



LUMS Law Journal

Volume 4, Issue 1, 2017

Articles

Challenging State Authority or Running a Parallel Judicial System? 'Ulama versus the Judiciary in Pakistan
Muhammad Munir

Discovering the Law without A Coherent Legal Theory: The Case of the Council of Islamic Ideology
Muhammad Mushtaq Ahmad

Mulla's *Principles of Mahomedan Law* in Pakistani Courts: Undoing/Unraveling the Colonial Enterprise?
Shahbaz Ahmad Cheema

Law on the Custody of Children in Pakistan: Past, Present, and Future
Mudasra Sabreen

Putting Public Trust Doctrine to Work: A Study of Judicial Intervention in Environmental Justice
Muhammad Wajid Munir

The Economics of Marriage: Recent Legal Developments in *Khula* and *Haq Mehr* in Pakistan
Sana Naeem & Asad Ullah Khan

Countering Legal Voids of Exceptionalism in Pakistan
Kashif Mahmood

Book Review

Rights of the Child in Islam: A Book Review
Mustafa Khan

Case Notes

The Mustafa Impex Case: 'A Radical Restructuring of the Law?' *Mustafa Impex, Karachi v The Government of Pakistan* PLD 2016 SC 808
Kamran Adil

Inheritance Rights of a Childless Widow of a Shia Husband *Khalida Shamim Akhtar v Ghulam Jaffar* PLD2016 Lahore 865
Nimra Arshad

Challenge to the Industrial Relations Act 2012: Two High Courts Respond *KESC v NIRC* 2015 PLC 1 & *Pakistan Workers Federation v Government of Pakistan* 2014 PLC 351
Naima Qamar & Siraat Younas

Assisted Reproduction in Pakistan and the Alternative Discourse *Farooq Siddiqui v Mst. Farzana Naheed* PLD 2017 FSC 78
Ayesha Ahmed

Pakistan's Need for Amicable Resolutions Concerning Foreign Investment Disputes: The *Reko Diq* Case *Maulana Abdul Haque v Government of Balochistan* PLD 2013 SC 641
Abdul Rafay Siddiqui

Legislative Reviews

Corporate Reorganizations: Debating the Adoption of Pakistan's Draft Corporate Rehabilitation Act 2004
Salman Ijaz

The Hindu Marriage Act 2017: A Review
Sara Raza

**Shaikh Ahmad Hassan School of Law
Lahore University of Management Sciences (LUMS)**

Editorial Board

International Members

Prof. Dr. Martin Lau, Professor of South Asian Law, School of Oriental & African Studies, University of London

Prof. Dr. Shaheen Sardar Ali, Professor of Law, School of Law, University of Warwick

Dr. Mathew Nelson, Reader, Department of Politics and International Relations, School of Oriental & African Studies, University of London

Jeff Redding, Associate Professor, School of Law, Saint Louis University

Dr. Ahmad Ghouri, Senior Lecturer in Commercial Law, School of Law, Politics, and Sociology, University of Sussex

Dr. Ayesha Shahid, Senior Lecturer, Coventry Law School, University of Coventry

Dr. Shoaib Ghias, JD and PhD in Jurisprudence and Social Policy, University of California, Berkeley

Dr. Vanja Hamzić, Senior Lecturer in Legal History and Legal Anthropology, School of Oriental and African Studies, University of London

Muhammad Rezaur Rehman, LL.M McGill University, Assistant Professor of Law at University of Asia Pacific

Arpeeta Shams Mizan, LL.M Harvard Law School, Lecturer of Law at University of Dhaka

National Members

Prof. Dr. Muhammad Khalid Masud, Member of Shariat Appellate Bench, Supreme Court of Pakistan

Prof. Dr. Muhammad Munir, Vice President Administration, Finance, and Planning; Director General Shari'ah Academy, International Islamic University Islamabad

Dr. Shahbaz Ahmad Cheema, Assistant Professor, Law College, Punjab University Lahore

Dr. Muhammad Mushtaq Ahmad, Associate Professor of Law, International Islamic University, Islamabad

