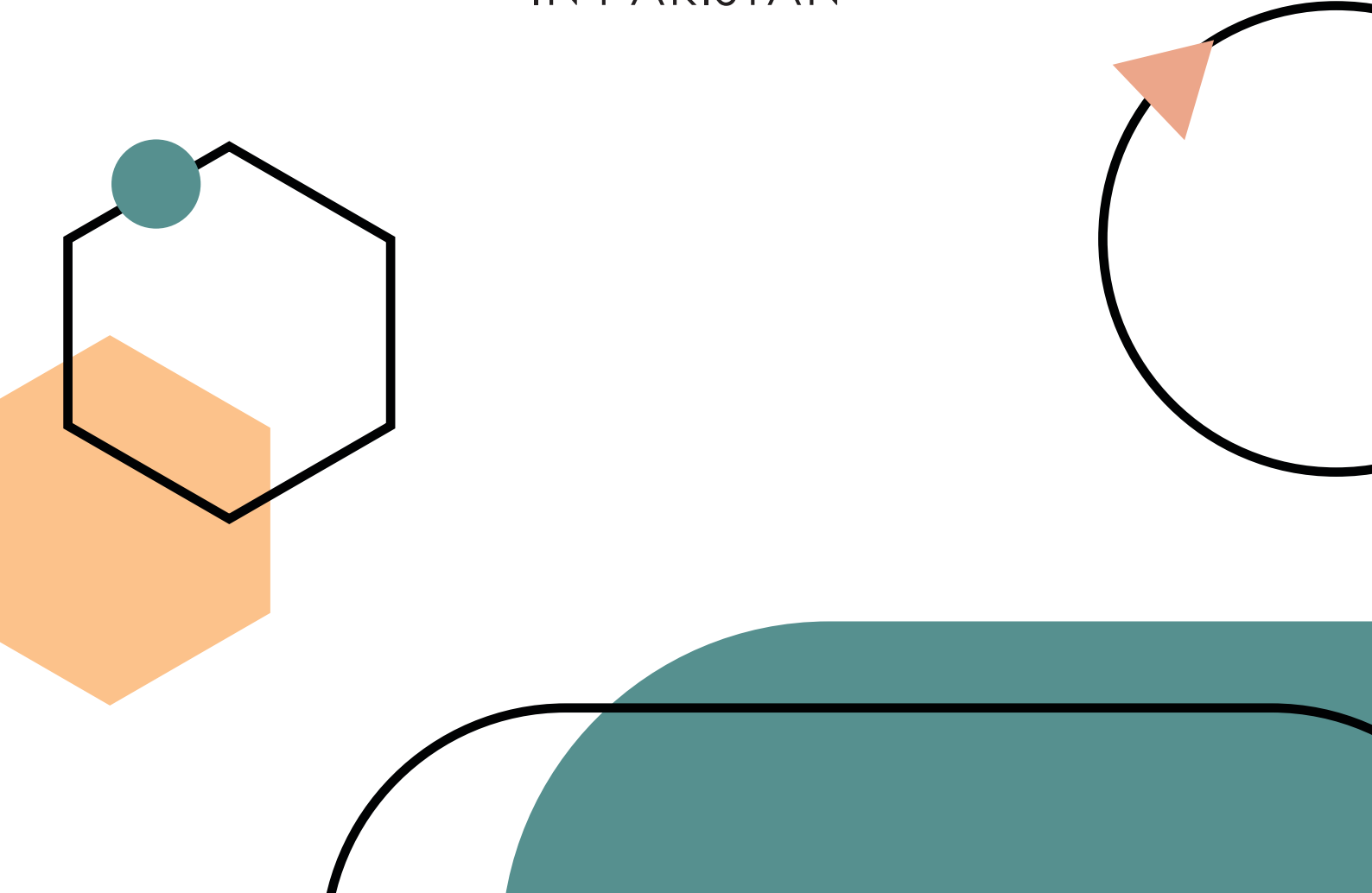


GUIDE ON

INTERNATIONAL HUMAN RIGHTS
AND THE CRIMINAL JUSTICE SYSTEM
IN PAKISTAN



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PURPOSE AND USE OF THE GUIDE

This Guide on International Human Rights & the Criminal Justice System in Pakistan has been designed to serve two equally valuable purposes. The first is to serve as a compendium of case law and information on the application of International Human Rights standards in the Pakistani legal context. To this end the Guide relies heavily on the decisions of the Supreme Court of Pakistan as well as the High Courts to help members of the judiciary apply human rights standards to their day to day work. Secondly, the Guide also serves as training manual for Judicial Academies as well as other centres of learning in Pakistan. The Guide has been specifically structured to allow for both these objectives to be achieved while ensuring ease of use for readers and trainers alike.

Ultimately, this Guide aims to facilitate an understanding of the critical role played by the Judiciary in Pakistan in upholding Pakistan's international obligations. Pakistan's judicial decisions are cited routinely at international fora to demonstrate the state's compliance with certain treaty obligations, as well as its failure to uphold others. This Guide, therefore, seeks to help judges appreciate that they are certainly free in their judicial decision making within the State but are not free from the State since the international obligations and commitments made by the State are equally binding on its Judicial arm as they are on its Legislature and the Executive. Importantly, numerous international treaties are drafted directly addressing a State's judiciary and can therefore only be fulfilled by its members.

The first two Sections of the Guide delineate Pakistan's international obligations and the role of the judiciary in realizing the complete implementation of human rights in the State. Sections Two to Eight of the Guide expound upon specific human rights and how the judiciary in Pakistan has interpreted their scope and application. These include:

- i. Protections in arrest, pre-trial and preventive detention,
- ii. Prohibition on torture and abuse,
- iii. Right to fair trial,
- iv. Protection of vulnerable groups,
- v. Rights of the child and the juvenile justice system and
- vi. The right to life and security

This division is intended to aid trainers in explaining international human rights standards and drawing on existing domestic protections to better guide the Judiciary in fulfilling its role in enforcing human rights in Pakistan.

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SECTION ONE

INTERNATIONAL LAW AND THE ROLE OF THE JUDICIARY

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INTERNATIONAL LAW AND THE ROLE OF THE JUDICIARY

OVERVIEW

The Judiciary plays an important role in implementing and promoting international law within the Pakistani legal framework. Domestic courts that openly engage with international law in their judgments provide fertile ground for the interpretation and evolution of the state's own law. It is thus pertinent to recognize the role of the Judiciary in the implementation of international law in Pakistan. This Chapter aims to provide an overview of Pakistan's international legal obligations, which will entail a discussion on the sources of international law and the role of international law in upholding the domestic rule of law. Subsequently, this section will outline the way in which Pakistani Courts have strived to implement international law in the State to reflect upon the significance of the judicial process in the enforcement of human rights standards.

1.1 INTERNATIONAL LAW DEFINED

International law as it is used in this Guide refers specifically to public international law i.e., the set of legal rules that govern international relations between public bodies that include states (i.e. Pakistan) and international organizations (i.e. the United Nations).¹ The narrowest understanding of international law thus reflects a set of obligations between and upon states.² However, unlike domestic law, International law is not always binding on all states. In fact, the cornerstone of international law is consent and reciprocity. In other words, states will agree to be bound (give their voluntary consent) by certain legal obligations since other states are also assuming the same obligations on a reciprocal basis. Once this reciprocal mechanism is put in place both states then have legal rights over each other. In most cases, States can choose not to be bound by certain aspects of international law e.g. by not signing and ratifying a particular treaty. However, in those situations they cannot invoke the treaty and, therefore, will not have any rights on other states.

1.2 SOURCES OF INTERNATIONAL LAW

For the purposes of this Guide, International law is the set of agreements, treaties, norms, rules and standards which relate to relations between nations and are binding on them. Article 38 of the Statute of the International Court of Justice (ICJ), the primary judicial body within the United Nations system, defines the general sources of International Law. These include:

- **International Conventions**³ recognized between States: The treaties that States have ratified are binding upon them. Mere signing of the treaty does not make its provisions binding on the State, but expresses an intention to observe the provisions of the treaty domestically. The provisions of a treaty become binding upon a state once it has ratified the treaty. Examples of such international conventions include the United Nations human rights conventions.
- **Customary Law** derived from the general accepted practice of States: Customary Law is not codified into a singular body of law like a treaty rather they are a set of rules which are binding on states due two factors: 1) These rules are widespread and consistently followed by States and 2) these rules are followed because States believe them to be legally binding. The first factor is easy to understand,

1 Public International Law, European Commission available at http://ec.europa.eu/justice/glossary/publicinternational-law_en.htm.

2 Diane Marie Amann, Benchbook on International Law, Am. Soc. of Intl. Law (2014) available at https://www.asil.org/sites/default/files/benchbook/ASIL_Benchbook_Complete.pdf.

3 The term convention, covenant, treaty, agreement, etc. can be used interchangeably. Any document, regardless of its name, which expresses the will of the State parties to be legally bound by it will fulfil this definition.

however, the second factor, also known as '*opinio juris*' or an 'opinion of law', requires further elaboration. Not all widespread and consistent actions done by States are customary law, the reason for this is that they lack the required *opinio juris*, i.e. these actions are not undertaken out of a legal obligation that the State feels. *Opinio juris* can, therefore, be defined as the subjective sense of a State that the action it takes, it does so because it is under a legal obligation to act in this manner.

Well established principles of customary law can later be codified into treaties. An example of this is the Vienna Convention on Diplomatic Relations of 1961. Diplomatic relations have existed for thousands of years between States, Empires, and Kingdoms as have special rules that States have observed in relation to diplomats. Clearly, therefore, the Vienna Convention did not establish the rules, in fact, these diplomatic rules developed out of widespread and consistent State practice undertaken due to a sense of legal obligation to the other State i.e. customary law. Thus, we can see that the customary law on diplomatic relations was well established much before the Vienna Convention was drafted and the Convention merely codified the custom that already existed. With this reasoning, we can understand that States that have not ratified by the Vienna Convention would still be bound by the customary law on diplomatic relations. Furthermore, if the Vienna Convention was to cease to operate for some reason, States would nonetheless still be bound by the customary law that existed on the issue. Customary law binds all States except those that can demonstrate that they have persistently objected to the custom from before it was established – a difficult task in most cases.

- **General principles of law** recognized by nations existing in their domestic legal systems.
- **Judicial decisions and Scholarly writings** of the highest qualified publicists: These two are considered as a subsidiary for determining the rules of international law. Judicial decisions and scholarly writings are non-binding laws however judicial decisions remain more influential for the ICJ and the national courts.

Other non-binding sources of international law also exist which include United Nations General Assembly (UNGA) resolutions, the position of States within the United Nations System, and International Law studies produced by the International Law Commission for the UNGA.

1.3 READING AND INTERPRETING INTERNATIONAL CONVENTIONS

International Conventions are the most significant source of international law due to which special rules apply in order to ascertain the scope and binding nature of the provisions of conventions. At its core, a convention is a special contract – governed by special rules of construction. In order to effectively read a convention, the nature of provisions introduced within it must be understood. Typically, three types of provisions can be found in International Conventions mainly; substantive provisions, implementing provisions and derogation provisions.

- **Substantive provisions**

Substantive provisions constitute the content of the Convention as they set out the rights, duties, obligations and rules which may be binding upon a State. These provisions form the core of the Convention and lay down the legal principles which are to be implemented. Within the International Conventions regarding human rights, all fundamental protections accorded within them constitute substantive provisions.

- **Implementing Provisions**

Implementing provisions provide for the mechanism through which a convention is to be applied. This may take the form of a requirement to amend domestic legislation in line with the substantive provisions of a Convention, or a positive duty on States to introduce laws to further the purpose of the Convention. Furthermore, these preclude Member States from making reservations to the implementation of certain substantive provisions, to signify the binding nature of certain parts of the Convention.

- **Derogation Provisions**

Finally, derogation provisions are those which set out the extent to which a Member State may derogate from the application of the substantive provisions of a Convention. These allow for State parties to refuse compliance with certain parts of a Convention and lay down the conditions which must be fulfilled for such derogation to be allowed. International law recognizes the principle of sovereignty of States due to which derogation provisions are introduced to strike a balance between the need for a State to protect its sovereignty and to ensure the application of the Convention to protect the rights of citizens.

[See Section 2 of this Guide for a list of substantive, implementation and derogation provisions introduced within each core UN Human Rights Conventions.]

In addition to this, a significant aspect of reading a convention is its subsequent interpretation. It must be noted that customary law may be used as a tool for interpreting and understanding the meaning of provisions within a Convention, however more detailed rules for interpretation are to be found within the Vienna Convention on the Law of Treaties 1969 (VCLT) which also has customary status.

It is important to note that in accordance with the VCLT, signing a convention merely reflects a State's support for the convention and does not make it binding. In order to be binding, a Convention must be ratified,⁴ accepted, approved or acceded to in accordance with the procedure laid down in Articles 11 to 16 of the VCLT. A memorandum submitted to the United Nations by the Government of Pakistan in 1951 stated that there are no laws, regulations, decrees or judicial decisions regarding the negotiation and conclusion of treaties in Pakistan and the matter is governed by custom. In 2018, Senator Mr. Mian Raza Rabbani introduced a Private Bill titled "Ratification of Foreign Agreements by Parliament Bill, 2018" (the 'Bill') proposing legislation in this vital area of public governance. Senator Rabbani introduced the same Bill in the Senate in 2007 and Dr Shireen Mazari proposed a similar legislation in the National Assembly in 2013, but both these proposals failed supposedly due to a lack of broader understanding on the significance of governance in this area of law.⁵

The existing legal framework includes Rule 16(H), of the Rules of Business, 1973. Rule 16 adjudicates upon cases that can be brought before the Cabinet. Rule 16(H) states, "proposals for signing of negotiated instruments with foreign countries and approval for ratification of the instruments." The proposals pertain to negotiations with foreign countries, e.g., exchange of diplomatic and commercial representation, treaties and agreements, visits of goodwill missions, representation at international conferences and meetings, in addition to the process of transposing it in domestic law.⁶

Furthermore, the rules of interpretation are to be found within Articles 31 to 33 of the VCLT which establish the general rule of interpretation, supplementary means of interpretation and rules for the interpretation

4 In accordance with Article 2 of the VCLT ratification is defined as, "the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty."

5 <https://sahsol.lums.edu.pk/law-journal/democratizing-foreign-policy-parliamentary-oversight-treaty-ratification-pakistan>

6 [https://cabinet.gov.pk/SiteImage/Downloads/\[ROB%20amended%20upto%2019%20August,%202019\].pdf](https://cabinet.gov.pk/SiteImage/Downloads/[ROB%20amended%20upto%2019%20August,%202019].pdf)

of treaties authenticated in two or more languages. The general rule in Article 31 explains that each convention must be interpreted in good faith, and that words in the convention must be given their ordinary meaning, interpreted in light of the object and purpose of the convention.

For this purpose, Article 31 goes on to explain that preambles, annexes and any agreements or instruments made in connection with the convention may be used to understand the purpose of a Convention for the purposes of interpreting its provisions. Article 31 further explains that any subsequent agreement, practice or relevant principles of international law may be used to understand the nature and scope of a Convention, to interpret it in accordance with its object, purpose and settled principles of international law.

Article 32 adds that in determining the nature and purpose of a Convention, the preparatory work of the Convention and the circumstances which led to its introduction may be referred to as supplementary means of interpretation in order to ensure that all parts of the convention are capable of clear application.

It is essential then that Courts refer to rules of reading and interpreting International Conventions while implementing international law within the domestic legal system to effectively comply with the purpose and object of such Conventions as well.

1.4 THE PROTECTION OF HUMAN RIGHTS AND THE DOMESTIC RULE OF LAW

Human rights have been widely defined as being rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. Everyone is entitled to these rights, without discrimination. These rights are interrelated, interdependent and indivisible. Internationally, human rights are guaranteed and protected by various forms of legally binding instruments including treaties, customary international law, general principles, and other sources of international law. Together this body of law is known as International Human Rights Law (IHRL) and as it is a subset of public international law it is primarily addressed to States.

IHRL limits what the State can do to its subjects and protects individuals from excesses that a State may commit. This aspect of IHRL is in line with the doctrine of the Rule of Law, one tenet of a functioning democracy.

The notion of the Rule of Law illustrates that every person is subject to the law, including lawmakers, law enforcement agencies and judges. The Rule of Law ensures that every person in positions of authority shall exercise their power within the established framework of public norms rather than acting on their own preferences or ideology. A significant component of the Rule of Law is the protection of human rights in which the judicial organ of the State plays the most important and active role. To uphold the Rule of Law in any State, judges must act as protectors of human rights.

In addition to any State's central constitution, statutes and the jurisprudence of their courts, the sources of law also include international laws or instruments, and cultural or religious norms. All of these collectively contribute to the domestic rule of law and the rights of the people.

While there are various international law treaties that ensure the rights of individuals, nine human rights treaties form the core of the human rights framework in international law.⁷ Out of these nine conventions,

⁷ International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination against Women, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child, International Covenant on the Protection of the Rights of All Migrant Workers and Members of their Families, International Convention for the Protection of all Persons from Enforced Disappearances, Convention on the Rights of Persons with Disabilities

Pakistan has ratified seven and is a party to hundreds of multilateral treaties and thousands of bilateral treaties and commitments etc. This shows the State's willingness to operate in accordance with international law. Fig. 1.1 below shows the core IHRL treaties and Pakistan's ratification status:

INSTRUMENT	STATUS IN PAKISTAN
Universal Declaration of Human Rights 1948	Widely accepted as customary international law
Convention on the Elimination of All Forms of Racial Discrimination 1965	Ratification 1966
International Covenant on Civil and Political Rights 1966	Ratification 2010
International Covenant on Economic, Social and Cultural Rights 1966	Ratification 2008
Convention on the Elimination of All Forms of Discrimination against Women 1979	Ratification 1996
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984	Ratification 2010
Convention on the Rights of the Child 1989	Ratification 1990
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1999	No action
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography 2002	Ratification 2011
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict 2002	Ratification 2016
International Convention for the Protection of All Persons from Enforced Disappearance 2006	No action
Convention on the Rights of Persons with Disabilities 2008	Ratification 2011

Figure 1.1 – International Human Rights Instruments

1.5 INTERNATIONAL HUMAN RIGHTS AT THE DOMESTIC LEVEL

Legal Framework in Pakistan:

Article 268(7) of the Constitution of Pakistan

Pakistan's existing legal framework is articulated by Article 268(7) of the Constitution, which states that “all laws (including Ordinances, Orders-in-Council, Orders, rules, by- laws, regulations and Letters Patent

constituting a High Court, and notifications and other legal instruments having the force of law) in force in Pakistan or any part thereof, or having extraterritorial validity...". While the words of the provision do not explicitly mention inclusion of international law, the text strongly implies it.⁸ Due to this, international obligations form a significant part of the domestic rule of law and for the complete protection of the rule of law within the State, human rights commitments remain essential.

The chapter on Fundamental Rights within the Constitution of Pakistan, which is essential to the protection of the domestic rule of law echoes many of the provisions of the ICCPR. A few such provisions are provided below:

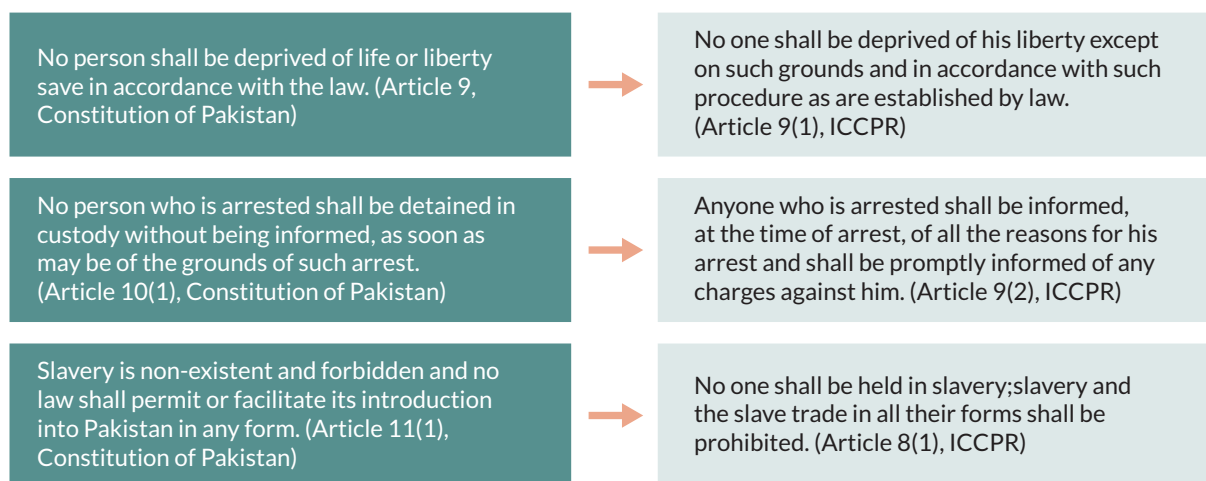


Figure 1.2 – International Human Rights Instruments and Corresponding Constitutional Provisions

International Law is widely entrenched in the domestic legal framework of Pakistan. There are various pieces of domestic law that replicate international law almost verbatim. The chapter on Fundamental Rights in the Constitution of Pakistan is identical to some of the provisions of the ICCPR. There are several other laws in Pakistan which closely correspond with provisions of international treaties which Pakistan has ratified. A few examples include:

INTERNATIONAL INSTRUMENT	CORRELATING DOMESTIC LAW
Chapter VII of the United Nations Charter and all subsequent Security Council Resolutions	United Nations (Security Council) Act 1948
Freedom of Association and Protection of the Right to Organize Convention, 1948 and Right to Organize and Collective Bargaining Convention, 1949	Industrial Relations Ordinance 1969
Certain provisions of the International Covenant on Civil and Political Rights and United Nations Standard Minimum Rules for the Treatment of Prisoners	Pakistan Prison Rules 1978

⁸ Article 268 (7) of the Constitution of Islamic Republic of Pakistan, "In this Article, "existing laws" means all laws (including Ordinances, Orders-in-Council, Orders, rules, by-laws, regulations and Letters Patent constituting a High Court, and any notifications and other legal instruments having the force of law) in force in Pakistan or any part thereof, or having extraterritorial validity, immediately before the commencing day."

