the appointment and removal of a body's members is a crucial consideration when determining its independence.[107] Hence, the NCPDP must ensure these two aspects are not left vague. Legislators can follow in the UK's footsteps and include rules for selecting members and setting up Parliamentary Standing Committees that can prepare reports on the selection criteria and process. In fact, it can look towards the Competition Commission of Pakistan (CCP) as inspiration, which serves a similar regulatory purpose to the NCPDP. The CCP was established under the Competition Ordinance, 2010. It exhibits transparency by detailing the standards to which its members are held and lists down situations under

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[103] Nath K, 'Analysis of Right to Privacy in Modern Era' (*Finology Blog - Latest Updates & News on Current Affairs and Laws in India,* 2020) <https://blog.finology.in/constitutional-developments/analysis-of-right-to-privacy-india?fb_comment_id=3501071956617521_3525643984160318>

[104] Kalyar (n 43).

[105] Interview with Hassan Niazi, Previously Visiting Faculty, Faculty of Law, LUMS (Lahore, Pakistan, 25 November 2023).

[106] Right to information applications under Article 19A of the Constitution.

[107] Interview with Hassan Niazi (n 105).

which someone cannot be appointed or continue as a member; section 14(6) mentions reasons such as being absent from three consecutive commission meetings without taking prior leave or failing to disclose any conflict of interest. The PDPB lacks such standards for NCPDP members and incorporating them could be a useful step towards greater transparency, accountability, and independence.

Furthermore, members and staff should not be considered public servants to ensure impartiality. Once again, inspiration can be gathered from the CCP. Section 14(4) of the Competition Ordinance, 2010, holds that only two members of the commission can be employees of the Federal Government, effectively removing the direct involvement of government personnel within the commission. Section 35(4) mentions that the NCPDP is a statutory corporate body. Employees of statutory corporate bodies, such as the National Bank of Pakistan (NBP) and CCP, are not government or public servants. This was confirmed by the Supreme Court of Pakistan in 2019 after Justice Mansoor Ali Shah ordered that NBP employees remove their occupation as 'Government Employees' from their passports.[108] Hence, members and staff of the Commission do not have to be public servants which can help secure their impartiality.

Sections that allow the government to obtain any information from the Commission should be modified. The European Model sets up SAs for every Member State that comprise the European Data Protection Board. This allows them to make decisions and oversee consistent compliance with the GDPR democratically. Pakistan could mandate independent provincial commissions that together form a similarly independent national commission. This would allow collective deliberation and foresight over government requests and let the independent national commission act as a watchdog to ensure that data is consistently being protected across the country. All government directives and approvals can be filtered through the National Commission to see if they meet data protection regulations.

[108] *Muhammad Naeem v Federation of Pakistan* (2019 CP 4294).

However, as pointed out by Advocate Niazi, such a recommendation is contingent upon whether data protection is a federal or provincial subject.[109]

Moreover, the PDPB should refrain from promoting data localisation policies that permit the government to store important information. To effectively enact them, the country requires the expansive digital infrastructure that it currently lacks. However, it maintains data localisation for national security reasons, prioritising them over 'economic, trade, and human rights interests.[110] Data protection interests should be at the forefront of an internationally compliant data protection bill, which does not have room for data localisation that hinders the rights of data subjects.

To avoid vagueness and further room for surveillance, the bill should clearly define any data categories created or 'national/public interest'. 'Critical personal data' should be defined, either in the bill or through the rules of the Commission, and not left to an arbitrary choice of the independent supervisory authority. Alternatively, the criteria for declaring personal data as 'critical' can be transparently drafted and published in the bill or in the rules. In the same spirit, the process for obtaining and withdrawing consent should be unified to guarantee an equitable procedure with no entry barriers and compliance with international obligations.

Maria Khan, a data privacy legal manager at Securiti, suggests that for substantive modifications, the Ministry of Information Technology and Telecom must consider all perspectives and keep the spirit of international frameworks, such as the GDPR, in mind.[111] But, while borrowing its language, it should be careful not to overpromise, and ground legislation within Pakistani realities. As far as procedural modifications are concerned, she believes that they can be fixed easily if the ministry releases rules and regulations alongside the final data protection act. According to her,

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[109] Interview with Hassan Niazi (n 105).

[110] Nigel Cory, Luke Dascoli and Ian Clay, 'The Cost of Data Localization Policies in Bangladesh, Hong Kong, Indonesia, Pakistan, and Vietnam' (*Information Technology and Innovation Foundation,* 12 December 2022) https://itif.org/publications/2022/12/12/the-cost-of-data-localization-policies-in-bangladesh-hong-kong-indonesia-pakistan-and-vietnam/.

[111] Interview with Maria Khan, Data Privacy Legal Manager, Securiti (Lahore, Pakistan, 28 November 2023).

publishing drafts of the regulations, alongside the proposed bill, can help the ministry make better decisions and gain insight from a plethora of stakeholders, further taking a step towards transparency and inclusivity.

While Pakistan's surveillance network is complex, it suffers terribly from misguided priorities. The evolving data landscape requires more clarity regarding the rights of data subjects and the situations in which these rights can be infringed. It is only natural that a surveillance regime focused on national security and data collection protects citizen rights through a data protection bill. Pakistan has shown considerable promise towards the establishment of a comprehensive data protection infrastructure, however, there is a need to localise the law to fit the country's context. This includes making sure data systems are not so complex that they cannot be implemented, or so vague that they apply to all situations. Legislators should look towards the spirit of international data protection legislation, rather than copy its content, and strike a balance aiming to develop an equitable relationship between State interests and citizen rights.

AUTONOMOUS WEAPON SYSTEMS: BOON OR BANE? THE PAKISTANI PERSPECTIVE

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ABSTRACT

The paper delves into the intricate landscape of Autonomous Weapon Systems (AWS) and their profound implications from the Pakistani standpoint. As States intensify efforts to develop fully autonomous weapons, legal, ethical, and global security considerations come under scrutiny. With challenges arising from rapid technological advancements and the absence of specific treaties for AWS regulation, adherence to existing laws of armed conflicts becomes more significant. The paper explores the global debate on AWS, provides an overview of systems currently under development, and analyses the regulatory framework. Emphasising the need for an adaptable legal framework, it delves into the stance of different States, with a focus on Pakistan's advocacy for a pre-emptive ban. The paper proposes a nuanced approach for Pakistan, balancing ethical concerns with the imperative to stay technologically competitive, suggesting the formulation of a clear national policy on AWS.

KEYWORDS: autonomous weapon systems (AWS), international humanitarian law (IHL), lethal autonomous weapon systems (LAWS), global security, Pakistani perspective.

1. INTRODUCTION

New weapons are set to revolutionise the nature of warfare. A prime focus of States and militaries is on emerging technologies, such as completely autonomous weapons. There is a discernible global trend toward the incorporation of autonomy into weapon systems, signifying a transformative shift in the conduct of warfare. This rapid technological advancement indicates a new era of military capabilities. However, this swift advancement comes alongside increasing calls for regulation of such weapons. While the development of fully autonomous systems remains a distant prospect, it is

still pertinent to analyse their legality. The debate surrounding the lawfulness of autonomous weapons is rife with conflicting ideas and suggestions – ranging from a complete ban on autonomous weapons to non-interference in the sovereign decisions of States. For a country to make an informed decision, several factors must be taken into consideration: State policy, regard for international humanitarian law (IHL) and international human rights law (IHRL), and State technology.

2. AUTONOMOUS WEAPON SYSTEMS: DEFINITION

At present, nearly all existing weapon and surveillance systems are operated with some degree of human oversight and control. Nonetheless, many countries have expressed their intentions to develop systems that possess complete autonomy.[1] While such countries are yet to express their desire to deploy such technologies to 'attack,' even defensive autonomous systems can have far-reaching implications. It is, however, necessary to note in the first place that there is no single all-encompassing definition of autonomous weapon systems (AWS). This is pertinent as there are concerns that, without proper parameters for what falls within the purview of AWS or LAWS (lethal autonomous weapon systems), future regulation can even impact existing weaponry.

The International Committee of the Red Cross (ICRC) defines 'autonomous weapons' as:

> Any weapon system with autonomy in its critical functions—that is, a weapon system that can select (search for, detect, identify, track or select) and attack (use force against, neutralize, damage or destroy) targets without human intervention.[2]

[1] Human Rights Watch, 'Killer Robots: Russia, US Oppose Treaty Negotiations' (*Geneva*, 19 August 2019).

[2] International Committee of the Red Cross (ICRC) 'Autonomy, Artificial Intelligence and Robotics: Technical Aspects of Human Control' (ICRC, 20 August 2019) 5 <https://www.icrc.org/en/document/autonomy-artificial-intelligence-and-robotics-technical-aspects-human-control>.

Many experts contend that under such a definition, there are a number of weapons that may qualify as autonomous weapons, for example, loitering munitions that, once deployed, look for their target,[3] or 'sense and react to military objects' (SARMO) weapon systems that are able to 'intercept high-speed inanimate objects.'[4] These weapons, however, are still operated under some supervision and lack complete autonomy – either in terms of tasks that can be performed, objects that can be targeted, or the context in which they are operated. Thus, these weapons are better classified as 'automatic' rather than autonomous as they operate on a series of pre-programmed series of actions and are incapable of independently gathering new information and adapting their actions accordingly.[5] Consequently, they are deemed to be 'precursors' to fully autonomous weapons systems.[6]

However, AWS are distinct from all existing technological systems. Such weapons are closely tied to artificial intelligence (AI) to aid their critical functions.[7] This can help the machine's decision-making process become independent as it gains evaluative capabilities.[8] The United Kingdom has proclaimed that AWS must possess 'situational awareness' that is similar to a competent human being in a particular circumstance.[9] The fundamental premise behind AWS deployment is to achieve complete autonomy, encompassing all critical functions such as detection, surveillance, targeting, attack, and navigation. The ultimate objective is for these systems to operate entirely without any human 'in the loop,' signifying a stark departure from the

[3] ICRC, 'Expert Meeting on "Autonomous Weapon Systems: Technical, Military, Legal and Humanitarian Aspects"' *ICRC* (Geneva, 26-28 March 2014), 16.
[4] Noel Sharkey 'Towards a principle for the human supervisory control of robot weapons' (2014) 2 Politica & Società 305.
[5] Bonnie Docherty, *Losing Humanity: The Case against Killer Robots* (Human Rights Watch & International Human Rights Clinic Harvard Law School, 2012) 13.
[6] ibid.
[7] Daniele Amoroso, Frank Sauer, Noel Sharkey, Lucy Suchman and Guglielmo Tamburrini 'Autonomy in Weapon Systems the Military Application of Artificial Intelligence as a Litmus Test for Germany's New Foreign and Security Policy' (2018) 49 Publication Series on Democracy 19.
[8] Vincent Boulanin, *Mapping the development of autonomy in weapon systems: A primer on autonomy* (Stockholm: Stockholm International Peace Research Institute, 2016).
[9] United Kingdom Ministry of Defense 'Joint Doctrine Publication 0-30.2 – Unmanned Aircraft Systems' (London: United Kingdom Ministry of Defense 2017) 67.

conventional model of human involvement in the decision-making process of weapon systems.[10]

3. LETHAL AUTONOMOUS WEAPON SYSTEMS CURRENTLY UNDER DEVELOPMENT

Many States are now redirecting their attention towards AWS rather than conventional weapons because they are potentially more efficient. States are now focusing on deploying autonomous weapons in the pursuit of enhancing both defensive and offensive capabilities while minimising human casualties.

Steve Omohundro has highlighted that '[a]n autonomous weapons arms race is already taking place,' and that such weapons 'can respond faster, more efficiently and less predictably.'[11] At the forefront of this paradigm shift are countries like the United Kingdom, United States, Turkey, Israel, Australia, France, Russia, and China. These countries are investing heavily in making their new weapon systems autonomous, underscoring their commitment to staying at the forefront of military innovation.

United States	**France**
AeroVironment Boeing Dynetics FLIR General Atomics Kratos Lockheed Martin Raytheon Textron	Dassault KNDS Airbus (EU) Safran
United Kingdom	**Turkey**
BAE Systems	STM
Russia	**Israel**
Rostec (Klashnikov; Ural Vagonzavod) United Aircraft (Sukhoi)	Rafael IAI Elbit
Australia	**China**
DefendTex Praesidium Global	AV CASC NORINCO

[10] United States Department of Defense 'Directive Number 3000.09: Autonomy in Weapon Systems' (Washington DC: United States Department of Defense 2012).
[11] John Markoff, 'Fearing bombs that can pick whom to kill' *The New York Times* (New York, 11 November 2014).

Above is a list of the companies (and the States in which they are headquartered) which are currently working on autonomous weapon systems and are of high concern.[12] For example, SeaRAM is a guided missile weapon system made by Raytheon, United States. This weapon is 'a supersonic, lightweight, quick-reaction, fire-and-forget weapon designed to destroy anti-ship missiles. The emerging SeaRAM defensive weapon will destroy approaching enemy drones, aircraft, missiles and small boats.'[13] A similar system is the Phalanx which uses a 'radar-guided Gatling gun mounted on a swivelling base' and is 'capable of autonomously performing its own search, detect, evaluation, track, engage and kill assessment functions.'[14] There is also a land-based version of the Phalanx called the Centurian, which performs similar functions.[15] These systems allow a human operator to override the decision to engage a target, and are thus not entirely autonomous. However, the human operator only has 'half a second' to veto the decision taken by such systems and are more likely not to intervene.[16]

Israel Aerospace Industries (IAI) has produced Harpy and Harop, which are categorised as 'fire-and-forget' autonomous weapons.[17] Harpy is a loitering munition system and is perhaps the most cited example of the move towards the development and proliferation of LAWS. Israel has reportedly exported the Harpy to China, South Korea, India, Chile and Turkey.[18] While the company claims that it does have a kill switch in case a soldier wants to abort the mission, the Harpy represents a gradual shift towards greater autonomy in weapon systems. It is described as a 'wide area loitering munition' which can stay aerial for more than two hours in search of targets to destroy –

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[12] Frank Slijper, *Slippery Slope; The arms industry and increasingly autonomous weapons* (Utrecht: PAX for Peace 2019).
[13] Kris Osborn, 'The U.S. Navy's Supersonic SeaRAM Missile System Could be a Game Changer' (*The National Interest*, 26 October 2016) <https://nationalinterest.org/blog/the-buzz/the-us-navys-supersonic-searam-missile-system-could-be-game-18199> .
[14] Phalanx Close-In Weapon System (United States Navy Fact File) <https://www.navy.mil/Resources/Fact-Files/>.
[15] ibid.
[16] Jack M. Beard 'Autonomous Weapons and Human Responsibilities' (2014) Georgetown Journal of International Law 617, 631.
[17] Israel Aerospace Industries, *Harpy Brochure* (2015).
[18] Congressional Research Service, 'International Discussions Concerning Lethal Autonomous Weapon Systems' (*Congressional Research Service*, 14 February 2023) <https://sgp.fas.org/crs/weapons/IF11294.pdf>.

providing it greater autonomy than the aforementioned 'automatic' weapon defence systems.[19]

A recent example of an autonomous weapon system is the Blowfish A3 helicopter drone developed by the Chinese manufacturer Ziyan. While a human operator controls the Blowfish A3 helicopter, the swarm capability of these drones allows them to operate autonomously, maintain their formation, and adapt to changing circumstances by themselves, even if the signal from the human operator is lost. This would potentially allow the Blowfish A3 helicopter drone to be used as one of the first completely autonomous drones.[20]

Similarly, the STM Kargu-2 developed by Turkey is another example of a loitering munition system that operates on a fire-and-forget rule. In 2021, it was reported to the United Nations (UN) that STM Kargu-2 was allegedly used in its autonomous mode to target fleeing soldiers in Libya's civil war.[21] However, the CEO of the company that developed these drones denies such allegations.[22]

Other than these air-based weapons and missiles, countries like the United States, China, and Russia are also focusing on Robotic Combat Vehicles or Unmanned Ground Vehicles (UGVs). In China, a company has developed a medium-sized unmanned ground vehicle capable of transporting ammunition and giving cover fire, known as Mule-200.[23] Similarly, a Russian research agency, ARF, has developed the Marker and Uran UGVs to establish Russia's place in the high-tech arms race.[24]

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[19] Paul Scharre, *Autonomous Weapons and Unintended Engagements* (Center for a New American Security 2016).
[20] Liu Xuanzun, 'Chinese helicopter drones capable of intelligent swarm attacks' *The Global Times* (9 May 2019).
[21] UN Security Council 'Final Report of the Panel of Experts on Libya Established Pursuant to Security Council Resolution 1973 (2011)' (2011) S/2021/229. UN, New York.
[22] Robert F. Trager and Laura M. Luca, 'Killer Robots Are Here—and We Need to Regulate Them' *Foreign Policy Magazine* (11 May 2022).
[23] Bureau, 'Chinese Firm Develops Robotized Unmanned Ground Vehicle' *Defence World* (2 March 2020).
[24] News Desk, 'Russian UGV Developments' *European Security and Defence* (7 November 2019).

The United States, on the other hand, is exploring programs such as the Ripsaw Robotic Combat Vehicle M5, with the support of major arms manufacturer Textron.[25] Countries have also focused on autonomous weapons on the surface of the water as well as underwater. China Shipbuilding and Offshore International Company is developing Jari that is a 'USV is a 20-ton, 15-meter boat that is orders of magnitude smaller than the People's Liberation Army Navy's manned Type -55 destroyer, but has all the same mission areas: anti-submarine, anti-surface and anti-air warfare.'[26] In the United States, the Defence Advanced Research Projects Agency (DARPA) has designed an Anti-Submarine Warfare Continuous Trail Unmanned Vehicle (ACTUV) known as the Sea Hunter**,** and it is capable of travelling the oceans for months without any humans on board.[27]

4. REGULATION OF AUTONOMOUS WEAPON SYSTEMS

While there is no particular treaty designed to regulate AWS, their development and deployment are, nonetheless, governed by the existing laws of armed conflict. Thus, in lieu of a substantive document regulating the design and operational usage of autonomous weapons, States must adhere to the established principles of IHL – distinction, proportionality, necessity and humanity. The foundational framework for these obligations can be traced back to the Hague Conventions of 1899 and 1907 as well as the Geneva Conventions of 1949 and their Additional Protocols of 1977. Additionally, the principles of customary international law (CIL) offer valuable guidance in monitoring States that employ autonomous weapon systems. Furthermore, national-level standards and policies, such as the U.S. Department of Defence Directive 3000.09, play a role in ensuring self-regulation. The recommendations of experts, lawyers, and parties to the UN Convention on Certain Conventional Weapons, 1980 (CCW)[28] can also be used as a basis for

[25] Sydney J. Freedberg, 'Textron Rolls Out Ripsaw Robot For RCV-Light… And RCV-Medium' *Breaking Defense* (14 October 2019).
[26] David B. Larter, 'China is Working on Killer Robot Ships of Its Own' *Defense News* (18 February 2019).
[27] Michael T. Klare, *Autonomous Weapons Systems and the Laws of War* (Washington DC: Arms Control Association 2019).
[28] Entered into force in December 1983, the Convention restricts the use of weapon systems which are either indiscriminate i.e. may cause harm to civilians, or which may cause unjustifiable suffering to combatants.

restraining the development and use of autonomous weapons. Moreover, the Responsibility of States for Internationally Wrongful Acts (2001) imposes reasonability on States to ensure compliance with international law, customs, and general principles and can be used to guarantee accountability for wrongful acts attributable to States.

However, it is vital to recognise that while specific codified laws may facilitate accountability, they can quickly become outdated with the rapid pace of technological advancement. Therefore, States must shift their focus towards adhering to broader and general principles that underpin the existing legal framework. These principles provide an adaptable foundation for assessing the legality and ethics of emerging technologies.

Importantly, there are separate rules governing the development and deployment of weapons. This is also reflected in the stance of certain States claiming that while the development of AWS is legal, whereas their deployment / use is or should be illegal. Like all other weapons, the legality of AWS depends on their characteristics and whether they can be employed in conformity with the rules of IHL, other treaty law, and CIL.[29] Human control then becomes necessary over weapons to make them legal under IHL, as a fully AWS may not be able make the legal judgment required to ensure distinction and proportionality, and may not be able to change its approach if circumstances change.[30]

Under the existing framework, the development of weapons is regulated under Article 36 of Additional Protocol I of the Geneva Convention.[31] This Article creates an obligation to carry out a legal review of all the new weapons made by the High Contracting Parties. However, the Additional Protocol I only requires a national review of weapons, and there is no accountability or enforcement mechanism. Furthermore, there is no concrete source of international law which States that a weapon that has no human control

[29] Neil Davison, 'A legal Perspective: Autonomous Weapon Systems Under International Humanitarian Law', UNODA Occasional Paper No 30 1/2018.

[30] ibid; UN, *Recommendations to Review Conference submitted by the Chairperson of the Informal Meeting of Experts* (Geneva: UN 2016); ICRC, *Expert Meeting on Lethal Autonomous Weapons Systems* (Geneva: ICRC 2017).

[31] Protocol Additional I to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of International Armed Conflict (Adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 ("API"), art 36.

would be illegal. While international bodies like the ICRC may have expertise on the subject, their recommendations are not binding under international law. Therefore, under the current framework, there is no source of international law that explicitly prohibits or regulates the development of LAWS.