Chief Editor

Dr. Muhammad Zubair Abbasi

Co-Editor

Marva Khan

Student Editors

Asad Ullah Khan

Mir Asfandyar Khan Mohmand

Hiba Fatima Hassan

ISSN 2414-8415 (Online), ISSN 2414-8407(Print)

A Note from the Editors

We are pleased to present the fourth volume of the LUMS Law Journal. This Journal aims to provide a platform for legal scholarship in Pakistan by encouraging reflection and research on the most relevant legal issues of the day. Collaboration between scholars, practicing lawyers and students has led to the fruition of Volume 4, which contains seven articles, five case notes, two legislative reviews and one book review.

Dr. Muhammad Munir sheds light on the contentious relationship between *ulama* and the state law in Pakistan. Dr. Munir analyses the role of the *ulama* in the Pakistani judicial system by examining the case law related to *khul'* to demonstrate the extent to which *ulama* can challenge the authority of the state. In his article, Dr. Muhammad Mushtaq Ahmad analyses the methodology of the Council of Islamic Ideology and highlights its failure to develop a comprehensive and internally coherent legal theory. Dr. Shahbaz Ahmad Cheema scrutinizes the context in which Mulla's *Principles of Mahomedan Law* was written. His article also examines the way courts in Pakistan have made use of Anglo-Mohammaden laws contained in this book. Lack of comprehensive laws governing child custody in Pakistan often compromise a child's wellbeing, as Dr. Mudrasa Sabreen shows through her evaluation of the Guardians and Wards Act 1890. She reviews the proposed reforms to this issue, against the backdrop of previous legislation and inconsistent case law pertaining to child custody. In his article, Muhammad Wajid Munir introduces the concept of environmental justice. Pakistani judiciary has a crucial role to play in the implementation of the Public Trust Doctrine, which is critically studied through case law and legislative tests. Sana Naeem and Asad Ullah Khan identify the need for progressive, gendered improvements to Islamic family law by probing into the contractual nature of a marriage in Islam, and what the monetization of marital obligations means for women in particular. Restricting its analysis to cases of *khul'*, their article discusses the implications of the 'economics of marriage'. In light of ethnic, sociological and theological tensions in Pakistan, Dr. Kashif Mahmood considers whether Pakistani courts have adopted an approach centered on human rights. The article inspects the attitude of the judiciary during periods of disturbance, and the way it has altered discourse on civil and personal liberties.

In the first case note, Kamran Adil outlines the effects the *Mustafa Impex* case had on Pakistani judicial landscape. The author discusses impact of the judgment on federal and provincial governments from a legal, political, and sociological point of view. Nimra Arshad's case note on *Khalida Shamim*

Akhtar v Ghulam Jaffar focuses on the right of inheritance of a widow of a Shia husband under Islamic inheritance law. This case note highlights the role of judiciary in protecting and promoting women's right to property under Islamic inheritance law. Naima Qamar and Siraat Younas conduct a parallel analysis of *KESC v NIRC* and *Pakistan Workers Federation v Government of Pakistan* to explain how the validity of the Industrial Relations Act 2012 was challenged after the 18th Amendment. Ayesha Ahmed's case note on *Farooq Siddiqui v Mst. Farzana Naheed* delves into the issue of assisted reproduction in Pakistan. This case note presents a comparative analysis of the stances taken by different Muslim countries and Islamic schools of thought. The last case note, written by Abdul Rafay Siddiqui on *Maulana Abdul Haque v Government of Balochistan*, assesses the domestic resolution of foreign investment disputes in Pakistan. This case note stresses on the need for Pakistani judiciary to have a grasp over international law in order to avoid international arbitrations.