The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, more commonly known as “Bangkok rules”.	
Convention for the Suppression of Financing of Terrorism, International Convention for the Suppression of Terrorist Bombings and Security Council Resolutions 1267, 1373, 1456	Anti-Terrorism Act 1997
United Nations Convention against Transnational Organized Crime, United Nations Convention against Corruption and Financial Action Task Force (FATF) Recommendations	Anti-Money Laundering Act 2010
General Agreement on Tariffs and Trade	Anti-Dumping Duties Act 2015
Afghanistan-Pakistan Transit Trade Agreement	Afghanistan-Pakistan Transit Trade Rules 2011
Common Article 3 to the Geneva Conventions and Customary International Humanitarian Law	Actions (in Aid of Civil Power) Regulations 2011
Framework Convention on Tobacco Control	Prohibition of Smoking and Protection of Non-Smokers Health Ordinance 2002
Chemical Weapons Convention	Chemical Weapons Convention Implementation Ordinance 2000
United Nations Framework Convention on Climate Change and Kyoto Protocol	Environmental Protection Act 1997
Chicago Convention on International Civil Aviation	Civil Aviation Authority Ordinance 1982
United Nations Convention on the Law of the Sea	Territorial Waters and Maritime Zones Act 1976
Convention for the Protection of Cultural Property in the Event of Armed Conflict	Antiquities Act 1975
Vienna Convention on Diplomatic Relations 1961	Diplomatic and Consular Privileges Act 1972
United Nations Convention on the Carriage of Goods by Sea	Carriage of Goods by Sea Act 1925

Figure 1.3 – International Instruments and Corresponding Domestic Laws

The fact that some provisions directly reference international instruments within their actual text indicates the willingness of the legislature to comply with international law and acute cognisance of the need to implement international law as well.

1.6 ROLE OF THE JUDICIARY IN UPHOLDING INTERNATIONAL LAW

It is rightly stated that the domestic judiciary, while free in the State, is not free from the State.⁹ It is, therefore, critical to understand that all three arms of the State – Legislature, Executive, and Judiciary play a role in upholding Pakistan's international obligations. In the context of Pakistan's human rights obligations under the various treaties Pakistan has ratified, the role of the judiciary is even more critical for three distinct reasons:

- i. Certain human rights obligations can only be discharged or protected by the judiciary. These can include granting a fair trial and ensuring due process – rights enshrined in the ICCPR as well as the Constitution of Pakistan. It is a judge's role to ensure that no torture is taking place against a person in police custody – a right enshrined in the UNCAT as well as the Constitution.
- ii. It is the inherent role of the judiciary to keep a check on abuses of rights committed by the other two organs of the State. In relation to the executive, it is the judiciary that can hold them accountable. The powers of magistrates in relation to the police, the powers of sessions court judges to ensure credible investigations and prevent abuse, and the important writ jurisdiction of the High Courts and exercise of judicial review prevent the executive from committing abuses of human rights. In relation to the legislature, where laws are made contrary to the Fundamental Rights enshrined in the Constitution, it is the duty of superior judiciary to hold them ultra vires of the Constitution.
- iii. It is the judiciary which can highlight issues of incompatibility between domestic law and international law for the legislature to remedy. This ensures that the judiciary plays a critical role in Pakistan complying with its international obligations, especially its human rights obligations.

In this manner the judiciary plays, arguably, the most important role in the State when it comes to the compliance with International Law. For the purposes of illustration, the following methods of incorporating or implementing International Law into domestic decision making by the Superior Judiciary of Pakistan have been observed:

i. Silent Application

This is when Courts apply domestic law which has been derived from international law and which takes the form of implementing legislation without directly referring to the international law source.

ii. Indirect Application of International Law

This is when Courts utilise international law as a guide to interpreting domestic law. In *Hanover Fire Insurance v. Muralidhar Banechand*¹⁰ the Supreme Court noted:

“Every statute is to be so interpreted and applied as far as its language admits, as not to be inconsistent with the comity of nations, or with the established rules of international law...” thus, reflecting the use of international law as a tool of interpretation for domestic law.

⁹ Ahmer Bilal Soofi, Inextricably Linked, DAWN, May 25 2014, available at <http://www.dawn.com/news/1108468>.

¹⁰ 1958 PLD SC 138

Furthermore, in *Al-Jehad Trust v. Federation of Pakistan*¹¹ the Supreme Court stated that there was an obligation on national courts to interpret ambiguous legislation harmoniously ensuring that such interpretation is in compliance with international law and provides maximum benefits to citizens.

iii. Defining the Content of Constitutional Rights through International Law

International law has been used to elaborate upon the rights encapsulated within the Constitution of Pakistan. In *Al-Jehad Trust v. Federation of Pakistan*¹² the Supreme Court stated that it is permissible to look at international conventions and customary law to expand the scope and content of Constitutional rights and in Human Rights Case No. 29388-K of 2013¹³ the Supreme Court even stated that unratified treaties may be referred to in order to comprehend the nature and application of Constitutional rights.

iv. Direct Application of the 'Principles' of International Law

Direct Application is where Courts implement international law directly and expressly in reaching a decision. The Supreme Court of Pakistan noted in Human Rights Case No. 29388-K of 2013.¹⁴

“...Our Constitution at Article 9 lays down the right to life which has received an expansive interpretation from this Court. Moreover, Article 10 provides direct protection from enforced disappearances. Thus, the crime against humanity of enforced disappearances is clearly violative of the Constitution of Pakistan. Therefore, this Court can also apply the principles enshrined in the 2006 Convention in order to achieve the ends of justice.”

In June, 2020, The Lahore High Court (LHC) commuted the death sentence of Muhammad Iqbal, a juvenile offender who had been entitled to relief for nearly twenty years. In a landmark judgement, a two-member divisional bench of the LHC allowed the petition filed by Justice Project Pakistan and commuted Iqbal's death sentence to life imprisonment. Authored by Hon'ble Chief Justice of LHC Muhammad Qasim Khan and Justice Asjad Javaid Ghural, the judgement relied on the Presidential Notification No. F.8/41/2001-Ptns, Article 37 (a) of UNCRC and Article 6 Paragraph 5 of ICCPR protecting juvenile offenders from the death penalty. The judgement reads: “...firstly the international legislation and secondly our domestic legislation impose a clear ban on the infliction of death penalty on an accused under the age of eighteen years, thus, the claim of the petitioner to seek benefit which otherwise, was fully available to him under the policy, having the force of law, could not have been denied....”¹⁵

However, in case of a conflict between international and domestic law, the scope of direct application of international law is limited and in *Muhammad Humayun v. Member, Board of Revenue*¹⁶ the Court has stated that if there is no possibility of reconciling domestic law with international law, domestic law must be applied but such incompatibility must be noted.

v. Domestic Adoption of International Standards

Courts in Pakistan have also been cognisant of international standards and their application in implementing domestic legislation. For example, the Supreme Court in *Ghulam Hussain vs. The State*¹⁷ stated that:

11 1999 SCMR SC 1379

12 1999 SCMR SC 1379

13 2014 PLD SC 305

14 2014 PLD Supreme Court 305

15 <https://mailchi.mp/024119b606a4/juvenile-muhammad-iqbal-death-sentence-commuted>

16 1991 CLC 362 Peshawar High Court

17 2020 PLD Supreme Court 61

“...the definition of 'terrorism' contained in Sec. 6 of the Anti-Terrorism Act 1997 as it stands at present is too wide and the same includes so many actions, designs and purposes which have no nexus with the generally recognized concept of what terrorism is...It is, therefore, recommended that the Parliament may consider substituting the present definition of 'terrorism' by a more succinct definition bringing it in line with the international perspectives of that offence and focusing on violent activities aimed at achieving political, ideological or religious objectives”

Furthermore, in the same case the Court has stated that international standards, definitions, and concepts can be adopted to ensure the implementation of all rights which are available to citizens under domestic law.

1.7 THE APPLICATION OF INTERNATIONAL LAW BY THE SUPERIOR JUDICIARY OF PAKISTAN

This role of the Judiciary is reflected in the progressive attitude of the Supreme Court and High Courts of Pakistan towards the application of internationally recognized human rights. The Superior Courts have taken a liberal approach towards the implementation of international law in the domestic legal framework which is demonstrated in its jurisprudence upon the subject of human rights.

Some examples include:

Superintendent Land Customs Torkham (Khyber Agency) v. Zewar Khan¹⁸

In this Case the Supreme Court reaffirmed the status of the Durand Line as an international border between Pakistan and Afghanistan which reflects the significance attached to international agreements in the implementation of the law.

Foundation for Fundamental Rights v. Federation of Pakistan¹⁹

The Peshawar High Court, in assessing the legality of drone strikes in international law referred to the UN Charter and the Geneva Conventions of 1949 to declare that such strikes were blatantly violative of the absolute right to life and had not been authorised by the UN Security Council thus, making them in breach of international law.

Mst. Rukhsana Bibi v. Government of Pakistan²⁰

A foreign male migrated to Pakistan to marry a Pakistani woman. He wasn't granted a right to acquire Pakistani Nationality under S.10(2) of the Pakistan Citizenship Act 1951. Denial of this right is discriminatory and a violation of not only Article 25 of the Constitution but also various international law instruments (i.e. Article 25 of the Universal Declaration of Human Rights, Article 15 of International Covenant on Civil and Political Rights, Article 23 of Beijing Declaration and Platform for Action 1995). The High Court directed relevant authorities to grant the foreign national citizenship after following the required procedure.

18 1969 PLD Supreme Court 485

19 2013 PLD Peshawar High Court 94

20 2016 PLD Lahore High Court 857

National Commission on Status of Women v. Government of Pakistan through Secretary Law and Justice²¹

In this case, the courts referred to multiple international instruments (i.e. Article 4,7,8 and 25 of Universal Declaration of Human Rights, Article 2,7,8 and 26 of ICCPR, Article 2,15 and 26 of CEDAW) while adjudicating upon the issue of discrimination against women and lack of access to justice and equality before the law. It was held that these international instruments place a responsibility on Pakistan to ensure that all women in the country have access to courts and tribunals and are treated equally before the law. Article 2(1) of the ICCPR considers negligent representation of women before jirgas/panchayats a blatant violation, which requires all State Parties the duty to protect human rights.

Imran Maqbool, President MCB Bank LTD. v. Federation of Pakistan through Secretary Law, Justice and Human Rights Division, Islamabad and others²²

The petitioners in this case challenged the jurisdiction of the Federal Ombudsman for Protection Against Harassment of Woman at the Work Place under the 2010 Act.

The Court referred to Article 23 of UDHR which declares the right to work and the right to favourable conditions of work as a human right and Article 11 of CEDAW which specifically requires States to ensure equal work opportunity and safe working conditions for women. As Pakistan has ratified these treaties and conventions it is obligated to protect the right to work and to ensure a favourable work environment. Protection Against Harassment of Women at the Workplace Act 2010 was promulgated in pursuance of Pakistan's obligations under the Universal Declaration of Human Rights (UDHR), the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the International Labour Organization Convention 100 ("ILO 100") which is the Convention for Equal Remuneration for Men and Women for Work and Convention 111 ("ILO 111"). The 2010 Act extends to the whole of Pakistan and is applicable over all employees, employers, organization and workplace in the public and private sector. The subject matter of protection of the workplace for women falls under Item 3 read with Item 32 of the Federal Legislative List of the Constitution which includes implementing international treaties and conventions.

Finally, the Court declared that due to the trans-provincial nature of the organisation, the complaint fell within the jurisdiction of the Federal Ombudsman.

Sumayyah Moses vs. Station House Officer, Faisalabad and 3 others

In the case of Sumayyah Moses vs. Station House Officer, Faisalabad and 3 others, the Lahore High Court relied on Hague Convention on the Civil Aspects of International Child Abduction, 1980 for the definition of "abduction." The judgement reads, "...keeping in view the fact that 101 countries are party to the Hague Convention one should prefer the definition given in Article 5 thereof which says that these rights "include rights relating to care of the person of the child and, in particular, the right to determine the child's place of residence.." ²³

21 2019 PLD Supreme Court 218

22 2019 PLD Lahore 17

23 P L D 2020 Lahore 716

SECTION TWO

CORE INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

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CORE INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

OVERVIEW

Pakistan has ratified seven of the United Nations core human rights Conventions, a testament to its commitment to ensuring the fulfilment of these rights for its citizens. This Section aims to shed light on the composition and application of each of these Conventions, along with the main domestic legal instruments and bodies which correspond with and address the rights provided within them. It is crucial to note that these legally binding treaties place an important responsibility on the State to ensure that the rights enshrined therein are not violated and where violations do take place adequate mechanisms for redressal of these violations are available.

The General System of Preferences (GSP) is a mechanism introduced by the European Union (EU) to grant non-reciprocal preferential treatment to imports from developing countries, without legally violating the obligations of the most favoured nation (MFN) status, as per the World Trade Organisation's norms. The GSP+ scheme is designed to assist developing countries assume the special burdens and responsibilities resulting from the ratification of 27 core international conventions on human and labour rights, environmental protection and good governance as well as from the effective implementation thereof.

Pakistan was granted GSP+ in 2014 and has shown commitment to maintaining ratifications and meeting reporting obligations to the United Nations Treaty Bodies for the 27 international conventions.

Pakistan has taken positive steps to comply with GSP+ scheme, these steps include the institutional and capacity development of the Ministry of Human Rights, the Treaty Implementation Cells (TICs), and Human Rights provincial departments, as well as the cooperation with stakeholders. The Ministry of Human Rights has begun to establish the Human Rights Information Management System (HRIMS) in cooperation with United Nations Development Programme (UNDP) and in consultation with the Office of the High Commissioner of Human Rights (OHCHR). This will strengthen the data collection for Treaty Bodies and GSP+ reporting. The Ministry of Human Rights' intention to establish a National Mechanism for Reporting and Follow up (NMRF) and to implement the OHCHR guidelines for Treaty Reporting Monitoring and follow up mechanisms are positive steps.²⁴

For a List of Human Rights Conventions ratified by Pakistan please refer to Figure 1.1 in Section One of this Guide.

2.1 UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights (UDHR) is the fundamental starting point in the area of human rights protection. The UDHR was adopted by the General Assembly of the United Nations on 10 December 1948. Although aspirational in nature, the UDHR holds weight with regard to the universality of certain fundamental human rights – the preamble delineates the Declaration as, 'a common standard of achievement for all peoples and all nations.' However, as it is not a treaty it does not create legally binding obligations for countries.

24 <https://ec.europa.eu/transparency/regdoc/rep/10102/2020/EN/SWD-2020-22-F1-EN-MAIN-PART-1.PDF>

The rights listed within the Declaration are generically worded and were later categorized into two distinct, legally binding Conventions: The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), thereby distinguishing between civil and political rights, on one hand, and economic, social and cultural rights, on the other, both of which were ratified by Pakistan. The UDHR, however, makes no such distinction. The UDHR, ICCPR and ICESCR combined are referred to as the 'International Bill of Rights'. The UDHR has been the foundation for a range of other international agreements which are legally binding on the countries that ratify them.

2.2 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights (ICCPR) establishes a framework for States to protect and promote the civil and political rights of their citizens, whilst also emphasizing on the importance of rectifying violations of these rights. With 53 Articles, the ICCPR consists of substantive, implementing and derogation provisions. The substantive provisions create, define or regulate rights, these include Articles 1, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27. The implementing provisions highlight implementation procedures and preclude the signatory parties from refusing compliance with certain obligations, such as Articles 2, 4(2), 44, 48, 49, 50 and 51. Finally, the derogation provisions, i.e. Articles 4(2)-(3) and 5(2), allow for the signatory parties to refuse compliance with certain obligations.

ARTICLE	CONTENT
Article 1	Self-determination
Article 2	State Party obligations (taking legislative or other measures to protect the rights enlisted in the Covenant; providing the right to legal recourse to those whose rights have been violated even where the violation was committed by someone acting in an official capacity)
Article 3	Equal right of men and women to enjoyment of civil and political rights
Article 4	Public emergency provisions
Article 5	Restriction and derogation provisions
Article 6	Right to life
Article 7	Prohibition against torture, cruel, inhuman or degrading treatment or punishment
Article 8	Prohibition against slavery, servitude and forced or compulsory labour
Article 9	Right to liberty and security
Article 10	Treatment of persons deprived of their liberty
Article 11	Prohibition against imprisonment for failure to fulfil contractual obligation
Article 12	Right to liberty of movement

Article 13	Provision on lawful aliens
Article 14	Due process and fair trial guarantees
Article 15	Prohibition against retrospective liability and punishment
Article 16	Right to recognition before the law
Article 17	Protection against arbitrary or unlawful interferences with privacy, family, home or correspondence
Article 18	Right to freedom of thought, conscience and religion
Article 19	Right to freedom of expression
Article 20	Prohibition of propaganda for war and incitement
Article 21	Right of peaceful assembly
Article 22	Right to freedom of association
Article 23	Protections afforded to family (marriage and responsibilities)
Article 24	Protections afforded to children (registration, nationality)
Article 25	Right to take part in public affairs, vote and have access to public service
Article 26	Non-discrimination guarantee
Article 27	Protection of ethnic, religious and linguistic minorities
Article 28	Provision on the establishment of the Human Rights Committee
Articles 29-30	Elections to the Human Rights Committee
Articles 31-39	Provisions on the composition, functions and re-election with regard to the Human Rights Committee
Articles 40-47	Submission of State Party reports, inter-state complaints procedure, recourse for settling disputes, submission of annual reports by the Human Rights Committee
Articles 48-53	Provisions on ratification, entry into force, extension of Covenant to all units of a Federation, amendments and languages in which the Convention's texts are authentic

Figure 2.1 – Summary of the ICCPR

In order to monitor implementation of the ICCPR, the Convention created the Human Rights Committee (HRC), the treaty-body mandated with monitoring State Party implementation of the Convention. Like the other treaty bodies, the HRC comprises independent experts responsible for monitoring progress under the ICCPR through compliance reports submitted by States Parties. Compliance reports are prepared and submitted by States Parties to a Convention as a measure of progress (or lack thereof) at given intervals and in a specified format.

Under certain conditions the Human Rights Committee may consider individual petitions alleging violations of rights guaranteed under the ICCPR. Pakistan has not ratified the First Optional Protocol to the ICCPR and has therefore not recognized the competence of the Committee to consider individual communications. However, there are other domestic mechanisms in place for complaints regarding human rights violations such as the helpline service established by the Ministry of Human Rights. Following ratification/accession, every state party to the ICCPR is required to submit an initial “state report” containing information on the implementation of each provision of the treaty. Pakistan submitted its initial state report to the Human Rights Committee in October 2015. In light of the information provided in the State report, as well as information received from civil society, the Human Rights Committee then prepared a List of Issues containing particular issues of concern to the Committee, and asking whatever questions it sees fit in light of those concerns. The answers provided by the State party to these questions, as well as other information submitted by civil society and others formed the basis of the “review” of the State’s compliance with the treaty, which was carried out on 11 and 12 July 2017 by the Human Rights Committee.²⁵

In the National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 produced in 2017, HRC also commended the Lahore High Court. The report reads, “In 2005, a law was passed which encouraged persons with disabilities to join public service. This ensured their participation in decision making at all levels in the public sector. Recently, Lahore High Court, in a landmark judgment of 11 January 2017 struck down the discriminatory provision of Civil Services Rule and allowed persons with disabilities to join all services on the basis of equality.”²⁶

Under the domestic legal framework in Pakistan, provisions of the Constitution and Domestic Laws also reiterate similar rights as protected by the ICCPR. For example, Article 2 of the ICCPR which promotes non-discrimination corresponds with Articles 25 and 26 of the Constitution of Pakistan, imposing equality of citizens and non-discrimination in respect of access to public spaces.

ICCPR PROVISION	CONSTITUTIONAL PROVISION
Article 2: Non-Discrimination	Article 25: Equality of Citizens Article 26: Non-discrimination in respect of access to public spaces
Article 3: Equal Rights of Men and Women	Article 25: Equality of citizens
Article 4: Provision for derogation and non-derogation	Article 8: Laws inconsistent with or in derogation of fundamental rights to be void
Article 6: Right to Life	Article 9: Security of person

²⁵ <https://www.icj.org/pakistan-ensure-effective-implementation-of-human-rights-committee-recommendations/>

²⁶ <https://www.ohchr.org/EN/HRBodies/UPR/Pages/PKindex.aspx>

Article 7: Prohibition against torture, cruel, inhuman or degrading treatment or punishment	Article 14: Inviolability of dignity of man, etc.
Article 8: Prohibition of slavery, servitude and compulsory labour	Article 11: Slavery, forced labour, etc. prohibited
Article 9: Right to liberty and security of person	Article 9: Security of person
Article 10: Treatment of Accused	Article 10: Safeguards as to arrest and detention
Article 12: Right to liberty of movement and choice of residence	Article 15: Freedom of movement, etc.
Article 14: Due process and fair trial guarantees	Article 10A: Right to fair trial
Article 15: Prohibition of retrospective punishment	Article 12: Protection against retrospective punishment
Article 17: Prohibition against arbitrary or unlawful interference with privacy, family, home or correspondence	Article 14: Inviolability of dignity of man, etc.
Article 18: Right to freedom of thought, conscience and religion	Article 20: Freedom to profess religion and to manage religious institutions
Article 19: Right to hold opinions/freedom of expression	Article 19: Freedom of speech, etc.
Article 21: Right of peaceful assembly	Article 16: Freedom of assembly
Article 22: Freedom of association	Article 17: Freedom of association
Article 23: Family and marital rights	Article 35: Protection of family, etc.
Article 24: Child protection/registration and rights	Article 35: Protection of family, etc.
Article 25: Right to take part in conduct of public affairs/vote/serve	Article 27: Safeguard against discrimination in service
Article 26: Non-Discrimination and Equal Protection of the Law	Article 25: Equality of citizens
Article 27: Minority rights to enjoy their culture, profess and practice their religion and use their own language	Article 28: Preservation of language, script and culture

Figure 2.2 – ICCPR and corresponding Constitutional Provisions

There are various domestic legislations in place which correspond and uphold the rights guaranteed by the ICCPR as well. These will be discussed in detail in the sections ahead with specific focus on arrest, detention, deprivation of their liberty, torture, abuse, fair trial, non-discrimination in the administration of justice, the rights of the child and juvenile justice systems, and right to life and security.