States' actions are also regulated by 'principles of humanity and dictates of public conscience.'[32] This rule stems from the Martens Clause,[33] which itself is deemed to be CIL.[34] It has also been considered a source for countering the rapid evolution of military technologies, confirming that the means of warfare are not unlimited and may be subjected to public conscience.[35] Thus, it has been advocated that AWS should be banned even if no explicit rule or treaty currently exists as their operation contradicts these principles.[36] This is especially relevant given the rapid evolution of military technologies, which outpaces the pace of international law development.[37] However, there is no authority which has held that the development of AWS is in contravention of the Martens clause, except for scholarly opinions.[38]

Under the current framework, the use and deployment of AWS would be covered by the legal rules governing the use of force, and on the interaction between IHL and IHRL.[39] IHRL would govern the use of AWS for law enforcement within domestic State jurisdiction. In armed conflict, the rules of IHL and IHRL concurrently apply with IHL being the primary and most

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[32] Rupert Ticehurst 'The Martens Clause and the Laws of Armed Conflict' (1997) 317 International Review of the Red Cross 125, 126.
[33] Protocol Additional I to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of International Armed Conflict (Adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 ("API"), art 1(2).
[34] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Reports 226, 257.
[35] ibid.
[36] Bonnie Docherty 'Losing Humanity: The Case against Killer Robots' (2012) Human Rights Watch & International Human Rights Clinic Harvard Law School 25; ICRC, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare* (Geneva: ICRC 2020) 17.
[37] ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Geneva 1987).
[38] Milena Costas Trascasas and Nathalie Weizmann, *Briefing N°8: Autonomous Weapons Systems Under International Law* (Geneva: Geneva Academy of International Humanitarian Law and Human Rights 2014).
[39] Maya Brehm, *Defending the Boundary: Constraints and Requirements on The Use of Autonomous Weapon Systems Under International Humanitarian and Human Rights Law* (Geneva: Geneva Academy of International Humanitarian Law and Human Rights 2017).

relevant framework for assessing the use of an AWS. However, the use of AWS for any other purposes by a State is governed by IHRL.

AWS must be capable of evaluating and making judgments that comply with IHL.[40] As Sassòli has observed, 'there are many elements that make a human being understand what is/is not a legitimate target, and those factors must be reproduced in a computer program.'[41] AWS must be capable of distinguishing between civilians and combatants, and between civilian objects and military objectives, direct their operations only against combatants and military objectives.[42] In case of doubt, a person or object is to be considered civilian.[43] AWS will also require parties in an armed conflict to take additional precautions when they carry out attacks to avoid and minimise incidental loss of civilian life, injury to civilians, and damage to civilian objects. An AWS will lack the necessary human judgement which would allow it to change course when unforeseeable circumstances arise.[44] In case civilian persons and objects are likely to be incidentally harmed, the principle of proportionality dictates that the 'incidental loss of civilian life, injury to civilians or damage to civilian objects, or a combination thereof' should not be 'excessive in relation to the concrete and direct military advantage anticipated.'[45]

One concern regarding the use of AWS is that it creates an accountability vacuum. Under IHL and international criminal law, 'individuals are criminally responsible for war crimes they commit,' and States do not have criminal liability.[46] There is disagreement as to who will be responsible if an AWS commits a war crime. Some scholars claim that the programmers and manufacturers should be held responsible.[47] Others claim that it would only be fair to hold them responsible if they specifically programmed or designed

[40] Costas (n 38).
[41] M. Sassòli, 'Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified' (2014) 90 International Law Studies Naval War College 327.
[42] API art 48; ICRC, Customary International Humanitarian Law, Volume I: Rules, CUP (2005), (ICRC, Customary IHL) Rule 1 and 7.
[43] API art 50(1) and 52(3).
[44] ibid art 57.
[45] API art 51(5)(b).
[46] ICRC, 'Customary IHL - Rule 151: Individual Responsibility' Volume II, Chapter 43, Section A <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule151>.
[47] Sassòli (n 41) 327.

the weapon to commit war crimes; otherwise, their criminal intent cannot be proven.[48]

The use of AWS for law enforcement and during peacetime is regulated under IHRL. The right to life is inherent in every person, and this right can never be suspended or otherwise derogated from even 'in time of public emergency which threatens the life of the nation.'[49] States have a responsibility to individuate the use of force for law enforcement purposes.[50] As per the UN General Assembly's 'Code of Conduct for Law Enforcement Officials', '[t]he use of lethal force is only justifiable if the particular person that force is directed at poses an imminent threat of death or serious injury.'[51] The Code of Conduct states that human agents should 'continuously, actively, and, arguably, personally' be engaged in 'every instance of force application.'[52] In this context, as Maya Brehm states, '[d]ue to the need to individuate the use of force under IHRL, the scope for the lawful use of an AWS is extremely limited.'[53]

5. STANCES OF STATES

The High Contracting Parties to the CCW formed a Group of Governmental Experts (GGE) at the Fifth Review Conference in 2016 which was tasked to deliberate upon the issue of emerging technologies in the area of LAWS. The GGE first met from 13th to 17th November 2017 in Geneva. The High Contracting Parties to the CCW, at their 2018 meeting, decided that the GGE on LAWS shall meet again in 2019. The first session of the meeting of the

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[48] Schmitt "'Out of the Loop": Autonomous Weapon Systems and the Law of Armed Conflict' (2013) 4 Harvard National Security Journal 278; J. Thurnher, 'Examining Autonomous Weapon Systems from a Law of Armed Conflict Perspective'(2014) in H. Nasu and R. McLaughlin (eds), *New Technologies and the Law of Armed Conflict* (The Hague: TMS Asser Press) 213–18.

[49] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 4(2); Human Rights Committee, *General Comment No. 29, Article 4, Derogation during a State of Emergency* (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11, [7]; Human Rights Committee, *General Comment No. 6, Article 6, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, (1994) U.N. Doc. HRI\GEN\1\Rev.1 at 6, [1]-[3].

[50] Brehm (n 39).

[51] UN General Assembly, 'Code of Conduct for Law Enforcement Officials 1980', A/RES/34/169, art 3.

[52] ibid.

[53] Brehm (n 39).

GGE took place from 25th to 29th March, and the second session took place from 20th to 21st August 2019. The GGE meeting held in 2019 was attended by eighty-three High Contracting Parties, six Observer States, the UN Institute for Disarmament Research (UNIDIR), other international organisations, and non-governmental organisations like 'Association of World Citizens' and 'Campaign to Stop Killer Robots.' Other than these, representatives from some notable universities attended this meeting as well.[54]

New Zealand's Minister for Disarmament and Arms Control shared the country's new policy position on 30th November 2021. In his statement, Phil Twyford stated that '[t]he idea of a future where the decision to take a human life is delegated to machines is abhorrent and inconsistent with [New Zealand's] interests and values, and now [New Zealand will] work with friends and allies to make sure this never comes to pass.'[55] In January 2023, Belgium became one of the first countries to ban the use of LAWS outright. Its Defense Committee approved 'a bill tabled by the parliament's Socialist group'.[56] The ICRC has also recommended that States should adopt new legally binding rules on autonomous weapon systems.[57] On 21st October, for the first time at the UN General Assembly, around 70 States (including United States, United Kingdom, and European States) united and delivered a joint statement on AWS. In their statement, these States agreed on the following:

- 'Recognition that autonomous weapons systems raise serious concerns from humanitarian, legal, security, technological and ethical perspectives.'
- 'Acknowledgement of the need to maintain human responsibility and accountability in the use of force.'

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[54] UNOG 'CCW GGE Participant list' (2019). <https://www.unog.ch/80256EDD006B8954/(httpAssets)/3DBF4443C79AC6ABC12584BE004565B4/$file/CCW+GGE.1+2019+INF.1+Rev.1.pdf>.

[55] The Beehive, 'Government Commits to International Effort to Ban and Regulate Killer Robots.' *The Beehive* (30 November 2021) <www.beehive.govt.nz/release/government-commits-international-effort-ban-and-regulate-killer-robots>.

[56] Nick Amies,'Belgium Upholds Decision to Ban 'Killer Robots.' *The Brussels Times* (15 January 2023) <www.brusselstimes.com/350980/belgium-upholds-decision-to-ban-killer-robots>.

[57] ICRC 'Autonomous Weapons: The ICRC Calls on States to Take Steps towards Treaty Negotiations' *ICRC* (Geneva, 2023) <www.icrc.org/en/document/autonomous-weapons-icrc-calls-states-towards-treaty-negotiations>.

- 'Emphasis on the need for internationally agreed rules and limits – including a combination of prohibitions and regulations on autonomous weapons systems.'[58]

The ICRC President and the UN Secretary General made a joint appeal on 5th October 2023, calling for the urgent need to create new international rules and regulations on autonomous weapon systems. The joint statement included the following:

> 'We must act now to preserve human control over the use of force. Human control must be retained in life and death decisions. The autonomous targeting of humans by machines is a moral line that we must not cross. Machines with the power and discretion to take lives without human involvement should be prohibited by international law.'[59]

China is one of the States advocating for a ban on the use of AWS while permitting their development and production.[60] Australia, on the other hand, has opposed the idea of a new treaty, despite emphasising that all weapons should be deployed under the restrictions imposed by IHL. Australia also discussed its system of control on the use of military force in its document submitted at the GGE meeting held in 2019. Australia proposed that if this system (consisting of nine stages) is used, all the States can ensure that the weapons they are using, including AWS, will operate in a lawful manner without the need for a specific ban.[61] The United States also favoured the use of internal procedures for reviewing and testing weapons and concluded that 'emerging technologies in the area of LAWS could strengthen the

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[58] Ousman Noor '70 States Deliver Joint Statement on Autonomous Weapons Systems at UN General Assembly.' (*Stop Killer* Robots, 23 November 2022) <www.stopkillerrobots.org/news/70-states-deliver-joint-statement-on-autonomous-weapons-systems-at-un-general-assembly>.

[59] ICRC 'Joint Call by the UN Secretary-General and the President of the International Committee of the Red Cross for States to Establish New Prohibitions and Restrictions on Autonomous Weapon Systems.' *ICRC* (6 October 2023) <www.icrc.org/en/document/joint-call-un-and-icrc-establish-prohibitions-and-restrictions-autonomous-weapons-systems>.

[60] Campaign to Stop Killer Robots, 'Convergence on Retaining Human Control of Weapons Systems' (*Stop Killer Robots, 1*2018) <https://www.stopkillerrobots.org/news/convergence/>.

[61] UNOG 'Australia's working paper - Australia's System of Control and Applications For Autonomous Weapon Systems.' Group of Governmental Experts Lethal Autonomous Weapons Systems Convention on Certain Conventional Weapons Geneva (2019).

implementation of IHL' in its working paper submitted to the 2019 GGE meeting.[62] Japan emphasised the need to uphold the principles of IHL in the development and operation of all weapons systems, including LAWS. In their working paper, Japan underscored that violations of IHL through the use of AWS should be attributed to States or individuals, similar to conventional weapon systems.[63]

International organisations also took part in the GGE 2019 meeting and contributed to the debate. On 26th March 2019, Bonnie Docherty from Human Rights Watch said,

> [f]irst, fully autonomous weapons would face significant obstacles to complying with the principles of distinction and proportionality…Second, the use of fully autonomous weapons would lead to a gap in individual criminal responsibility for war crimes…Third, fully autonomous weapons raise serious concerns under the Martens Clause, a provision of IHL that sets a moral baseline for judging emerging technologies.[64]

The ICRC, in their statement, claimed that manipulation in operational parameters like the environment in which the weapon is operated could reduce the risk of violating IHL However, they caveated this by saying the following:

> given the high degree of unpredictability of most real world conflict environments, it is likely that operational constraints alone will only help avoid an unacceptable risk of IHL violations in the narrowest of circumstances, and will generally not be sufficient to ensure compliance with IHL in carrying out an attack with an autonomous weapon system.[65]

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[62] UNOG 'United States Statement - Implementing International Humanitarian Law in the Use of Autonomy in Weapon Systems.' Group of Governmental Experts Lethal Autonomous Weapons Systems Convention on Certain Conventional Weapons Geneva (2019).
[63] UNOG 'Japan's Statement - Outcome Of 2019 GGE and Future Actions of International Community on LAWS' Group of Governmental Experts Lethal Autonomous Weapons Systems Convention on Certain Conventional Weapons Geneva (2019).
[64] Bonnie Docherty, 'Statement on International Humanitarian Law, CCW meeting on lethal autonomous weapons systems' (*Human Rights Watch*, 26 March 2019) <https://www.hrw.org/news/2019/03/26/statement-international-humanitarian-law-ccw-meeting-lethal-autonomous-weapons>.
[65] International Committee for Robots Arm Control, '

The International Committee for Robots Arms Control (ICRAC) proposed a design for weapons in line with IHL: '[f]irst, there should be a focus on what the human operator must do in the targeting cycle…Second, the design of weapon systems must render them incapable of operating without meaningful human control.'[66]

The International Panel on the Regulation of Autonomous Weapons (iPRAW) said in their statement that '[n]ational weapon reviews alone are not sufficient to address those issues. iPRAW considers it important for States Parties to take regulatory action to shape whether and how LAWS are developed. Human control has to be the foundation of any policy that is formulated.'[67]

6. PAKISTAN & AUTONOMOUS WEAPONS

The utilisation of semi-autonomous drones and missiles by the United States for 'counterterrorist' missions in Pakistan, a practice dating back to 2004, has been marked by a history of controversy and concern. Drones were initially used to survey the region between Afghanistan and Federally Administered Tribal Areas (FATA) and later to conduct 'targeted killings' of suspected terrorists. Covered in vague details and secrecy, the strikes – under the guise of being safe and having minimal collateral damage – continued despite much international condemnation.[68] The most recent strike was conducted in 2018,[69] bringing the total number of strikes to 414.[70] Despite claims of precision and efficacy by the United States, it was found that the strikes were incredibly ineffective as they wrongfully targeted civilians. In fact, the unmanned drones were found to be counterproductive, acting as a stimulus

ICRAC statement at the March 2019 CCW GGE' (*International Committee for Robot Arms Control*, 26 March 2019) <https://www.icrac.net/icrac-statement-at-the-march-2019-ccw-gge/>.

[66] ibid.

[67] ibid.

[68] News Desk, 'Targeting Pakistan: UN rights panel condemns use of drones' *The Express Tribune* (24 September 2014).

[69] Kay Johnson, 'Pakistan condemns U.S. drone strike inside its territory' *Reuters* (24 January 2018).

[70] Peter Bergen, David Sterman, Melissa Salyk-Virk 'The Drone War in Pakistan – Counterterrorism Wars' *New America* (17 June 2021) <https://www.newamerica.org/future-security/reports/americas-counterterrorism-wars/>.

for people to plan terrorist attacks as revenge after living in fear and watching hundreds of innocent community members die.[71]

While the debate and apprehension surrounding semi-autonomous drones have been profound, the advent of AWS has amplified these concerns exponentially. Pakistan's stance on LAWS remains resolute, advocating for an outright ban on such technology. It is feared that these weapons will amplify conflicts, alter the nature of conflicts, and pose serious impediments to accountability for the use of force.[72] Pakistan contends that the development of LAWS poses a substantial risk of non-compliance with IHL as these are highly likely to violate the principles distinction and proportionality. The same was presented in a special report of the UN in April 2013.[73]

Pakistan was one of the first Global South States to call for such a ban on LAWS and remains an active advocate of a pre-emptive ban.[74] Pakistan additionally issued a statement as the representative of the Organisation of the Islamic Conference, an entity comprising over 50 Member States. This statement conveyed a critical message emphasising the transformation of warfare's fundamental nature when human control over the use of force is relinquished. Such a shift opens the door to a concerning scenario characterised by an 'accountability gap.'[75]

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[71] James Cavallaro, Stephan Sonnenberg, and Sarah Knuckey, *Living Under Drones: Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan* (International Human Rights and Conflict Resolution Clinic, Stanford Law School, NYU School of Law, Global Justice Clinic 2012) 131.

[72] UNGA First Committee: Thematic Debate on Conventional Weapons 'Statement by Mr. Khalil Hashmi, Counsellor, Permanent Mission of Pakistan to the UN, New York' (29 October 2013) Sixty-Eighth Session of the General Assembly: Thematic Debate on Other Disarmament Measures and International Security.

[73] UNGA 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' A/HRC/23/47 (9 April 2013).

[74] Ingvild Bode 'Norm-making and the Global South: Attempts to Regulate Lethal Autonomous Weapons Systems' (2019) 10(3) Global Policy 359, 361; Informal Meeting of Experts on Lethal Autonomous Weapon Systems, *Statement by Ambassador Tehmina Janjua, PR of Pakistan* (*UNODA*, 11-15 April 2016) <https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-_Informal_Meeting_of_Experts_(2016)/2016_LAWS%2BMX_GeneralExchange_Statements_Pakistan.pdf>.

[75] Government of Pakistan, 'Statement to the UNHRC on behalf of the Organization of the Islamic Conference' *Stop Killer Robots* (30 May 2013) <http://stopkillerrobots.org/wp-content/uploads/2013/05/HRC_Pakistan_OIC_09_30May2013.pdf>.

Pakistan is the first Non-Aligned Movement (NAM) group member to serve as a CCW Review Conference (RevCon) president. Ambassador Tehmina Janjua, Pakistan's disarmament representative, presided over the CCW's Fifth RevCon in December 2016. At this conference, many States supported the ban on LAWS. Pakistan, along with 13 other States, has also called for pre-emptive restrictions on LAWS. Affected by the drone strikes of the United States, Pakistan still faces consequences within its own borders and, thus, questions the legality and morality of such weapons.[76] It has, therefore, argued for legally binding instruments that pre-emptively ban the advancement and utilisation of such weapons as reflected by the working paper submitted calling for the Conference on Disarmament to address 'the security and stability implications of military applications of AI and autonomy in weapon systems.'[77] The stance is in line with Human Rights Watch and the UN, which oppose the development of LAWS and invoke the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (or the Ottawa Treaty) which bans naval and anti-personnel mines (a subcategory of autonomous weapons) as precedent. Pakistan is not a Party to the Ottawa Treaty but holds the same view.

Pakistan considers armed drones and lethal autonomous robots (LARs) as some of the most concerning weapons, owing to the prospects of their upgradation to autonomous systems.[78] Pakistan has consistently pushed for a consensus and clarity of the definition of AWS.[79] Pakistan believes that in the desperation of war, LAWS could be the most inhumane weapon. In addition to a call for a complete ban on a legal basis, it also states that 'LAWS are by nature unethical' and 'irrespective of the degree of sophistication, they cannot be programmed to comply with International Humanitarian Law.'[80]

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[76] Informal Meeting of Experts on Lethal Autonomous Weapon Systems, 'Intervention of Pakistan - Informal consultations' Notes by the Campaign to Stop Killer Robots (11 November 2013) 23.
[77] Permanent Mission of Pakistan to the UN, Working Paper by Pakistan on 'Addressing the Security and Stability Implications of Military Applications of Artificial Intelligence (AI), and Autonomy in Weapon Systems' (21 July 2023).
[78] UNGA (First Committee: General Debate), *Statement by Ambassador Zamir Akram, Permanent Representative of Pakistan to the UN* (Geneva, 16 October 2013).
[79] Informal Meeting of Experts on Lethal Autonomous Weapon Systems, *Statement by Irfan Mahmood Bokhari, Second Secretary* (Geneva, 13 April 2015).
[80] ibid.

Accordingly, it states that LAWS will 'bring down the limit of going to war' and create a responsibility vacuum as it would become complicated to track the responsible person for actions of such systems.[81] This scenario, Pakistan contends, would deprive soldiers and non-combatants of the protections afforded by international law, undercutting the notion that LAWS would be a benefit to the world.[82]

In 2018, Pakistan reiterated that the rapid technological advancement of military weapons carried with it 'serious implications.'[83] The statement on behalf of the country's Ministry of Foreign Affairs also noted that such autonomous weapons add a dangerous dimension to the current arms race. Thus, Pakistan called for a moratorium to be placed on the production of AWS until a framework could be devised.[84]

Notably in 2019, a Regional Meeting on Lethal Autonomous Weapons Systems was organised in Islamabad. The gathering brought together representatives from eight Asian states[85] and the Campaign to Stop Killer Robots to generate regional support for a legally binding document on LAWS. The event concluded with a declaration recognising the need to increase national and international outreach and increase the membership of the campaign.[86]

Pakistan's ambassador, Mr. Zaman Mehdi, speaking at the 2022 CCW meeting, emphasised the need to preserve the 'balance between military necessity and humanitarian concerns' in the CCW.[87] Regarding LAWS,

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[81] Gulshan Bibi 'Implications of Lethal Autonomous Weapon Systems (LAWS): Options for Pakistan' (2018) 2(2) Journal of Current Affairs 18, 38.
[82] Convention on Conventional Weapons Meeting of High Contracting Parties, *Statement of Pakistan by Ambassador Zamir Akram, Permanent Representative* (Geneva, 14 November 2013).
[83] UNGA First Committee: Disarmament and International Security, *Statement by Mr. Husham Ahmed, Director (Arms Control and Disarmament), Ministry of Foreign Affairs* (Geneva, 30 October 2018) Seventy-Third Session of the General Assembly: Thematic Debate on Other Disarmament Measures and International Security.
[84] Web Monitoring Desk, 'Pakistan calls for moratorium on production of Lethal Autonomous Weapon Systems' *The Nation* (01 November 2018).
[85] Afghanistan, Azerbaijan, Japan, Kazakhstan, Kyrgyzstan, Nepal, Pakistan, and Sri Lanka.
[86] Sustainable Peace and Development Organization (SPADO) 'Civil Society Declaration - Regional Meeting on Lethal Autonomous Weapons Systems' (Islamabad, 2019).
[87] Zaman Mehdi, 'Statement by Ambassador Zaman Mehdi, Deputy Permanent Representative at the Annual Meeting of High Contracting Parties to Convention on Certain Conventional Weapons

Pakistan called for legally binding international rules due to their rapid technological advancements and significant implications. Pakistan committed to working with other States to ensure the Convention's sustainability and effective implementation, focusing on emerging technologies related to LAWS.