Salman Ijaz peruses the features of Pakistan's Draft Corporate Rehabilitation Act 2004 in the legislative review. This reform to corporate legislation attempts to incorporate part of the US Bankruptcy Code in Pakistan. The author analyzes the extent to which this has been possible. Sara Raza traces the difficulties the Hindu community had to face regarding marriage laws in her legislative review of the Hindu Marriage Act 2017. The plight of this minority community is extensively discussed in the context of Pakistan's history and previous laws on Hindu marriage. Mustafa Khan reviews the book, *Rights of the Child in Islam*, authored by Dr. Muhammad Munir. This review is appreciative of the delicate and controversial issues that Dr. Munir discusses, and probes into the depth of analysis conducted.

We would like to extend our gratitude to the Chief Editor, Dr. Muhammad Zubair Abbasi, and the Co-Editor, Marva Khan for their guidance and supervision. We are also grateful to our Faulty members, Dr Muhammad Azeem, Dr. Faiza Ismail, and Ms. Rida Jamal; LUMS alumnus, Maham Naweed, Salman Ijaz, and Muhammad Mustafa Mirza for constantly providing constructive feedback and overseeing the work of student editors. We would like to acknowledge the support and encouragement of our Dean, Prof. Dr. Martin Lau, and the Vice Chancellor, Prof. Dr. Syed Sohail Hussain Naqvi.

The publication of Volume 4 of the LLJ was made possible due to the efforts of the members of the LLJ Editorial Committee. We especially thank our sub-editors, Abdul Wahab Niaz, Eesha Arshad Khan, and Sara Raza, for their hard work in reviewing and editing the submissions.

Our aim, as always, remains to encourage scholarship and discourse on Pakistani law, and we always welcome aid in pursuing this endeavor. If you wish to provide us feedback, or make recommendations or suggestions, please write to us at submissions.llj@lums.edu.pk.

The Student Editors

Table of Contents

Articles

Challenging State Authority or Running a Parallel Judicial System? ‘ <i>Ulama</i> versus the Judiciary in Pakistan Muhammad Munir	1
Discovering the Law without A Coherent Legal Theory: The Case of the Council of Islamic Ideology Muhammad Mushtaq Ahmad	29
Mulla’s <i>Principles of Mahomedan Law</i> in Pakistani Courts: Undoing/Unraveling the Colonial Enterprise? Shahbaz Ahmad Cheema	48
Law on the Custody of Children in Pakistan: Past, Present, and Future Mudasra Sabreen	72
Putting Public Trust Doctrine to Work: A Study of Judicial Intervention in Environmental Justice Muhammad Wajid Munir	96
The Economics of Marriage: Recent Legal Developments in <i>Khula</i> and <i>Haq Mehr</i> in Pakistan Sana Naeem & Asad Ullah Khan	120
Countering Legal Voids of Exceptionalism in Pakistan Kashif Mahmood	129

Case Notes

The Mustafa Impex Case: ‘A Radical Restructuring of the Law?’ <i>Mustafa Impex, Karachi v The Government of Pakistan</i> PLD 2016 SC 808 Kamran Adil	149
Inheritance Rights of a Childless Widow of a Shia Husband <i>Khalida Shamim Akhtar v Ghulam Jaffar</i> PLD 2016 Lahore 865 Nimra Arshad	158

Challenge to the Industrial Relations Act 2012: Two High Courts Respond
*KESC v NIRC 2015 PLC 1 & Pakistan Workers Federation v Government of
Pakistan 2014 PLC 351*

Naima Qamar & Siraat Younas 166

Assisted Reproduction in Pakistan and the Alternative Discourse
Farooq Siddiqui v Mst. Farzana Naheed PLD 2017 FSC 78

Ayesha Ahmed 178

Pakistan's Need for Amicable Resolutions Concerning Foreign Investment
Disputes: The *Reko Diq* Case

Maulana Abdul Haque v Government of Balochistan PLD 2013 SC 641

Abdul Rafay Siddiqui 195

Legislative Reviews

Corporate Reorganizations: Debating the Adoption of Pakistan's Draft
Corporate Rehabilitation Act 2004

Salman Ijaz 207

The Hindu Marriage Act 2017: A Review

Sara Raza 219

Book Review

Rights of the Child in Islam: A Book Review

Mustafa Khan 236