It is also pertinent to note that following the 18th Constitutional Amendment, provincial governments have established Human Rights Departments at the provincial level that supplement the work of the Federal Ministry of Human Rights. Other bodies which regulate human rights in Pakistan include the National Commission of Human Rights (NCHR), National Commission on the Status of Women (NCSW), National Commission for Minorities, and the National Commission on the Rights of the Child (NCRC). The Election Commission of Pakistan also plays a crucial role in the protection of civil and political rights guaranteed under the ICCPR.

2.3 INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The International Covenant on Economic, Social and Cultural Rights (ICESCR) encourages States to grant economic, social and cultural rights to all citizens and provide labour rights, rights to health, education and an adequate standard of living. As mentioned previously, the UDHR, taken together with the ICCPR and the ICESCR, is commonly referred to as the 'International Bill of Rights'. Pakistan ratified the ICESCR in 2008 and committed itself to implementation of the Covenant in letter and spirit by incorporating these rights in its constitution and legal system as well as to respect, protect and fulfil all its international obligations.

With 31 Articles, the ICESCR consists of substantive, implementing and derogation provisions. The substantive provisions create, define or regulate rights, these include 1, 6, 7, 8, 9, 10, 11, 12, 13 and 15. The implementing provisions include Articles 2, 3, 5(1), 14, 23, 26, 27 and 29. And finally, the derogation provisions, i.e. Articles 4 and 5(2), allow for the signatory parties to refuse compliance with certain obligations.

ARTICLE	CONTENT
Article 1	Self-determination
Article 2	State Party obligations (to take steps, in accordance with the maximum of available resources, to progressively realize the rights in the Treaty; guarantee of the rights enlisted without any sort of discrimination)
Article 3	Equal right of men and women to social, economic and cultural rights.
Article 4	Limitation provision (limitations only permissible where they are compatible with the nature of the right and solely for the purpose of promoting public good in a democratic society)
Article 5	Restriction and derogation provisions (no one is permitted to destroy any of the rights enlisted therein)
Article 6	Right to work

Article 7	Right to enjoyment of just and favourable conditions of work
Article 8	Right to form and join trade unions
Article 9	Right to social security
Article 10	Protection and assistance to be accorded to the family (special protection and assistance for mothers and children)
Article 11	Right to adequate standard of living (food, clothing, housing and continuous improvement of living conditions)
Article 12	Right to enjoy highest attainable standard of physical and mental health
Article 13	Right to education
Article 14	Compulsory and free primary education
Article 15	Right to take part in cultural life, enjoy benefits of scientific progress and artistic production
Article 16-17	State Party reports
Article 18-19	Arrangements and reports by the Economic and Social Council
Article 20	State Party comments to general recommendations or otherwise
Article 21	Submission of reports to the General Assembly the Economic and Social Council
Article 22-24	Provisions on technical assistance and holding of regional and technical meetings
Article 25	Right to enjoy one's natural wealth and resources fully and freely
Article 26-31	Provisions on ratification, instruments of accession, application of Convention to all units of a Federation, amendments and languages in which texts of the Convention are authentic

Figure 2.3 – Summary of the ICESCR

In order to monitor implementation of the ICESCR, the Convention created the Committee on Economic, Social and Cultural Rights (CESCR), the treaty-body mandated with monitoring State Party implementation of the Convention. Like the other treaty bodies, the CESCR comprises independent experts responsible for monitoring progress under the ICESCR through compliance reports submitted by States Parties.

The Committee on Economic, Social and Cultural Rights may, under certain conditions, consider individual petitions alleging violations of rights guaranteed under the ICESCR. Pakistan, however, has not recognized the competence of the Committee to consider individual communications. Those States which have ratified the Optional Protocol to the ICESCR recognize the competence of the Committee to consider individual communications. While Pakistan has not recognized the competence of the CESCR to receive and consider individual communications, it has established a domestic helpline service for complaints regarding human rights violations.

The Constitution provides for various protections under the ICESCR.

ICCPR PROVISION	CONSTITUTIONAL PROVISION
Article 2: Non-Discrimination	Article 25: Equality of Citizens Article 26: Non-discrimination in respect of access to public spaces Article 27: Safeguard against discrimination in services.
Article 3: Equal Rights of Men and Women	Article 25: Equality of citizens
Article 6: Right to Work	Article 34: Full participation of women in national life
Article 7: Right to just and favorable conditions of work	Article 38: Promotion of social and economic well-being of the people.
Article 10: Protection and assistance to the family	Article 35: Protection of family etc.
Article 11: Right to an adequate standard of living	Article 37: Promotion of social justice and eradication of social evils
Article 12: Right to highest attainable standard of physical and mental health	Article 37: Promotion of social justice and eradication of social evils
Article 13: Right to education	Article 25A: Right to education Article 37: promotion of social justice and eradication of social evils
Article 14: Compulsory education free of charge for all	Article 37: Promotion of social justice and eradication of social evils
Article 15: Right to take part in cultural life etc.	Article 28: Preservation of language, script and culture

Figure 2.4 – ICESCR and corresponding Constitutional Provisions

Various domestic legislative instruments provide similar protections afforded under the ICESR. These will be discussed ahead in depth according to the priority areas defined for the purposes of this Guide.

As mentioned above, provincial governments have established Human Rights Departments at the provincial level that supplement the work of the Federal Ministry of Human Rights. Other bodies which regulate human rights in Pakistan include the National Commission of Human Rights (NCHR), National Commission on the Status of Women (NCSW), National Commission for Minorities, and the National Commission on the Rights of the Child (NCRC).

With regard to the ICESCR, there are several Federal and Provincial institutions that play an important role in the protection of economic, social and cultural rights guaranteed under the Covenant. These include:

- Ministry of Planning and Development
- Economic Affairs Division
- Ministry of Housing & Works, Ministry of Inter-Provincial Coordination,
- Ministry of Religious Affairs and Inter-Faith Harmony
- Ministry of Water and Power, Ministry of National Health Services Regulation and Coordination

Additionally, there are provincial departments designated to health, labour, women development, food, education etc.

2.4 CONVENTION ON THE RIGHTS OF THE CHILD

The aim of the Convention on the Rights of the Child (CRC) is to set standards for the protection of children against abuse, neglect and exploitation. It addresses the right to possess, receive and have access to certain services essential to the well-being of children. The Convention also mandates the protection of children from harmful acts and practices. Further, it ensures the child's right to be heard in relation to decisions affecting his or her life and provides for progressive participation in matters impacting the child. Furthermore, the CRC also lays down essential standards for the protection of children's rights in the realm of the juvenile justice system. Pakistan ratified this convention in 1990.

The CRC has three optional protocols. Pakistan ratified the first two on 17 November 2016 and 5 July 2011 respectively. The protocols are as follows:

- i. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in Armed Conflict (25 May 2000)
- ii. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (25 May 2000)
- iii. Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (19 December 2011)

The Convention consists of a total of 54 Articles. Articles 1, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39 and 40 are substantive in nature. Whereas Articles 2, 4, 19, 21, 22, 33, 35, 42 and 44(6) are implementing provisions and Arts. 10(2), 13(2), 14(3) and 15(2) are derogation provisions.

ARTICLE	CONTENT
Article 1	Definition of Child
Article 2	Non-discrimination
Article 3	Best interests of the child (the best interests of the child must be the primary consideration while taking decisions that affect the child)
Article 4	Protection of the rights (through available measures)
Article 5	Parental guidance
Article 6	Survival and development
Article 7	Registration, name, nationality and care
Article 8	Preservation of identity
Article 9	Separation from parents
Article 10	Family reunification
Article 11	Kidnapping
Article 12	Respect for the views of the child
Article 13	Freedom of expression
Article 14	Freedom of thought, conscience and religion
Article 15	Freedom of association
Article 16	Right to privacy
Article 17	Access to information, mass media
Article 18	Parental responsibilities, state assistance
Article 19	Protection from all forms of violence
Article 20	Children deprived of family environment
Article 21	Adoption

Article 22	Refugee children
Article 23	Children with disabilities
Article 24	Health and health services
Article 25	Review and treatment in care
Article 26	Social security
Article 27	Adequate standard of living
Article 28	Right to education
Article 29	Goals of education
Article 30	Children of minorities/indigenous groups
Article 31	Leisure, play and culture
Article 32	Child labour
Article 33	Drug abuse
Article 34	Sexual exploitation
Article 35	Abduction, sale and trafficking
Article 36	Other forms of exploitation
Article 37	Detention and punishment
Article 38	War and armed conflicts
Article 39	Rehabilitation of child victims
Article 40	Juvenile justice
Article 41	Respect for superior national standards
Article 42	Knowledge of rights
Article 43-54	Implementation measures

Figure 2.5 – Summary of the CRC

In order to monitor implementation of the CRC, the Convention created the Committee on the Rights of the Child, the treaty-body mandated with monitoring State Party implementation of the Convention. Like the other treaty bodies, the CRC Committee comprises independent experts responsible for monitoring progress under the CRC through compliance reports submitted by State Parties.

The Committee on the Rights of the Child may, under certain conditions, receive and consider individual complaints alleging violations of the rights enlisted within the Convention. Pakistan, however, has not recognized the competence of the Committee to do so. The Optional Protocol (on a communications procedure) to the CRC gives the Committee competence to receive and consider individual communications alleging violations of the CRC and its Protocols. While Pakistan has not recognized the competence of the CRC Committee to receive and consider individual communications, it has established a domestic helpline service for complaints regarding human rights violations as mentioned previously.

The Constitution of Pakistan broadly safeguards many of the provisions enlisted within the CRC. The details that fall within these principles are further governed under Pakistan's criminal, civil and family laws.

CONSTITUTIONAL PROVISION	
Article 3	<p>Elimination of Exploitation: The State shall ensure the elimination of all forms of exploitation and the gradual fulfillment of the fundamental principle, from each according to his ability to each according to his work.</p>
Article 11	<p>Slavery, Forced Labour etc. Prohibited: Art. 11(3) - No child below the age of fourteen years shall be engaged in any factory or mine or any other hazardous employment.</p>
Article 25A	<p>Right to education: The State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law.</p>
Article 35	<p>Protection of family, etc.: The State shall protect the marriage, the family, the mother and the child.</p>
Article 37(e)	<p>Promotion of Social Justice and Eradication of Social Evils: The State shall: Art. 37 (e) – make provision for securing just and humane conditions of work, ensuring that children and women are not employed in vocations unsuited to their age or sex, and for maternity benefits for women in employment</p>

Figure 2.6 – CRC and corresponding Constitutional Provisions

There are various domestic legislations pertaining to the rights guaranteed by the CRC. For the purposes of this Guide, the legal instruments relevant to the rights of the child and juvenile justice systems will be discussed in depth in Section 7.

Please see below for a non-exhaustive list of the relevant domestic legal instruments to the rights of children in Pakistan:

- Zainab Alert Response and Recovery Act, 2019
- Juvenile Justice System Act 2018
- The Sindh Child Protection Authority Act 2011
- The Child Protection and Welfare Act (CPWA) 2010
- The Punjab Destitute and Neglected Children Act 2004
- Protection of Breastfeeding and Child Nutrition Ordinance 2002
- Federally Administered Areas Compulsory Primary Education Ordinance 2000
- NWFP Compulsory Primary Education Act 1996
- Punjab Free and Compulsory Education Act 2014
- The Employment of Children Rules 1995
- Bonded Labour System (Abolition) Act 1992
- Employment of Children Act 1991 (as amended in 2011)
- Punjab Youthful Offenders Ordinance 1983 (as amended in 2001)
- Sindh Children Act 1955
- Children (Pledging of Labour) Act 1933
- Child Marriage Restraint Act 1929
- Birth, Marriage and Death Registration Act 1886
- Guardians and Wards Act 1890

With regards to the CRC, there are several Federal and Provincial institutions that play an important role in promoting the rights protected under the CRC. These include, but are not limited to, the National Commission for Child Welfare and Development (NCCWD), Punjab Child Protection and Wellness Bureau (CPWB), Vigilance Committees Against Bonded Labour (Provincial and District).

2.5 CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

The purpose of the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is to promote the fundamental rights of all citizens of the State Party irrespective of their race, colour, sex, national origin, language or religion. The Constitution of Pakistan guarantees fundamental rights to its citizens, provided irrespective of their race, religion, caste, sex, residence or place of birth. The Convention also requires accurate statistics of the marginalized communities, this extends to evaluation of appropriate data relating to minority ethnic groups including consultation on, and implementation of, comprehensive monitoring guidance. Pakistan ratified this Convention in September 1966.

ARTICLE	CONTENT
Article 1	Definition of racial discrimination
Article 2	State Party obligations (legislation and otherwise)
Article 3	State Parties to condemn racial segregation and apartheid

Article 4	State Parties to condemn and penalize dissemination of racial propaganda (also, incitement to hatred and violence)
Article 5	Equality and non-discrimination
Article 6	Effective protection and remedies
Article 7	Immediate and effective measures to combat racial prejudice (particularly in education)
Article 8-16	Establishment of Committee on the Elimination of Racial Discrimination, mechanism for implementation of ICERD, submission of initial and periodic reports.
Article 17-25	Provisions on specific operation of the ICERD (ratification, accession, denunciation, inter-state disputes and languages in which the Convention is authentic)

Figure 2.7 – Summary of the ICERD

In order to monitor implementation of the ICERD, the Convention created the Committee on the Elimination of All Forms of Racial Discrimination (CERD), the treaty-body mandated with monitoring State Party implementation of the Convention. Like the other treaty bodies, the CERD comprises independent experts responsible for monitoring progress under the ICERD through compliance reports submitted by States Parties.

The Committee on the Elimination of Racial Discrimination (CERD) may, under certain conditions, receive and consider individual complaints alleging violations of the rights enlisted within the Convention. Pakistan, however, has not recognized the competence of the Committee to do so. State Parties that have made the requisite declaration under Article 14 of the Convention recognize the competence of the Committee to receive and consider individual communications. While Pakistan has not recognized the competence of the CERD to receive and consider individual communications, it has established a domestic helpline service for complaints regarding human rights violations.

Several Federal and Provincial institutions play an important role in protection against racial discrimination guaranteed under the Convention. Of particular relevance are the following:

- Ministry of Inter-Provincial Coordination;
- Women Development Departments in all the provinces;
- Inspector Generals of Prisons in all the provinces;
- Inter Provincial Coordination Departments in all the provinces.

2.6 CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMANE OR DEGRADING TREATMENT OR PUNISHMENT

This convention was adopted and opened for signature and ratification by the General Assembly on Dec 10, 1984. The government of Pakistan signed the convention on Apr 17, 2008, and ratified it on June 23, 2010.²⁷

²⁷ <https://www.dawn.com/news/1341873>

This Convention requires State Parties to end torture within their jurisdiction and criminalize all acts of torture. The Convention goes beyond many other international Conventions in that it offers a comprehensive definition of torture in Section 1:

“the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

Article 2 of the Convention states, “1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. 2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. 3. An order from a superior officer or a public authority may not be invoked as a justification of torture.”

Article 4 of the Convention elaborates on domestic law of signatory states. It reads, “Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.”

Article 12 pertains to impartial investigation, it states, “Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.”²⁸

The Convention consists of 33 Articles. Articles 1, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 are substantive in nature whereas Articles 2, 3, 4 and 16 are seen as implementing provisions.

ARTICLE	CONTENT
Article 1	Definition of torture
Article 2	State Party obligations (effective legislative, administrative, judicial or other measures)
Article 3	Obligation of non-refoulement
Article 4	Criminalization of all acts of torture
Article 5	Establishing jurisdiction over torture-related offences
Article 6	Taking custody and making preliminary inquiry into facts

28 <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>

Article 7	Submission of case of torture for prosecution
Article 8	Extradition
Article 9	Supply of evidence and mutual judicial assistance
Article 10	Training of law enforcement personnel, civil or military, medical personnel, public officials and other persons involved in custody, interrogation or treatment of anyone subjected to any form of arrest, detention or imprisonment.
Article 11	Obligation of State Party to systematically review interrogation rules, instructions, methods and practices
Article 12	Prompt and impartial investigation in cases where there is reasonable ground to believe that an act of torture has been committed
Article 13	Right to complain and have case heard promptly and impartially examined (protection of complainants and witnesses)
Article 14	Right to obtain redress and receive adequate compensation
Article 15	Evidence gathered through torture to be inadmissible
Article 16	Acts of cruel, inhuman or degrading treatment or punishment by public officials to be prevented
Article 17-24	Provisions on the Committee against Torture, election to the Committee, State Parties reports, cooperation between State Parties and the Committee, inter-state complaints procedure, individual communications procedure, ad hoc conciliation commissions, annual reports of the Committee
Article 25-33	Provisions on ratification and accession, amendments, inter-state disputes, denunciation and languages in which the text of the Convention is authentic

Figure 2.8 – Summary of the CAT

In order to monitor implementation of the CAT by state parties, the Convention created the Committee against Torture. Like the other treaty bodies, the CAT Committee comprises independent experts responsible for monitoring progress under the CAT through compliance reports submitted by States Parties.

The Committee against Torture may, under certain conditions, receive and consider individual complaints alleging violations of the rights enlisted within the Convention. Pakistan, however, has not recognized the competence of the Committee to do so. The Committee may consider individual communications with regard to those States that have made the requisite declaration under Article 22 of the Convention. While Pakistan has not recognized the competence of the CAT Committee to receive and consider individual communications, the domestic helpline service has been created for complaints regarding human rights violations.

Pakistan has yet to enact specific legislation incorporating the provisions of the Convention. However, the following legislative instruments provide similar protections as afforded under the CAT:

- Article 14 of the Constitution (Inviolability of dignity of man)²⁹
- Sec. 44 of the Pakistan Penal Code³⁰
- The Prisons Act 1894
- Prison Rules 1978
- Punjab Employees Efficiency, Discipline and Accountability Act 2006
- Abolition of the Punishment of Whipping Act 1996
- Police Order 2002:
 - (i) Article 35
 - (ii) Article 114(1)(c)
 - (iii) Article 114(2)
 - (iv) Article 156(d)

In February 2016, Pakistan had launched the historic National Action Plan on Human Rights which consisted of six thematic areas, including strengthening human and technical resources and capacity building of law enforcement agencies, improving the forensic sciences, and upgrading physical facilities and equipment to investigate human rights violations on specific grounds with the view to give impetus to speedy justice.³¹

The Torture and Custodial Death (Prevention and Punishment) Act, 2020 was passed in February by the Senate but it is still pending at the National Assembly. The bill criminalizes torture in police custody. The Act states that anyone found guilty of torturing someone in custody will be sent to jail for over three years and fined Rs2 million.³²

The following institutions play an important role in promoting the rights guaranteed under the CAT:

- Women Development Departments in all the provinces;
- Prisons Departments in all the provinces;
- Home Departments in all the provinces;
- Inspector Generals of Prisons in all the provinces;

2.7 CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The overarching purpose of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) is the eradication of any such concurrent traditional practices or laws in a State that discriminate against women on the basis of their sex and to provide them a manifesto of equal opportunities and rights through domestic enforcement of their inherent rights.

The Convention consists of a total of 30 Articles. Articles 1, 10, 11, 12, 13, 14, 15 and 16 are substantive provisions, whereas Articles 2, 3, 4, 5, 6, 7, 8, 9, 23 and 24 are the implementing provisions.

29 "(1) The dignity of man and, subject to law, the privacy of home, shall be inviolable. (2) No person shall be subjected to torture for the purpose of extracting evidence."

30 "The "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property."

31 <https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21514&LangID=E>

32 http://senate.gov.pk/uploads/documents/1582706236_509.pdf

ARTICLE	CONTENT
Article 1	Definition of discrimination
Article 2	Policy measures (duty of State Parties to eliminate discriminatory laws, policies and practices in the national legal framework)
Article 3	Guarantee of basic human rights and fundamental freedoms
Article 4	Special measures (temporary special measures to enhance equality of women)
Article 6	Prostitution and trafficking
Article 7	Political and public life
Article 8	Representation
Article 9	Nationality
Article 10	Education
Article 11	Employment
Article 12	Health
Article 13	Economic and social benefits
Article 14	Rural Women
Article 15	Equality of men and women before the law
Article 16	Marriage and family life
Article 17	Provision on the Committee on the Elimination of Discrimination against Women
Article 18	National reports
Article 19	Rules of procedure
Article 20	Committee meetings
Article 21	Committee reports
Article 22	Role of specialized agencies

Article 23	Effect on other treaties
Article 24	Commitment of State Parties
Article 25-30	Administration of the Convention

Figure 2.9 – Summary of the CEDAW

In order to monitor implementation of the CEDAW, the Convention created the Committee on the Elimination of All Forms of Discrimination against Women. Like the other treaty bodies, the CEDAW Committee comprises independent experts responsible for monitoring progress under the CEDAW through compliance reports submitted by States Parties.