At the 2023 CCW GGE meeting, Pakistan submitted a proposal outlining the need for an international legal framework regarding LAWS due to the challenges, risks, and dangers they pose.[88] Pakistan emphasised the urgency of developing an international legally binding framework for LAWS under the CCW, stating that this framework should include prohibitions on the development, deployment, and use of LAWS that do not comply with IHL principles. These include prohibitions on weapons lacking 'human control over the decision to use force' or causing excessive harm to civilians.[89] The proposal also suggests restrictions and regulations for LAWS that do have human control, ensuring that their use adheres to IHL standards. The document underscores that the failure to establish clear legal norms for LAWS could lead to dire humanitarian consequences, provoke an arms race, weaken arms control efforts, and jeopardise global security. Therefore, Pakistan urged the CCW GGE to develop a comprehensive normative framework to address these challenges and concerns associated with LAWS effectively.

7. THE WAY FORWARD: CONCLUSION AND RECOMMENDATIONS

Pakistan faces a complex and strategically sensitive dilemma regarding its policy on AWS. By being one of the most vocal countries that oppose AWS,

(CCW), 16 November 2022' (Speech delivered at Annual Meeting of High Contracting Parties to Convention on Certain Conventional Weapons (CCW), 16 November 2022) <https://reachingcriticalwill.org/images/documents/Disarmament-fora/ccw/2022/hcp-meeting/statements/16Nov_Pakistan.pdf>.

[88] Government of Pakistan, 'Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons System', Geneva, 6-10 March, and 15-19 May 2023, Item 5 of the Provisional agenda, CCW/GGE.1/2023/WP.3 (6 March 2023). <https://reachingcriticalwill.org/images/documents/Disarmament-fora/ccw/2023/gge/documents/Pakistan_March2023.pdf>.

[89] ibid.

Pakistan will not be able to justify any future development of such systems. India, on the other hand, continues its research on the development of this technology, and if it succeeds, it will put Pakistan at a disadvantage, given the unique security situation in the region.

Since the proliferation of AWS seems inevitable in the militaries of leading powers,[90] Pakistan will have to adopt a nuanced and flexible approach by shifting to a more moderate stance on the legality of AWS. One such approach can be the continuation of the call for a pre-emptive ban on completely autonomous weapons, on ethical and legal grounds, while taking a more lenient stance on the development of semi-autonomous weapons. The critical distinction is with regard to who makes the decision to deploy lethal force, i.e., as long as the decision to deploy force is made with human intervention, the weapon would be allowed. However, if that decision is taken by the machine itself, Pakistan will be able to continue its opposition based on the inviolability of human dignity and the accountability vacuum such weapons will create.

Alternatively, Pakistan could take a cue from China's approach, which allows for the research and development of such weapons to explore their potential but opposes the deployment of such weapons. This will allow Pakistan to pursue research and development of such weapons, which will allow them to explore the alternate uses of such technologies, for example, in surveillance and reconnaissance. This should also allow Pakistan to call for regulations on the use of such weapons in peacetime for law enforcement purposes.

A national policy for the use and development of AWS will have to be formulated that ensures that emerging technologies comply with the duty to individuate force and ensure that no person who cannot be legally harmed is in danger. This policy should also lay down the characteristics that would render a weapon illegal when a legal review is conducted as per Article 36 of API, to give more meaning to that provision. This would provide a practical framework for evaluating the legality of emerging technologies.

[90] Bibi (n 81) 38.

While the development and deployment of completely autonomous weapons appear to be concerns of the future, the rapid advancements in artificial intelligence technology suggest that they could become a tangible threat in the near future. Leading technology developers are already in an arms race to take humans out of the loop and make weapons completely autonomous. Therefore, it is necessary that Pakistan formulates a clear stance and policy on such technology. This policy needs to be consistent with the earlier position taken by Pakistan while also being pragmatic and forward-thinking. Such a policy would permit Pakistan to explore emerging technologies, ensuring it is not left at a disadvantage when other nations incorporate AWS into their military strategies. It should also provide room for Pakistan to continue its opposition to the use of such weapons based on ethical and legal concerns.

PERSONHOOD AS 'TRANSITIONAL JUSTICE': EMANCIPATING INDIGENOUS CLAIMS TO THE ENVIRONMENT

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ABSTRACT

The paper seeks to introduce theoretical concepts in environmental law and connect them with juridical practices to study the merits and possibilities of an environmental personhood regime. The first part of the paper explains the historical roots of environmental degradation, including mass extractive colonial practices and draconian protectionist laws, which pushed environmental stakes away from indigenous communities. The paper then introduces the reader to transitional justice as an alternative imagination to environmental law, focusing on reclaiming indigenous rights and claims over the environment. Finally, and most extensively, environmental personhood, i.e., vesting legal rights to environmental sites themselves, is analysed in the context of this environmental reclamation by indigenous peoples. Insight is offered into whether legal personhood to environmental sites has succeeded in indigenous protection and how the regime can and should evolve. By critically examining the prospect of environmental personhood in the Global South, the paper ascertains an alternative to the status quo of environmental courts and other policy practices in the Global South.

KEYWORDS: environment, personhood, transitional justice, Global South, environmental rights, indigenous peoples.

1. INTRODUCTION

Environmental degradation has increased manifold over the last two centuries. As a result, humanity must confront questions of responsibility for the damage, the mitigation of future damage, and the restoration of damaged natural resources. Rather than viewing these questions in isolation, this paper seeks to carefully position the history of land, air, and water degradation as both a historical wrong and a continuing process of hyper-capitalist

intervention. The primary focus is on the environmental destruction in the Global South, and by extension, on its basis in imperialism. By acknowledging the imperialist roots of this 'man-made' disaster, it becomes increasingly apparent that modern litigation modelled upon the Anglo-American tradition is inadequate in truly emancipating the environment and communities associated with it. Therefore, as an alternative legal imagination, environmental personhood – although unlikely to replace the developmental approach – fundamentally restructures the environmental legal system in the Global South by promoting litigation, transitional justice and reparations, and re-empowering indigenous communities, can potentially protect the environment.

Exploitative colonialist economic systems and the mass-scale plundering of resources from the colonies in the Global South have resulted in long-term challenges in post-colonial States, and the modern environmental crisis is a consequence of the historicity of these 'policies'. Even after the decolonisation of countries in the Global South, the remnants of imperialism last in the independent nation-States in newer forms, encompassing colonial-era laws, political systems, economic institutions, and neocolonialism, leaving them to tackle not only the travesties of the past but also their consequences in the present. The modern-day environmental challenges are not merely physical but also have the social, cultural, economic, and psychological underpinnings in the damages faced by the indigenous communities.[1] Hence, justice theories need to include the fourth dimension, the vitally important 'socio-ecological' realm, if they are to serve as conceptual resources for advancing indigenous peoples' rights and needs related to their environments.[2] It is important to understand the link between the environment and imperialism for a deeper understanding of the contemporary environmental crisis and to devise more pragmatic solutions to overcome the environmental problem. This root cause approach will help identify an accurate account of the origins of environmentalism in the post-colonies emanating from policies in the West. It will also provide an

[1] Joseph Murphy 'Environment and Imperialism: Why Colonialism Still Matters' (2010) Sustainability Research Institute University of Leeds 4,7.
[2] Lana D. Hartwig, Sue Jackson, Francis Markham and Natalie Osborne 'Water Colonialism and Indigenous Water Justice in South-Eastern Australia' (2022) 38(1) International Journal of Water Resources Development 30, 30

understanding of the legacy of colonialism and how it continues to shape contemporary environmental challenges through processes of imperialism operating today.[3]

2. THE COLONIAL ANTECEDENTS OF ENVIRONMENTAL DESTRUCTION:

Colonialism refers to a period of formal political control over lands and exploitation of their resources for economic gains. Colonisers saw themselves as chosen men of God.[4] The facade of Christian obligation behind their expeditions of seeking control of frontiers which they considered uncivilised, barbarous, and in need of saving.[5] George Muller, a Christian evangelist, was unmistakably clear of this notion and said:

> Humanity must not, cannot allow the incompetence, negligence, and laziness of the uncivilised peoples to leave idle indefinitely the wealth which God has confided to them, charging them to make it serve the good of all.[6]

Hence, the indigenous people of the colonised lands were seen as less than 'human' and material resources to be exploited. Such categorisation alienated indigenous communities from their ancestral lands and resources, allowing unquestioned damage to the environment and natural sites.

Moreover, an important process that connects environmental degradation to colonialism is the commodification of nature for the purpose of commerce. The colonial economy and productive enterprises depended on commodities, such as tea, coffee, cotton, wool, sugarcane, lumber, rubber, tobacco, gemstones, and metals, which were exported from the colonies to Europe, where they were consumed in high demand.[7] Productive frontiers created plantation and pastoral enterprises, resulting in adverse effects to indigenous people, the natural environment, and the land in different ways. Such appropriation of land, wholesale modification of the indigenous ecology, and

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[3] Murphy (n 1) 4.
[4] Roxanne Dunbar-Ortiz, *An indigenous peoples' history of the United States* (Beacon Press 2023) 48.
[5] ibid.
[6] Robin DG Kelley, Aimé Césaire, and Joan Pinkham, *Discourse on Colonialism* (New York Press 2000) 39.
[7] Dunbar-Ortiz (n 4) 24.

consumerism of natural resources - concepts unfamiliar to indigenous people – deprived them of their right to these resources of their indigenous lands. Moreover, the extraction, processing, and packaging of goods for export created a colossal environmental footprint, while colonialism's commercial endeavours extended to ports and shipping channels that polluted indigenous waters.

Technology and modern agriculture practices subjugated the environment to what benefitted the larger colonial agendas. Technology and infrastructure were particularly used to control the flow of water in the colonies. They were considered more efficient ways of water resource management than existing indigenous approaches. Similarly, European agricultural practices, techniques, and agro-chemicals were imposed to enhance agricultural production. While such interventions were initially efficient for colonial interests, they resulted in lasting consequences for the indigenous communities.

Such effects can be seen in former colonies which have modern day effects as well. For example, in India, the British colonial policies caused food insecurity by reorienting domestic agriculture towards overseas markets, prioritising cash crops like cotton, jute, and indigo over staple food crops that were essential to meet consumption needs of the local populations.[8] The commodification of land for cash crops often resulted in monoculture practices that depleted soil fertility. Moreover, over-vegetation in the pursuit of meeting the requirements of global markets also resulted in soil exhaustion and disruption of local ecosystems and biodiversity.[9]

Similarly, in Egypt, the construction of large dams by colonial administration contributed to salination problems, creating a dependency on agricultural chemicals to prevent the Nile's annual inundation of surrounding land and silt deposition.[10] This, in turn, significantly impacted the agricultural practices and sustainability in Egypt.[11] In the aftermath of colonial rule, many former colonies faced the challenge of rehabilitating degraded soils because of the

[8] David Washbrook 'The Commercialization of Agriculture in Colonial India: Production, Subsistence and Reproduction in the 'Dry South' (1994) 28 Modern Asian Studies 129, 130
[9] ibid 158.
[10] Lotte Hughes and William Beinart, *Environment and Empire* (OUP 2007) 130-147.
[11] ibid.

intensive cultivation for export-oriented agriculture. The prioritisation of profit over sustainable land management left a legacy of impoverished soils incapable of supporting diverse ecosystems or traditional agricultural practices.

It is crucial to note that colonialism strategically employed legal and policy frameworks in collaboration with State authorities and governments to legitimise commodification and exploitation of nature for colonial commerce to operate beyond mere piracy and plunder. The colonial authorities were aware of the unprecedented environmental degradation of the colonised lands, and quite paradoxically, the impetus to conserve the environment for longer-term human use was a product of the colonial mindset to ensure their economic advantage. However, the colonial environmental policy further alienated the land from indigenous communities through a process called 'ecological enclosure', under which local people were declared responsible for ecological destruction and incapable of managing their resources effectively.[12] Ecological enclosure encompasses various policies and practices with widespread and long-term consequences for indigenous communities and their land. European colonisers in southern Africa, particularly the Dutch East India Company and later European settlers, also introduced such policies and practices to effectively control the land resources which had profound ecological implications for indigenous people.[13]

The imposition of European land tenure systems, farming methods and the establishment of reservations disrupted traditional nomadic herding practices and indigenous agricultural systems. The Khoikhoi, San, and Bantu-speaking communities of southern Africa, who were traditionally pastoralists, were forcibly displaced and settled into fixed areas.[14] It also resulted in overgrazing and soil degradation of the lands in which natives were forced to settle in with their animals. As the European colonisation expanded into the interior of Africa, it encroached upon the previously untouched landscapes and caused dispossession of land and resources for the indigenous communities. Later,

[12] Robert Cribb 'Conservation in Colonial Indonesia' (2007) 9(1) Interventions 49, 50-61.
[13] Catherine M Coles 'Land reform for post-apartheid South Africa' (1993) 20 BC Envtl. Aff. L. Rev. 699, 703-704.
[14] ibid 703.

the establishment of reserves and the denial of land rights to black South Africans under land policies during the apartheid regime further severed the connection of native populations to the environment and traditional ways of living.[15]

European colonial powers subverted indigenous practices and knowledge in favour of extractive industries. In the Amazon rainforest, indigenous communities traditionally practiced agroforestry and cultivated crops beneath the canopy.[16] The arrival of European colonisers, however, led to mass clear-cutting for monoculture plantations, which disrupted not only the environment but also the intricate local knowledge systems of indigenous peoples. The alienation of indigenous communities from their lands during colonial rule was not only an act of dispossession but a deliberate strategy to weaken traditional connections to the environment. This perpetuated a mindset that prioritised economic gain at the expense of both indigenous communities and the environment. Colonisation, therefore, not only destroyed the landscape, but also distorted the relationship between indigenous peoples and their environment, leaving a legacy of environmental challenges that continues to be felt in the Global South.

This imperialist conceptualisation of environmental use and 'access' persists in more complex ways in contemporary times, both in terms of consumer-centric 'lifestyle choices' and the larger role of transnational corporations and their subsidiaries that function with relative impunity to wreak environmental havoc upon 'developing States'. This insatiable capitalistic appetite of global economies and corporations is firmly rooted in exploitative practices that prioritise profit over environmental sustainability. The exploitation of nature and degradation of the environment in the form of mining for raw material and mineral reserves which started during African colonisation continues even today under the banner of ecological imperialism. Large-scale mining in African countries serves the interests of modern day industrialism and capitalism, and has wreaked havoc on the ecosystem of mining communities,

[15] ibid 712-716.
[16] Nidia Catherine González and Markus Kröger 'The potential of Amazon indigenous agroforestry practices and ontologies for rethinking global forest governance' (2020) 118 Forest Policy and Economics 102257, 102258-102260.

their livelihood strategies, and their connection with their land.[17] Moreover, the neocolonial continuation of exploitative colonial agricultural and industrial practices further perpetuates environmental degradation in post-colonial landscapes in the form of deforestation, soil degradation, water pollution, depletion of biodiversity and disruption of ecosystems. These environmental challenges highlight the persistent influence of imperial economic interests on the ecological well-being of regions, particularly the Global South, that are striving to meet contemporary global market demands.[18]

3. MODERN CAPITALISM AND THE REGIME OF ENVIRONMENTALISM

The arguments presented above prove the critical and interdependent relationship between the environmental crisis and colonialism. Thus, it is imperative to acknowledge that the consequences of colonialism are prevalent for indigenous people and nature around the world, in the subtler form of imperialism today. and need immediate redress. Modern-day imperialism predominantly manifests itself in the form of global capitalism through both consumer choices and corporate endeavours. Societies and environments were modified by newer technologies, practices, and ideologies of living, which have become normalised around the world and contribute to maintaining the hegemony of colonialism. An illustration of these fundamental lifestyle changes can be witnessed in the evolution of wool consumption during colonisation, which continues to influence the modern-day consumer behaviour and demand under capitalism.

In the 19th century, increased wages and improved living standards enhanced people's purchasing power and modified consumer choices, thus shifting the notions of what is essential to live a normal and pleasurable life.[19] Industrial advancements enabled larger quantities and different types of cloth production, which caused a boom in wool exports from colonies to satisfy the demand. Hence, millions of fine-wooled merino sheep were introduced

[17] Jasper Abembia Ayelazuno and Lord Mawuko-Yevugah 'Large-scale mining and ecological imperialism in Africa: the politics of mining and conservation of the ecology in Ghana' (2019) 26(1) J Polit Ecology 243, 243-245.
[18] Washbrook (n 8) 155.
[19] C.B Macpherson, *The Political Theory of Possessive Individualism* (OUP 1962) 176, 177.

artificially in colonies and used for wool harvesting, which exhausted natural pastures as these sheep were more aggressive grazers than indigenous animals.[20] Over time, the cloth industry caused severe soil run-off and erosion, affecting the natural ecosystem and transforming the environment of colonies. The colonialism-driven changes in metropolitan centres were equally profound in the colonial periphery, and their mutual interactions were significant.[21] Such lifestyle changes extend to most commodities visibly because of the shift from a raw material-based industry to a manufacturing industry of readily accessible 'products'. The overarching observation of such a 'global' lifestyle shift is that the empire revolutionised the way of life of both the colonisers and the colonised, which remained a reality even after the colonies' independence. The consumerism that emerged during the Industrial Revolution has become an essential thread of the modern social fabric and causes different environmental challenges.

Furthermore, a new form of imperialism operates at the global level that defines the neo-colonial experience of the Global South due to the extra-territorial impact of multinational corporations (MNCs). The countries of the Global South are still recovering from the economic effects of colonisation and rely on industrialisation and foreign investment for their development. National development strategies exploit the peripheries of so-called post-colonies and have been likened to 'internal state colonialism'.[22] Developing countries are home to the global supply chains of multinational enterprises because of lower labour costs, cheaper raw materials, untapped natural resources, and ineffective domestic mercantile laws. The Bhopal Gas disaster in India and oil spills in Nigeria are a few examples of some of the deadliest ecological disasters caused by MNCs in developing countries.[23] However, the MNCs and their home countries turn blind eyes to man-made environmental catastrophes leaving the victims with devastated lands and inadequate compensation.

[20] Leigh Dale, *Empire's Proxy: Sheep and the Colonial Environment* (Brill 2007) 1, 2.
[21] Richard Drayton, *Nature's Government: Science, Imperial Britain, and the 'Improvement' of the World* (Yale University Press 2000).
[22] Murphy (n 1) 23.
[23] Martin Khor 'The Double Standards of Multinationals', *The Guardian* (London, June 25 2010).

Conventional litigation has had limited success in bringing about justice or compensation for communities and their natural environment. This is because of legal principles like *locus standi*, and a lack of litigatory and judicial awareness on the subject particularly in the Global South. MNCs have been held accountable in some instances, especially within their own States. A prominent example is one in which Walmart was asked to pay $81 million for handling hazardous substances in their stores as a violation of the federal Clean Air Act in the US.[24] Nevertheless, the existing environmental legal order has been insufficient in dealing with this transnational phenomenon despite some momentum in the Global North.

Consequently, environmental tribunals have attempted to fill the gap in the development of environmental law as specialised judicial and administrative decisions bodies. There is however a key issue with a regime that solely relies on specialised 'tribunals' as a universalist solution to the problem. In many instances of environmental policy creation, judges from ordinary courts would act as the presiding authorities for these tribunals. This is not a problem in itself; the judiciary, in the ordinary sense, is equipped to handle subject matters that are expansive and wide-ranging. Yet, it has been purported with the growing advent of climate science that, unlike most other subject matters, the environment requires a fundamental resort to technical science.[25] This is also in line with international law principles like the precautionary principle or sustainable development, which require a particular scientific and technical approach to the question.[26]

In the Global South, there is an inherent limitation in finding enough members of the judiciary (or otherwise) that have a sufficient understanding of handling questions of environmental disasters, climate justice and ascertaining the scientific evidence in the relevant case. This is primarily an issue of capacity-building noted in China following its move to protect its 'ecological civilization':[27] as China created specialised environmental panels,

[24] *The People v Walmart Inc* [2020] A155886 (Cal Ct App)
[25] Brian J Preston 'Characteristics of successful environmental courts and tribunals.' (2014) 26 Journal of Environmental law 365, 378.
[26] ibid 389.
[27] Rachel E Stern 'The political logic of China's new environmental courts.' (2014) 72 The China Journal 53, 58.

it faced the inevitable issue of creating a regime that, without a larger capacity in environmental litigation and justice, faced immense bureaucratic challenges. While China has since recovered to create one of the largest environmental circuit court networks in Asia, that is an economic question rather than simply one of improved policy since 2003. However, as of today, the Chinese environmental regime has been at the forefront of exercising criminal jurisdiction of environmental crimes[28] which has been successful in holding large corporations accountable. Nevertheless, this limitation of specialised expertise and knowledge in the Global South has inevitably meant that constitutional courts, with much more significant funding, access and capacity have been more instrumental in tackling legal environmental questions of significance.

Upon examining the environmental tribunals regime in numerous Global South States, it is evident that it operates closely in line with how constitutional courts function. Constitutional courts in the Global South have been the flagbearer of environmental justice, including expansive interpretations of constitutional rights to include a right to the environment.[29] Such interpretations are imperative to an environmental transitional justice model as it would require a similar creative interpretation of rights and responsibilities as the higher courts in States like Pakistan and the Netherlands have done.[30] Yet, a simple top-down approach by the higher constitutional courts is insufficient. The higher courts with immense case backlog in the Global South are not as accessible for personalised environmental claims as a small environmental tribunal may be. Secondly, in most of these cases, this liability is vested in governmental authority[31] that is pushed to do more. As a result, other contributors like MNCs are simply not deemed as relevant when superior courts interpret and create environmental 'rights'.