The Committee on the Elimination of Discrimination against Women may, under certain conditions, receive and consider individual complaints alleging violations of the rights enlisted within the Convention. Pakistan, however, has not recognized the competence of the Committee to do so. Those States that have ratified the Optional Protocol to the Convention on the Elimination of Discrimination against Women recognize the competence of the Committee to consider individual communications. While Pakistan has not recognized the competence of the CEDAW Committee to receive and consider individual communications, it has established a domestic helpline service for complaints regarding human rights violations. The Constitution of Pakistan safeguards equality of all citizens in Article 25, and provides protection against discrimination through non-discrimination guarantees contained in Articles 26 and 27. These provisions, along with others relevant to the rights enlisted within the CEDAW, are reproduced below:

CONSTITUTIONAL PROVISION	
Article 25A	<p>Equality of citizens.</p> <ol style="list-style-type: none"> (1) All citizens are equal before law and are entitled to equal protection of law. (2) There shall be no discrimination on the basis of sex. (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.
Article 26	<p>Non-discrimination in respect of access to public places.</p> <ol style="list-style-type: none"> (1) In respect of access to places of public entertainment or resort not intended for religious purposes only, there shall be no discrimination against any citizen on the ground only of race, religion, caste, sex, residence or place of birth. (2) Nothing in clause (1) shall prevent the State from making any special provision for women and children.

Article 27	Safeguard against discrimination in services. (1) No citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence or place of birth.
Article 34	Full participation of women in national life: Steps shall be taken to ensure full participation of women in all spheres of national life.
Article 35	Protection of family, etc.: The State shall protect the marriage, the family, the mother and the child.

Figure 2.10 – CEDAW and corresponding Constitutional Provisions

For the purposes of this Guide, the Right to Equality and Non-Discrimination in the Criminal Justice System and a focus on the rights of women will be discussed in detail in Section 6. However, a non-exhaustive list of domestic legal instruments in Pakistan which provide similar protections afforded under CEDAW is presented below:

- Punjab Protection of Women Against Violence Act 2016
- Punjab Commission on the Status of Women Act 2014
- Sindh Domestic Violence (Prevention and Protection) Act 2013
- Reproductive Healthcare and Rights Act 2013
- National Commission on the Status of Women Act 2012
- Women in Distress and Detention Fund Act 1996
- Criminal Law (Second Amendment) Act 2011
- Criminal Law (Third Amendment) Act 2011 (on prevention of anti-women practices)
- Acid Control and Acid Crime Prevention Act 2010
- Criminal Law (Amendment) Act 2010 (on sexual harassment)
- Punjab Protection against Harassment of Women at the Workplace Act 2010
- The Domestic Violence Prevention and Protection Act 2009
- North-West Frontier Province Establishment of a Commission on the Status of Women Act 2009
- The Protection of Women (Criminal Laws) (Amendments) Act 2006
- The Criminal Law (Amendment) Act 2004 (on Honour crimes)
- Family Courts Act 1964 The Muslim Family Laws Ordinance 1961
- The West Pakistan Maternity Benefit Ordinance 1958
- The West Pakistan Maternity Benefit Rules 1961
- Mines Maternity Benefit Act 1941 The Child Marriage Restraint Act 1929
- Balochistan Domestic Violence (Prevention and Protection) Act 2014 Punjab Fair Representation of Women Act 2014
- Balochistan Protection and Promotion of Breast-feeding and Child Nutrition Act 2014

With regard to the CEDAW, there are several Federal and Provincial institutions that play an important role in the protection of women's rights guaranteed under the Convention. These include the following:

- National Commission of Human Rights (NCHR)
- National Commission on the Status of Women (NCSW)
- National Commission for Minorities
- National Commission on the Rights of the Child (NCRC)
- Ministry of Inter-Provincial Coordination
- Women Development Departments in all the provinces
- Inter Provincial Coordination Departments in all the provinces

2.8 CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The purpose of the Convention on the Rights of Persons with Disabilities (CRPD) is to protect, promote and ensure the full and equal enjoyment of all human rights and freedoms by all persons with disabilities. The Convention defines persons with disabilities as those with long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may obstruct their full and effective participation and engagement in society on an equal basis with others. Moreover, the Convention makes specific references to women with disabilities and children with disabilities.

The Convention consists of a total of 50 Articles. Articles 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 are substantive provisions, whereas Articles Arts. 4, 5, 31, 33, 33 and 43 are the implementing provisions and Articles 4(4) and 4(5) are derogation provisions.

ARTICLE	CONTENT
Article 1	Purpose of Convention (promoting, protecting and ensuring enjoyment of all rights and freedoms by persons with disabilities)
Article 2	Definitions of key terms (including communication, language, discrimination on the basis of disability, reasonable accommodation and universal design)
Article 3	General principles (respect for dignity, non-discrimination, participation and inclusion, respect for difference, equality of opportunity, accessibility, equality between men and women, respect for children)
Article 4	General obligations (to take all measures to promote full realization of all human rights and fundamental freedoms for persons with disabilities; obligation of non-discrimination)
Article 5	Equality and non-discrimination
Article 6	Women with disabilities
Article 7	Children with disabilities
Article 8	Awareness-raising

Article 9	Accessibility
Article 10	Right to life
Article 11	Situations of risk and humanitarian emergencies
Article 12	Equal recognition before the law
Article 13	Access to justice
Article 14	Liberty and security of person
Article 15	Freedom from torture or cruel, inhuman or degrading treatment or punishment
Article 16	Freedom from exploitation, violence and abuse
Article 17	Protecting the integrity of the person
Article 18	Liberty of movement and nationality
Article 19	Living independently and being included in the community
Article 20	Personal mobility
Article 21	Freedom of expression and opinion, and access to information
Article 22	Respect for privacy
Article 23	Respect for home and the family
Article 24	Education
Article 25	Health
Article 26	Habilitation and rehabilitation
Article 27	Work and employment
Article 28	Adequate standard of living
Article 29	Participation in political and social life
Article 30	Participation in cultural life, recreation, leisure and sports
Article 31	Statistics and data collection
Article 32-50	Responsibility of States Parties with regard to reports and how to effectively implement and monitor the Convention.

Figure 2.11 – Summary of the CRPD

In order to monitor state parties' implementation of the CRPD, the Convention created the Committee on the Rights of Persons with Disabilities.

Regarding individual communications procedures, the Committee on the Rights of Persons with Disabilities may, under certain conditions, receive and consider individual complaints alleging violations of the rights enlisted within the Convention. Pakistan, however, has not recognized the competence of the Committee to do so. States Parties to the Optional Protocol to the Convention recognize the competence of the Committee to receive and consider individual communications. While Pakistan has not recognized the competence of the CRPD Committee to receive and consider individual communications, it has established a domestic helpline service for complaints regarding human rights violations.

To understand the domestic status of rights guaranteed by the CRPD, the following legislative instruments are relevant:

- Articles 25 & 27 of the Constitution of Pakistan
- Punjab Disabled Persons (Employment and Rehabilitation) (Amendment) Act 2015
- Disabled Persons Employment and Rehabilitation (Amendment) Act 2012
- Mental Health Ordinance 2001
- Disabled Persons (Employment and Rehabilitation) Ordinance 1981

The various Federal and Provincial human rights departments discussed previously in this Section are responsible for enforcing these rights.

SECTION THREE

HUMAN RIGHTS AND ARREST, PRE-TRIAL DETENTION AND PREVENTIVE DETENTION

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HUMAN RIGHTS AND ARREST, PRE-TRIAL DETENTION AND PREVENTIVE DETENTION

OVERVIEW

The right to be treated with dignity and humanity has been entrenched in various international instruments and is reflected within the Constitution of Pakistan as well. Various domestic laws have been introduced to regulate arrest, pre-trial detention and preventive detention which also lay down conditions that must be observed when dealing with cases related to the deprivation of liberty. This Section aims to outline the international and constitutional standards and correlating domestic laws to provide a holistic view of the law related to arrest, pre-trial and preventive detention which may guide the judicial process of dealing with such areas of the law in light of requirements established under various human rights standards.

3.1 ARREST

The deprivation of liberty and the right to liberty and security of person is dealt with under several international instruments. The term arrest has been defined by the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment as the “act of apprehending a person for the alleged commission of an offence or by the action of an authority.”³³ In addition to this, the erstwhile UN Commission on Human Rights defined arrest as, “the act of taking a person into custody under the authority of the law or by compulsion of another kind and includes the period from the moment he is placed under restraint up to the time he is brought before an authority competent to order his continued custody or to release him.”³⁴ This definition continues to be applied by the UN Working Group on Arbitrary Detention as well.

3.1.1 International Human Rights Safeguards and Standards

The Universal Declaration of Human Rights recognized the inherent dignity of man,³⁵ due to which certain standards must also be applied to the act of arresting an individual to ensure that during such an act, an individual's security is protected and that he is not found guilty merely on the basis of the arrest. The following international instruments establish human rights standards which must be complied with in the conducting an arrest:

RELEVANT PROVISIONS	
Universal Declaration of Human Rights	<p>Article 9 – Protection from arbitrary arrest, detention or exile.</p> <p>Article 11 – Presumption of innocence, and protection from retrospective punishment.</p>
International Covenant on Civil and Political Rights	Article 9 – Life, Liberty and Security of Person, Protection from arbitrary arrest and detention.

³³ 'Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment' (Ohchr.org, 1988)

³⁴ United Nations, Economic and Social Council, Commission on Human Rights 'Study of the right of everyone to be free from arbitrary arrest, detention and exile: report of the Committee' 9 January UN (1961) Doc E/CN.4/813.

³⁵ UNGA, 'Universal Declaration of Human Rights' 10 December 1948 Article 3

Convention on the Rights of the Child	Article 37 - Life, Liberty and Security of Person, Protection from arbitrary arrest and detention and special protection of children.
Convention Relating to the Status of Refugees	Article 26 - Freedom of movement.
Convention on the Rights of Persons with Disabilities.	Article 14 – Liberty and Security of Person and special protections for differently-abled persons.
Convention Against Torture	Article 11 – Treatment of persons subjected to arrest, detention or imprisonment.
Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment	Principle 2 – Protections as to arrest and detention. Principle 10 – Requirement for communication of grounds of arrest.

Figure 3.1 – International standards as to Deprivation of Liberty

Various other international principles such as the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), and the Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention guide the interpretation of the core conventions. These international instruments reflect the human rights standards which are applicable during arrest and stipulate that individuals who have been arrested must have knowledge as to the reasons of their arrest, must be produced before a competent authority for a fair trial and must be compensated in case of unlawful arrest.

Furthermore, international law establishes that any deprivation of liberty must be carried out in accordance with the law,³⁶ delineating a clear prohibition on arbitrary arrest and detention. Arbitrary arrest may be characterized as any arrest carried out in a manner which is in violation of the due process of law, or has been carried out inappropriately.³⁹

The UN Working Group on Arbitrary Detention is a body of independent human rights experts that investigate cases of arbitrary arrest and detention and identifies cases of deprivation of liberty in violation of set international standards. Furthermore, the Group has been mandated to seek and receive information from Governments and non-Governmental organisations, conduct field missions and work in close coordination with States and the Human Rights Council to prevent and guard against the practice of arbitrary detention. The group explains that arbitrary arrest and detention leads to unlawful deprivation of

³⁶ Communicaton No. 702/1996, C. McLawrence v. Jamaica (Views adopted on 18 July 1997), in UN doc. GAOR, A/52/40 (vol. II), pp. 230-231, para. 5.5.

³⁷ Communication No. 458/1991, A. W. Mukong v. Cameroon (Views adopted on 21 July 1994), in UN doc. GAOR, A/49/40 (vol. II), p. 181, para. 9.8; footnote omitted from the quotation; emphasis added.

³⁸ Report of the UN Working Group on Arbitrary Detention, 'United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court' 6 July 2015 UN Doc A/HRC/30/37

³⁹ Report of the UN Working Group on Arbitrary Detention, 'A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court' 30 June 2014 UN Doc A/HRC/RES/20/16, para. 6 (d))

liberty where individuals are not allowed to access legal redress and may be subjected to torture and other forms of ill treatment. This includes the right to challenge the legality of such detention in court as well. The Human Rights Council has encouraged States to ensure that this right is available to all citizens deprived of their liberty through arrest or detention.

In their Opinion 11/2018 with regards to arbitrary arrest and detention in Pakistan and Turkey, the Working group establishes 5 categories where deprivation of liberty must be deemed to be arbitrary where:

- Category I: When there is no legal basis for the deprivation of liberty.
- Category II: Where the deprivation of liberty is a result of the exercise of rights or freedoms guaranteed within Articles 7, 13, 14, 18, 19, 20 and 21 of the UDHR or Articles 12, 18, 19, 21, 22, 25, 26 and 27 of the ICCPR.
- Category III: Where the right to fair trial has been completely or partially violated so as to give the deprivation of liberty, an arbitrary character.
- Category IV: Where asylum seekers, immigrants or refugees are subjected to administrative custody for a long period of time without the possibility of administrative or judicial review.
- Category V: Where the deprivation of liberty is violative of principles of international law on grounds of discrimination.

In assessing the actions of the Government of Pakistan in a case involving a Turkish family residing in Pakistan, the Working group further emphasises on the established principle that individuals should not be expelled from a State where there are substantial grounds to believe that their life or freedom would be at risk. The Group states that the risk of arbitrary detention in the receiving State must also serve as a consideration before individuals are expelled from a State.

In addition to the Opinions of the Working Group on Arbitrary Detention, the Working Group on Enforced Disappearances visited Pakistan in 2012 as well.⁴⁰ The Group shares its reservations with regards to the Anti-Terrorism Act which allows forms of arbitrary deprivation of liberty, which may lead to creation of conditions for the occurrence of enforced disappearances. Moreover, the Working group recommended that the legal and regulatory framework dealing with deprivation of liberty must be brought in line with international standards to ensure that secret detention which may lead to the practice of enforced disappearances is prohibited. It provides that as a preventive measure against enforced disappearances, persons deprived of their liberty must be held in an official place of custody and must be brought before a judicial authority without undue delays.

Moreover, the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, visited the Islamic Republic of Pakistan (hereafter Pakistan) from 19 to 29 May 2012 at the invitation of the Government. In the realm of international human rights law, Pakistan has recently ratified two important treaties, namely the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which include many provisions relating to the administration of justice, fair trial, equality before the law and non-discrimination. The Special Rapporteur commended this positive step and urged the Government to undertake all necessary steps, including the passing of new domestic legislation, to implement these essential human rights conventions.

⁴⁰ Report of the UN Working Group on Enforced Disappearances, 'Report of the Working Group on Enforced or Involuntary Disappearances on its mission to Pakistan' 26 February 2013 UN Doc A/HRC/22/45/Add.2

The Special Rapporteur further noted that the vague language of the blasphemy laws make no reference to a potential offender's psychological state or intention and represents an open door for abuse and the persecution of minorities, in particular religious or sectarian groups. These laws serve the vested interests of extremist religious groups and are not only contrary to the Constitution of Pakistan, but also to international human rights norms, in particular those relating to non-discrimination and freedom of expression and opinion. Laws that are ambiguous can be applied in an arbitrary and discriminatory manner and impede the proper administration of justice. For this reason, the Special Rapporteur believes that they should be repealed and replaced with clear provisions in full conformity with the Constitution of Pakistan and international human rights instruments to which Pakistan is a party.⁴¹

3.1.2 Constitutional Safeguards

The Constitution of Pakistan provides specific safeguards as to arrest and deprivation of liberty in Article 9 and 10. Article 9 states that, "No one shall be deprived of life or liberty save in accordance with the law." Furthermore, Article 10 provides for detailed safeguards as to arrest and detention and explains that any individual when arrested must be informed of the grounds of arrest and has the right to consult a lawyer. In addition to this, it provides that any individual who is arrested must be produced before a magistrate within 24 hours. While the Constitution of Pakistan provides that the provisions of Articles 10 (1) and (2) are not applicable to individuals arrested or detained under preventive detention, these provisions must be reconciled with Section 11EEE of the Anti-Terrorism Act 1997, which provides within Section 11EEE (2) that the provisions of Article 10 of the Constitution apply to the arrest and detention of persons subjected to preventive detention under Section 11EEE(1).

The Anti-Terrorism Act (ATA) was issued in 1997 to provide a legal solution to acts of terrorism, sectarian violence and other heinous offences. Originally the ATA contained no specific provision providing for preventative detention. The Anti-Terrorism (Amendment) Ordinance, 2002 inserted Section 11EEE and the Anti-Terrorism (Second Amendment) Act, 2013 inserted Section 11EEEE to provide for preventative detention pursuant to the ATA.

Section 11EEE reads, " Power to arrest and detain suspected persons (1) Government if satisfied that with a view to prevent any person whose name is included in the list referred to section 11EE, it is necessary so to do, may, by order in writing, direct to arrest and detain, in such custody as may be specified, such person for such period as may be specified in the order, and Government if satisfied that for the aforesaid reasons it is necessary so to do, may, extend from time to time the period of such detention for a total period not exceeding twelve months. (2) **The provisions of Article 10 of the Constitution of the Islamic Republic of Pakistan shall mutatis mutandis apply to the arrest and detention of a person ordered under sub-section (1) which grant constitutional safeguards to the person arrested i.e. 'No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.'**

Some other limitations to the power of exercising preventive detention include:

Section 11EEEE pertaining to Preventive detention for inquiry reads, "(1) The Government may, for a period not exceeding thirty days and after recording reasons thereof, issue order for the preventive detention of any person who has been concerned in any offence under this Act relating to national security and sectarianism or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned, for purposes of inquiry: Provided

41 <https://daccess-ods.un.org/TMP/7264616.4894104.html>

that the Anti-Terrorism Court may, for reasons to be recorded, grant extension in the period of detention for up to thirty days at a time, but the total period of detention shall not exceed ninety days.”

3.1.3 Domestic Law and Jurisprudence

A. Domestic Law

- Criminal Procedure Code 1898

Domestic law also establishes certain standards which are to be met in carrying out arrest. The Criminal Procedure Code (Cr.P.C.) provides that arrests may be made on the basis of both cognizable and non-cognizable offences. Sec. 46 of the Cr.P.C. stipulates the power to use reasonable force which is needed to make an arrest but clarifies that the power to cause death has not been granted. Furthermore, Sec. 50 states that restraint which is more than necessary cannot be applied when arresting an individual. For women, specific protections have been established within Sec. 52 of the Cr.P.C. which states that if a woman is to be searched or arrested, such actions must be carried out by another woman. These Sections are to be read in line with the fundamental guarantees provided under the Constitution of Pakistan which states that once an arrest has been made, the individual must be informed of the reasons for arrest, must be allowed to consult with a lawyer and must be produced in front of a magistrate within twenty-four hours of arrest.

Arrests can primarily fall under two broad categories – (i) arrest pursuant to a warrant and (ii) arrests without a warrant. In the first category, this Section shall look at the Court's powers to issue warrants of arrest under Sect. 75-79. Under the second category, this Section will look at the Police's general powers of arrest without warrant under Sec. 54 of the Cr.P.C. as well as the exceptional power to arrest for the prevention of a cognizable offence under Sec. 151.

- Arrests pursuant to a Warrant:

Generally, arrests are to be made pursuant to a warrant⁴² to ensure the legality of arrest. The law relating to warrants, their form and to whom they may be directed to is to be found within Sec. 75 to 79 of the Cr.P.C. Furthermore, Sec. 80 provides that the substance of the warrant must be brought into the knowledge of the person to be arrested, and if required the warrant may be shown to such person as well. Sec. 81 provides for further protections by stating that once a warrant has been executed, the arrested individual must be produced in front of a magistrate without unreasonable delay.

- Arrest without Warrant:

The Cr.P.C. also lays down the procedure for arrest without warrant to ensure that clear restrictions are established on the exercise of such powers. Sec. 54 of the Cr.P.C. states that an arrest without a warrant can be made in nine instances. Furthermore, Sec. 61 clarifies that any person arrested must be produced in front of a Magistrate within 24 hours of the arrest.

42 Sec. 75 Cr.P.C. 1898 (Act V of 1898)

RELEVANT SECTION	CONTENT
Sec. 54, Cr.P.C: Any police-officer may, without an order from a Magistrate and without a warrant, arrest:	Person concerned in any cognizable offence or against whom a reasonable complaint, credible information or reasonable suspicion for cognizable offence.
	Person in possession of implement of house-breaking
	Proclaimed offender
	Person in possession of stolen property
	Person obstructing police officer
	Deserter from armed forces
	Person apprehended under extradition law/concerned in offence committed outside Pakistan
	Released convict-committing break of any rule under Sec. 565 (3) of Cr.P.C.
Person for whose arrest a requisition has received from another police officer	

Figure 3.2 – Sec. 54, Cr.P.C. 1898

It is important to note that the first ground under Sec. 54, while granting wide powers of arrest, has been limited by requiring the police to make an arrest on the basis of either 'credible information' or 'reasonable suspicion'.⁴³ 'Credible information' has not been given a technical legal expression and does not mean that such information must be received upon oath or affirmation. 'Reasonable suspicion' as used in Sec. 54 of the Cr.P.C. does not mean a vague surmise or inference but rather a bona fide belief on the part of the police that an offence had been committed or was about to be committed. Such belief had to be founded on some definitive averments/allegations which create the basis for suspicion of the person to be arrest of involvement in the offence.⁴⁶

Furthermore, the wide powers given to Police Officers under Sec. 54 Cr.P.C. have been interpreted and construed in a strict manner by the superior judiciary in Pakistan. The Courts have time and again expressed alarm and disapproval at the tendency of Police Officers to regard their powers under Sec. 54 Cr.P.C. as

43 Mohsin Ali Shah v. S.H.O. Police Station Garh Maharaja, 1995 MLD 771 Lahore

44 Abdul Qayyum v. S.H.O. Police Station Shalimar 1993 P.Cr.L.J 91 Lahore

45 Manthar Ali v. S.H.O. 2013 P.Cr.L.J 553 Karachi

46 Manthar Ali v. S.H.O. 2013 P.Cr.L.J 553 Karachi

without qualification or limitation.⁴⁷ This means that a general definition of what constitutes 'reasonableness' in a complaint or 'suspicion' and 'credibility' of information cannot be given. Both must depend upon the existence of 'tangible legal evidence' within the cognizance of the Police Officer and he must judge whether the evidence is sufficient to establish the reasonableness and credibility of the charge, information or suspicion.⁴⁸ Any arrest which goes beyond the provisions of Sec. 54 Cr.P.C. would be illegal and void per se⁴⁹ and exposes a Police Officer to an offence punishable under Sec. 220 P.P.C.⁵⁰

The Human Rights Committee,⁵¹ in its concluding observations on the initial report of Pakistan in 2017 shows concern with regards to the high incidence of enforced disappearances and extrajudicial killings allegedly instigated by the police and security forces. The Committee shows concern regarding the Actions (in Aid of Civil Power) Regulation 2011 for allowing detention without warrant. Thus, in accordance with international standards arrests without warrant must ensure protection of established safeguards with regards to arrest and detention and must not preclude rights related to communication of reasons for arrest, and the right to be produced before a Court which has been emphasised by General Comment 8 on Article 9 of the ICCPR produced by the Human Rights Committee.

Article 9(2) of the International Covenant on Civil and Political Rights states, "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." Principle 10 of the Principles for the Protection of All Persons under Any Form of Detention or Imprisonment reads, "Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him." These principles highlight the safeguards against arbitrary arrests.

The Universal Declaration of Human Rights (UDHR) article 11 states, "(1) Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

Principle 17 of the Principles for the Protection of All Persons under Any Form of Detention or Imprisonment guarantees right to legal counsel, while Principle 18 elaborates upon the communication with legal counsel.

Rule 93 of the Standard Minimum Rules for the Treatment of Prisoners states, "For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official."

47 Noor Muhammad S.H.O. Police Station KlurKot District Bhakkar 2000 Y L R 85 Lahore, Abdul Qayyum v. S.H.O. Police Station Shalimar 1993 P.Cr.L.J 91 Lahore, Rasool Bux v. the State 2005 Y L R 915 Karachi, Asma Khatoon v. Syed Shabbir Hussain Shah PLD 1996 Karachi 517, Ghulam Sarwar v. the State, 1984 P.Cr.L.J 2588 Lahore, Sohail v. the State 1995 P.Cr.L.J 369 Karachi

48 Abdul Qayyum v. S.H.O., Police Station Shalimar, 1993 P.Cr.L.J 91 Lahore

49 Mst. Raza Pervez v. the Senior Superintendent of Police Multan 1992 P.Cr.L.J 131 Lahore

50 Sec. 220 Pakistan Penal Code 1860 -Commitment for trial or confinement by person having authority who knows that he is acting contrary to law

51 Un Human Rights Committee, 'Concluding Observations on the Initial Report of Pakistan' 23rd August 2017 Un Doc CCPR/C/PAK/CO/1

- **Arrest without a Warrant for the Prevention of a Cognizable Offence:**

The Police are under a duty to prevent cognizable offences under Chapter XIII of the Cr.P.C. Pursuant to this obligation, the Police is authorized under Sec. 151 of the Cr.P.C. to arrest, without the need for a warrant or orders from a Magistrate, any person involved in a design to commit a cognizable offence. Sec. 151 is deemed an emergency arrest provision available to a police officer where no other means of preventing the commission of the offence exist.⁵² In other words this section provides powers to a police officer to arrest a person even prior to the commission of a cognizable offence.

- **Police Rules 1934**

Chapter 26 of the Police Rules deal with the power to arrest, and the duties attached to the exercise of such powers. It clarifies that a police officer must apply for a warrant of arrest other than in the situations outlined in Sec. 54 Cr.P.C. As per Rule 26.2 the police also have the power to defer arrest until after sufficient investigation in cases where there is no risk of the accused absconding. Furthermore, it states that if the police carries out an arrest, the facts of the case must justify such an action and the liberty of the individual must not be interfered with prior to such arrest.⁵³

The Police Rules have established specific protections for women as well. In relation to the powers to search an individual after arrest, the Rules clarify that a woman must be searched by another woman.⁵⁴ Furthermore, Rule 26.18A states that an arrest of a woman must be carried out by any officer who is a Sub-Inspector or the head constable and the warrant must clarify the reasons for arrest. It also clarifies that in cases where bail is admissible after arrest, no woman must be kept in custody for an unreasonable duration. In addition to this, the Rules clarify that any women in custody must not be kept in a police station overnight unless in 'unavoidable circumstances' and must be transferred to judicial custody.⁵⁵

The Rules also provide for the protection of the rights of those who have been arrested and state that any individual suffering from any illness or injury at the time of or after arrest must be provided with medical treatment at the earliest.⁵⁶ It further states that if an arrested individual is sick or wounded, he must be transferred to the prison hospital and a Magistrate may be requested to examine such person, or to grant remand. In addition to this, it has been clarified that any police officer does not have the power to re-arrest an individual released on bail, and if such a re-arrest is deemed necessary it may only be carried out through an application to the Court for the cancellation of bail and the issuance of another warrant in accordance with Sec. 497(5) Cr.P.C.⁵⁷

Other significant rules in relation to arrest are as follows:

RELEVANT SECTION	CONTENT
Rule 26.8	Report of Arrest
Rule 26-19	Arrest of drunken persons

52 Ameer Mai v. Justice of the Peace Yazman 2012 P.Cr.L.J 1082 Lahore

53 Rule 26.2 Police Rules 1934

54 Rule 26.3 Police Rules 1934

55 Rule 26.18A(2) Police Rules 1934

56 Rule 26.6 Police Rules 1934

57 Rule 26-21(6) Police Rules 1934

Rule 26-19A	Stoppage of trains at non-stop stations to arrest persons
Rule 26-20	Transfer of arrested persons
Rule 26.22	Conditions in which handcuffs are to be used
Rule 26.23	Conditions in which use of handcuffs may be dispensed with

Figure 3.3 – Chapter 26, Police Rules 1934

The Courts of Pakistan have implemented the safeguards established under the Cr.P.C. and the Police Rules in various cases. In *Bashiran Bibi v. Station House Officer, Police Station, Kot Sabzal*,⁵⁸ the accused was detained in a hospital while his arrest remained pending. He had not been produced in front of a Magistrate, nor was a Magistrate requested to examine the accused in the hospital due to which the Court deemed the detention illegal, as the arrest of the accused had been kept pending without any legal justification. The Court ordered investigation of the investigating officer under the Police Rules and the Police Order 2002 to ensure that such arbitrary exercise of power does not go unpunished.

- Police Order 2002

In defining the duties of the Police, the Order states that sharing information about the arrest of an individual with a person of the accused's choice⁵⁹ and obtaining warrants⁶⁰ lie within the purview of the responsibilities of the police, thus any laws related to these actions must be complied with. Furthermore, it aims to further the prohibition on arbitrary arrests and states that any police officer who unnecessarily arrests a person, or inflicts torture on them during custody may be punished for a term up to five years and will be liable for a fine.⁶¹ Article 157 of the Order also states that police officers who cause unnecessary delays in producing an arrested individual in Court may be punished for a year along with being liable for a fine.⁶²

3.2 PRE-TRIAL DETENTION – PHYSICAL AND JUDICIAL REMAND

3.2.1 International Human Rights Safeguards and Standards

International law lays down certain standards for the protection of human rights during deprivation of liberty in the form of detention as well. Much like arrest, the principle of legality must be complied with in relation to detention as well which means that such deprivation of liberty must be lawful.⁶³ The UDHR and core international human rights conventions lay down the standards of protection to be accorded during pre-trial detention.

However, it must be noted that pre-trial detention is seen as a last resort in international law and may be used where there is a credible risk of the accused absconding or committing more serious crimes.⁶⁴ The UN

58 2013 MLD 1359 Lahore High Court

59 Article 4(k) Police Order 2002 (C.E. Order No.22 of 2002)

60 Article. 4(3) Police Order 2002 (C.E. Order No.22 of 2002)

61 Article 156 Police Order 2002 (C.E. Order No.22 of 2002)

62 Article 157 Police Order 2002 (C.E. Order No.22 of 2002)

63 OHCHR and IBA, 'Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers' Professional Training Series No. 9, 2003

64 Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August – 7 September 1990, Chapter 1, section C, paragraph 2(b).

Human Rights Committee has taken the view that detention when an accused has not been convicted of a crime impacts the presumption of innocence⁶⁵ and may lead to further violations of human rights. To this end, the HRC has stated that, “bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the state party.”⁶⁶ A report of the Justice Project Pakistan (JPP) had revealed in May, 2020 that there were 77,275 prisoners in Pakistani prisons against the authorised capacity of 57,742 prisoners in Sindh, Punjab, K-P and Balochistan. “This is 34 per cent more than the official capacity.” The report revealed that out of Pakistan's total prison population (77,275), 65 percent of all prisoners are currently undergoing trial. “This means that 48,008 prisoners out of Pakistan's prison population have not yet been convicted of a crime.”⁶⁷

The issue of under-trial prisoners not only leads to overcrowding but leads to conditions for rampant abuse of prisoners as well. In *Saqib Raza v. State*,⁶⁸ the High Court emphasised on the need to protect the rights of under-trial prisoners and stated that expeditious and a fair trial is a fundamental right which must be protected for all. The Court stated that delay in imparting justice leads to reduced confidence of the public in the judiciary which must be avoided. Moreover, the Code of Criminal Procedure (Amendment) Act 2011 also provides for statutory bail to under trial prisoners whose trials have not been disposed of in the prescribed time limit. Thus, an under trial prisoner is entitled to bail if he has been charged with any offence not punishable by death and has been detained for one year. This reflects the budding need to ensure the rights of under trial prisoners and to limit pretrial detention in line with international law on the subject.

The primary international law with regards to pre-trial detention can be found within Article 9 of the ICCPR which provides for the protection of the right to liberty and security of person and requires all deprivations of liberty to be conducted in a manner in accordance with the procedures established by law. Article 9(3) encapsulates the international standards relating to pre-trial detention and explains that any detained individual is entitled to a fair trial within a reasonable time, and any individual awaiting trial may be detained, or released on conditions set out by the law. Furthermore, Article 9(4) provides individuals with the right to challenge the legality of detention thus ensuring that arbitrary arrest and detention are prohibited.

In explaining the application of Article 9 of the ICCPR, the HRC has stated that pre-trial detention must only be used as an exception. In General Comment No. 8 the HRC notes that such detention should be as short as possible and defines 'reasonable time' within Article 9(3) as no longer than 48 hours.

Furthermore, Article 11 of the UDHR states that every individual has the right to be presumed innocent until proven guilty, and no individual must be held criminally responsible under any law which applies retrospectively. The same can be found within Article 14(2) of the ICCPR as well. Article 14 of the ICCPR establishes various protections such as equality before the law, right to effective remedy by a competent Court, right to fair trial and due process of law, right to compensation in cases of miscarriage of justice, and the right to not be held criminally liable if acquitted for an offence in accordance with the law. Furthermore, Article 15 states that every individual has the right to not be held criminally liable under law which applies retrospectively.

65 Human Rights Committee, Concluding Observations: Argentina, UN Doc CCPR/CO/70/ARG (2000), para. 10.

66 *Hill v. Spain*, Communication No. 526/1993, para. 12.3.

67 <https://tribune.com.pk/story/2262196/pm-orders-release-of-women-prisoners-in-line-with-top-court-order>

68 2015 MLD 515 Karachi High Court Sindh

Additional standards have also been established under international law which are essential in providing guidance for the protection of those in pre-trial detention. A list of such standards is presented below:

RELEVANT SECTION	CONTENT
Standard Minimum Rules for the Treatment of Prisoners	Rules 84 to 93 provide for the provision of separate accommodation for untried prisoners. Furthermore, individuals in pre-trial detention are to be kept in separate rooms, allowed to wear their own clothes, are to be given opportunities for work but are not required to work, must be allowed to visit or treated by their own doctor, and must be provided with legal aid to present their defense.
Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment	These principles require for humane treatment of anyone deprived of their liberty and places a prohibition on derogation from human rights of those who have been detained. The principles place a strict prohibition on torture, requires provision of separate accommodation for detained persons, provision of legal assistance and upholds the right to fair trial. Further, the principles strictly prohibit the use of violence or other measures to compel the detained person to confess or to incriminate himself.
UN Basic Principles and Guidelines on Remedies and Procedures on the right of anyone deprived of their liberty to bring proceedings before a Court.	These require detained persons to be informed of the charge against them, provided adequate time to challenge their deprivation of liberty, provision of legal aid and the ability to bring proceedings in Court. These Principles also require specific measures to be adopted to ensure that women and girls are treated equally in challenging the legality of any deprivation of liberty to which they have been subjected.
Convention on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.	The UN Convention places a strict prohibition on torture and any form of inhumane or degrading treatment which is equally applicable to individuals subjected to pre-trial detention.
UN Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules)	These provide for alternatives to pre-trial detention and require that detention should be used as a last resort only when non-custodial measures are not appropriate.

Convention on the Rights of the Child	The Convention requires detention of a child to be a measure of last resort, and requires any child deprived of their liberty to be treated with humanity and respect. Furthermore, it requires that children deprived of their liberty must be provided with separate accommodation and kept separately from adult detainees. It further requires legal assistance to be provided to children subjected to detention.
UN Standards Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)	Rule 13 explains that detention pending trial must be used as a last resort, children awaiting trial must be kept separately from adults and are entitled to all rights provided under the Rules.
UN Rules for the Protection of Juveniles Deprived of their Liberty.	These Rules state that any juveniles awaiting trial must be presumed innocent until proven guilty, must be provided legal counsel, must be provided separate accommodation, must be provided with opportunities to work and should receive materials for leisure and recreation.

Figure 3.4 – International Human Rights Standards in Pre-Trial Detention

3.2.2 Constitutional Safeguards

The protections accorded under Article 9 and 10 of the Constitution apply to cases of pre-trial detention as well which means that any deprivation of liberty must be made in accordance with human rights and the security of such persons must be protected. Furthermore Article 10 stipulates that any detained individual must be informed of their arrest, and must be provided access to legal consultation.

More importantly, Article 10 requires detained persons to be produced in front of a magistrate within twenty-four hours of their arrest so as to determine the legality of such deprivation of liberty. In addition to this, the Constitution of Pakistan requires the right to fair trial to be protected (Article 10A) and prohibits slavery and forced labour of all kinds for persons awaiting trial.

The rights of detained persons are further protected under Article 12, 13 and 14 which prohibit retrospective punishment, provide protection from double punishment and self-incrimination and establishes the inherent dignity of man. Article 14(2) clarifies that a person must not be subjected to torture to extract evidence which must be complied with during pre-trial detention as well.

3.2.3 Domestic Law and Jurisprudence

Beyond the initial twenty-four hour period after an arrest, further pre-trial detention in Pakistan is divided into two categories – physical and judicial remand.

- **Physical Remand**

A. Domestic Law

Physical Remand includes detention of the accused in police custody to further investigate the commission of the crime. An arrest permits the Police to detain an individual for the purposes of investigation for up to twenty-four hours and where the Police cannot complete their investigation within twenty-four hours,⁶⁹ the accused must be produced before a magistrate. However, continued custody of the detained individual may be requested through an application for physical remand.

This procedure has been laid down by Sec. 167 Cr.P.C. which provides that if an investigation cannot be completed within 24 hours, and there exists sufficient information as to the commission of a crime then the arrested person may be detained for a time exceeding twenty-four hours. Furthermore, it stipulates that for such an extension to be made a Magistrate may authorize detention for a term not exceeding fifteen days.⁷⁰ In practice, Magistrates are approached several times for extension in remand and it is common for the full 15 day remand period to be granted to the Police.

In addition to this, any Magistrate authorizing such detention is under a duty to record the reasons for such detention,⁷¹ and if detention is not deemed appropriate then a Magistrate may try the case or send the accused for trial to a Magistrate who has sufficient jurisdiction to try the case.⁷² Sec. 167(5) lays down the law for physical remand of women and states that a magistrate may not authorize detention of a female in cases other than those involving Qatl or Dacoity, and the interrogation of the accused must be conducted in the presence of an officer of jail and a female police officer.⁷³

The specific application procedure for physical remand is dealt with by Rule 25.56 of the Police Rules 1934.⁷⁴ Rule 25.56 (1) explains that an application for remand is to be made on an incomplete Charge Sheet Form found in Form No. 25.56(1) of the Police Rules. Copies of the case diary concerning the investigation are to be attached to this application and produced before the Magistrate along with the arrested individual and the Magistrate must record his order on the application form which is not to be returned to the police but forms part of the Magisterial proceedings.

The basis for seeking remand was discussed in the case of *Rasool Bux v. the State*⁷⁵ where the Karachi High Court juxtaposed the requirements of Sec. 54 Cr.P.C. regarding the grounds needed to arrest with those under Sec. 167 Cr.P.C. relating to the grounds upon which physical remand may be granted. Under Sec. 54 Cr.P.C. The wordings are that the police officer has 'reasonable suspicion' of the accused having being concerned in the crime thus justifying his arrest. Sec. 167 on the other hand, requires a police officer to have "grounds for believing" that the accusation or information received by him against the appellant is well founded. According to the Karachi High Court, the police should have some tangible evidence with them which converts their opinion from a 'reasonable suspicion' (Sec. 54) to 'belief' (Sec. 167) about the involvement of the accused within twenty-four hours of arrest and for that there should be grounds to show that the accusation or information is well founded.

69 Sec. 61 Cr.P.C. 1898 (Act V of 1898)

70 Sec. 167(2) Cr.P.C. 1898 (Act V of 1898)

71 Sec. 167(3) Cr.P.C. 1898 (Act V of 1898)

72 Sec. 167(2) Cr.P.C. 1898 (Act V of 1898)

73 Sec. 167(5) Cr.P.C. 1898 (Act V of 1898)

74 Rule 25.26 Police Rules 1934

75 2005 YLR 915

Further guidance in relation to the grounds for requesting remand has also been provided within Rule 25.56(2) the relevant portions of which have been produced below:

POLICE RULES 1934	
Rule 25.56(2)	<p>(2) No application for remand to police custody shall be made on the ground that an accused person is likely to confess. Grounds for such an application should be of the following nature:</p> <ol style="list-style-type: none"> a. That it is necessary to take the accused to a distance that he may be shown to persons likely to identify him as having been seen at or near the scene of the offence. b. That it is necessary to have his footprints compared with those found on or near the scene of offence. c. That the accused has offered to point out stolen property or weapons or other articles connected with the case. d. Any other good and sufficient special reason.

Figure 3.5 – Rule 25.56(2) Police Rules 1934

The following principles⁷⁶ have also been laid down for the guidance of Magistrates in the matter of granting remands, and District Magistrates are required to see that they are carefully applied:

1. Under no circumstances should an accused person be remanded to Police custody unless it is made clear that his presence is actually needed in order to serve some important and specific purpose connected with the completion of the inquiry. A general statement by the officer applying for the remand that the accused may be able to give further information should not be accepted.
2. When an accused person is remanded to Police custody the period of the remand should be as short as possible.
3. In all ordinary cases in which time is required by the Police to complete the inquiry, the accused person should be detained in magisterial custody.
4. Where the object of the remand is merely the verification of the prisoner's statement, he should be remanded to magisterial custody.
5. An accused person who has made a confession before a Magistrate should be sent to the Judicial lock-up and not made over to the Police after the confession has been recorded. If the Police subsequently require the accused person for the investigation, a written application should be made giving reasons in detail why he is required and an order obtained from the Magistrate for his delivery to them for the specific purposes named in the application. If an accused person, who has been produced for the purpose of making a confession, has declined to make a confession or has made a statement which is unsatisfactory from the point of view of the prosecution he should not be remanded to Police custody.

These principles have been included in the Police Rules as well for the guidance of Police officers.