Therefore, environmental tribunals are merely administrative bodies, where investigative procedure trumps substantive rights. Therefore, the evidentiary

[28] ibid 67.
[29] Robert V Percival 'The Greening of the Global Judiciary.' (2016) 32 J. Land Use & Envtl. L. 333, 334.
[30] ibid.
[31] ibid 342.

requirements of an environmental suit, coupled with the lack of extra-territorial jurisdiction of these tribunals and even superior courts to indict MNCs, limit the efficacy of providing true 'environmental justice'.[32]

4. PERSONHOOD AND TRANSITIONAL JUSTICE AS AN 'ENVIRONMENTAL FRAMEWORK'

As gathered from the discussion, the environmental crisis requires pragmatic interventions to rectify historical injustices, improve the present, and ensure a sustainable future. Transitional justice is one theoretical model that justifies the need for rectifying these historical and current wrongs to the environment. Using this framework, environmental reparations can serve as restitution for indigenous communities, which will be highlighted later in the article. However, reparations are rooted in the past experiences of communities and hold a symbolic value instead of offering a futuristic solution to environmental issues. Within the model of transitional justice, the concept of granting 'environmental personhood' to natural sites offers an innovative approach to environmentalism, potentially establishing a new environmental order in the Global South. Unlike the post-colonial adoption of Anglo-American legal traditions and environmental policies that overlook historical environmental degradation and the rights of indigenous communities, 'environmental personhood' integrated with transitional justice can pave the way for real emancipation for both communities and nature.

Environmental personhood is the granting of legal personhood for environmental sites to grant them rights to initiate litigation. Similar to company law, environmental sites can, like companies, sue in their own right, and in turn, be sued. This legal 'persona' means that the site is registered, much like a company, and in some sense, is equivalent to the rights created by virtue of citizenship, which make 'citizens' of a State legal subjects.[33]

[32] Marilyn Grace Lee 'How Environmental Tribunals Contribute To Important Advances in Environmental Laws' (2012) University of Toronto 43
[33] Matthew Miller 'Environmental Personhood and Standing for Nature: Examining the Colorado River Case' (2018) UNHL Rev 17, 355-357.

The historical injustices both to the environment and its indigenous caretakers meted out by the colonial expansionist project reflect several salient observations. Firstly, it reflects the inherent limitation of using the same colonial structures, like the law, as the sole mechanism to protect future environmental claims. This is because the colonial expansionary laws have themselves separated the individual from the environment as a disjointed subject, whose only interaction with the environment is then perceived to be a transactional one.[34] For example, the relationship of the national reserve parks in former African colonies is seen largely in the same structure as separating the indigenous claims to the environment and segmenting environmental subjects as objects of science and protectionism.[35]

A more pertinent example to this is the regime of riparian rights. In India for example, the principle of upper and lower riparian is legislated through the Madhya Pradesh Irrigation Act, the North India Irrigation and Drainage Act and other similar statutes.[36] The underlying important point is highlighted as 'a vested right to the water' as 'a form of private property'.[37] Therein, private property replaced any indigenous claim to the river or any other natural body for that matter. Consequently, owning property was made the condition precedent for claiming a right to the access to resources and to the water itself. One sees this a century later too in the much-celebrated *MC Mehta v Union of India*,[38] which reaffirmed the riparian rights to the Ganges in a claim against pollution, although contingent to the petitioner possessing land title bordering the Ganges.

Transitional justice must be understood as an essential process to this decolonisation attempt. Colonial policies at large were not just instrumentally harmful to the environment but also to indigenous communities which benefited from the river pre-colonialism, but also in turn protected it. In the

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[34] ibid 357-358.
[35] Paul A. Garber, Alejandro Estrada, Vinícius Klain, and Júlio César Bicca-Marques. 'An urgent call-to-action to protect the nonhuman primates and Indigenous Peoples of the Brazilian Amazon.' (2023) American Journal of Primatology.
[36] Christopher V. Hill 'Water and Power: Riparian Legislation and Agrarian Control in Colonial Bengal.' (1990) 14 Environmental History Review 12, 20.
[37] ibid 14.
[38] *MC Mehta and Others v Union of India* [1987] AIR 1086.

vast Hindu exegesis on rivers, the Ganges and the Yamuna were the life of the community, the site for pilgrimage, for rituals and for subsistence of the communities themselves.[39] Whether it was fishing, or moving across inaccessible areas of the country, it is evidently clear that the river was beyond mere hydration for the indigenous collective.[40]

At its inception, the model for transitional justice is a move towards restoring the indigenous imagination to the river itself. It uses the corpus of modern policy-making to enshrine further rights. Personhood is an important way in which the modern legal regime can still support the disenfranchised relationships to the environment. By creating a 'living Ganges', for example, it moves the river away from the language of private property into a lexicon of indigeneity, of a living and breathing environmental entity itself.

While this lexical step is important, a far more radical future imperative is the redistribution of the rights themselves. Once again, the *MC Mehta*[41] example is relevant. By granting personhood to the Ganges, the petitioner is no longer a landowning subject whose only claim lies in his property and damage to it. Rather, the right itself shifts to a less transactional imperative, which is more inherent to the river form. The appointed guardians to the river are then subjects which protect the river in its own right and, in turn, increase the possibility of claims arising in courts upon any pollution or environmental degradation. By transitioning justice to mean an indigenous claim, personhood protects the most vulnerable and offers to the court a means to enforce the rights that go beyond a transactional anthropocentrism,[42] and into further possibilities of claims arising against multinational corporate actions and unsustainable development projects. In the ideal sense, personhood means that the river itself is the central question, and the balancing act of environmental harm and economic development that many courts in the Global South have carried out is only secondary to it.

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[39] Cristy Clark, Nia Emmanouil, John Page, and Alessandro Pelizzon 'Can you hear the rivers sing: Legal personhood, ontology, and the nitty-gritty of governance' (2018) 45 Ecology LQ 787, 790.
[40] ibid.
[41] *MC Mehta and Others v Union of India* (n 38).
[42] Nidia Catherine González and Markus Kröger 'The potential of Amazon indigenous agroforestry practices and ontologies for rethinking global forest governance' (2020) 118 Forest Policy and Economics 102257, 102258-102260.

However, at the policymaking level, several questions as to how the environment is actually equipped in its 'legal persona' remain answered. Perhaps the most rudimentary question is what constitutes these 'environmental sites to protect'. A purview suggests that entities like rivers, basins and reefs have been at the centre of this movement; however, because the threshold offered by most jurisdictions is the level of degradation, the principle can undoubtedly be extended to include trees, forests and even the air, as illustrated by the Ecuadorian Constitution. The larger question, however, remains: who brings about a claim on behalf of the environment?

There are broadly two approaches to this. Firstly, the model followed in New Zealand and the Whanganui River entrusts the custodian role to the indigenous Maori tribe, which has its own councils that are specifically entrusted with the protection of the river. The second model, which India adopted in the case of the Ganges River, entrusts litigation to three officials who are, in turn, appointed by the mayoral authority of the towns enclosing the Ganges. The former is an instance of indigenising modern law because it acknowledges the basis of granting personhood to the sacredness of tribal law prior to colonisation[43] and recognises the colonisation of New Zealand as a historical wrong to the environment as well as to its people. In contrast, the Ganges model is an attempt to co-opt personhood with modern litigation, where the local government is deemed the primary stakeholder in representing the environment.[44] The concern with this has much to do with limited State interests and the enticing alternative of 'development'. Moreover, this approach sidelines indigenous stakes in the environment. This is imperative because of the harm afforded to indigenous communities by environmental degradation, and secondly, because the radical re-imagination of the purpose of personhood that indigenous communities envision firmly lies in creating a transitional justice model that locates environmental degradation in its imperialist roots.

[43] Toni Collins and Shea Esterling 'Fluid Personality: Indigenous Rights and the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 in Aotearoa New Zealand' (2019) 20 Melb. J. Int'l L 197, 202.
[44] Clark et al. (n 39) 790.

Transitional justice is a robust jurisprudential tool in its own right and therefore warrants discussion before illustrating the role of environmental personhood in its larger paradigm. Arguably, it emerged after the trials of Nuremberg to redress a reeling Jewish community from the Holocaust. The fundamental question that transitional justice posits is how to usher a new socio-legal regime after successful emancipatory struggles, which have more often than not, been marred with violence legitimised by pre-conflict laws.[45] Considerations of transitional justice can be contextualised in the post-Algerian liberation movement period in 1972: how was the independent Algerian State going to transition from a violent colonial history of law and policy to a modern sovereign economy? What will the role of France be in redressing the wrongs of its colonising history? How will the new State be equipped to offer recompense to millions of lives permanently affected by imperialism? The transitional justice model offers tangible solutions to propel this new socio-legal regime, and for the purposes of this paper, this model albeit focused on human rights violations by the coloniser, can and should be extended to include environmental wrongs by the same imperialist order.

There are two distinct approaches in transitional justice that can explain the role of environmental personhood in transitioning the Global South into a sustainable present and future. Firstly, the restorative model seeks to 'restore' a turbulent present into a state of relative stability through various means including 'rights', reparations, and the formation of commissions.[46] The purpose is not to restore a 'tranquil' pre-conflict state of affairs, but rather to acknowledge the violence imposed by the imperialist, and to move forward by reaffirming the dignity and rights of affected parties. In the context of environmental violations, the model offers nuance because it is impossible to revert to the pre-industrial and pre-imperial State because of both the level of permanent damage afforded to the natural environment and the sheer rate at which modern development continues to occur. Rather, the restorative model is useful because it acknowledges the man-made nature of this catastrophe inflicted by the imperialist order, before offering solutions in restoring the plight of the environment.

[45] Scott Veitch and Emilios Christodoulidis, *Jurisprudence: Themes & Concepts* (Routledge 2017) 253.
[46] ibid.

Article 14 of the Ecuadorian Constitution[47] is a useful example, which uses the words, '*sumac kawsay*' or 'clean living' as the basis for providing environmental personhood to nature,[48] in turn, indigenising environmental protectionism and decolonising environmental discourse at a rudimentary level. Restorative justice may not 'restore' nature to the era of indigenous civilisations, but it provides an alternative in understanding the role of imperialism and the unique cultural outlook of protecting the environment that lies firmly in the idea of a living and breathing natural world which warrants legal 'personhood'. Nature, or 'Mother Earth', was most often imagined as alive and autonomous by indigenous communities through stories of river goddesses, for instance,[49] and a restorative model of justice helps preserve and codify this belief system through creating legal personhood for these rivers.

Within the model of restorative justice also exists the idea of retrospective effect, which, when combined with the operation of personhood, can tangibly benefit indigenous communities. The retrospective effect of the law refers to action that is taken after the occurrence of catastrophes, in spite of the fact that the catastrophe may have been legally sanctioned. The most common way this operates is through economic reparations, where aggrieved communities are monetarily compensated for the wrong inflicted upon them by a past socio-legal regime.[50] Reparations are a common feature of post-genocide regimes, and should be extended to parties like environmental refugees aggrieved by man-made environmental catastrophes. This is because of the systemic nature of the latter, often sanctioned by economic policies like building dams that dislocate river-based communities for example. However, the Global South being plagued with problems of corruption and political instability has often meant that reparative programs have failed to trickle down to aggrieved parties, especially where reparation funds have been procured and managed by government officials.

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[47] Constitution of the Republic of Ecuador 2008, art 14.
[48] Erin Fitz-Henry, *Decolonizing personhood" in Wild Law—In Practice* (Routledge 2014) 133-148, 139.
[49] Kelly D Alley 'River goddesses, personhood and rights of nature: implications for spiritual ecology.' (2019) Religions 109, 502-503
[50] Veitch and Christodoulidis (n 45) 252.

In the case of environmental reparations, which, although rare, are not unheard of, environmental personhood mitigates the risks that are rife in governmental reparation programs. If the New Zealand model of indigenous guardians is adopted, reparations from corporations and potentially 'developed states' would directly be given to the environmental site itself.[51] This, in turn, means that reparations are aimed at economically helping restore the environment, i.e., funds for massive plantation drives would be entrusted to the indigenous guardians of the environment. Because these guardians have an active stake in the plight of the environment, this presents a greater possibility of the reparations being utilised for environmental site preservation and benefits to the local community, as compared to the alternative of governmental management. If the communities that are directly impacted by climate change are involved in the utilisation of these funds, environmental personhood can bring tangible benefits to the community.

The second model of transitional justice relevant to this discussion is the distributive justice model, which seeks to 'distribute' rights and liabilities through gauging individual needs and outcomes.[52] A billionaire tax akin to the Scandinavian model is one example, where to distribute resources in an egalitarian way, billionaires are charged a higher percentage of tax. When distributing environmental rights across society, legal personhood for the environment can potentially lead to a distributive model to the extent of rights, if not resources. Generally, an individual needs to possess *locus standi* or a right to sue that is conferred upon the cause of action. What this means is that in conventional environmental litigation, one needs to be an aggrieved party, i.e., having lost one's house to flash floods to bring a suit in court. Whilst this takes into account general principles of equality, it ignores wider issues of access to justice, especially because of litigation fees.

However, environmental personhood offers an alternative to the rigidity of 'cause of action', and, instead, grants the right to litigation to stakeholders most impacted. This has already emerged through public interest litigation, where concerned members of civil society can bring an environmental suit

[51] Collins and Esterling (n 43) 212.
[52] Veitch and Christodoulidis (n 45) 256.

without a cause of action.[53] Nevertheless, public interest litigation is a phenomenon that requires social and economic capital and thus remains restricted to the upper strata of society. With environmental personhood entrusted to indigenous guardians, the scope of litigation is extended to include the concerns of parties that are disproportionately affected by climate change. This has been further extended by the potential argument that damages won in civil suits can be dispensed to the guardians of environmental sites directly, facilitating investment into climate action efforts or future legal expenses.[54] Personhood therefore creates a more egalitarian model that distributes these rights to all aggrieved parties, even parties that would ordinarily not possess them,[55] both by extending the right to bring a claim to more individuals as well as to those with little access to an expensive judicial system.

5. LIMITATIONS TO ENVIRONMENTAL PERSONHOOD IN ACTION

Despite its benefits, environmental personhood is not an airtight solution to a significant issue. It is only as successful as those who implement it – the Ganges in India, despite the new legal model, continues to be one of Earth's most polluted rivers. The premise to 'development' is the oft-stated question: if the West could 'develop' through industrial policies that had no regard for the environment, why must the Global South, as many of its States emerge as key economic players, be restricted by modern environmental regimes? This, coupled with an incessant need to develop large-scale industries, which have lax environmental protocols and energy sources to save costs, pushes back against any environmental action.[56] Simultaneously, States within the Global South have incentivised companies to invest into their local economy, which has again created environmental violations with impunity. The Thar Coal Project in Pakistan is an astute example; Chinese companies have been incentivised to help Pakistan produce energy through coal, an air pollutant.

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[53] Christian Schall 'Public interest litigation concerning environmental matters before human rights courts: A promising future concept?' (2008) 20 Journal of Environmental Law 417, 444

[54] Kaitlin Sheber 'Legal Rights for Nature: How the Idea of Recognizing Nature as a Legal Entity Can Spread and Make a Difference Globally' (2020) 26 Hastings Envt'l L. J 147, 165.

[55] RiverOfLife, Martuwarra, Alessandro Pelizzon, Anne Poelina, Afshin Akhtar-Khavari, Cristy Clark, Sarah Laborde, Elizabeth Macpherson, Katie O'Bryan, Erin O'Donnell, and John Page 'Yoongoorrookoo: The emergence of ancestral personhood' (2021) 30 Griffith Law Review 505, 518

[56] Clark et al. (n 39) 802.

While the rest of the world moves away from coal projects, the need for investment and fulfilling the energy requirements of an emerging economy has pushed environmental action as secondary to 'development' and 'modernisation'.[57] This makes environmental personhood unlikely to be adopted as a legal right, to protect companies that provide a positive rate of investment to the government from the 'hurdle of litigation'. But more importantly, even if environmental personhood is granted, the jurisprudence of courts is likely to favour future investments into the local economy rather than rights of the environment or of indigenous communities, which already have little to no access to justice in the Global South.

A second limitation to environmental personhood is linked with the preceding point on the conflicting interests of other stakeholders. If governmental control is vested in the legal right of personhood, as with the case of the Ganges River in India, the glaring issue of conflicting interests becomes more apparent. Governmental action that prioritises industrial development inevitably creates a conflict of interest with governmental interest in litigating on behalf of the environment. In States like India, where commission cuts for governmental authorities are regular features of major industrial projects, governmental authorities that benefit from environmentally exploitative projects are not incentivised into launching a suit on behalf of the environment upon those very companies. Arguably, the New Zealand model mitigates this conflict of interest where the interests of the indigenous community are often markedly different from governmental interests in pursuing large-scale industrial projects.[58] Similarly, one can argue that the threat of lobbying by corporate groups has always persisted against radical changes in environmental law; yet, popular movements, like the Colombian fight against dictatorship, have successfully implemented rights like environmental personhood through collective action and constitutional overhaul. Whilst courts in the Global South have generally shown varying support for environmental suits, the fight for protecting the environment could continue through street protests rather than court battles, until

[57] Muhammad Amir Raza, Krishan Lal Khatri, Muhammad Ali Memon, Khalid Rafique, Muhammad Ibrar Ul Haque, and Nayyar Hussain Mirjat 'Exploitation of Thar coal field for power generation in Pakistan: A way forward to sustainable energy future' (2002) 40 Energy Exploration & Exploitation 1173, 1180.
[58] Collins and Esterling (n 43) 208.

community interests of saving the environment are prioritised over urban 'development', or a mutually inclusive path between environmental protection and industrial 'development' is found.

6. CONCLUSION

To conclude, this article attempts two ambitious interventions into an environmental discourse that is heavily tilted towards the 'developed world'. Firstly, it grounds disastrous environmental consequences of the contemporary Global South in a historical and ongoing existence of imperialism, which continues to systemically act as a barrier to change. Secondly, it offers a radical reconceptualisation of environmental justice through the avenue of 'environmental personhood', and seeks to couple it with transitional justice models, to delineate what a 'transition' to an inclusive model of climate justice will look like. The law is only one tool, amongst many, that must therefore be instrumentalised to prevent history books from reflecting upon the 21st century as the darkest of all ages, with a complete and utter disregard for nature, and by extension, humanity's preservation.

THE DOCTRINE OF THE MARGIN OF APPRECIATION IN REGIONAL HUMAN RIGHTS COURTS

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ABSTRACT

This paper explores the doctrine of the margin of appreciation, its scope and applicability under three regional human rights courts, namely the European court of Human Rights, the Inter-American Court of Human Rights and the African Court on Human and People's Rights. The paper begins by defining the doctrine of the margin of appreciation and how it applies to the regional human rights courts. It proceeds with a detailed analysis of the margin of appreciation's invocation in the European and Inter-American systems. While the African Court on Human and People's Rights makes no special reference to the doctrine, this paper argues in favour of the adoption of a margin of appreciation by this Court. The discussion concludes with the view that both the Inter-American and African courts should follow the model of the European court when adopting the margin of appreciation in their jurisprudence to some extent, notwithstanding the suspicions regarding the grant of the margin to States in all three regional systems.

KEYWORDS**:** margin of appreciation, human rights, regional human rights systems, European Court of Human Rights, Inter-American Court of Human Rights, African Court on Human and People's Rights

1. THE MARGIN OF APPRECIATION: AN INTRODUCTION

The doctrine of the margin of appreciation is often viewed as 'breathing space' or 'elbow room' afforded 'by international authorities to national authorities.'[1] The doctrine refers to the freedom granted to domestic authorities to interpret a State's obligations arising out of different international conventions in a way that aligns with the State's own national interests, or is not in conflict with the norms, values or customs of its jurisdiction.

[1] Bert B. Lockwood Jr., Janet Finn & Grace Jubinsky 'Working Paper for the Committee of Experts on Limitation Provisions' (1984) 7(1) Human Rights Quarterly 35, 67.

In the European system, the European Court of Human Rights (ECtHR) provides deference to the national governments of States Parties to the European Convention on Human Rights (ECHR) and their institutions in the fulfillment of their obligations.[2] The doctrine emerged because of the need felt by some European States to restrict the scope of certain rights enshrined in the ECHR. Under the limitation clauses in Articles 8-11 of the ECHR and Article 2 of the Fourth Protocol to the ECHR, there are three standard requirements for legitimate restrictions on these rights. Firstly, 'the State's interference in the rights of individuals must be 'in accordance with the law' or 'prescribed by the law'.[3] Secondly, 'the restriction must pursue a legitimate aim."[4] Finally, the limits imposed on individual rights by the State must be 'necessary in a democratic society.'[5]

Understanding the doctrine's development in European human rights law requires an examination of the 'theory of European consensus.' European consensus refers to 'the level of uniformity present in the legal frameworks of the Member States of the Council of Europe on a particular topic.'[6] Where there is a disagreement between Member States on specific issues, the Court allows 'a wide margin of appreciation to Member States.'[7] Consensus is also used to justify the progressive interpretation of the ECHR whenever there is an inclination towards that interpretation found in domestic legislation and judgments of domestic courts in different Member States.[8] Domestic courts' interpretations in different States differ greatly as those are mostly influenced by each State's local legal, moral and cultural systems.

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[2] ibid.
[3] Humphrey Waldock 'The effectiveness of the system set up by the European Convention on Human Rights' (1980) 1 Human Rights Law Journal 9.
[4] ibid.
[5] ibid.
[6] Council of Europe 'Interpretative mechanisms of ECHR case-law: the concept of European consensus' <https://www.coe.int/en/web/help/article-echr-case-law#:~:targetText=The%20concept%20of%20%22European%20consensus,Europe%20on%20a%20particular%20topic.&targetText='The%20concept%20is%20usually%20analysed,this%20approach%20is%20not%20exhaustive.> accessed 1 November 2019.
[7] ibid.
[8] ibid.

Moreover, the margin of appreciation can be seen as a legal manifestation of 'cultural relativism' within the context of human rights jurisprudence. Cultural relativists believe that the margin of appreciation doctrine is important because the idea of human rights as a Western liberal concept is almost alien to States outside the Western context.[9] It acknowledges that human rights standards may vary based on cultural, historical, or social factors. Simply put, the margin of appreciation recognises the diversity of cultural perspectives and allows States some flexibility to determine how to fulfill their human rights obligations. Values promoted by a certain system are only relevant to that system and they cannot be held as universal or applicable in the same manner to every other system.[10] It would be highly unjust to impose the norms of one society on another without giving due regard to the norms and values of that society.[11]

The margin of appreciation has been crucial for international and regional human rights systems to gain the confidence of domestic authorities and indigenous groups across different societies. According to some scholars, the totalitarian nature of human rights documents risks turning the international human rights law regime into a tool for cultural genocide.[12] Therefore, the focus should be on consensus-building and providing States with a certain amount of leeway necessary to implement their international or regional human rights obligations.

2. THE MARGIN OF APPRECIATION AND ITS INVOCATION IN REGIONAL HUMAN RIGHTS SYSTEMS

According to George Letsas, States have the authority to limit individuals' rights under certain circumstances in order to achieve legitimate aims, that are of public interest, i.e., matters involving a breach of national security or

[9] James A Sweeney 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era' (2005) 54(2) The International and Comparative Law Quarterly 459, 460.
[10] ibid.
[11] ibid.
[12] David M. Smolin 'Will International Human Rights Be Used as a Tool of Cultural Genocide? The Interaction of Human Rights Norms, Religion, Culture and Gender (1995) 12(1) Journal of Law and Religion 143.

disruption of public order.[13] He further argues that the said doctrine itself does not determine whether the State's intervention is legitimate or if said intervention violates a given right. This determination is made by reference to other concepts, such as 'fair balance' and 'proportionality'[14]

Proportionality demands a three-pronged analysis of the legitimacy of the objective of the restricting measure, the necessity of the restricting measure, and a balancing test.[15] The restriction must 'pursue a legitimate aim,' such as public safety, public health, or the protection of others' rights.[16] The restriction has to be proven to be necessary to achieve the aim, i.e., no less intrusive alternative means exist to achieve said aim.[17] The restriction's benefits must outweigh its detriments to individual rights. The more severe the restriction, the more compelling the justification must be.[18] Crucially, the margin of appreciation does not act as a blank check to Member States. The ECtHR retains the ability to review national measures through the lens of proportionality, ensuring that States do not abuse their discretion and that restrictions remain genuinely necessary and proportionate.[19] In essence, proportionality is the yardstick, while the margin of appreciation acknowledges the ruler's flexibility depending on the context. Together, they guarantee that individual rights are not unduly encroached upon in the pursuit of legitimate societal goals.

According to Letsas, there are two distinct conceptions of the margin of appreciation as implemented in the ECtHR, namely the 'structural' and 'substantive' margins.[20] The 'structural' version of the margin of appreciation is the dominant one in the ECtHR's jurisprudence. It attempts to 'balance the sovereignty of the contracting States with the need to secure protection of the rights embodied in the ECHR.'[21] Although States have been granted

[13] ibid.
[14] ibid.
[15] Jan Burda 'The Principle of Proportionality in EU law' (2019) Law and Legal Science. <https://is.muni.cz/th/inasg/The_Principle_of_Proportionality_in_EU_Law.pdf>
[16] *Handyside v United Kingdom*, 1976 Eur. Ct. H.R. (ser. A) 5.
[17] *Sunday Times v United Kingdom*, 1979 Eur. Ct. H.R. (ser. A) 30.
[18] *R.R. v France*, 2014 Eur. Ct. H.R. (ser. A) 824.
[19] *Levits v Latvia*, 2012 Eur. Ct. H.R. (ser. A) 645.
[20] George Letsas 'Two Concepts of the Margin of Appreciation' (2006) 26(4) Oxford Journal of Legal Studies 705.
[21] ibid.

leeway in interpreting the provisions of the ECHR, the Court has the power to limit the discretion given to States in this regard.[22] The practice of granting a margin to States signifies that specific human rights provisions can be defined and applied in different ways by Member States' authorities while staying within the acceptable extents of legitimacy, i.e., in conformity with the ECHR.[23]

The ECtHR is the 'oldest regional court' across all human rights systems.[24] with the most well-developed jurisprudence on the rights enshrined under the ECHR. Because the margin of appreciation first emerged in the European system, the ECtHR has used the doctrine in the largest number of cases compared to the other regional systems. Although concerns may arise over the use of the doctrine by the ECtHR, especially in cases involving freedom of religion and violations of *jus cogens n*orms, the ECtHR has given State authorities considerable flexibility in interpreting and implementing the provisions of the ECHR in several cases.

The Inter-American Court on Human Rights (IACtHR) has invoked the margin of appreciation on extremely rare occasions. Nevertheless, there is an ongoing debate in the Inter-American system regarding adopting and applying this doctrine in their system. The IACtHR has taken an interventionist approach in the past, because of which there is a danger of resistance or backlash from States.

In the African human rights system, which also happens to be the youngest, there has been no mention of the margin of appreciation, or any similar doctrine of deference, in its case law or in writings of scholars working in the African system thus far. However, a need for this doctrine could be inferred from how the African Court on Human and People's Rights (ACtHPR) decides its cases.

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[22] ibid.
[23] ibid.
[24] Maria A. Sanchez 'Deference and Divergence in Regional Human Rights Courts' (DPhil Thesis, University of Minnesota 2022) 9 https://conservancy.umn.edu/handle/11299/241313

3. THE MARGIN OF APPRECIATION AT THE EUROPEAN COURT OF HUMAN RIGHTS

The European margin of appreciation has its roots in the ECtHR, and draws upon the 'jurisprudence of the French Conseil d'Etat,' the classical martial law doctrine and the administrative law reviews of institutions from other continents.[25] The term 'margin of appreciation' is derived from the French term '*merge d'appreciation*', and is thus commonly translated into English as 'margin of assessment/appraisal/estimation.'[26]

The margin of appreciation is an essential element of the 'principle of subsidiarity,' which is a fundamental principle in European regional law:

> The general aim of the principle of subsidiarity is to guarantee a degree of independence for a lower authority in relation to a higher body or for a local authority in relation to central government. It therefore involves the sharing of powers between several levels of authority, a principle which forms the institutional basis for federal states.[27]

Subsidiarity dictates that issues should be addressed at the most appropriate level, prioritising local decision-making unless compelling reasons necessitate intervention by regional authorities. This principle finds expression in various legal frameworks, including EU law and international human rights law. Under Article 5(3) of the Maastricht Treaty on the European Union, 1992, the European Union is only required to act if Member States are unable to meet their intended objectives through certain measures.[28]

Furthermore, subsidiarity informs the scope of the margin. Issues delegated to lower levels receive a wider margin, as national particularities are more relevant.[29] Subsidiarity also limits the margin; when international authorities

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[25] H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague/Boston/London: Kluwer, 1996) 14.
[26] Steven Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights,* Human Rights Files No. 17 (Council of Europe Publishing) 5.
[27] European Parliament 'Fact sheets on the European Union, The principle of subsidiarity' *European Parliament* <https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity>
[28] See, e.g., Case C-332/13, EMIR Trading, [37]-[38].
[29] *South Bank Mutual Investments Ltd v Bulgaria*, 2018 Eur. Ct. H.R. (ser. A) 1262 [59].

intervene due to insufficient protection at the domestic level, the margin of appreciation narrows to ensure uniform adherence to fundamental rights.[30]

Moreover, both principles are not absolute. The margin can be exceeded, i.e., serious violations of human rights or persistent failures to uphold obligations can lead to interventions despite the margin.[31] Ultimately, the goal is to achieve a delicate balance between preserving national sovereignty and allowing for flexible interpretations while holding States accountable for falling short of their obligations to their citizens under human rights law. This ongoing dialogue between subsidiarity and the margin of appreciation ensures that both the universal nature of human rights and the specificities of national contexts are considered in the pursuit of a just and equitable global order.

The ECtHR has the authority to review whether measures imposed by a Member State fall under the ambit of the margin. The ECtHR can also determine a change in variable limits of the margin, i.e., how much leeway a State can be afforded when implementing a certain right. These two factors prove that this doctrine does not imply a complete renunciation of the Court's power of judicial review.[32] Rather, while States are granted some leeway in interpreting and applying the ECHR, this must be done in a legitimate manner.

Furthermore, while the doctrine is estimated to have been used in over 700 judgments of the ECtHR,[33] the *travaux preparatoires* (documents describing the discussions and negotiations of a treaty before it is finalised) of the ECHR make no clear reference to the margin of appreciation doctrine.[34] This shows that the doctrine developed over time through the practice of the Court under the circumstances where internal conflicts in some member States led to a demand for deviation from some of the obligations under the ECHR.

In cases on the freedom of religion, the ECtHR has allowed a considerable margin of appreciation to States on several occasions, particularly because

[30] See, e.g., *Handyside v United Kingdom*, 1976 Eur. Ct. H.R. (ser. A) 5, [66].
[31] See, e.g., *Hirsi Jamaa v Italy*, 2012 Eur. Ct. H.R. (ser. A) 644, [155].
[32] ibid.
[33] Letsas (n 20) 705.
[34] Yourow (n 25) 14.

European States adopt a secular constitutional structure.[35] The ECtHR's application of the margin of appreciation gives more space to States in cases involving restrictions on the freedom of religion than any other right.[36] The ECtHR has supported States' approaches in religious freedom cases conflicting with the ideology of secularism.

An example of this can be seen in *Leyla Sahin v Turkey*.[37] Leyla Sahin was a medical student at the University of Istanbul in 1997, which is a public university.[38] In 1998, the Vice Chancellor of the University banned the wearing of a headscarf on campus.[39] Sahin was denied access to classrooms because she wore a headscarf.[40] She protested the imposition of the ban and filed petitions in the Turkish courts against the circular issued, but did not receive a decision in her favour.[41] She filed a case at the ECtHR claiming a violation of her freedom of religion under Article 9 of the ECHR.[42] The State responded to her claim with the argument that Article 2 of the Turkish Constitution promotes 'secularism and gender equality':[43]

> The Republic of Turkey is a democratic, secular [*laik*] and social State based on the rule of law that is respectful of human rights in a spirit of social peace, national solidarity and justice, adheres to the nationalism of Atatürk and is underpinned by the fundamental principles set out in the Preamble.[44]

The State further claimed that headscarf was a symbol of religious belief and might have symbolised the Turkish State's support for a specific religion.[45] They also argued that it was against the 'principle of gender equality.'[46] The

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[35] Benjamin Elisha Sawe 'What is a Secular State?' *WorldAtlas* (8 March 2018) <https://worldatlas.com/articles/what-is-a-secular-state.html>
[36] Tom Lewis 'What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56(2) The International and Comparative Law Quarterly 395, 396. <www.jstor.org/stable/4498074>
[37] *Leyla Sahin v Turkey*, App no 44774/98 (ECtHR, 10 November 2005), [29] available at: <https://www.refworld.org/cases,ECHR,48abd56ed.html>
[38] Lewis (n 36) 406.
[39] ibid.
[40] ibid.
[41] ibid.
[42] ibid.
[43] ibid.
[44] *Leyla Sahin v Turkey* (n 37) [29].
[45] ibid [35].
[46] ibid [111].

Court gave deference to the position of State authorities in this case and stated that the State was permitted a margin of appreciation in religious matters:

> Consequently, the Contracting States enjoy a certain margin of appreciation in this sphere, although the final decision as to the observance of the Convention's requirements rests with the Court. In order to ensure that the restrictions that are imposed do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness, the Court must satisfy itself that they are foreseeable for those concerned and pursue a legitimate aim. However, unlike the position with respect to Articles 8 to 11 of the Convention, it is not bound by an exhaustive list of "legitimate aims" under Article 2 of Protocol No. 1 (see, *mutatis mutandis*, *Podkolzina v Latvia*, no. 46726/99, § 36, ECHR 2002-II). Furthermore, a limitation will only be compatible with Article 2 of Protocol No. 1 if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[47]

Ultimately, the ECtHR held that the university's ban on the headscarf was 'a proportionate interference with Leyla Sahin's Article 9 rights.'[48]

There are several similar cases in which the ECtHR used the margin of appreciation. In *Karaduman v Turkey*, a girl was denied graduation even after she had completed the degree requirements because she refused 'to submit a photograph without a headscarf' for her graduation ceremony.[49] Her claim that this was a violation of Article 9 of the ECHR was rejected.[50] Similarly, *Dahlab v Switzerland* was a case where Dahlab, a school teacher, was dismissed for insisting that she wanted to wear a headscarf.[51] The Court determined that this was not a 'disproportionate interference' in her freedom of religion as States have a margin of appreciation in religious matters.[52] The Court also stated that because of the 'tender age' of her students, her decision to wear a

[47] ibid [154].
[48] Lewis (n 36) 409.
[49] *Karaduman v Turkey*, App No 16278/90 (ECtHR 3 May 1993).
For comment and comparison with *Sahin v Turkey*, see H Gilbert 'Redefining Manifestation of Belief in *Leyla Sahin v Turkey*' (2006) 3 European Human Rights Law Review 308.
[50] ibid.
[51] *Dahlab v Switzerland*, App No 42393/98 (ECtHR, 15 February 2001).
[52] ibid.

headscarf while teaching might have an impact on the notion of neutrality that the Swiss education system promotes.[53]

In 2014, the ECtHR decided a case filed against the law banning wearing of veil by Muslim women in France in favor of French government.[54] The same law was challenged by different applicants at the UN Human Rights Committee, which decided the complaint in favor of the applicants.[55] The dissenting opinion on the Committee's decision, written by Yadh Ben Achour, rightly pointed out that the concept of veiling is contested in Islam.[56] He stated:

> The truth is that the wearing of the niqab or the burka is a custom followed in certain countries called "Muslim countries" that, under the influence of political Islamism and a growing puritanism, has been artificially linked to certain verses from the Qur'an, in particular to verse 31 of the Surah of Light and verse 59 of the Surah of the Confederates. However, the most knowledgeable authorities on Islam do not recognize concealing the face as a religious obligation.[57]

Because of the highly contested nature of concept of veil in different Islamic schools of thought, this decision cannot be compared with the decisions in *Leyla Sahin* or *Dahlab* as the hijab (or the headscarf) is a more unambiguous concept. The Committee took a victim-centered approach in this case; it could be said that as the ECtHR is a regional court and more familiar with the practices in the region, it decided to allow States to restrict the applicants' right to freedom of religious expression in 2014.

Similar reasoning was extended to other cases as well. *Refah Partisi* case was a case in which the ECtHR stated that limiting the religious expression such as wearing of headscarf is sometimes justified 'to protect the public order' and

[53] ibid.
[54] See *S.A.S. v France*, App no 43835/11 (ECtHR, 1 July 2014).
[55] See *Yaker v France*, Communication no 2747/2016, (UN Human Rights Committee, 17 July 2018) CCPR/C/123/D/2747/2016.
[56] ibid.
[57] ibid.

freedom of others.[58] This case was not related to headscarf, but rather was against the activities of Islamic political parties.

Another important case is *Lautsi v Italy*.[59] In this case, Soile Lautsi filed a case to the ECtHR on behalf of her two sons claiming a violation of her freedom of religion.[60] The classrooms of the public school her sons used to attend had a crucifix on display.[61] According to Lautsi, this was a violation of her and her 'children's right to freedom of religion' as she did not want to raise them as Christians.[62] On the other hand, the Italian government argued that the display of crucifix was meant to symbolise their importance in history of Italy and not to highlight them as a symbol of Christianity.[63]

The ECtHR initially mandated a ban on the display of the crucifix in all public schools.[64] This initial decision reflects the ECtHR's inclination towards values of secularism.[65] In cases on the headscarf mentioned above, the Court readily granted the margin of appreciation to States identifying themselves as secular.[66] However, when it came to the issue of the State trying to conform to a certain religious tradition, the Court came up with a decision in favor of the petitioner demanding neutrality from the State in *Lautsi*.[67] The Grand Chamber hence denied the margin of appreciation to Italy.

Later on, due to pressure from other European countries and an appeal from Italy for a rehearing, the case was reheard.[68] It came to be known as *Lautsi II*, with the highest number of *amicus curae* briefs filed in the history of the Court

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[58] *Refah Partisi (The Welfare Party) and others v Turkey*, Apps nos 41340/98, 41342/98, 41343/98 and 41344/98, (ECtHR, 31 July 2001)
[59] *Lautsi v Italy*, App no 30814/06 (ECtHR, 18 March 2011).
[60] ibid.
[61] ibid.
[62] ibid.
[63] ibid.
[64] ibid.
[65] ibid.
[66] ibid.
[67] ibid.
[68] William L Saunders 'Does Neutrality Equal Secularism? The European Court of Human Rights Decides *Lautsi v Italy*' (2011) 12(3) The Federalist Society Review. <https://fedsoc.org/commentary/publications/does-neutrality-equal-secularism-the-european-court-of-human-rights-decides-lautsi-v-italy>

at that time.[69] Several States criticised the Court's decision for not granting deference to the Italian government. As a result, the Grand Chamber overturned the decision.[70]

Thus, the ECtHR developed the margin of appreciation doctrine to grant national discretion to States in matters where they felt it more appropriate to interpret the rights enshrined in the ECHR in a different, usually more restrictive, manner. Although cases like *Leyla Sahin* and *Lautsi* attracted criticism from Muslim and Christian communities respectively, this does not mean that the ECtHR should not grant this margin to national authorities in implementing the provisions of the ECHR at the domestic level. The Court retains the right to review State practice in implementing its ECHR obligations even after granting the margin. The overall jurisprudence at the ECtHR shows that the margin of appreciation is important to garner support and confidence of Member States in the credibility of the European human rights system.

4. THE MARGIN OF APPRECIATION AT THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The Inter-American human rights system was founded by the Organisation of American States (OAS) adopting the American Declaration on Rights and Duties of the Man (ADRDM) in 1948.[71] Later, the OAS adopted the American Convention of Human Rights (ACHR) in 1969,[72] and it entered into force in 1978.[73]

The two main bodies established to safeguard the protection of rights guaranteed under the ACHR are the Inter-American Commission on Human rights (IACmHR) which became operational in 1960[74] and the Inter-American Court of Human Rights (IACtHR) which became operational in

[69] ibid.
[70] ibid.
[71] ibid.
[72] ibid.
[73] ibid.
[74] ibid.

1979 and delivered its first contentious decision in 1988.[75] These two bodies have the discretion to 'decide individual complaints' regarding 'alleged human rights violations' and 'issue emergency protective measures when an individual or the subject of a complaint is in immediate risk of irreparable harm.'[76] The IACtHR's mandate is more restricted than that of the IACmHR because the former 'may only decide cases brought against the OAS Member States' that have 'specifically accepted the Court's contentious jurisdiction' and have been processed by the latter first.[77]

Three different positions are generally taken towards the margin of appreciation doctrine in the Inter-American human rights system.[78] The first position argues that there is no place for this doctrine in the Inter-American system.[79] The second position - a completely opposing viewpoint – is that the IACtHR should seriously consider the adoption of this doctrine as there is an emerging need for the incorporation of a doctrine of deference in this system.[80] The third position takes a middle ground approach, claiming that the IACtHR should be extremely careful when determining the margin of appreciation to OAS Member States.[81]

During the 1970s and 1980s, Central and Latin American countries were experiencing the worst period in their history in terms of large-scale human rights violations.[82] Most of these States were either under dictatorship or experiencing civil wars.[83] Nino Tsereteli observes that when the Inter-American system was established, the IACtHR mostly dealt with cases

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[75] *Velásquez-Rodríguez v Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).
[76] International Justice Resource Center 'Inter American Human Rights System' *International Justice Resource Center* (n.d) <https://ijrcenter.org/regional/inter-american-system/#:~:text=The%20Court%27s%20mandate%20is%20more,be%20processed%20by%20the%20Commission.>
[77] ibid.
[78] Pablo Contreras 'National Discretion and International Deference in the Restriction of Human Rights: A Comparison Between the Jurisprudence of the European and the Inter-American Court of Human Rights' (2012) 11(1) Northwestern Journal of Human Rights 61.
[79] ibid.
[80] ibid.
[81] ibid.
[82] David J. Harris and Stephen Livingstone, *The Inter-American System of Human Rights* (Clarenbon Press, Oxford 2004) preface.
[83] ibid.

concerning 'acts of state violence'.[84] Because of the lack of will on part of the State authorities to conform to provisions of the ACHR, there was no reason for the Court to give deference to national authorities.[85]

It is because of this history and the kind of cases the IACtHR dealt with in its early years that people like former ICJ Judge Antonio Cancado Trindade (also ex-president of the IACtHR) believed that there is no place in the Inter-American system of human rights for the margin of appreciation.[86] He further stated, that because most cases brought to the IACtHR involve violations of non-derogable rights, States should not be given the discretion to interpret the ACHR in different ways.[87] Thus, the 'relative application of international human rights law' that the margin allows for was not acceptable to Judge Trindade.[88] His viewpoint is an illustration of the 'universal' tendency of this court in interpreting the regional treaty.[89] This view is also reflective of the tendency in the Inter-American system for being more interventionist and anti-deference in its approach.

Thus, the IACtHR has tried to take stronger measures in order to make OAS Member States endorse and comply with international human rights standards. Firstly, the ACHR has contains more non-derogable rights than the ECHR.[90] Secondly, the IACtHR applies the 'doctrine of conventionality control' extensively, requiring States' domestic courts to follow the decisions

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[84] Nino Tsereteli 'Emerging doctrine of deference of the Inter-American Court of Human Rights?' (2016) 20(8) The International Journal of Human Rights 1097. <http://dx.doi.org/10.1080/13642987.2016.1254875>

[85] ibid.

[86] Antonio Cançado Trindade 'Reflexiones sobre el Futuro del Sistema Interamericano de Protección de los Derechos Humanos' in El Futuro del Sistema Interamericano de Protección a Los Derechos Humanos (Juan E. Méndez & Francisco Cox eds., 1998) 582

[87] ibid.