Finally, the Cr.P.C. under Sec. 173 requires the submission of a police report at the culmination of the investigation. This report must be made in accordance with Form 25.57(2) of the Police Rules 1934 and is significant as it marks the end of physical remand, requiring that investigation must be completed without unnecessary delay. On completion of the maximum period of police remand under Sec. 167 Cr.P.C. the accused becomes entitled for trial, and challan/final Police report under Sec. 173 Cr.P.C. is to be submitted before the competent Court of jurisdiction through a Public Prosecutor.⁷⁷

Furthermore, principles as to remand in cases regarding terrorism are dealt with under the Anti-Terrorism Act 1997 under which an Anti-Terrorism Court is deemed to be a Magistrate and is empowered to grant physical or judicial remand.⁷⁸ The ATC may grant physical remand for a period of thirty days at a time, up to a total remand period of ninety days.⁷⁹ Extensions beyond the initial thirty days are to be granted if the ATC is satisfied that further evidence may be available and that no bodily harm has been or will be caused to the accused.⁸⁰

The HRC review of Pakistan also further sheds light upon this issue. It states that Pakistan 'should review the Anti-Terrorism Act with a view to aligning the definition of terrorism provided in Article 6 of the Act with international standards; removing the jurisdiction of the antiterrorism courts over juvenile offenders; repealing section 21-H of the Act; and establishing procedural safeguards in the Act and bringing the court proceedings in line with articles 14 and 15 of the Covenant to ensure fair trials. It should also take the measures necessary, acting in line with the Covenant, to reduce the existing backlog of case.'⁸¹

The review also highlighted that there was a rising concern regarding the country's application of the death penalty in cases which do not constitute as the "most serious crimes" as defined by Article 6(2) of the Covenant. This is further exacerbated by the death penalty being assigned to juveniles and individuals suffering from psychosocial or intellectual disabilities. There is also no existing record of clemency applications being granted, instead there is reason to believe that a blanket policy exists to refuse clemency applications and there is no mechanism in place to prevent executions through torture or inhumane punishment. A large number of Pakistani migrant workers who have either been awarded the death penalty or already executed in foreign countries apparently receive inadequate consular and legal services which is a protected right to under Articles 2, 6, 7, 9, 14 and 24.⁸²

The review states that death penalty should only be applied for the "most serious crimes" and should not be treated as a mandatory sentence. Pardons or commutations of the sentence should be available in all cases lest it be imposed in violation of the Covenant. Such a violation also exists if the death penalty is awarded in the absence of fair trial procedures or by military courts. Secondly, the review states that Pakistan should ensure that individuals who were below 18 years of age at the time the offence was committed are not subjected to the death penalty and that an independent and effective age determination process is in place in such situations. In case of doubt, the offender should be treated as a minor. The State party needs to make a greater effort to register children at birth and employ all reasonable measures to facilitate the identification of undocumented children.⁸³ Thirdly, individuals with psychosocial or intellectual disabilities should be exempt from the death sentence. This may be facilitated by the establishment of an independent mechanism to review all cases where sufficient evidence exists that the prisoner facing death penalty is the victim of such disabilities as well as to monitor the mental health of death row inmates. Lastly, Pakistani

77 Sec. 173(1) Cr.P.C 1898 (Act V of 1898)

78 Sec. 21E(2) Anti-Terrorism Act 1997

79 Sec. 21E(1) and (2) Anti-Terrorism Act 1997

80 Sec. 21E Anti-Terrorism Act 1997

81 Sec. 22 International Covenant on Civil and Political Rights [2017] CCPR/C/PAK/CO/1

82 Sec. 17 International Covenant on Civil and Political Rights [2017] CCPR/C/PAK/CO/1

83 Sec. 44 International Covenant on Civil and Political Rights [2017] CCPR/C/PAK/CO/1

migrant workers facing the death penalty in foreign countries must be provided with effective and sufficient legal and consular services throughout their legal proceedings.⁸⁴

With regards to the use of torture and cruel or inhumane forms of punishments and executions against prisoners, The HRC review stated that Pakistan should adopt measures to discourage this practice. The laws should be amended to ensure that all elements of the crime of torture are prohibited in accordance with Article 7 of the Covenant and sanctions should be imposed for acts of torture proportional to the gravity of the crime. Secondly, mechanisms should be developed to ensure prompt, thorough and effective investigation of all allegations of torture or ill-treatment. The accused must be immediately prosecuted and accordingly penalized if found guilty of the offence while the victims should be rehabilitated or receive effective remedies. To further discourage and discredit torturous acts, confessions obtained through coercion must be deemed inadmissible during legal proceedings and the training of judges, prosecutors, police, military and security forces should be strengthened in this regard.⁸⁵

At the same time, review recommends that Pakistan should also tackle the issue of prison overcrowding and must improve the conditions of detention with regards to healthcare and hygiene. All necessary measures should be taken to restrict situations in which pretrial detention is allowed. Instead, this should only be viewed as an exceptional measure and not be allowed for very lengthy periods of time in accordance with Article 9 of the Covenant.⁸⁶

B. Jurisprudence

The Superior Judiciary has adopted a liberal approach to Sec. 167 Cr.P.C. and has established guiding principles for pre-trial detention which aim to restrict the potential for abuse within detention. In *Mian Ghulam Ijaz v. State the Court*⁸⁷ took the view that an accused cannot merely be physically remanded because his presence is essential for the completion of the investigation, and there needs to be sufficient grounds for such detention to be granted.

In *Ghulam Sarwar's Case*⁸⁸ the Court laid down fifteen principles which aimed at regulating the grant of remand and improving accountability in the process. The principles are as follows:

1. During first 15 days, the Magistrate may authorise the detention of the accused in judicial custody liberally but shall not authorise the detention in the custody of the police except on strong and exceptional grounds and that too, for the shortest possible period;
2. The Magistrate shall record reasons for the grant of remand.
3. The Magistrate shall forward a copy of his order passed under Sec. 167, Cr.P.C. to the Sessions Judge concerned.
4. After the expiry of 15 days, the Magistrate shall require the police to submit complete or incomplete challan and in case, the challan is not submitted, he shall refuse further detention of the accused and shall release him on bail with or without surety.
5. After the expiry of 15 days, no remand shall be granted unless, the application is moved by the police for the grant of remand/ adjournment.
6. The application moved by the prosecution/ police after the expiry of 15 days of the arrest of the accused, be treated as an application for adjournment under Sec. 344 Cr.P.C.

⁸⁴ Sec. 18 International Covenant on Civil and Political Rights [2017] CCPR/C/PAK/CO/1

⁸⁵ Sec. 26 International Covenant on Civil and Political Rights [2017] CCPR/C/PAK/CO/1

⁸⁶ Sec. 28 International Covenant on Civil and Political Rights [2017] CCPR/C/PAK/CO/1

⁸⁷ 2018 PLD Lahore High Court 151

⁸⁸ 1984 P.Cr.L.J 2588

7. Before granting remand, the Magistrate shall assure that evidence sufficient to raise suspicion that the accused has committed the offence has been collected by the police and that further evidence will be obtained after the remand is granted.
8. The Magistrate shall not grant remand /adjournment in the absence of the accused.
9. The Magistrate should avoid giving remand /adjournment at his residence.
10. The Magistrate shall give opportunity to the accused to raise objection, if any, to the grant of adjournment/remand.
11. The Magistrate shall record objection which may be raised by an accused person and shall give reasons for the rejection of the same.
12. The Magistrate shall examine police file before deciding the question of remand.
13. If no investigation was conducted after having obtained remand, the Magistrate shall refuse to grant further remand /adjournment.
14. The Magistrate shall not allow remand/ adjournment after 2 months (which is a reasonable time) of the arrest of the accused unless it is unavoidable.
15. The Magistrate shall not grant remand mechanically for the sake of co-operation with the prosecution/police.

In another landmark case, *Noor Muhammad v. SHO Police Station KlurKot, District Bhakkar*, the Lahore High Court further developed the jurisprudence relating to remand.⁸⁹ The principles laid down by the Court in this case are also useful for determining whether a person should be remanded to police custody or judicial/magisterial custody.

1. In order to form an opinion as to the necessity or otherwise of the remand applied for by the police, the Magistrate should ascertain what previous similar orders (if any) have been made in the case, and the longer the accused person has been in custody the stronger should be the grounds required for a further remand to police custody.
2. Under no circumstances should an accused person be remanded to police custody unless it is made clear that his presence is actually needed in order to serve some important and specific purpose connected with the completion of the enquiry.
3. A general statement by the officer applying for the remand that the accused may be able to give further information should not be accepted.
4. When an accused person is remanded to police custody the period of the remand should be as short as possible.
5. In all ordinary cases in which time is required by the police to complete the enquiry, the accused person should be detained in magisterial custody.
6. Where the object of the remand is merely the verification of the prisoner's statement, he should be remanded to magisterial/ judicial custody.
7. A prisoner, who has been produced for the purpose of making a confession and who has declined to do so, or has made a statement which is unsatisfactory from the point of view of the prosecution, should in no circumstances be remanded to police custody.
8. In any case when an accused person is remanded to police custody, the reasons must be recorded in the order of remand.
9. If the physical remand is granted by a Magistrate a copy of the order has to be forwarded to the Sessions Judge under Sec. 167(4) of the Code of Criminal Procedure who can suo moto review the same under Sec. 439-A of the Code of Criminal Procedure. However, if the physical remand is granted by a Special Court or an Executive Magistrate not under the administrative control of the Sessions Judge, he need not send a copy of the order to him.

89 2000 YLR Lahore 85

The Lahore High Court cautioned the Special Courts and Magistrates to adopt the utmost precautions when granting physical remand otherwise they could also be held responsible/liable for any extra-judicial killing effected afterwards by the Police.

Due to the nature of pre-trial detention under physical remand, Courts in Pakistan have taken the view that such powers must be exercised with caution. In *Rehan v. State*⁹⁰ the Supreme Court stated that if the final report of investigation could not be submitted after the time prescribed under Sec. 167 Cr.P.C. then an interim challan must be submitted through the Public Prosecutor for trial and an accused must not be kept in detention without any legal justification for an indefinite period.

In the *State v. Nasir Javed Rana*⁹¹ the Court emphasised that the liberty of a person cannot be curtailed and every accused has the right to represent themselves before a Magistrate when remand is to be granted. Additionally, it was stated that it is the sacred duty of a Magistrate to safeguard the rights of individuals due to which remand cannot be granted on a mere request of the Police. Furthermore, in *Haseeba Taimoor Afridi v. The State*⁹² the Court stated that under Sec. 167 Cr.P.C. it is the duty of the Magistrate to satisfy himself that there are grounds for believing that the accusation or information is well founded for justifying custody of an accused with the police.

Furthermore, in relation to timely submission of police reports, the Court in *Hakim Mumtaz Ahmed v. The State*⁹³ stated that delay in submission of challan under Sec. 173 Cr.P.C. has been noticed invariably in criminal cases, resulting in a large number of persons detained in jails without trial – which is in clear violation of Article 9 of the Constitution. The Court noted that the detention of accused individuals for indefinite periods without trial cases creates innumerable problems and that the Superintendent of the Police should initiate action against any S.H.Os or Investigating Officers found negligent in complying with the mandatory provisions of Sec. 173 Cr.P.C.

- **Judicial Remand**

A. Domestic Law

Judicial remand operates in two ways. Where the police seek physical remand under Sec. 167 of the Cr.P.C. the Court can instead grant judicial remand where it feels that the physical presence of the accused is not needed for the police investigation. This judicial remand cannot last longer than 14 days as envisioned in Sec. 167. Where physical remand is granted to the Police for a period less than the maximum 14-day period, the remainder of this period can be given as judicial remand under Sec. 167. After the culmination of the initial fifteen-day period from arrest wherein either physical or judicial remand is granted and investigation ought to be completed, any further detention of the accused may only be granted under the provisions of Sec. 344 of the Cr.P.C. The detention of an accused under Sec. 344 is not intended to be penal but to ensure the attendance of the accused at the trial. At any period during judicial remand a bail application may be made and the accused may be admitted to bail under Sec. 497 Cr.P.C.

90 2009 SCMR Supreme Court 181

91 PLD 2005 Supreme Court 86

92 2013 SCMR 1326

93 2002 PLD Supreme Court 590

In order for the prosecution to obtain a judicial remand under Sec. 344 three conditions are required to be fulfilled:

1. Some evidence should be adduced before the Court which should be sufficient to raise suspicion of the accused's guilt and the Court should be sure that further evidence to strengthen the suspicion is expected to be collected;
2. A police report in writing of acts constituting the offence must be produced to enable the Court to take cognizance of the offence; and
3. If the nature of the case is such that no cognizance of the offence can be taken without previous sanction, then such sanction should be produced to enable the Court to take cognizance of the offence.⁹⁴

Proceedings relating to judicial remand are proceedings within the meaning of Sec. 340 Cr.P.C. and therefore, during these proceedings, an accused has the right to be represented by his lawyer and to have access to his relatives for that purpose.⁹⁵ No single order of remand by a Magistrate under Sec. 344 can exceed fifteen days at a time. However, there is no limit on the total period of a series of orders of remand. Further remand under Sec. 344 can only be made if sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and that it appears likely that further evidence may be obtained by remand.⁹⁶

Generally, under the Cr.P.C. only in exceptional cases can a Magistrate having sent an individual to judicial remand, send him back to the police on physical remand. This is to be distinguished from the procedure under the Anti-Terrorism Act 1997 where such a transfer back to physical remand is specifically authorized. Under Sec. 19(5) of the Anti-Terrorism Act 1997 if an accused has been released from police custody, remanded to judicial custody then the ATC is authorized to grant physical remand to the Police or any other investigating agency joined in the investigation for the purpose of further investigation in the case.

DISTINCTION BETWEEN SEC. 167 AND SEC. 344 CR.P.C

- Remand under Sec. 167 may be both physical or judicial remand.
- Physical/police remand may only be granted where the Police require physical custody of the accused for the purposes of investigation, otherwise judicial remand will be granted.
- Continued detention in custody of the accused after the initial 15-day period cannot be granted under Sec. 167 but only under Sec. 344.
- The powers given by Sec. 167 Cr.P.C. cannot be exercised by a Magistrate of 1st or 2nd class unless he is specially empowered in that behalf. This detention in custody can only be judicial remand. In essence custody under Sec. 344 is for under-trial accused persons.
- The maximum period of detention under Sec. 167 is fifteen days whereas the sum period of detention under Sec. 344 can exceed fifteen days provided sufficient reason is found.
- It is to be noted that since Sec. 344 deals with postponement or adjournment of trial, such delays can only be made for fifteen days at a time.
- With regards to the location of detention under these sections, under Sec. 167 detention may be in police custody or in judicial lockup whereas detention under Sec. 344 can only be in judicial lockup (jail).

⁹⁴ Dr. Aijaz Hassan Qureshi v. Government of the Punjab through Secretary Home Department Government of Punjab, Lahore and another 1977 PLD Lahore 1304

⁹⁵ ibid

⁹⁶ Amir v. Bakhshu and six others 1975 PLD Lahore 625

- With regards to the jurisdiction of the Magistrate to try the case, since Sec. 167 applies when the police are conducting investigation at the preliminary stage- prior even to the framing of charges whereas Sec. 344 generally applies after commencement of the trial. Therefore, a Magistrate acting under Sec. 167 need not have jurisdiction to try the case, however a Magistrate acting under Sec. 344 must have jurisdiction over the case in order to grant remand.

Figure 3.6 – Distinction between Sec. 167 and Sec. 344 Cr.P.C

B. Jurisprudence

Courts in Pakistan have recognised the need to protect the rights of individuals who have been arrested and detained prior to conducting a fair trial to determine the illegality of the actions of the accused. In *Dost Muhammad v. Addition Sessions Judge Barkhan at Rakhni*⁹⁷ the Court stated that in exercising the power under Sec. 344, the reasons for adjournment of proceedings must be in writing and the duration of such adjournment must be reasonable. Furthermore, in *Adeel v. State*⁹⁸ It was held that it is settled law that once an accused is sent to Judicial lock-up he cannot be handed over to Police subsequently and successive remand cannot be given except in extraordinary circumstances. If remand is required in exceptional cases, then it must be on the basis of details given in the application for remand and the reasons given by the Magistrate concerned.

3.3 PREVENTIVE DETENTION

3.3.1 International Human Rights Safeguards and Standards

It is essential to draw a distinction between pre-trial and preventive detention. Preventive detention is that which is ordered by the Executive and all powers of decision making are held solely with the executive authority imposing the detention. Preventive detention is broader than any other form of deprivation of liberty as it is not imposed merely due to a violation of criminal law but is imposed because the detained person's actions have the effect of threatening national security and public order.⁹⁹ The International Commission of Jurists defines administrative or preventive detention as,

“The deprivation of a person's liberty, whether by order of the Head of State or any executive authority, civil or military for the purposes of safeguarding national security or public order or other similar purposes, without that person being charged or brought to trial.”¹⁰⁰

International instruments such as the ICCPR and UDHR lay the basis for the protection of human rights within deprivation of liberty of an individual as well. Article 9 of the ICCPR deals with the right to liberty and security of person and Article 9(1) provides protections in cases of preventive detention as well which means that any individual must not be subjected to arbitrary detention of an administrative nature. Other provisions under Article 9 may pertain to specific violations of criminal law however, for the purposes of Article 9(4) any individual subjected to preventive detention is entitled to challenge the legality of the detention.

97 2017 P.Cr.L.L Quetta High Court 1654

98 2016 YLR Peshawar High Court 2212

99 United Nations Economic and Social Council, Commission on Human Rights, Sub- Commission on Prevention of Discrimination and Protection of Minorities, 'Report on the Practice of Administrative Detention, submitted by Mr Louis Joinet', E/CN.4/Sub.2/1989/27 (6 July 1989), 7.

100 International Commission of Jurists, *States of Emergency: Their Impact on Human Rights* (1983), 394.

Furthermore, Article 9 of the UDHR is significant in cases of arbitrary preventive detention which means that any detention of a preventive or arbitrary nature must be justified on the basis of a threat to national security or public order.

Thus, international law does not expressly prohibit preventive detention however, it is very important to note that it establishes clear restrictions as to the conditions for imposing such detention and states that administrative or prevention detention must apply in accordance with the law and must not be arbitrary in nature. The Human Rights Committee has stated that detention of a person due to unsound mind was allowed as it was not unlawful or arbitrary.¹⁰¹ Furthermore, the Human Rights Committee has taken the view that detention of asylum seekers may not be a violation of human rights law as long as “every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed.”¹⁰²

The working group (WG) of the HRC in its review of Pakistan has underlined the need for availability of habeas for the persons held under preventive detention.¹⁰³ In its review the WG has maintained that depravity from liberty should be in conformity with international standards. The WG has also stressed on the need of the appropriate training for the law enforcement and members of the intelligence agencies in the field of human rights.

Thus, international standards on preventive detention dictate that such detention must not be arbitrary, must be justified under the law and must be reviewed periodically to ensure the legality of such detention.¹⁰⁴ This has been further laid down by General Comment No. 8 where the Human Rights Committee states,¹⁰⁵

“if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9(2) and (3), as well as article 14, must also be granted.”¹⁰⁵

All other human rights standards which has been discussed in the preceding sections also apply to all cases of preventive detention.¹⁰⁶ (See Sections 3.1.1 and 3.2.1)

The Human Rights Committee concluded its consideration in July 2018 of the initial report of Pakistan on its implementation of the provisions of the International Covenant on Civil and Political Rights. The committee noted that persons in pre-trial detention comprised 69 per cent of the entire prison population in 2015, and individuals remained in pre-trial detention for periods longer than the sentence itself. Security agencies were allowed to detain any person suspected of terrorism for a year. There was no independent mechanism to monitor the release, and judges had discretion in granting compensation.¹⁰⁷

101 Communication No. 754/1997, *A. v. New Zealand* (Views adopted on 15 July 1999), in UN doc. GAOR, A/54/40 (vol. II), p. 254, para. 7.2.

102 Communication No. 560/1993, *A. v. Australia* (Views adopted on 3 April 1997), in UN doc. GAOR, A/52/40 (vol. II), p. 143, paras. 9.3 and 9.4.

103 HRC 'Report of the Working Group on Enforced or Involuntary Disappearances on its mission to Pakistan' A/HRC/22/45/Add.2

104 *Ibid* Para 9.4

105 HRC, 'CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)' 30 June 1982 UN Doc HRI/GEN/1/Rev.9 (Vol. I)

106 OHCHR and IBA, 'Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers' Professional Training Series No. 9, 2003

107 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21868&LangID=E>

3.3.2 Constitutional Safeguards

Article 10 of the Constitution provides for protections against arrest and detention however, the Article expressly mentions laws which have been established for preventive detention fall outside the scope of Article 10(1) and (2). However, Article 10(4) deals with preventive detention and states that such laws may only be established to protect the integrity, security or defence of the State and to protect public order or the external affairs of the State. However, this Article expressly states that such detention may not exceed a period of three months unless a review board decides after allowing the detainee to present their defence, has sufficient reason to believe that such detention may be extended.

The appropriate review board under Federal Law is deemed to be a board appointed by the Chief Justice of Pakistan which must include a Chairman and two other persons each of whom is or has been a Judge of the Supreme Court or High Court. Under Provincial Law however, the review board is a board appointed by the Chief Justice of the relevant High Court which must include a Chairman and two other persons, who is or has been a Judge of the Supreme or High Court.

Article 10(5) of the Constitution explains that when a person is subjected to preventive detention, the requisite authority making the order should within 15 days of such detention, communicate the grounds of detention to the person and must provide him the right to challenge the order. However, such authority has the discretion to limit the information that it discloses to protect public interest in the circumstances.

A person arrested under the law relating to preventive detention under Article 10 is protected by the following principles:

1. That no person detained under any such law can be detained for a period exceeding three months, unless he is given an opportunity to appear before the Review Board in person, and the State obtains the opinion of the said Board that there is sufficient cause for such detention before the expiry of that period;
2. If the detention is continued after the said period of three months, the State will have to obtain opinion of Review Board, before the expiry of each period of three months, that there is, in its opinion, sufficient cause for such detention;
3. That the authority ordering the detention shall, within fifteen days from such detention, communicate to the detenu the grounds for his detention, and shall afford him the earliest opportunity of making a representation against the orders of his detention; however, the authority making order for the detention may not disclose the grounds or any particular fact if they consider it to be against public interest;
4. That no person shall be detained for more than a total period of eight months in case of a person detained for acting in a manner prejudicial to public order and twelve months in any other case within a period of twenty-four months commencing on the day of the first detention.
5. The detainee is also entitled to be heard in person or through his counsel by the Review Board and he may also consult a legal practitioner (Article 10(5));
6. Similarly, the composition of the Review Board is provided by the Constitution itself. According to Article 10(4) members of the Review Board are appointed by the Chief Justice of Pakistan and the Board consists of a Chairman and two other members, each of whom is or has been a Judge of the Supreme Court or a High Court;
7. Communicating the grounds to the detainee and review by the Board are two mandatory provisions. Their denial will amount to violation of the law and will render the detention illegal.