[88] ibid 593

[89] María Angélica Benavides Cassals 'El Consenso y el Margen de Apreciación en la Protección de los Derechos Humanos' (2009) 15 Ius Et Praxis 295, 308

[90] Article 15.2 of the European Convention states that it is not allowed to derogate from the right to life ("except in respect of deaths resulting from lawful acts of war"), the prohibition of torture, the prohibition of slavery or servitude and the prohibition of punishment without law. In contrast to that, Article 27.2 of the American Convention prohibits "any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights."

and interpretation of the ACHR by the IACtHR.[91] Conventionality control is viewed as the 'direct opposite of the margin of appreciation by some scholars:'[92] Dulitzky advised the IACtHR to become 'less absolutist' and accept the domestic courts as the enforcers and interpreters of the ACHR.[93] Other scholars believe that deference to national courts under the margin of appreciation could be termed as an application of the principle of subsidiarity,[94] in a manner similar to the approach of the ECtHR.

Consequently, the doctrine has not found a proper place in the jurisprudence of the Inter-American human rights system, unlike in the ECHR. The majority of Member States that in the Inter-American system did not adhere to strong democratic principles as did the States that ratified the ECHR.[95] Some argue that it is not feasible to allow a margin of appreciation to States under this system because of the poor democratic quality of OAS Member States and problems in their legislative mechanisms. However, some Inter-American States are ranked higher on the Democratic Quality Index than many of the forty-eight countries that have ratified the ECHR. For example, Uruguay ranks 15,[96] Costa Rica ranks 20[97] and Chile ranks 23.[98] Nevertheless, the ECtHR does discuss any classification of countries on the basis of their democratic credentials.[99] While granting a margin of appreciation, the ECtHR

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[91] Álvaro Paul 'The Emergence of a More Conventional Reading of the Conventionality Control Doctrine' (2019) 49 Revue Générale de Droit (N° hors série: Canada's Role in Protecting Human Rights in the Americas) 275, 292-3.

[92] Lucas E. Barreiros 'Emerging Voices: Freedom or Restraint? On the Comparison Between the European and Inter-American Human Rights Courts' *Opinio Juris* (11 August 2014) <http://opiniojuris.org/2014/08/11/emerging-voices-freedom-restraint-comparison-european-inter-american-human-rights-courts/>

[93] Ariel E. Dulitzky 'An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights' (2015) Texas International Law Journal 45, 76.

[94] Álvaro Paúl 'Decision-Making Process of the Interamerican Court: An Analysis Prompted By The "In Vitro Fertilization" Case' (2014) 21 ILSA Journal of International & Comparative Law 87, 125. <https://nsuworks.nova.edu/ilsajournal/vol21/iss1/4>

[95] Andreas Follesdal 'Exporting the margin of appreciation: Lessons for the Inter-American Court of Human Rights" (2017) 9 International Journal of Constitutional Law 359.

[96] See The Economist Intelligence 'Democracy Index 2018' *The Economist* (2018) <http://www.eiu.com/public/thankyou_download.aspx?activity=download&campaignid=Democracy2018>

[97] ibid.

[98] ibid.

[99] ibid.

mainly relies on a proportionality test[100] because it acknowledges that democracies can develop laws that do not conform to international human rights standards.[101]

Furthermore, the lack of consensus amongst OAS Member States is seen as another hurdle in granting States a margin of appreciation. However, the requirement of grant of margin of appreciation depends more on the 'nature and formulation' of the right, rather than consensus.[102] 'Consensus is not a condition for granting margin of appreciation'; rather, it is the other way around.[103] For instance, in the European system, if a violation by a State falls under the category of rights for which the ECtHR usually grants a margin of appreciation, the consensus between the States would only make the scope of the margin 'narrower'.[104] Another view on regional consensus suggests that, at times, regional consensus may demand a different interpretation of 'broad rules' stated in the ACHR.[105] This shows the difference of perspectives between the European system and the Inter-American system.

The IACtHR first mentioned the margin of appreciation in 1984 in a case related to the grant of nationality by a State.[106] This led some scholars to conclude that the doctrine is not completely alien to the inter-American system.[107] Indeed, a closer look at the Court's stance reveals that it grants a margin of appreciation to States to interpret norms where the ACHR is silent.[108] Similarly, in 2004, the IACtHR analysed the restrictions on freedom of speech in *Herrera Ulloa v Costa Rica*, a case where a journalist was found guilty for offensive publications that constituted defamation.[109]

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[100] ibid.
[101] ibid.
[102] Paúl 'Decision-Making' (n 94) 125.
[103] Follesdal (n 95).
[104] ibid.
[105] ibid.
[106] Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, 19 January 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984), [59], [62]–[63].
[107] Jorge Contesse,'Contestation and Deference in the Inter-American Human Rights System' (2016) 79 Law and Contemporary Problems 141.
[108] Tsereteli (n 84) 1098.
[109] *Herrera-Ulloa v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment, InterAm. Ct. H.R. (ser. C) No. 107 (July 2, 2004).

The Court stated that

> democratic control exercised by society through public opinion encourages the transparency of State activities and promotes the accountability of public officials in public administration, for which there should be a reduced margin for any restriction on political debates or on debates on matters of public interest.[110]

The Court observed that statements related to public officials or any private individuals performing public functions should be looked at with a certain 'latitude'.[111] This shows an inclination in the Inter-American system towards reducing the national discretion to a great extent in matters related to freedom of speech.

In the same case, the Court discussed how States have discretion to regulate judicial remedies.[112] However, if the 'essence' of the right to judicial remedy is affected by the State's interference, the international courts have the power to review these cases.[113] This case is another example of a narrowing of the margin of appreciation by the IACtHR.

The margin of appreciation was invoked by the State of Costa Rica in *Artavia Murillo et al. v Costa Rica,*[114] a case against the Costa Rican Constitutional Court's decision banning in-vitro fertilisation (IVF) in 2012. The Costa Rican Court banned IVF because it led to the loss of embryos, which it argued was a violation of the right to life, which it attached to the embryos under Article 4 of the ACHR.[115] Costa Rica demanded a broad margin of appreciation in this regard because they believed that there was an lack of scientific consensus on whether an embryo constitutes the 'beginning of life.'[116] The IACtHR supported the argument that because 'embryos have no chance of survival without implantation,' embryos cannot be said to have a right to life as

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110 ibid [127]
111 ibid.
112 ibid [161].
113 ibid.
114 *Artavia Murillo et al. v Costa Rica*, Judgment of 28 November 2012 (Preliminary Objections, Merits, Reparations and Costs), [162].
115 ibid
116 ibid [170]

embryos themselves do not represent beginning of life.[117] None of the countries in the region had imposed any restrictions on IVF as none of them attached the right to life to embryos before implantation.[118] Thus, the claim of a margin of appreciation raised by Costa Rica was rejected by the IACtHR in this case based on the argument of state practice, stating that

> The Court considers that, even though there are few specific legal regulations on IVF, most of the States of the region allow IVF to be practiced within their territory. This means that, in the context of the practice of most States Parties to the Convention, it has been interpreted that the Convention allows IVF to be performed. The Court considers that this practice by the States is related to the way in which they interpret the scope of Article 4 of the Convention, because none of the said States has considered that the protection of the embryo should be so great that it does not permit assisted reproduction techniques and, in particular, IVF. Thus, this generalized practice is associated with the principle of gradual and incremental – rather than absolute – protection of prenatal life and with the conclusion that the embryo cannot be understand as a person.[119]

To summarise, the origin, history, practice and case-law of the Inter-American system along with the critiques on the system's universalist approach[120] make it clear that the doctrine of margin of appreciation has not found a resolute place in the decision making by the IACtHR. The general trend in this Court seems to be towards putting some limitations on the discretion of States in interpreting the ACHR. Nevertheless, there is an ongoing debate and demand from certain circles for the adoption of the doctrine in the Inter-American system in order to make this system less absolutist in its practices.

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117 ibid [177], [186], [187].
118 ibid [252]-[254].
119 *Artavia Murillo and Others ("In Vitro Fertilization") v Costa Rica.* (2016). International Law Reports, 165, 1-187, [256].
120 "Universality means that human beings are endowed with equal human rights simply by virtue of being human, wherever they live and whoever they are, regardless of their status or any particular characteristics."
UN Office of the High Commissioner of Human Rights 'Universality and Diversity' *UNOHCHR* <https://www.ohchr.org/en/special-procedures/sr-cultural-rights/universality-and-diversity>

5. THE MARGIN OF APPRECIATION IN AFRICAN COURT ON HUMAN AND PEOPLE'S RIGHTS

The Organisation for African Unity (OAU) was established in 1963. Its 'principal human rights issues' include the 'decolonisation for all African peoples, in the context of self-determination, and ending apartheid in South Africa.[121] The principles of 'freedom, equality dignity and justice',[122] the 'unity and solidarity of the African States' and a 'better life for the peoples of Africa'[123] were deeply embedded in the Charter of the OAU, which was the first step towards the establishment of human rights institutions in Africa. While some called the Charter of the OAU a 'charter of liberation,'[124] there was sheer disregard for the violations of human rights of citizens from independent states of Africa.[125]

The main human rights body of the OAU, the African Commission on Human and Peoples' Rights (AfComm), was established by the African Charter on Human and Peoples' Rights, 1981 (ACHPR) and became operational in 1987.[126] Later, the African Court on Human and People's rights (ACtHPR) was created under Article 1 of the Protocol to the African Charter on the Establishment of the African Court on Human and People's Rights.[127] The said Protocol was adopted by the OAU in 1998 and entered into force in 2004.

Adopted in 1981, the ACHPR has now been ratified by all African Union (AU) Member States. Out of the thirty States that have ratified the Protocol, eight have made declarations that allow individuals and non-governmental

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121 Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford 2019) Oxford Commentaries on International Law.

122 Charter of the Organization of African Unity, Done at Addis Ababa on 25 May 1963 <https://au.int/sites/default/files/treaties/7759-file-oau_charter_1963.pdf> preamble

123 ibid art 2.

124 J Dugard 'The Organisation of African Unity and Colonialism: An inquiry into the plea of self-defence as a justification for the use of force in the eradication of colonialism' (1967) 16 International and Comparative Law Quarterly 157

125 Gina Bekker 'The African Human Rights System: An Uphill Struggle' (2009) 52 German Yearbook of International Law 45, 47

126 ibid.

127 Kate Stone 'African Court of Human and People's Rights' *Advocates for international development* (27 February 2012) 3.

organisations (NGOs) to bring their cases to the Court[128] after the withdrawal of Rwanda's declaration in 2016[129] and Tanzania's declaration in 2019.[130] The Court is situated in Arusha, Tanzania.[131] Interestingly, 40 percent of the cases decided by the Court up to September 2019, i.e., 28 out of a total of 70 cases, were from Tanzania.[132] While the Tanzanian government has not provided a specific reason for the withdrawal of its declaration so far, it is assumed that it is due to the volume of cases against the State of Tanzania caused the government to withdraw the declaration to the Protocol. This shows how the majority of African states have shown some resistance towards allowing different groups to bring their cases to the African Court. It is because of absence of a doctrine similar to the doctrine of margin of appreciation, that would have allowed states some form of leeway to interpret the charter in a way that is a bit more aligned with their specific domestic situation.

Rwanda withdrew the declaration allowing access to court to individuals and NGOs when a person who was found guilty and sentenced to life imprisonment for the crime of genocide was granted access to the ACtHPR.[133] He had been declared a fugitive by Rwandan authorities.[134] The Foreign Ministry issued a statement indicating that when the State submitted the declaration in 2013, 'it never envisaged that such a person (Genocide convict/fugitive) would ever seek or be granted a platform.'[135] This shows how the African human rights system has been unable to gain the trust of OAU Member States because of its consistent disregard of States' internal

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128 ibid.

129 International Justice Resource Centre, 'Rwanda Withdraws Access to African Court for Individuals and NGOs' *IJRC* (14 March 2016) <https://ijrcenter.org/2016/03/14/rwanda-withdraws-access-to-african-court-for-individuals-and-ngos/>

130 Amnesty International 'Tanzania: Withdrawal of individual rights to African Court will deepen repression' *Amnesty International* (2 December 2019). <https://www.amnesty.org/en/latest/news/2019/12/tanzania-withdrawal-of-individual-rights-to-african-court-will-deepen-repression/>

131 Kate Hairsine 'Africa's rights court suffers setback as Tanzania blocks cases' *DW* (12 June 2019) <https://www.dw.com/en/africas-rights-court-suffers-setback-as-tanzania-blocks-cases/a-51548555>

132 Anuradha Mittal 'Tanzania's Withdrawal from the African Court on Human and People's Rights' *Oakland Institute* (9 December 2019) https://www.oaklandinstitute.org/tanzanias-withdrawal-african-court-human-peoples-rights-wrong-move

133 The New Times 'Rwanda withdraws from African Court Declaration' *The New Times* (5 March 2016) <https://www.newtimes.co.rw/section/read/197697>

134 ibid.

135 ibid.

circumstances. A similar attitude is found in the Court's jurisdiction, calling into question whether it would ever be considerate enough to develop a doctrine similar to the margin of appreciation.

The ACtHPR's success would be dependent on the will of States to adopt the core Afrcan human rights values that the Court was intended to serve.[136] At that point in time, the principle of State sovereignty was seen to be at odds with a supra-national legal order created 'to regulate their municipal laws under the instruction of that legal system.'[137] Hopkins believed that States had a two-dimensional obligation: first, to incorporate provisions of the ACHPR into their own domestic law and to guarantee the compliance by their own municipal courts, and second, to accept and obey the judgments of the ACtHPR regardless of any dispute that may have existed between their own legislation and provisions of statutes applied in the Court.[138]

The ACHPR lays great emphasis on the duties that an individual owes to his or her community. It is believed that the ACHPR goes even further in establishing individual duties than 'the Universal Declaration of Human Rights, the American Declaration of Rights and Duties of Man and the American Convention on Human Rights.'[139] The Preamble of the ACHPR makes two important ideological claims: 'that the reality and respect of people's rights should necessarily guarantee human rights;' and that 'the enjoyment of rights and freedoms . . . implies the performance of duties on the part of everyone'.[140] The two claims can be linked with each other as espousing an idea of a strong sense of the community in African affairs.[141] Umozurike states that 'the notion of individual responsibility to the community is firmly engrained in the African tradition . . . It is an open question, however, as to whether "community" equals "State".'[142] If

136 Kevin Hopkins 'The Effect of an African Court on the Domestic Legal Orders of African States' (2002) 2 African Human Rights Law Journal 234, 236.
137 ibid.
138 ibid.
139 Bekker (n 125) 50.
140 Patrick Thornberry 'The African Charter on Human and Peoples' Rights; African Perspectives on Indigenous Peoples' in *Indigenous Peoples and Human Rights*, 244-64. (Manchester University Press, 2002) 7 <www.jstor.org/stable/j.ctt155jg1p.15>
141 ibid.
142 U. O. Umozurike, 'The African Charter on Human and Peoples' Rights: Suggestions for More Effectiveness' (1983) 77(4) American Journal of International Law 902, 911.

community does equal State, then the African system of human rights would be considered a highly restrictive system that directs the individuals to fulfil the duties owed to the State more than any other international human rights instrument. Rather, the ACtHPR should come up with a more progressive charter that allows for more individual freedom. The Member States' confidence should be gained by reassuring them that the ACtHPR would allow states some flexibility in their imposing their obligations under the ACHPR.

Furthermore, 'claw back' clauses reveal the restrictive nature of the ACHPR.[143] At the time the Charter was framed, there was increasing international pressure as well as pressure from other human rights regimes. Hence, the system is said to be borne out of geo-political realities rather than sincere commitment to the cause of human rights.[144] The allegedly restrictive nature of the ÅCHPR could be assumed as corresponding directly to the fact that States were not comfortable with the idea of having a supranational regional system trying to meddle with their domestic affairs, as mentioned earlier. In order to get African States on board, framers of the ACHPR came up with the provisions that would make it seem like a pro-State document. The term 'pro-state' would essentially entail that the Charter would prioritise the interests of State authorities or laws in place within a State over the freedoms and rights of individuals.

Although the aforementioned facts make the African system seem relatively restrictive, the ACHPR allows the AfComm to 'draw inspiration' from other human rights treaties and documents.[145] This has created space for a wide array of interpretations and the broadest possible meanings that could be attached with individual rights enshrined in the ACHPR. In some cases, the AfComm implied certain rights from other rights that are enshrined in the ACHPR. One major example of this practice is the *Ogoniland* case, wherein the Court held that the rights to life, health, and economic, social and cultural development give rise to an implicit right to food.[146] This exemplifies how the

[143] Bekker (n 125) 51.
[144] ibid 48.
[145] African Charter on Human and Peoples' Rights, 1981, art 60.
[146] *Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v Nigeria)* Case no ACHPR/COMM/A044 (27 May 2002) [64].

ACtHPR can sometimes take great amount of leeway in terms of implying certain human rights.

The African Charter on the Rights and Welfare of Children, 1990 (ACRWC) and the Protocol to the African Charter on the Rights of Women, 2003 (Maputo Protocol) could also be seen as signifying a broad interpretation of rights in the African system. The ACRWC prohibits child marriages,[147] recruiting children as soldiers during armed conflicts,[148] and children's sexual exploitation,[149] and also introduces special measures for the promotion of girls' education.[150] The Maputo Protocol provides for a ban on female genital mutilation,[151] for 'monogamy as the preferred form of marriage,'[152] equal rights when it comes to 'separation, divorce or annulment of marriage,'[153] the right for women to control their own fertility,[154] property rights[155] and the rights of widows.[156]

In light of the abovementioned instruments, and also the way the ACtHPR is implying additional rights from the existing provisions in the ACHPR, one could assume that the African system is not as restrictive as the African charter's basic reading would have us believe. Thus, scholars who argue that African system was created just to protect the interests of African States would not be able to stand their grounds.[157]

Moreover, the ACtHPR is the youngest and least experienced regional human rights court. Consequently, it is difficult to find literature highlighting the number of cases in which the Court has given some deference to national

[147] African Charter on the Rights and Welfare of the Child, 1990, adopted by 26th Ordinary Session of the Assembly of Heads of State and Government of the OAU (adopted in Addis Ababa, July 1990, entered into force 29 November 1999) art 21 (2).
[148] ibid art 22.
[149] ibid art 27.
[150] ibid art 11.
[151] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 (adopted 1 July 2003, entered into force 25 November 2003) art 5(b).
[152] ibid art 6(c).
[153] ibid art 7.
[154] ibid art 14.
[155] ibid art 21.
[156] ibid art 20.
[157] Bekker (n 125) 151.

authorities to interpret the provisions of the ACHPR or its Protocols in a way that that is deemed appropriate for their domestic legal systems.

The ACtHPR issued its first judgment on women's rights in *APDF and IHRDA v The Republic of Mali.* In 1998, the Republic of Mali decided to modernise its legislation relating to family law to bring it in line with its international obligations.[158] After the promulgation of the Family Code in 2009, several groups, including Islamic organisations, organised protests and demanded an amendment of the law in line with Muslim family law. In 2011, Mali adopted a revised Family Code.[159]

The petitioners alleged violations of provisions regarding the 'minimum age of marriage,' consent of parties at the time of marriage, violations of inheritance rights of women, and violations of obligations to end harmful traditional practices that are harmful to women's well-being.[160] Although Mali claimed that they had amended the law under *force majeure* conditions, they were still responsible for violating their obligations under the ACRWC, the Maputo Protocol, and the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[161] The Court ordered the State to amend the Family Code to align it with their international obligations under the instruments they had ratified.[162]

This case indicates how the African Court can be extremely inflexible in certain cases, imposing its will on the State without giving due regard to the State's interests. Mali is a Muslim majority country where almost 92% of the population is Muslim.[163] In the above case, the State contended that, under Islamic law, women receive half of the share in property as that of men. The State also contended that women are considered to be eligible for marriage after reaching puberty, with an appropriate age for women to get married in

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158 *Association Pour le Progres et la Defense des Droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali,* App no 046/2016 (ACtHPR, 11 May 2018)
159 ibid.
160 ibid.
161 ibid.
162 ibid.
163 Kenneth Kimutai too 'Religious Beliefs in Mali' *WorldAtlas* (25 April 2017) <https://worldatlas.com/articles/religious-beliefs-in-mali.html>

the Muslim community of Mali determined to be as low as 15 years of age.[164] The ACtHPR did not give any deference to the argument of the State; the fact that religious groups had forced the government to amend the Family Code was not a suitable argument in view of the Court.

Moreover, the argument against the Family Code in Mali was that the State had ratified the Maputo Protocol, which contained provisions on the State's obligations regarding women's consent in marriage, the right age for women to get married and equitable share in inheritance for women. The State had contended that they were trying to improve the law slowly; however, the Court did not give any credence to this argument. The ACHPR also ignored the fact that the State had shown a strong will and inclination towards bringing its laws in conformity with international human rights treaties by incrementally modernising their legislation starting in 1998. The State of Mali promulgated the Family Code against all odds in 2009. It was only after the backlash that the government had to face from different groups, including Islamic organizations that the Family Code was amended that led to violations of the State's international obligations.

Depending on how the situation unveils in the future, Mali could be the third country after Rwanda and Tanzania to withdraw the declaration that allows NGOs and individuals to take their cases to African Court. In a country where the majority of the population is Muslim, it is never easy to go against religious and customary norms and practices. It could be said that by not allowing Mali to introduce laws that are not in conformity with the State's international obligations to gain control over a situation of internal conflict, the ACtHPR may have given rise to resistance against the international human rights regime at the domestic policymaking level in Mali.

In *Dexter Eddie Johnson v Republic of Ghana,*[165] the ACtHPR affirmed and justified the State's decision in imposing the death penalty. the applicant had alleged that the Ghanaian State had violated his right to life and right to protection from inhumane punishment under the International Covenant on

[164] *Association Pour le Progres et la Defense des Droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali* (n 158).
[165] *Dexter Eddie Johnson v Republic of Ghana* (Ruling), App. No 016/2017 (ACtHPR, 28 March 2019).

Civil and Political Rights (ICCPR).[166] The Court noted that he was awarded the death penalty after a proper investigation and after proper establishment of charge against him.[167] The Constitution of Ghana allowed the death penalty; therefore, his sentence was legal. The Court dismissed the relief sought.[168] The Court did not derive a rule against the death penalty from the rights mentioned in the application in the case of Ghana.

Considering the above-mentioned facts, the doctrine of margin of appreciation has not found any place in practice of the ACtHPR. The African system is clearly not an entirely pro-State system as it draws inspiration from other human rights instruments, implies new and more progressive rights from existing provisions, and requires States to conform to their treaty obligations in a straightforward manner. Even the sub-regional courts in Africa, namely the 'ECOWAS Community Court of Justice, the East African Court of Justice, and the Tribunal of the Southern African Development Community' have no application of the doctrine of margin of appreciation in their systems.[169] It is believed that these Courts are more focused on the rights of citizens and are not willing to give States much leeway.[170]

There have been mixed approaches towards the nature of this ACtHPR until now. Some view it as a restrictive system that favours States while some cases such as the *Ogoniland* and *Republic of Mali* cases indicate otherwise. Like the other two systems, the application of the doctrine of margin of appreciation in the African system would depend on the circumstances of each individual case. However, the ACtHPR needs to establish a system of deference to domestic governments, as otherwise, Member States will be reluctant in ratifying further international human rights treaties at the African level. There is also a danger of some States ultimately leaving the system. After Tanzania's withdrawal, there are only eight states that have made declarations to allow

166 ibid.
167 ibid.
168 ibid.
169 Andreas von Staden 'Subsidiarity, exhaustion of domestic remedies, and the margin of appreciation in the human rights jurisprudence of African sub-regional courts' (2016) 20(8) International Journal of Human Rights 1113.
170 ibid 1126.

the ACtHPR to receive cases from individuals and NGOs. The Mali judgment could further discourage other States to adopt this declaration.

6. CONCLUSION

The notion of the margin of appreciation, though originating in Europe, is finding greater relevance when considered within the framework of various regional human rights regimes. The European system is well-versed in the doctrine, which has been applied by the ECtHR in a number of judgments. In cases where national authorities do not entirely agree with the provisions of the American Convention, Member States of the Inter-American system—who at first did not object to the IACtHR 'universalist' approach—are now requesting a margin of appreciation. The ACtHPR is the newest and has less developed and established norms and tendencies; yet, in certain instances, the ACtHPR has adopted a stance that is comparable to the Inter-American court—or even more restricted in certain instances. The reaction that the ACtHPR has gotten from the OAU is the strongest as indicated by the withdrawal of States from its jurisdiction.

In conclusion, the margin of appreciation is needed in all regional human rights systems. The way every State perceives their human rights obligations would almost always correspond with the domestic socio-cultural realities of those States. Cultural relativism posits that the cultural context should shape the evaluation of ethical standards; the margin of appreciation acknowledges this by allowing States some leeway in interpreting human rights norms based on their unique cultural and historical backgrounds. The varying adoption of the margin of appreciation stems from the tension between preserving cultural diversity and the desire for universal human rights standards; legal traditions, political philosophies, and historical contexts shape how different systems approach this balance. The margin of appreciation allows States to move in the direction of conformity with international human rights treaties and obligations, while also adopting such measures that are acceptable to those groups within a State who have a different conception of rights and duties than those enshrined in international human rights instruments.

BOOK REVIEW: 'RAISE THE DEBT: HOW DEVELOPING COUNTRIES CHOOSE THEIR CREDITOR' BY JONAS BUNTE

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From the US-China trade war to growing grievances regarding the International Monetary Fund (IMF) and the World Bank (WB), issues of international lending and donor politics have dominated headlines in recent years. Developing countries and emerging market economies (EMEs) have regularly needed to take out loans to finance developmental projects and deal with balance of payment issues/trade deficits. Historically, countries have had the option to either sell treasuries to private investors or approach States (typically Western Nations) for bilateral lending. If a developing country preferred a multilateral approach, their primary option was the IMF, whose loans came attached with their own set of conditions. Recently, however, the surge of new lenders/economic coalitions such as BRICS (Brazil, Russia, India, China and South Africa) or the Chinese-led Asian Investment and Infrastructure Bank (AIIB) has created additional options for international lending. The question then arises: what determines which creditor a developing nation finally enters a lending arrangement with?

In his book *Raise the Debt: How Developing Countries Choose Their Creditor*,[1] Jonas Bunte attempts to answer this question. He divides the main options available to debtor countries into four categories. These four options include private creditors and investors, bilateral Western donors (whom he groups together as members of the Developmental Assistance Committee), International Financial Institutions (IFIs) like the IMF or WB, and finally, the relatively

[1] Jonas B. Bunte, *Raise the Debt: How Developing Countries Choose Their Creditors* (New York: OUP, 2019; online edn, Oxford Academic, 21 February 2019), https://doi.org/10.1093/oso/9780190866167.001.0001.

new donor group that has emerged in the form of BRICS. According to Bunte's thesis, developing countries pick their creditors based on the demands of their dominant societal interest group. In other words, politicians will pick creditors based on the preferences of the social coalitions which exert the greatest influence over a country's domestic politics, be it through electoral capacity, financial capability or other means.

To justify this claim, Bunte first establishes why it is important to consider debtor countries as 'active' recipients who genuinely weigh the choice of approaching one creditor against the other. Given that debtor countries now have such distinct options, with each type of creditor having different terms and investment interests, Bunte considers it amiss to assume that only creditor willingness to give a loan, or 'supply-side' considerations, are important. Rather, he uses a variety of case studies and evidence collected from first-hand research in Peru, Ecuador, and Colombia to show how even countries with seemingly similar economies can have divergent preferences in terms of the creditors they approach. For example, Peru shows a preference for DAC donors, Colombia for private creditors and Ecuador for BRICS. This exemplifies how the pros and cons weighed by the debtor country, or 'demand-side' considerations, are also at play.

Bunte then goes on to expand upon which societal groups in particular impact this decision-making process. He identifies three main coalitions: Labour (i.e., the workforce), Industry (i.e., owners of fixed assets such as manufacturing plants) and Finance (i.e., owner of mobile assets and financial capital for investment). Bunte further expands how, in developing countries, two of these groups may hold more power than the third, which results in an alliance or 'coalition' between these groups so that their joint preferences motivate which creditor a debtor country chooses. In the context of this book, the term 'coalition' does not necessarily mean a formal alliance between two societal groups or joint negotiations with the government. Rather, each of the three groups has individual preferences which consist of both overlap and divergences. What is unique to each debtor country is which two groups exert more influence than the third and therefore, what 'coalition' forms the dominant interest group. Bunte argues that the benefits to a government of

catering to this coalition's preferences outweigh the losses from displeasing the third group, and so those preferences dictate debtor choice.

Continuing the systematic fashion he has adopted throughout the book, Bunte goes on to name each of the three potential interest group configurations in Chapter 2 and explains why each group prefers a particular creditor. In countries where Labour and Industry make up the more dominant societal interest groups, Bunte classifies this as the presence of a Capital Coalition. In such economies, the interests of capital owners (either fixed capital like factories/plants or mobile capital in the form of monetary assets) are pitted against the interests of the labour force, with the interest of the Capital Coalition prevailing. Countries with a Capital Coalition will prefer lending from IFIs. The Industry sector remains ambivalent to IFI donations, while Finance benefits greatly from IMF conditionality to lower inflation and liberalise the market. They exhibit an even stronger preference for private creditors as selling treasuries puts more money in circulation for Industry while also linking government debt to the wellbeing of the domestic financial sector. Countries where the combined interests of workers and manufacturers, that is the Industry and Labour sector, outweigh Finance represent a Corporatist Coalition. In such States, BRICS loans are the most preferred option as they are often provided for developmental projects. Hence, they provide Industry with subcontracting opportunities and Labour with more employment options. Finally, the last and least common coalition type is a Consumer Coalition. This is where the joint preferences of Labour and Finance together are expressed most strongly over issues, such as inflation, which affect consumers (i.e. labour) who are also the customers of the domestic Finance Industry. This coalition exhibits a strong preference for Western DAC loans. Labour prefers DAC assistance as they often invest in humanitarian needs, while Finance benefits from the 'good-governance' or anti-corruption policies associated with them.

Through this detailed division of societal interest groups and a thorough explanation of the economic rationale behind their divergent preferences, Bunte provides a very pragmatic answer as to why developing countries show variation in their borrowing portfolios. However, the merits of this book do not just lie in its unique thesis. Rather, Bunte's thesis leaves room for debate

and revision in the modern political atmosphere. Bunte realises this burden, and the true prowess of this book lies in the methodology he uses, both in terms of research and presentation, in order to make his arguments both persuasive and understandable. In particular, this review will highlight: the notable contribution the book makes in the field of political economy, its reader-friendly expansion and use of economic rationale and finally, the emphasis Bunte places on both qualitative and quantitative evidence.

Bunte's work fully embraces how debtor choice is a decision bound by both the economic preferences of interest groups and political developments in an increasingly interlinked world. Therefore, the book stands as an exemplary work in the discipline of political economy. From a political lens, the book highlights the potential consequences of the rise of BRICS and their distinct lending policies right from the first chapter. For example, he has mentioned how while Western loans have often been attached to conditions of upholding democratic values, BRICS and, in particular, Russo-Chinese donations have gone to countries where democracy may be weaker. Hence, the rise of BRICS may reduce the incentive developing countries have to increase their democratic capacity for loan eligibility. Similarly, the author shows awareness about how the strength of democracy and electoral accountability in each State is a statistically significant factor when accounting for why developing countries would choose a particular creditor. He addresses this by sorting countries according to their democratic score rating and picking countries with similar democratic scores for his case studies. This ensures that domestic coalitions can wield similar influence over government policy and hence variations in borrowing portfolios are due to differing dominant coalitions.

At the same time, Bunte takes care to not just explain economic concepts associated with interest group preferences but also to cater to alternative explanations based on economic thinking. For example, he addresses potential supply-side explanations right from Chapter 1. According to supply-side or creditor-focused theories, a developing country will only receive a loan from a lender that is willing to lend to it. These theories suggest that the primary matter is that of creditor choice, and creditors prefer certain types of debtors, such as democratic countries or those rich in natural resources.

However, Bunte compels the reader to question the logic behind considering all debtors as passive recipients. He does not outright deny supply-side economic considerations and even accepts that some governments may have more choices available than others. That being said, similar governments make different decisions hence there must be demand-side factors at play. Bunte also relies on economic thinking to tackle some counterarguments to his thesis. Some may argue that debtor countries could simply use different creditors for different tasks based on their expertise without paying attention to the dominant interest group. However, here Bunte expands upon the economic concept of 'fungibility', where a fund is delegated to a recipient for one sector, and so the recipient decreases its own funding in that sector. Due to varying degrees of fungibility as per the creditor, debtor countries retain a degree of flexibility and so do not necessarily link their choice with creditor expertise.

Another quality of *Raise the Debt* that shines through its research is the simultaneous use of both quantitative and qualitative evidence. While it is a given that a book studying borrowing portfolios will rely heavily on quantitative evidence and figures which reflect amounts borrowed, Bunte makes great effort to display data in an understandable manner. The discrete group of four creditor classes and three coalition configurations prevent any graphs or data displays from being too complicated for the reader. In addition, the book uses multiple methods of presentation, including bar charts, histograms, and dot-and-whisker plots, with the author choosing the graph type that would most clearly display the data. Bunte also mentions significant statistics explicitly in the text. For example, in the first chapter, he highlights how only '1.8% of borrowers obtained loans from all four types of creditors.' This helps establish how there definitely are divergences in borrowing patterns, and countries exhibit a statistically significant preference for one creditor over the other.

What the book does more uniquely, however, is complementing its quantitative findings with qualitative, first-hand research through interviews. This sets the findings presented in *Raise the Debt* apart by giving the qualitative evidence an almost ethnographic value. He goes to great lengths to explain his methodology of case study selection and interview conduct in Chapter 3

while expanding on his findings in the preceding chapters. The author personally conducted interviews with local bankers, factory owners and labour union representatives (hence representatives of each societal interest group) in his chosen case study countries of Peru, Colombia and Ecuador. Furthermore, he also interviewed all other stakeholders involved in borrowing decisions in order to add to the validity of his claim. He interviewed politicians and local elites in order to see how receptive they truly were to the interests of societal groups. He also interviewed creditors from all four categories. This ensured that his qualitative work also included supply-side perspectives and was not demand-side biased. Bunte demonstrates a great degree of transparency regarding the potential obstacles he faced in conducting the interviews and then ensuring their credibility for his research. He obtained affiliations at local universities in Peru, Colombia, and Ecuador to help put institutional weight behind his research and interview requests. In interviewing elites, he was aware of points raised by other scholars such as Welch on how political/business elites are trained in persuasion so their interviews may create false impressions of causality in research. He combats this by using the 'competitive' interview approach inspired by Delaney's work and interviewing elites from all sectors in order to 'triangulate' his information. Seeing the author take such care greatly adds to the ethos of Bunte's work in the reader's mind.

The above merits are what truly stand out from reading *Raise the Debt*, there are some areas where the scholarly argument feels somewhat weaker or leaves more to be desired.

While Bunte does go to great degrees to substantiate his thesis with evidence, when one generalizes his thesis to all developing countries, there are some cases where the reader may feel that his assumptions are too strong. Firstly, Bunte's findings rely on the assumptions that governments will be most responsive to, and so will gain the most electoral benefit by catering to, the preferences of two out of three societal interest groups. This does not account for a country where one sector, for example, a resource-abundant industrial sector in which several politicians have personal ties, dominates both of the other societal interest groups. In such situations, if a government chooses to borrow from BRICS, this may simply be in response to Industry preferences,

and it could be inappropriate to use this as evidence for the strength of the Labour sector as well. Secondly, Bunte has considered the military a part of the Industry sector. However, in several developing countries, the military plays a direct or indirect role in politics to varying degrees. Treating the preferences of the military as akin to the domestic industry at large can greatly underestimate the role of a country's army in its foreign policy and so international lending decisions.

There are also some nuances regarding international lending decisions that the book remains silent on. The first is the notion of regionality. Although the book's case studies are based in one region of Latin America, this region is far from China, which remains the main donor force of the BRICS coalition. This compels the reader to question whether Bunte's thesis can apply equally well to countries in South or South East Asia where either country has very strong economic ties with China (like Pakistan) or has economic conflict with China (like the Philippines over the South China Sea). Whether or not proximity to regional donors decreases the influence of the preference of the dominant coalition is a question that could be explored further.

Secondly, while Bunte's display of the preferred donors of each societal interest group is backed with ethnographic evidence, the book does not explicitly answer whether these preferences are static or could change over time based on new experiences with a previously preferred donor. For example, while Labour prefers BRICS loans due to new employment opportunities, there have also been several cases of mistreatment of workers in MNCs set up by countries like China in less developed economies, particularly in the African region. Would such cases then change Labour preferences? Here, a case study of societal preferences across a given time period rather than one point in time may be useful.

While some points, such as the one mentioned above, are not addressed in *Raise the Debt*, these all are minor shortcomings in an overall extensive and well-argued piece of work. Bunte does not shy away from addressing alternative explanations but rather explores them in detail in Chapter 10 of the book to see where they fit into his theory. In terms of alternative

economic explanations, most prominently supply-side considerations, Bunte makes it clear that his work does not take a hardline stance of dismissing supply-side considerations and the willingness of a creditor to extend a loan to a particular country. Rather, he logically asserts that the heart of an economic decision lies at the intersection of both supply and demand side preferences. In terms of demand-side explanations, Bunte uses alternative ideas to show how his own thesis remains the most robust. For example, if the primary demand-side consideration were that of loan prices (maturity time, interest rate, grant ratio) or creditor expertise (in terms of investment projects), then countries with similar income classes or developmental needs would need to pick the same creditors. However, variations in borrowing portfolios are present in both such classes, hence showing why Bunte's theory of borrowing decisions being based on dominant interest groups holds weight.

In conclusion, *Raise the Debt* by Jonas Bunte is an impeccable contribution to the field of political economy, which shines due to its reader-friendly explanations of economic rationale, awareness of ever-changing geopolitical considerations and use of both quantitative and qualitative evidence. It combines general supply-side explanations of borrowing portfolios which are based on lender willingness, with a credible demand-side explanation that seems to more accurately account for why countries with similar GDP and developmental needs may still choose different creditors.

In my opinion, what makes Bunte's work particularly potent now is that it provides a useful lens through which to predict what countries will look favourably upon the ascendancy of BRICS and China in particular. The global geopolitical landscape has changed greatly in the past 3 years. On the one hand, the onset of COVID-19 has left developing countries in even more dire need of assistance and loans. On the other hand, incidents such as Russia's invasion of Ukraine have made financial links with countries like Russia a political statement and hence much more costly to make. The factors may pull countries towards BRICS creditors or push them away respectively. Hence, I believe Bunte's theory which follows how domestic preferences shape international institutional decisions, should be complemented by similar research on how shifts in foreign relation preferences could increase

or decrease the impact of domestic coalitions. Using the ethnographic style that Bunte has adopted in his research, these efforts could provide invaluable insight into how foreign lending will affect the international political and economic landscape in the 2020s.

CASE COMMENT: THE LAW ON ENVIRONMENTAL IMPACT ASSESSMENTS IN THE SOUTH CHINA SEA ARBITRATION (THE REPUBLIC OF THE PHILIPPINES V THE PEOPLE'S REPUBLIC OF CHINA)

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1. INTRODUCTION

The expansive claims of China over the sovereignty of the South China Sea have been a constant source of tension among competing interest-holders. The geostrategic location of and the abundance of natural resources in the South China Sea mark it as one of the most contentious areas in the world. In 2013, the Philippines instituted arbitration proceedings against China at the Permanent Court of Arbitration (PCA) under the United Nations Convention on the Law of the Sea, 1982 (UNCLOS). The Tribunal's Award addressed several issues within the law of the sea, ruling on the status of maritime features in the South China Sea, the source of maritime entitlements, and the illegality of certain actions of China in the South China Sea. The Award dedicates an entire section to China's obligations to protect and preserve the marine environment. This comment focuses on the Tribunal's findings on the obligation to conduct an environmental impact assessment (EIA) and communicate its findings under Articles 205 and 206 of UNCLOS.

An environmental impact assessment (EIA) is a procedure that examines and assesses the environmental impacts of planned activities before approval and proposes measures to reduce and continually monitor effects on the

environment.[1] The procedural duty of conducting an EIA is rooted in the substantive obligation to prevent environmental damage.[2] The principle of prevention obligates States 'to use all available means to avoid activities' undertaken in their territory or 'jurisdiction that cause significant damage to the environment of another State.'[3]

The duty to conduct an EIA has received customary status[4] and is also featured in treaties in several areas of environmental law, including biodiversity protection, climate change, and the usage of international watercourses. An example of one such treaty is the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) 1991, which mandates States Parties to incorporate the obligation to conduct an EIA in their domestic legislation for certain activities listed in Appendix I that may have a 'significant adverse transboundary impact.'[5]

While already regarded as part of customary international law, the renewed interest in EIAs is accredited to the momentous passing of the Agreement Under the United Nations Convention on the Law of The Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Agreement) in 2023, and the debate surrounding the inclusion of EIAs in the Draft Exploitation Regulation of the International Seabed Authority's Draft Mining Code. The need for EIAs is particularly acute in the latter case since our understanding of the biodiversity and ecosystem of the deep sea-bed is incomplete.[6] Further, the rising demand for technology is propelling the extraction of metals such as

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[1] UNEP, Goals and Principles of Environmental Impact Assessment, UNEP Res. GC14/25, 14th Session.

[2] Declaration of the United Nations Conference on the Human Environment 1997 (Stockholm Declaration), Principle 21

[3] *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Order, Provisional Measures, [2006] ICJ Rep 113 [101]

[4] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, [2011] ITLOS Rep 10 [145]

[5] Convention on Environmental Impact Assessment in a Transboundary Context (adioted 25 February 1991, entry into force 10 September 1997) 1989 UNTS 309 ('Espoo Convention'), art 2(3).

[6] IUCN, 'Deep-sea mining' (*IUCN,* May 2022) <https://www.iucn.org/resources/issues-brief/deep-sea-mining> accessed 10 December 2023.

copper, zinc, lithium, etc., and other minerals from the ocean bed. threatening the survival of habitats and species.

Similarly, the BBNJ Agreement represents a significant step towards a more comprehensive legal framework on the rights and obligations of States to protect and preserve the marine environment in areas beyond national jurisdiction, which includes the high seas and the seabed/ocean floor outside national jurisdiction. In particular, Part IV of the BBNJ Agreement exclusively deals with EIAs and lays down the procedural requirements in impressive detail. However, unlike UNCLOS, the BBNJ's EIA obligations do not extend to areas within the national jurisdiction of States. Therefore, retrospectively analysing the South China Sea Award in light of the BBNJ Agreement offers insights into the extent to which the law on EIA in maritime areas has developed and areas where further progress is needed.

This case comment begins with an overview of the Philippine's main contentions against China regarding the obligation to conduct and EIA, and the Tribunal's ruling on the matter. Next, the Tribunal's decision is analysed against four key concerns regarding EIAs under UNCLOS: scope of the duty, threshold to trigger an obligation under Article 206, specific content of an EIA, and the duties to communicate and monitor. Generally, UNCLOS does not detail any procedural obligations associated with EIAs, like notification and consultation, that are mentioned in other legal instruments. It is within this context that the ruling of the Tribunal in the South China Sea Arbitration gains significance. Thus, the next part explores whether the Tribunal succeeded in filling the gaps left by the Convention.