3.3.3 Domestic Law and Jurisprudence

A. Domestic Law

There are various domestic laws that deal with preventive detention in Pakistan.

- **Conditions for Preventive Detention**

- **Anti-Terrorism Act 1997**

This Act was introduced to provide legal solutions to acts of terrorism, sectarian violence and other heinous offences. Sec. 11EEE of the Act was added in 2002 and is a by-product of the¹⁰⁸ post-September 11, 2001 anti-terrorism regime. The section deals with preventive detention and states that the Government may detain a person for an initial period of three months and may extend the time of detention, subject to review, for a term not more than twelve months. Furthermore, it expressly states that such detention is subject to the provisions of Article 10 of the Constitution. Under this section, an order is to be issued by the Government directing detention, specifying custody and the period of detention. The UN Human Rights committee in its annual review has raised a concern on the dominance of Anti-Terrorism Act over all other laws in Pakistan especially with regards to arbitrary detention and jurisdiction over juvenile offenses. The committee has recommended an overhaul of the act so as to bring it in line with the article 14 and 15 of the ICCPR.¹⁰⁹ In its Concluding Observations on the Initial Report of Pakistan, the HRC notes its concern with regards to the broad definition of terrorism within the Act, the Acts supremacy over other laws including the Juvenile Justice System Act which raises serious concerns with regards to the rights of children in the criminal justice system. The Committee notes that the Anti-Terrorism act allows courts to try juveniles, detain a person for up to a year and admits confessions made in police custody in clear violation of international law on the matter. The Committee recommended that the Anti-Terrorism Act be reviewed in light of international standards, the definition of terrorism be amended and aligned to international standards and further recommended repealing Section 21-H of the Act with regards to confessions in police custody. The Committee advises Pakistan to establish procedural safeguards within the Act and to bring court proceedings as initiated under the Act in line with Articles 14 and 15 of the Covenant to ensure fair trials and requires the State to take steps to avoid delays in resolving cases.

- **Maintenance of Public Order Ordinance 1960**

Sec. 3 of the Ordinance allows the Government to arrest and detain any person acting in a manner so as to undermine public safety and the maintenance of public order for a period prescribed within the order for detention. Sub-Section 1 clarifies that the Government has the power to extend the period of detention however this must not exceed six months at a time. This power of extension is subject to review by the Board as Sec. 3(5) states that any person cannot be detained for a period exceeding three months unless the Board has reviewed the case and found sufficient case for extension.

Sec. 6 further states that if a person is detained then within fifteen days, the grounds for such detention must be communicated to him. However, the authority ordering the detention reserves the power to restrict the disclosure of information if such disclosure is contrary to public interest.¹¹⁰ Moreover, the authority must present all relevant documents pertaining to the case to the Board if such disclosure is not contrary to public interest. Sec. 11, on the other hand, clarifies that any time limitations as to detention

108 UNHRC 'Concluding Observation on the initial report of Pakistan' 23 August 2017, CCPR/C/PK/1

109 *Ibid* para 21

110 Sec. 3(6) Maintenance of Public Order Ordinance 1960 (Ordinance XXXI of 1960)

within the Ordinance will not apply to enemy aliens. 'Enemy aliens' refer to nationals of an enemy state i.e. nationals of a state you are at war with. International law permits that in situations of war, the nationals of an enemy state can be detained or interned for the duration of the conflict.¹¹¹ Since the 18th Amendment each province has also applied the Maintenance of Public Order Ordinance in their territories to deal with preventive detention. The ordinance has been extensively used both by the military and democratic government alike and has been under repeated judicial scrutiny for being misused by the executive.¹¹²

- Security of Pakistan Act 1952

The Security of Pakistan Act 1952 remains in force as was declared in *Amatul Jalil Khawaja v. Federation of Pakistan*¹¹³ where the Court stated that if the Act had been repealed by subsequent laws, the Government could have confirmed when all federal laws were reviewed in 1981. Sec. 3 of the Act follows the same contours as the law set out in Article 10 of the Constitution of Pakistan and states that a person may be detained if they act in a manner so as to undermine the defence or external affairs or the security of the State.¹¹⁴ It further states that any person conducting activities to adversely affect public order may be detained for eight months and for twelve months for any other activity.¹¹⁵ However, these restraints do not apply to a person who qualifies as an enemy alien. Moreover, the Board of Review is entitled to decide the conditions and place of detention.¹¹⁶

Sec. 3-C widens the ambit of power granted to the Government to enforce preventive detention and states that an order for detention will not be invalid merely because the detained person is outside the territorial jurisdiction of the Government which means that detention of aliens has also been legalized under the Act.

Sec. 6 of the Act lays down the rules in relation to the communication of the order of detention and states that the authority making the order must communicate the grounds of such order to the detained person within fifteen days¹¹⁷ and must enable him to represent himself as against the order. However, the discretion to withhold information on the basis of preservation of public interest has been preserved by the Act as well.¹¹⁸ Following the guidance provided in Article 10, the Act in Sec. 6-A states that a person may not be detained under an order for more than three months unless the Board of Review opines that there is sufficient cause for the extension of such detention. It adds in Sec. 6-A(4) that the proceedings of the Board shall be in private. Certain sections of the Act do not conform with the international standards laid through covenants and general principles. For instance, Section 9 of the ICCPR lays out conditions that must be met before detaining an individual and specifies that all deprivations of liberty must be conducted in accordance with the procedures established by the law. Article 9(4) provides individuals with the right to challenge the legality of the detention, ensuring that arbitrary arrest and detention are prohibited. In General Comment No. 8 the HRC notes that such detention should be as short as possible and defines 'reasonable time' within Article 9(3) as no longer than 48 hours. Furthermore, Article 11 of the UDHR states that every individual has the right to be presumed innocent until proven guilty, and no individual must be held criminally responsible under any law which applies retrospectively. Additional standards have also been established under international law that include but are not limited to 'the requirement of detained persons to be informed of the charges against them, to be provided adequate time to challenge their deprivation of liberty, the provision of legal aid and the ability to bring proceedings in Court.'¹¹⁹ and the provision of

111 See Articles 41 - 44 of the Convention relative to the Treatment of Prisoners of War 1949 (3rd Geneva Convention).

112 PHC warns DCs <<https://www.thenews.com.pk/print/96784-PHC-warns-DCs-against-misusing-Section-3-of-MPO>> accessed 25 November 2020.

113 PLD 2003 Lahore 310

114 Sec. 3(1) Security of Pakistan Act 1952 (Act No. XXXV of 1952)

115 Sec 3(1)(b) Security of Pakistan Act 1952 (Act No. XXXV of 1952)

116 Sec. 3(4) Security of Pakistan Act 1952 (Act No. XXXV of 1952)

117 Sec. 6(2) Security of Pakistan Act 1952 (Act No. XXXV of 1952)

118 Sec. 6(1) Security of Pakistan Act 1952 (Act No. XXXV of 1952)

119 UN Basic Principles and Guidelines on Remedies and Procedures on the right of anyone deprived of their liberty to bring proceedings before a Court.

alternatives to pre-trial detention and the requirement that detention should be used as a last resort only when non-custodial measures are not appropriate.¹²⁰

The Act has been contested as several subsequent laws have been promulgated, however, courts have maintained that as the law still exists in the statute books, therefore, it's applicable.¹²¹ Nonetheless, it is the duty of the judicial organ of the State to reconcile domestic law with Pakistan's international obligations which must be reflected in the precedent set by Courts in the State.

- **Foreigners Act 1946**

Sec. 3 of the Act lays down the rules to make an order for detention and follows the same principles as set out in Article 10 of the Constitution. Sec. 3(2)(g) states that within a period of twenty-four months from the commencement of the first day of detention no person can be detained for more than a total of eight months if they have acted in a manner so as to undermine public order, and for not more than twelve months in any other case. Sec. 4 on the other hand, states that any foreigner detained under this Act is subject to the conditions established by the Federal Government as to the place and manner in which the person is to be detained.

- **Juvenile Justice System Act 2018**

Sec. 5(2) of the Act established a prohibition on the preventive detention of a minor.

- **Treatment of Detainees**

Detainees can only be admitted subject to a lawful order of detention.¹²² Once admitted they are questioned by the Assistant Superintendent to confirm and verify their name and other personal details.¹²³ Prisoners are thoroughly checked at arrival under the supervision of the Assistant Superintendent. All weapons and prohibited items are removed. Personal items, cash, clothing etc. are removed and logged for storage.¹²⁴ There is an admissions register that detainees have to fill.¹²⁵ A full personal description, including thumb impressions have to be recorded in this register.¹²⁶

Each detainee on admission must be thoroughly examined by the Medical Officer for unexplained injuries, wounds or abrasions. If injuries are found, they must be recorded into the admissions register and the injury register.¹²⁷ If those who had custody of the detainee prior to arrival at the detention facility did not log the injuries, a report must be forwarded to the relevant personnel, including the presiding Superintendent of Police.¹²⁸ On completion of the entries in the admission register, the Deputy Superintendent is to check each entry in order to be satisfied that the entries correspond with the warrants and are correct in every respect.¹²⁹ The Superintendent is to be satisfied that the prisoner's description, identification, marks and thumb impression/signature have been duly recorded in the admission register.¹³⁰

120 UN Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules)

121 'LHC Told 1952 Security Act Still in Force' (DAWN.COM, 15 February 2003) <<http://beta.dawn.com/news/82189/lhc-told-1952-security-act-still-in-force>> accessed 30 November 2020.

122 Rule 14 Prison Rules 1978

123 Rule 15 Prison Rules 1978

124 Rule 16 Prison Rules 1978

125 Rule 17 Prison Rules 1978

126 Rule 22 Prison Rules 1978

127 Rule 19 Prison Rules 1978

128 Rule 20 Prison Rules 1978

129 Rule 25 Prison Rules 1978

130 Rule 26 Prison Rules 1978

Furthermore, Detainees are to be kept in association wards where they shall be allowed to associate freely with one another. However, a particular detainee or a class of detainees may be confined separately by the Superintendent on the grounds of health or other sufficient reason.¹³¹ All male and female detainees are to be kept separately within detention facilities.¹³²

The Inspector-General of the facility is required to take all steps necessary to ensure that every detainee is supplied with a diet that maintains good health.¹³³ Along with the Deputy Superintendent and Medical Officer, the Superintendent must be satisfied as to the following:

- Clean drinking water is provided for consumption at all times
- All food provided is of a quality fit for consumption
- All cooked food is prepared properly and fit for consumption
- All food raw and cooked is examined fully before consumption
- All stored foods are inspected frequently and any that do not meet inspection disposed of immediately
- Places and tools for consumption of food are suitable and available for use.¹³⁴

The Senior Medical Officer is required to examine the prepared food daily.¹³⁵ In addition to this, detainees may either wear their own clothing or may be provided a uniform as per the guidelines.¹³⁶ A detainee who is unable to provide himself with sufficient clothing and bedding through his own sources will be supplied by the Superintendent with clothing and bedding on the same scale as is prescribed for ordinary prisoners.¹³⁷ Furthermore, detainees are permitted to send and receive correspondence and have personal visitations in accordance with the laws and procedures established. Personal visitations are referred to as interviews under domestic law.¹³⁸

Torture and infliction of violence upon persons in custody has also been criminalised under the Police Order 2002,¹³⁹ however the 2002 Order is only applicable in Punjab as Khyber Pakhtunkhwa in 2017 enacted the Khyber Pakhtunkhwa Police Act which provides that whoever, being a police officer, inflicts torture or violence to any person in his custody shall on conviction be punished and sentenced up to five years imprisonment.¹⁴⁰ Furthermore, the Pakistan Prison Rules 1978 also prohibit the use of violence and abusive language towards a prisoner.¹⁴¹

B. Jurisprudence

When dealing with preventive detention, Courts in Pakistan have emphasised on the need to ensure compliance with the principle of legality and have protected the right of the accused to challenge such detention. In *Allah Nawaz v. Government of Khyber Pakhtunkhwa*¹⁴² the Court stated that a Constitutional petition against an order for preventive detention was maintainable as no alternative adequate remedies were available to the petitioner which could debar him from filing a constitutional petition before the High Court.

131 Rule 3 West Pakistan Public Order Detenu Rules

132 Rule 231(i) Prison Rules 1978

133 Rule 503 Prison Rules 1978

134 Rule 504 Prison Rules 1978

135 Rule 505 Prison Rules 1978

136 Rule 6 West Pakistan Detenu Rules and Chapter XXI Prison Rules

137 Rule 6 West Pakistan Detenu Rules

138 Chapter XXII Prison Rules and R. 11-22 West Pakistan Public Order Detenu Rules

139 Sec. 156(C) and (D) Police Order 2002

140 Sec. 119(D) Khyber Pakhtunkhwa Police Act 2017

141 Rule 1069 (ii) Prison Rules 1978

142 2019 MLD Peshawar High Court 1016

A similar dictum was reached in *Rafaqat Ali v. Deputy Commissioner*¹⁴³ where the Court found that detention orders had been made merely on the basis of police reports, and there was insubstantial evidence for such detention to be authorized due to which constitutional petitions were allowed and the detained persons were set at liberty. Furthermore, in *Muhammad Yaqoob Butt v. Deputy Commissioner Hafizabad*¹⁴⁴ the Court stated that a person's mere involvement in one criminal case could not serve as an adequate basis for an order of preventive detention, and the Court had to assess the possibility of misuse or arbitrary use of such power by executive authorities. In *Raheel v. State*¹⁴⁵ as well, the Court explained that an order for detention had to be made on the basis of strong evidence which is of such a nature so as to persuade and satisfy any ordinary prudent person to justify the order of preventive detention. Where an order had been issued on the basis of a letter only, the detention was found to be violative of Article 9 of the Constitution.

143 2019 P.Cr.L.J.N Lahore High Court 154

144 2018 P.Cr.L.J Lahore High Court 31

145 2017 MLD Peshawar High Court 1548

SECTION FOUR

INTERNATIONAL STANDARDS FOR THE PROTECTION OF THOSE DEPRIVED OF THEIR LIBERTY: FREEDOM FROM TORTURE AND ABUSE

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INTERNATIONAL STANDARDS FOR THE PROTECTION OF THOSE DEPRIVED OF THEIR LIBERTY: FREEDOM FROM TORTURE AND ABUSE

OVERVIEW

This Section aims to outline the international and domestic law in relation to the use of torture and inhumane or degrading treatment within the criminal justice sector. The use of torture by public officials continues within the criminal justice system in Pakistan. Internationally, and within Pakistan's Constitution, the right to be treated with dignity and humanely when deprived of one's liberty are recognized as fundamental rights, available to all human beings. This Section aims to shed light on the prohibition on torture and the conditions of detention in international and domestic law and aims to provide guidance on the implementation of these rights through the judicial process.

4.1. THE PROHIBITION ON TORTURE AND CRUEL, INHUMANE OR DEGRADING TREATMENT OR PUNISHMENT

The prohibition on torture and other cruel, inhumane and degrading treatment or punishment is found in all major international human rights treaties and numerous human rights instruments. International law has introduced strict rules in relation to the prohibition on torture or cruel, inhuman and degrading treatment. The peremptory nature of the right to freedom from torture and other inhumane treatment is substantiated by the fact that these rights cannot be derogated from under international human rights law even in the gravest of circumstances.¹⁴⁶ The international legal framework places a responsibility on States to protect both the physical and mental integrity of individuals.¹⁴⁷ Therefore, Pakistan is under a positive obligation to ensure that the prohibition of torture and ill-treatment is effectively implemented.

4.1.1 International Human Rights Safeguards and Standards

Significant efforts have been made to eradicate torture in international law. Article 5 of the Universal Declaration of Human Rights 1948 reads "No one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment." This Article is widely accepted as expressing customary international law. There is a wide array of international documents that prohibit acts of torture, abuse and ill treatment. The United Nations, in 1984, established a binding treaty to deal exclusively with the subject of torture, cruel, inhumane or degrading treatment or punishment.¹⁴⁸ In addition to this, many other international instruments condemn degrading treatment. Few of them are mentioned below.

- 1 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture)
- 2 International Covenant on Civil and Political Rights (arts. 4, 7, 10)
- 3 United Nations Standard Minimum Rules for the Treatment of Prisoners (art. 31)
- 4 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment
- 5 American Convention on Human Rights (art. 5)

146 Article 2(2) CAT, Article 4(2) ICCPR

147 Article 7 ICCPR and General Comment No. 20 CCPR (United Nations Compilation of General Comments, p.139, para 2.)

148 UNGA, 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)' 10 December 1984

- 6 Arab Charter on Human Rights (art. 8)
- 7 Cairo Declaration on Human Rights in Islam (arts. 19, 20)

Figure 4.1 – Prohibition on Inhuman or Degrading treatment in International LawAs Pakistan is party to International Covenant on Civil and Political Rights (ICCPR) and Convention Against Torture (CAT), it has been under scrutiny by the Human Rights Committee (HRC) and Committee on Torture (CAT) with regards to human rights particularly that of torture. In its review the Human Rights Committee has underlined the need of incorporating the rights as outlined by the covenant in the domestic courts of Pakistan which includes training judges, lawyers, prosecutors and other officials to prevent torture.¹⁴⁹ The review also pointed to the need for the National Commission for Human Rights to investigate the violations by the members of intelligence agencies.¹⁵⁰ The committee is perturbed by the fact that there is no defined definition as to what constitutes torture in Pakistan's domestic law in the absence of which various modes of investigations are employed by law enforcement officials and members of the agencies.¹⁵¹

The Committee Against Torture in its assessment of Pakistan's track record on torture has recommended several steps to curb torture in Pakistan's criminal justice system.¹⁵² The committee has stressed on the need of prohibiting torture under law and has further stressed on the need of punishing police officers engaged in torture. It has also recommended increasing the reliance on forensic science to secure confessions.¹⁵³ The committee has specifically recommended the establishment of police oversight bodies at the provincial and district levels.¹⁵⁴ It has further urged Pakistan to take legislative steps and review the Custodial Death and Custodial Rape bill (2004) to ensure that it is in conformity with the convention.

Furthermore, the NCHR maintained that Pakistan should withdraw its reservations attached with CAT, ratify it to the fullest and promulgate domestic legislation, which should include a definition of torture; something that has been missing in Pakistan's criminal justice system and all the laws associated with it.

4.1.2 Constitutional Safeguards

There are several provisions of the Constitution of Pakistan that prohibit acts of torture, abuse and ill-treatment. Article 14(2) of the Constitution states that “no person shall be subjected to torture for the purpose of extracting evidence”, and Article 10 provides safeguards as to arrest and detention. The safeguards regarding arrest and detention ensure that even during deprivation of liberty a person must have access to fundamental rights guaranteed under the Constitution. Article 9 specifically protects the right to life and liberty by stating that no person can be deprived of their life or liberty unless done so in accordance with law. This right is widely interpreted and has led to a vast extension of substantive rights including freedom from torture and abuse.

149 HRC, Concluding observation on the initial report of Pakistan, CCPR/C/PAK/CO/1, 23 August 2017

150 Ibid para 10

151 Ibid para 25

152 CAT, Concluding observations on the initial report of Pakistan, CAT/C/PAK/CO/1

153 Ibid para 7(d)

154 Ibid para 9(c)

4.1.3 Domestic Law and Jurisprudence

A. Domestic Law

- **Protection of Liberty**

The Pakistan Penal Code 1860 and Chapter XXXIX of the Code of Criminal Procedure 1898 includes a number of procedural safeguards to protect those who have been detained. These provisions prohibit wrongful arrest and confinement and are designed to prevent abuse during arrest and detention that would curtail the liberty of any person.

There are several provisions in domestic law to ensure that Article 10 of the Constitution is not violated during a person's detention. As per Sec. 61 of the Code of Criminal Procedure 1898, once a person concerned or suspected of having committed a cognizable offence is arrested by a police officer it is expected that he/she would complete the investigation without any loss of time and within twenty-four hours of the arrest. Sec. 167 of Cr.P.C. 1898 authorizes the detention of any person by the police beyond 48 hours up to a maximum of 15 days subject to the orders of a Magistrate in cases where the police are unable to complete the investigation within twenty-four hours of arrest. The production of an accused person under custody of a police officer along with entries made by them in the diaries, before a Magistrate are mandatory requirements of law.

Sec. 103 of the Cr.P.C. 1898 requires the police to conduct house searches in the presence of two or more witnesses and under Sec. 52 women are to be searched by female officials. Moreover, the Police Order 2002¹⁵⁵ imposes penalties on police officers who may abuse a person in their custody. The Order also provides complaint mechanisms against the police.

- **Prohibition on Torture**

Domestic law is silent on the definition of torture. Sec. 332 of the Pakistan Penal Code 1860 defines hurt but does not provide any purposive definition of torture. Whether it includes both mental and physical suffering is also not clear. Sec. 337-K imposes imprisonment up to 10 years on anyone who is found to have been using torture as a means of extracting evidence. Sec. 348 also prohibits wrongfully confining someone or injuring someone to extort a confession.

Moreover, under the Punjab Code of Conduct for Punjab Police Officers 2011, no police officer may inflict, instigate or tolerate any act of torture or inhumane treatment. Sec. 156(d) of the Police Order 2002 also imposes penalties of a fine or imprisonment of up to five years on police officers who inflict 'violence or torture' on a person in their custody.