2. OVERVIEW OF THE TRIBUNAL'S FINDINGS ON CHINA'S ALLEGED BREACH OF ARTICLE 206 OF UNCLOS

The South China Sea hosts a wide variety of fisheries and some of the world's most biodiverse coral reef ecosystems. Some species are vulnerable or endangered, and human activities threaten fragile coral reefs.[7] The vitality of ecosystems everywhere in the South China Sea was threatened by the

[7] *South China Sea Arbitration*, *Philippines v China*, Award, ICGJ 495 (PCA 2016) [824]

'environmental harm occurring at Scarborough Shoal and in the Spratly Islands due to connectivity between ecosystems.'[8]

According to the Philippines, China conducted activities that breached its obligations to protect and preserve the marine environment through Submissions No. 11 and 12(b). The allegations relate to two activities: harmful fishing and construction practices.[9] This comment focuses on the latter claim, particularly China's land reclamation and construction on seven reef features located in the Spratly Islands. China's land reclamation activities involved dredging, which extracted large amounts of sand, rock, and other materials from the seabed and deposited them onto shallow reefs, directly destroying the reef habitat and indirectly impacting several organisms.[10]

Along with others, the Philippines accused China of breaching Articles 123, 192, 194, 197, 205, and 206 of UNCLOS through such activities. In particular, the Philippines claimed that China was under an obligation to carry out an EIA under Article 206, assessing 'possible effects on the marine ecosystem of the South China Sea, the coral reefs at issue, the biodiversity and sustainability of living resources there and endangered species.'[11]

The obligation to conduct an EIA is incorporated under Article 206 of the United Convention on the Law of the Seas (UNCLOS), which reads as follows:

When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.

[8] ibid [825].
[9] ibid [817].
[10] ibid [857].
[11] ibid [911].

Article 206 obliges States to assess the detrimental environmental consequences of proposed activities before their approval and to communicate the results of such an assessment. Article 205 requires States to either publish their EIA reports or 'provide such reports at appropriate intervals to the competent international organisations, which should make them available to all States.' While Article 206 doesn't explicitly mention the term 'environmental impact assessment' or 'environmental impact statement,' the requirements listed in Articles 205 and 206 match the basic requirements of an EIA, and the jurisprudence of ITLOS confirms this.

According to the Philippines, China's State Oceanic Administration (SOA) Report and SOA Assessment fell short of the requirements under Articles 205 and 206.[12] The Tribunal had to infer the Chinese position from official statements since China generally did nt participate in the proceedings and provided no statement on the Philippines' Submissions No. 11 and 12(b). The Tribunal could only identify the SOA Statement and the SOA Report as environmental studies conducted by China. It invited the Chinese government to submit a copy of the relevant EIA to the Tribunal, but China failed to do so.

When considering whether China had conducted and communicated environmental impact assessments of the relevant land reclamation and island-building activities, the Tribunal began by emphasising the customary nature of the obligation under Article 206. Ultimately, based on the considerations discussed below, the Tribunal found China to have breached its obligations under Article 206.

3. SCOPE OF ARTICLE 206

The scope of Article 206 extends to 'all planned activities under [a State's] jurisdiction or control.' The provision seems to have universal application, covering all maritime areas, including those within the national jurisdiction of a State and those beyond national jurisdiction. Accordingly, the nationality of

[12] ibid [911].

the person or enterprise responsible for the activity is rendered irrelevant[13] as long as it is within the jurisdiction or control of a State. However, the Convention does not define what constitutes 'control,' but the Sea-Bed Committee has previously asserted that control was related to activities rather than areas.[14] Further, while the extent of 'control' needed to trigger this provision remains unanswered, the drafting history indicates that a factual link, rather than a legal one, between the State and the concerned activities, needs to be satisfied.[15] This fact, coupled with the general language of 'all planned activities,' signifies that the State's obligation extends to not just the activities of the State but also those of private entities. Yet, the use of the word 'activities' suggests the exclusion of national policies and strategies.

3.1 Tribunal's Finding on Scope

At the outset, the Tribunal confirmed that the scope of Article 206 applies to all maritime areas, both inside and beyond the national jurisdiction of States. Furthermore, the sovereignty of any State over features in the South China Sea was deemed irrelevant to the Tribunal's finding on the Article and Part XII of the Convention at large. The Tribunal adhered strictly to the issue without elaborating or expanding on crucial legal terms, particularly the idea of 'control' within Article 206. This is a reasonable approach since the Tribunal noted that the artificial island-building program was 'part of an official Chinese policy implemented by organs of the Chinese State.'[16] Accordingly, the ambiguity of the term 'control' in Article 206 does not impinge on China's responsibilities in the present case, as there is an evident and clear-cut linkage of the activities with the Chinese State.

An opportunity was presented to address the matter of 'control' in the Tribunal's discussion of Articles 192 and 194. The Tribunal noted that the

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[13] Myron H. Nordquist, Shabtai Rosenne and Alexander Yankov, eds., T*he United Nations Convention on the Law of the Sea 1982: A Commentary*, Volume IV, Martinus Nijhoff Publishers, (1991): 109–124
[14] Boyle A, *United Nations Convention on the Law of the Sea: A Commentary*, Edited by Alexander Proelss (Nomos Verlagsgesellschaft 2017) 1376; Sea-Bed Committee, Note by the Chairman of Working Group 2 Addressed to the Chairman of Sub-Committee III, UN Doc. A/AC.138/SC.III/L.39 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-I), 85, 87 (Annex: WG.2 Working Paper No. 8/ADD.2, note 6).
[15] ibid.
[16] ibid [976].

Articles covered activities undertaken directly by States and their organs and those within their jurisdiction and control. Without any elaboration on 'control,' the Tribunal proceeded to assert the responsibility of a flag State for the activities of its fishing vessels with respect to the obligation to protect and preserve the marine environment. Thus, the exact extent and nature of 'control,' for instance, as elaborated for attribution of responsibility under the law of State responsibility,[17] that a State must exert to trigger the obligation under Article 206 remains unanswered with this Award.

4. THRESHOLD TO TRIGGER THE OBLIGATION UNDER ARTICLE 206

Article 206 lays down two conditions that must be met to meet the threshold necessary to initiate the obligation to conduct an EIA, namely that (i) reasonable grounds must exist to believe that (ii) the proposed activity may cause 'substantial pollution of or significant and harmful changes to the marine environment.' While no definition has been provided for the term 'reasonable,' the term seems to confer an element of discretion on State parties, which is confirmed by the phrase 'as far as practicable' within the same Article. In this regard, Article 206 seems to differ from other instruments, such as Article 14 of the Convention on Biological Diversity, 1992 and Article 2(3) of the Espoo Convention, which require 'likelihood of a significant harm'.

As for the second condition, UNCLOS provides no definitions for 'substantial pollution of or significant and harmful changes'. Some commentators have argued that the disjunctive structure of the provision provides two different thresholds, with 'substantial' being a higher standard than 'significant.'[18] This is supported by the commentary to Article 2 of the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, which states that 'significant' is a factual, rather than a legal, standard and is greater than 'detectable' but less than 'substantial' or

[17] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States),* Judgment on Jurisdiction and Admissibility, [1984] ICJ Rep 392; *Prosecutor v Tadić (Duško)*, Appeal Judgment, ICL 93 (ICTY 1999).
[18] Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge University Press 2008) 133.

'serious.'[19] On the other hand, some argue that the two criteria do not set different thresholds but address different threats to the marine environment.[20] Unfortunately, the preparatory documents do not provide any reason for using two different terms, especially since earlier proposed drafts by States only mentioned substantial pollution.[21]

4.1 Tribunal's Finding on Threshold

The Tribunal held that 'given the scale and impact of the island-building activities…, China could not reasonably have held any belief other than that the construction 'may cause significant and harmful changes to the marine environment.'"[22] Thus, China's obligation to conduct an EIA - as far as practicable - and communicate the results had been triggered.

Generally, as previously discussed, the term 'reasonable' confers some level of discretion upon States in deciding and conducting an EIA. The EIA obligation only becomes mandatory when such reasonable grounds are believed to exist. The Tribunal also confirmed the element of discretion,[23] suggesting a subjective test in determining whether the activities have caused significant and harmful changes. China's position forwarded that the construction activities would not damage the marine environment and ecosystem in the South China Sea and that a high standard of environmental protection was followed.[24] Since the Article does not provide for what needs to be done to establish that reasonable grounds do not exist, such as a screening process, a strict reading of the law would lead to the conclusion that China was not obligated to conduct an EIA.

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[19] International Law Commission 'Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries' (2001) 2(2) Yearbook of the International Law Commission 152.
[20] Nordquist, Rosenne and Yankov (n 13) 1375.
[21] ibid; Sea-Bed Committee, Note by the Chairman of Working Group 2 Addressed to the Chairman of Sub-Committee III, UN Doc. A/AC.138/SC.III/L.52 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-I), 89, 92 (Annex: WG.2 Working Paper No. 13); Third Committee UNCLOS III, Results of Consideration of Proposals and Amendments Relating to the Preservation of the Marine Environment, UN Doc. A/CONF.62/C.3/L.15/ADD.1 (1975), OR III, 200 (Art. IX). 22 UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975).
[22] *South China Sea Arbitration*, Award (n 7) [988].
[23] ibid [948].
[24] ibid [981].

However, this is different from the Tribunal's conclusion. While the Tribunal should be commended for holding China to a strict standard in protecting the marine environment, its reasoning in reaching such a conclusion requires further attention. Despite asserting the discretionary nature of Article 206 indicated by the term 'reasonable,' at other points in the Award, the Tribunal's reasoning gave the impression that the threshold test is objective. The Tribunal relied on the findings of independent experts appointed by the Tribunal, under Article 24(1) of the Arbitral Tribunal's Rules of Procedure, to conclude that China's activities had an unequivocal and unprecedented impact on the reefs in the region.[25] Accordingly, China was obligated to conduct an EIA since there were reasonable grounds to believe that significant harm was being caused.

China's assessment of the nature and impacts of the construction activities did not align with the conclusions reached by the reports that the Tribunal relied on.[26] However, the Tribunal did not emphasise national considerations when determining whether the obligation to conduct an EIA had been activated. Instead, the threshold was objectively discerned through reliance on 'impartial and independent' scientific evidence of appointed experts. The Tribunal exhaustively listed all the impacts of Chinese activities on the marine environment, providing some indication of what sort of impact would meet the threshold. However, its failure to elaborate on 'significant' and 'reasonable' and its reliance on independent experts left the law less clear than before. Overall, the Tribunal's reliance on experts, especially in light of China's failure to submit a copy of an EIA despite public officials' statements of having conducted so, is a reasonable approach that ensures that environmental protection is prioritised above all procedural technicalities. However, the law of the sea would have significantly benefited from more transparent and more coherent legal reasoning, rather than factual assertions, regarding the requirements needed to trigger an obligation to conduct an EIA.

[25] ibid [84], [978].
[26] ibid [982].

5. CONTENT OF AN EIA

The stringency of the obligation under Article 206 is further weakened by the absence of assessment criteria necessary to fulfil the obligation. The term 'as far as practicable' confers further discretion upon State parties. However, the term's placement within the Article hints that it relates to the specific content of the EIA rather than the decision to conduct one.[27] This points to the international environmental legal principle of common but differentiated responsibilities (CBDR) which recognises the varying responsibility of States for common problems based on their contribution and capability to address the issue at hand. Such a development-oriented theme demonstrates the historical context of UNCLOS, adopted following the recognition of the CBDR principle in the Stockholm Declaration on the Human Environment, 1972. Consequently, 'as far as practicable' enabled States to adopt EIA standards in accordance with their national laws and capacity.

5.1 Tribunal's Finding on Content

The Tribunal could not 'make a definitive finding' that China had failed to prepare an EIA since Chinese officials and scientists have repeatedly asserted that such an assessment had been undertaken.[28] However, the Tribunal did review the SOA report and SOA Statement against China's own legislative standards and concluded that 'both fall short of these criteria and are far less comprehensive than EIAs reviewed by other international courts and tribunals'[29] The Tribunal seems to have introduced a new criterion of 'comprehensiveness,' along with compliance to domestic standards, for an assessment to qualify as an EIA. Such an approach raises two concerns. Firstly, past case law, as seen in the *Pulp Mills* case, has held that each State is to determine the specific content of an EIA in its domestic legislation. At the same time, it is not an irrefutable position and has been challenged. For instance, Judge *ad hoc* Dugard asserted that 'certain matters inherent in the

[27] Craik (n 18) 99.
[28] But the Tribunal also noted that such a finding is irrelevant to discern whether China breached the obligation under Article 206. *South China Sea Arbitration*, Award (n 7) [991].
[29] ibid [990].

nature of an environmental impact assessment that must be considered if it is to qualify as an environmental impact assessment.'[30] In the present case, the Tribunal neither strictly complied with the *Pulp Mills* approach nor elaborated on what a 'comprehensive' EIA would entail, leaving a grey area in the law.

However, the Tribunal attached a link in the footnote for the Final Environmental Impact Statement for the proposed Abbot Point Growth Gateway Project, possibly as an example of what a 'comprehensive' EIA is. Among other things, the Abbot Point Growth Gateway Project incorporated a stakeholder consultation process, raising the question of whether it is a requirement within the ambit of UNCLOS. The Convention does not explicitly require States to consult affected parties. However, the Tribunal has previously required States to enter into consultations to assess, among other things, the effects or risks of land reclamation activities, as seen in the *Land Reclamation* case[31], and to exchange information on possible consequences to the marine environment in the *MOX Plant* case.[32] The Tribunal's language in both cases suggests that the duty to consult is integral to an EIA. However, neither of the cases specified whether the duty to consult arose from Article 206. The criterion of 'comprehensive' was an excellent opportunity for the Tribunal to rule on whether Article 206 incorporates the duty to consult. Yet, it did not do so.

6. DUTIES TO COMMUNICATE AND MONITOR

Despite being silent on the specific content of an EIA, two distinct duties of communication and monitoring still exist within UNCLOS. Firstly, Article 206 requires States to communicate the results of an EIA by publishing it or sending it to a competent international organisation that will disseminate it amongst States. While the word 'shall' indicates that the duty to communicate is strict, the strength of the duty is enervated by the absence of any mention

[30] *Separate opinion of Judge ad hoc Dugard, Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Compensation owed by Nicaragua to Costa Rica, [2018] ICJ Rep 15 [161].
[31] *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)*, Provisional measures, ICGJ 345 (ITLOS 2003)
[32] *MOX Plant Case (Ireland v United Kingdom*), Order, Request for Provisional Measures, ICGJ 343 (ITLOS 2001) 111

of the contents of the reports. Furthermore, no definition is provided for a 'competent international organisation.' Earlier negotiations favored the United Nations Environment Programme (UNEP), and the 1975 draft provided no opportunity for States to publish results themselves.[33] Other proposals only required communicating results to 'States likely to be affected' where an appropriate international organisation was not established.[34]

Secondly, under Article 204 (2), States must continue monitoring the effects of approved activities to determine whether they are likely to pollute the marine environment. The link between Article 204 and Article 206 is premised on the fact that the duty to conduct an EIA is a continuous one. In the *Gabčíkovo-Nagymaros* case, Judge Weeramantry reasoned that constant monitoring is required since it is impossible to anticipate every potential environmental risk prior to the approval of the project.[35]

6.1 Tribunal's Finding on Duties to Communicate and Monitor

The Tribunal held that 'the obligation to communicate reports of the results of the assessments is absolute,'[36] confirming the stringency of duty relayed by the term 'shall.' Such an approach is at variance with the case law of the ICJ that purports that the duty to communicate only arises when an EIA *confirms* a risk of significant [transboundary] harm.[37] Although no justification was provided for why the responsibility to communicate is absolute, a reference to Article 200 of UNCLOS would give a potential reason. Article 200 encourages States to exchange information that is acquired about pollution of the marine environment, regardless of where the pollution occurs. Thus, once the impact of pollution is recognised, States can take appropriate measures to protect and preserve the marine environment.

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[33] Nordquist, Rosenne and Yankov (n 13) 1375; UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975)
[34] Nordquist, Rosenne and Yankov (n 13) 1366.
[35] Separate Opinion of Vice-President Weeramantry, *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7.
[36] ibid 948.
[37] *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* Compensation owed by Nicaragua to Costa Rica, [2018] ICJ Rep 15 [161].

The Tribunal considered the duty to communicate very broadly without evaluating in sufficient detail whether either of the two methods set out in Article 205 had been met. The Chinese Ambassador's assertions at the 25th Meeting of States Parties that China's construction activities were following a high standard of environmental protection were deemed insufficient to meet the obligation in Article 205.[38] Article 205 required an EIA to be submitted in writing to the Meeting or any other international body.[39] While the Tribunal implicitly recognised that the Meeting of State Parties is an appropriate forum to submit EIA reports to, it did not elaborate on what would be included under 'any other international body.' Furthermore, the Tribunal did not consider the alternative option of China publishing the report independently. Given the chequered negotiating history of Article 205, the Tribunal missed an opportunity to clarify the methods and addressees of 'publishing.' The omission of any discussion on publishing could also lead to a conclusion that such an option is only available to China where no competent international organisation exists, as indicated by the negotiating history of the Convention. However, this is a stretch since it goes beyond the language of the Article.

Yet, neither was the Tribunal's reasoning on China's failure to submit a report to the Tribunal within the language of the Article. The Tribunal partly determined China's violation of Article 205 on China's failure to draw the tribunal's attention to an EIA when directly asked to do so. It is unclear why the Tribunal took such an approach since the Article does not mandate submitting an EIA to any dispute settlement body.

As for the duty to monitor, the Philippines never alleged China of breaching Article 204. However, the Tribunal explicitly acknowledged that monitoring the risks or effects of pollution on the marine environment under Article 204 is relevant to the Philippines' submissions.[40] Yet, the Tribunal never considered the duty to monitor, even under the specific section of the Award titled 'China's Construction Activities and the Obligation to Monitor and Assess.' No reason is provided for the lack of deliberation over China's duty to continue surveilling its activities.

[38] *South China Sea Arbitration*, Award (n 7) [991].
[39] ibid.
[40] ibid [947].

7. CONCLUDING REMARKS: THE BBNJ AGREEMENT AND THE WAY FORWARD

On 19 June 2023, the United Nations General Assembly adopted the BBNJ Agreement. The purpose of Part IV of the Agreement is to operationalise the provisions of UNCLOS on EIAs, but only for areas beyond national jurisdiction. The Agreement goes a long way in clarifying the exact content of an EIA, filling a gaping hole in the provisions of UNCLOS and its interpretation by ITLOS and PCA. The BBNJ Agreement sets a new threshold to determine whether an obligation to conduct an EIA exists by bifurcating it into a two-step process: screening and assessment. The initial screening process is triggered when an activity may have more than a minor or transitory effect or when the effects are unknown or poorly understood. Only when the screening process establishes that the activity may reasonably cause substantial pollution of or significant and harmful changes to the marine environment will the obligation to conduct an EIA arise.[41] Article 30 of the BBNJ Agreement impressively lists the exact content of the screening and the factors to be considered when deciding whether the planned activities meet the threshold necessary to initiate a screening process. As for the EIA itself, the BBNJ Agreement introduces the duty to publicly notify about the planned activity to ensure the participation of potentially affected States and stakeholders in the EIA process. The provision itself, along with the definitions and detailed procedural obligations provided within Article 32, provides much-needed clarity in the law of EIA in maritime areas. As previously explored, UNCLOS's lack of a notification and consultation requirement has inhibited ITLOS from explicitly linking the duty to consult with the EIA process with Article 206 of UNCLOS.

Despite the progress made in the EIA regime due to the BBNJ Agreement, two key issues still need to be answered. Firstly, the BBNJ Agreement naturally replicates the language of UNCLOS in requiring EIA for planned activities under the 'jurisdiction or control' of parties, even if the scope of the

[41] Agreement Under the United Nations Convention on the Law of The Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Agreement) 2023, art 30.

BBNJ Agreement excludes areas within the national jurisdiction of States. Like UNCLOS, the BBNJ Agreement contains no definition of 'control.' However, Article 1(2) of the May 2019 Draft Text of the BBNJ Agreement defined '[a]ctivity under a State's jurisdiction or control' as an activity over which a State has effective control or exercises jurisdiction.[42] The definition was deleted in later drafts and the Agreement's final text. While it provides no clarification on 'control', it does limit the scope of control to 'effective control.' It is for international tribunals to clarify what constitutes 'effective control' in the law of the sea regime. Some support can be found in the submissions of States to the Preparatory Committee. For instance, Mexico seemed to consider licensing, funding, and sponsoring private entities within a State's control.[43]

Secondly, the BBNJ Agreement also mirrors the threshold of 'substantial pollution of or significant and harmful changes' in UNCLOS. And just like UNCLOS, the BBNJ Agreement does not offer any guidance on what would constitute 'significant' harm or 'substantial' pollution. Had the Tribunal in the South China Sea Award elaborated on these terms, the UNCLOS and BBNJ Agreement would benefit from such clarity.

In conclusion, the PCA's Award cemented the position of EIAs in the law of the sea. The ambiguous reasoning and low threshold for undertaking an EIA made it possible to legally hold China accountable for its breach of Article 206, fortifying the importance of protecting and preserving the environment. However, the unpredictable, vague, and occasionally contradictory reasoning leaves the law on EIA less clear.

[42] Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, Draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (A/CONF.232/2019/6), (17 May 2019).
[43] Mexico's Submission at the Third Session of Preparatory Committee for the Purpose of the Preparation of the Streamlined Version of the Chair's Non-Paper (A/RES/69/292), (24 April 2017).