The Qanun-e-Shahadat 1984 renders any confession made under police custody inadmissible as evidence¹⁵⁶ and makes all statements, confessional or otherwise, made in police custody inadmissible in Court unless they are made in the presence of a magistrate.¹⁵⁷ These rules were made to address the fact that confessions, in many cases, are extracted through custodial torture. An exception to this exists in cases brought under the Anti-Terrorism Act of 1997 wherein Sec. 21H states, "...in any court proceedings held under this Act the evidence (which includes circumstantial and other evidence) produced raises the

155 Police Order 2002 (C.E. Order No.22 of 2002)

156 Article 38 Qanun-e-Shahadat Order 1984 (X of 1984)

157 Article 39 and 40 Qanun-e-Shahadat Order 1984 (X of 1984)

presumption that there is a reasonable probability that the accused has committed the offence, any confession made by the accused during investigation without being compelled, before a police officer not below the rank of a Distt. Superintendent of Police, may be admissible in evidence against him, if the Court so deems fit.” However, in practice Anti-Terrorism Courts require substantial corroborating evidence for such a confession to be acceptable. There continues to be concern that law enforcement personnel resort more frequently to torture and extrajudicial executions if given wide-ranging powers. In particular, by placing time limits on the investigation process, ATCs can make investigating officials prone to falsifying evidence and using coercive methods with suspects. A 2009 amendment to the Anti-Terrorism Act, which permits “extrajudicial confessions” to be used as evidence, has been seen in some quarters as an invitation for investigators to torture suspects.¹⁵⁸

The Torture, Custodial Death and Custodial Rape (Prevention & Punishment) Bill 2014 was introduced in the National Assembly to criminalize torture. The objective of the Bill was to provide enabling legislation that defines torture and criminalises it as suggested in the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment however, the bill lapsed in 2015 after 90 days.

In 2018, the government reported that it had “prepared a Torture and Custodial Death (Prevention & Punishment) Bill, 2018, in consultation with relevant stakeholders, to harmonize the national legislation with the provisions of the subject Convention. However, this Bill has not been tabled despite commitments made by the Federal Minister of Human Rights in January 2019 to table the bill in the next National Assembly session.¹⁵⁹

In October 2019, the Torture and Custodial Death (Prevention & Punishment) Bill 2019 was submitted to the Senate Secretariat. The bill as approved by the Senate's Functional Committee on Human Rights has suggested imprisonment of three to ten years and a fine of Rs 2 Million if anyone is found guilty of torture in custody.¹⁶⁰ Moreover the bill has stipulated a fine of Rs 3 million for death in custody and categorized such acts as non-bailable offence.¹⁶¹ The bill also binds the courts to issue verdict on such issues within 60 days.

B. Jurisprudence

Dr Yasin Zia v. Government of Punjab¹⁶²

The Lahore High Court in the case ordered installation of the CCTV cameras for round the clock surveillance at police stations. This was to minimize instances of verbal and physical torture of inmates.

Muhammad Amin v. The State¹⁶³

In this case, public functionaries were charged with causing hurt contrary to provisions of PPC, as read with Sec. 156 of the Police Order. The Sindh High Court took serious notice of the allegations against the accused (public functionaries), that pertained to maltreatment, unlawful confinement and torture of a citizen. The court held that such offences were to be taken very seriously and rejected their plea for bail in the case.

158 Personal interview, Iqbal Haider, co-chairperson of the Pakistan Human Rights Commission, Karachi, Pakistan, February 2010.

159 Imran, Myra. “Ministry Plans to Present Anti-Torture Bill in next NA Session.” The News International, January 10, 2019. <https://www.thenews.com.pk/print/416877-ministry-plans-to-present-anti-torture-bill-in-next-na-session>.

160 Article 39(1)(2) Torture and Custodial Death (Prevention and Punishment) Act 2020

161 Article 4(1) Torture and Custodial Death (Prevention and Punishment) Act 2020

162 2016 PLD Lahore 94

163 2007 P.Cr.L.J 1303

Abdul Baqiv. The State¹⁶⁴

In the case, the prosecution had produced circumstantial evidence in the shape of extra-judicial confession. It was stated that for awarding conviction on the basis of extra judicial confession, three-fold proof was required, i.e. firstly, it was in fact made, secondly; it was made voluntarily, and thirdly; it was made truly without any coercion or torture.

Attaullah v. The State¹⁶⁵

The case concerned the applicability of Article 38 and 39 of Qanun-e-Shahadat 1984. The confession by the accused in police custody was voluntary according to the prosecution. However, it was established that the confessional statement was induced via torture and therefore, the confessional statement was not admissible under the law.

Dr. Mehmood Nayyar Azam v. State of Chhatisgarh¹⁶⁶

The victim in the case sought public law remedy for grant of compensation and filed constitutional petition before the High Court contending that actions of police and other authorities affected his fundamental right to live with dignity and that he should be granted compensation. It was revealed that the victim was in fact tortured and humiliated at the hands of the police officers. Therefore, the appeal was allowed and a sum of Rs. 5 lacs were granted to the victims as a compensation.

Benazir Bhutto v. President of Pakistan¹⁶⁷

It was held that acts such as extra-judicial killings or custodial deaths, arrests and torture by the State violate the fundamental rights guaranteed under the Constitution of Pakistan including Articles 9, 14 and 25 and these rights cannot be derogated from except as provided by the law, for there was no law to justify such an act perpetrated by the State machinery.

Mst Rohaifa v. Federation of Pakistan (Adialla 11 case)¹⁶⁸

A significant case with regards to torture, inhumane and degrading treatment is that of the 'Adiala 11' where the abuse of suspects at internment centres established under the Actions in Aid of Civil Power Regulation 2011 became well documented. The Supreme Court of Pakistan stated that authorities were under a responsibility to comply with the order of the Court in letter and spirit and must produce the detained persons before the Supreme Court in safe custody.

4.2. CONDITIONS OF DETENTION AND IMPRISONMENT

The rights to life, liberty, security of person, and guarantees of humane and dignified treatment extend to all phases of the criminal justice system including where individuals are deprived of their liberty due to some form of detention or imprisonment. Arrest, pre-trial detention, and preventive detention have been discussed in the previous section, however, there remain other forms of detention or imprisonment as well, including detention for undertrial persons and the imprisonment of persons convicted of an offence.

164 2019 P.Cr.L.J Quetta-High-Court-Balochistan 442

165 2019 PLD Quetta High Court Balochistan 75

166 2013 SCMR Supreme Court 66

167 1998 PLD Supreme Court 388

168 2012 SCMR 388

In November 2019, Pakistan had a total prison population of 77,275 prisoners against a sanctioned strength of 57,742 translating to overcrowding of 133%.¹⁶⁹ Of the total number of prisoners 48,008 were undertrial or 62%.¹⁷⁰

According to the fourth implementation report of the Federal Ombudsman secretariat, the Justice Project Pakistan (JPP) revealed that there is a total of 77,275 prisoners detained in prisons authorized to hold a maximum capacity of 57,742 people in Pakistan. In other words, Pakistani prisons are 34% over the official capacity. The JPP also revealed that 1,500 of these prisoners were over the age of 60 along with 1,204 women and 1,248 juveniles. In the Punjab and KPK provinces, a total of 120 mothers along with 150 children form part of the prison population while 2,100 prisoners suffer from physical illnesses and 600 individuals from mental diseases. Additionally, 2,400 more prisoners are afflicted with a variety of infectious diseases. In the wake of the Coronavirus, the disastrous consequences of overcrowded prisons are significant particularly when we take into account the large number of vulnerable inmates. Therefore, prisons should be systematically depopulated through identification of at-risk and vulnerable prisoners and their conditional release. According to the report, 65% of all detainees are still undergoing trial and have not yet been convicted. This can be addressed through the revision of situations warranting pretrial detention.¹⁷¹

4.2.1 International Human Rights Safeguards and Standards

International human rights law has promulgated strict standards regarding the treatment of detainees and prisoners which are applicable at all times, and States are under a legal duty to take the necessary legislative and administrative measures to put an end to all practices that violate these rules. Article 9 of the ICCPR and Article 9 of the UDHR prohibit arbitrary arrest and detention and provide for the right to liberty and security of a person. Article 10 of the ICCPR further states that accused persons undertrial should be segregated from convicted persons and treated separately. It also requires juveniles to be housed separately from adults. The Article also notes that the aim of any prison system should be the reformation and social rehabilitation of inmates. In General Comment No. 20 on Article 7 of the ICCPR, the Human Rights Committee stated:

'To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends.'¹⁷²

Article 11 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also requires State Parties to keep under systematic review interrogation rules, instructions and practices for the treatment of persons subjected to detention or imprisonment to prevent any cases of torture and Article 2 of the Convention requires the State Parties to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. Moreover, according to Article 12 of the Convention each State party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction. Apart from this, guidance can be taken from

169 Nasir Iqbal, Nov. 10, 2019. 'Over 77,000 inmates lodged in 114 jails with capacity of 57,742, SC told' (Dawn Online) available at: <https://www.dawn.com/news/1515932>

170 Ibid.

171 Shehzad, Rizwan. 2020. "Pakistani Prisons House 77,275 Inmates Against Authorised Capacity Of 57,742 | The Express Tribune". The Express Tribune. <https://tribune.com.pk/story/2183601/1-pakistani-prisons-house-77275-inmates-authorized-capacity-57742>.

172 HRC, General Comment No. 20, 'Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)' 10 March 1992 UN Doc HRI/GEN/1/Rev.9 (Vol. I)

Standard Minimum Rules for Treatment of Prisoners 1977 and Basic Principles for the Treatment of Prisoners 1990.

4.2.2 Constitutional Safeguards

The Constitution of Pakistan protects the rights of citizens within detention as well. The right to life and liberty enshrined in Article 9 of the Constitution states that no person can be deprived of their life or liberty unless done so in accordance with law. Domestic courts have stated that the right to life and liberty cannot be taken away from a person upon arrest.¹⁷³ Safeguards are guaranteed under Article 10 of the Constitution specifically in relation to the strict regulation of State actions when depriving an individual of their liberty. Furthermore, Article 10A guarantees the right to a fair trial and due process which has important implications for persons detained in Pakistan.

4.2.3 Domestic Law and Jurisprudence

A. Domestic Law

- **Health and Employment of Prisoners**

Chapter VI of the Prisons Act 1894 legislates on the 'Food, Clothing and Bedding of Civil and Unconvicted Criminal Prisoners.' Sec. 31 provides that a civil prisoner or a prisoner who has not been convicted shall be able to maintain himself and should be able to receive proper meals, clothing and other necessities. It further states that if such persons lose the privilege to purchase these necessities such as sufficient food and clothing then it must be supplied by the Superintendent of the prison.¹⁷⁴ Chapter VII and Chapter VIII of the Act¹⁷⁵ also provides for Employment and Health of prisoners respectively. The Pakistan Prison Rules also specify the meals and quantities of food that are to be provided to the prisoners.¹⁷⁶

The Pakistan Prison Rules require each prison to maintain a hospital on the premise¹⁷⁷ staffed by a medical officer, a junior medical officer, and a dispenser.¹⁷⁸ The Pakistan Prison Rules also require that a prisoner who complains of ill-ness shall be brought before a medical officer who can then assess the severity of the condition and act accordingly,¹⁷⁹ and Sec. 49 of the Prison Act, 1978 requires that a medical officer should certify to the fitness of a prisoner for punishment in order to assess if he is fit for punishment or not. Provinces are also in the process revising the Acts in their bid to ensure that the rights of prisoners are safeguarded. Last year government of Sindh legislated a bill to turn prisoners into correctional facilities. "The Act aims to convert prison facilities into a state of the art reformations centres which will give a platform for the prisoners to reform themselves once they complete their sentences are legally free citizens again"

- **Separation of Prisoners**

Sec. 27 of the Prisons Act 1894¹⁸⁰ and Rule 231 of the Pakistan Prison Rules 1978¹⁸¹ requires the mandatory separation of convicted prisoners, under-trial detainees, male and female prisoners, and juveniles and

173 Benazir Bhutto v. President of Pakistan PLD 1998 Supreme Court 388

174 Sec. 33 Prisons Act 1894 (Act of IX of 1894)

175 Prisons Act 1894 (Act of IX of 1894)

176 Chapter 20 Pakistan Prison Rules 1978

177 Rule 787 Pakistan Prison Rules 1978.

178 Sec. 6 Prison Act 1894 and Rule 1063 of the Pakistan Prison Rules 1978

179 Rule 788 Pakistan Prison Rules 1978

180 Prisons Act 1894 (Act IX of 1894)

181 Pakistan Prison Rules 1978

adults. The Jail Manual also stipulates that women and juvenile prisoners are to be kept separately from other prisoners. In addition to this, Rule 154 of the Prison Rules 1978 provides that all male prisoners under 18 years old with sentences of three months or more shall be transferred to a borstal institution and juvenile prison. Pakistan has only seven juvenile detention facilities in total. Two of these are located in Punjab, four in Sindh, and one is in KP. There is no such facility in Balochistan. The KP juvenile detention facility is not functional. Therefore, these children are usually detained in prisons with adults.

- **Solitary Confinement**

The PPC 1860 allows the Courts to award a maximum of three months of solitary confinement as rigorous punishment. Sec. 74 further states that confinement is not to exceed 14 days at a time and when imprisonment is awarded for over three months, solitary confinement should not be for more than 7 days in any one month. Previously, prison offences committed by a prisoner were punished by an order of solitary confinement which could extend to a maximum of 14 days. Now, however, this practice has become obsolete and prisoners can only be placed in solitary confinement through direct judicial orders. Every cell for solitary confinement is to have a yard attached to it as per Rule 623 of the Pakistan Prison Rules 1978, so the occupant can have access to fresh air. Sec. 29 of the Prisons Act 1984 also provides that every prisoner held in solitary confinement for over twenty-four hours is to be visited at least once a day by a medical officer.

- **Juveniles**

The Juvenile Justice System Act 2018 applies to juvenile offenders. The Act provides for the right of legal assistance,¹⁸² creation of juvenile rehabilitation centres¹⁸³ and the Juvenile Justice Committee¹⁸⁴ that may alternatively dispose of cases through the process of diversion.¹⁸⁷ According to the Act, a separate challan and trial of juvenile offenders must be carried out. The Act provides for a specific provision for female juveniles¹⁸⁸ and also prohibits the use of preventive detention on a child.¹⁸⁹

Under Section 7 of the JJSO, it is mandatory for the Juvenile Court to conduct an inquiry for the determination of age of the accused. While the said provision of the JJSO states that the inquiry shall include a medical report, a critical study of the case law would reflect that courts, sometimes, give preference to other documents (such as the birth certificate, the school leaving certificate, and national registration cards) over the medical report.

Though the promulgation of the JJSO itself is a significant measure for the protection of the rights of juvenile offenders in Pakistan, its implementation has been inadequate in many respects. For example, the law has not been put into full operation in certain areas such as the Federally Administered Tribal Areas (FATA), despite the express provision of the law and its extension through a formal government notification. The death penalty is still awarded to juvenile offenders showing courts' lack of concern for the fact the same has been expressly outlawed. Similarly, juvenile offenders are still jointly tried with adult accused by the same court. The probation services are neither adequate nor efficient. Juvenile offenders are kept with adults accused in jails in poor and vulnerable conditions.¹⁹⁰

182 Sec. 3 Juvenile Justice System Act 2018

183 Sec. 20 Juvenile Justice System Act 2018

184 Sec. 10 Juvenile Justice System Act 2018

185 Sec. 9 Juvenile Justice System Act 2018

186 Sec. 7(2) Juvenile Justice System Act 2018

187 Sec. 4 Juvenile Justice System Act 2018

188 Sec. 17 Juvenile Justice System Act 2018

189 Sec. 5(2) Juvenile Justice System Act 2018

190 Amnesty International, „Pakistan: Protection of juveniles in the criminal justice system remains inadequate . Online. Available at <http://www.amnesty.org/en/library/asset/ASA33/021/2005/en/24a9ffb0-d4b6-11dd-8a23-d58a49c0d652/asa330212005en.pdf>

The UN Convention on the Rights of the Child (UNCRC) explicitly dictates that neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age. Since Pakistan is party to both the UNCRC and the ICCPR, it has an obligation to abide by their terms and provide special protections to juvenile offenders for the entire legal process, particularly sentencing. International law categorically condemns the use of the death penalty for juvenile offenders. The Juvenile Justice System Ordinance (JJSO), 2000 and the Presidential Notification of 2001 which granted special remissions in sentences to those condemned prisoners who were below 18 when they committed the offence were attempts to abide by the principles laid down by the UNCRC and the ICCPR.¹⁹¹

In practice however, these laws have not been effectively enforced as can be observed in the case of *Muhammad Iqbal v. The Province of Punjab*.¹⁹² Iqbal was below 18 years of age when he was arrested in 1998. The following year, the Court sentenced him to death and the subsequent appeals and mercy petitions filed by him were not granted. In 2018, a Writ Petition was submitted to the Lahore High Court where it was held that he had indeed been a juvenile at the time of the commission of the offence and was entitled to have his death sentence waived. They also found that his appeals and petitions had been wrongfully overlooked and delayed by the departmental authorities concerned. The JJSO and the Presidential Notification of 2001 had explicitly banned courts from awarding death sentences to juveniles, so Iqbal's requests were perfectly within his rights. The judgment also expressed regret that he had to file mercy petitions and appeals in the first place when the same should have been done beforehand in accordance with international and domestic laws. It was only after 22 years that his sentence was reduced from the death penalty to life imprisonment as announced in 2020.¹⁹³

The Lahore High Court was able to reach a decisive decision after noting the precedent set by the Supreme Court of Pakistan in the 2003 case titled *Ziaullah vs. Najeebullah*. This was decided soon after the publication of the President's Notification of 2001 which allowed special remissions for condemned individuals who were below 18 years of age when they committed the offence. The President's letter had explicitly stated that 'Provincial governments shall ensure that the age as recorded by the trial court entitles the condemned prisoner to such commutation'. In this case, the Supreme Court held that questions relating to the determination of age would be settled judiciously and not by the Executive or other departments. This was to ensure that the Judiciary would retain their independence in applying the law and preventing future complexities and inconsistencies.¹⁹⁴

Sec. 29-B of the Cr.P.C. 1898 allows for children under fifteen, who have committed an offence other than one which is punishable with death or transportation for life, to be tried by a Magistrate specifically provided for by the Provincial Government in accordance with the Reformatory Schools Act 1897.¹⁹⁵ Moreover, Sec. 399 of the Cr.P.C. 1898 provides that youthful offenders can be confined in reformatories under the Reformatory Schools Act 1897¹⁹⁶ established by the provincial governments where they can receive suitable education and vocational training rather than in a criminal jail.

The Prison Rules set a higher standard for the provision of education to convicted juveniles than to undertrial juveniles. Under the Rules, education is mandatory for juveniles sentenced to a prison term of one year or more. All such convicts "shall be brought under a course of Instruction, in reading, writing, and arithmetic for

191 The Death Penalty In Pakistan - A Critical Review. 2019. 1st ed. Lahore: Justice Project Pakistan.

192 Writ Petition No.24302/2019

193 Order Dated [6.02.2020] for writ petition

194 The Death Penalty In Pakistan - A Critical Review. 2019. 1st ed. Lahore: Justice Project Pakistan.

195 The Reformatory Schools Act 1897 continues to be in force and was recently referred to in *Zia Ahmed Awan v. Government of Sindh* 2002 P.Cr.L.J 659 Karachi High Court Sindh

196 Reformatory Schools Act 1897 (Act VIII of 1897)

two hours daily,” and “[t]he standard of education will be up to the Matric standard as laid down for schools by the Education Department.” Prison superintendents are furthermore authorized to raise the standard and to increase the subjects taught, in the case of promising boys.¹⁹⁷ The Rules do not require the provision of education to undertrial children, who form the overwhelming majority of the juvenile prison population. In November 2019, the total number of juveniles in prison in Pakistan stood at 1248.

B. Jurisprudence

Mst. Saima Bibi v. Additional Sessions Judge (East)¹⁹⁸

Mother, confined in prison, filed a petition for custody of her suckling baby. It was iterated in the case that the woman prisoner could keep her children with them in the prison till they attain the age of six. The State was responsible to provide the basic necessities to the minor and the mother whether she was in judicial custody or otherwise.

Ayyaz Ahmad v. Saqib Nazir¹⁹⁹

Petitioner was a convicted prisoner and his grievance was that he had not been given medical treatment as prescribed by the medical specialist. He argued that punishing a wrong doer was the demand of law but provision of facility of health was a basic necessity, safeguarded under Rule 197 of Pakistan Prison Rules, 1978. The High Court depreciated the act of local administration, jail hierarchy as well as government functionaries, who failed to perform their duties and directed the authorities to provide health facilities to petitioners in letter and spirit as per the Jail Manual.

Suo Motu case No. 14 of 2009²⁰⁰

The case concerned the conditions of detention of prisoners in jail. It was reported that the Jail Administration continued to infringe basic rights of prisoners and the controlling authorities in the Government also displayed negligent behaviour with regards to the problems faced by prisoners. It was held that non-observance of instructions contained in the Jail Manual and Prison Rules, in respect of right and facilities to be provided to prisoners was not only violation of human rights but also was a grave legal and constitutional violation. Prisoners were entitled to fair and equal treatment in respect of their rights as citizens under the law and Constitution, which reflects the need to ensure proper conditions of detention.

Reports on Prison Conditions presented to the Supreme Court

- The Federal Ombudsman conceded before the Supreme Court that a total of 77,275 inmates are currently housed in 114 prisons in the four provinces against a sanctioned capacity of only 57,742.²⁰¹
- A suo moto case²⁰² was initiated to consider and redress the plight and miseries of women prisoners detained in jails. The Supreme Court in its order outlined several critical issues relating to the deteriorating conditions of prisons in the country and required the Ombudsman to take cognizance of the shortcomings.²⁰³

197 298 Pakistan Prison Rules 1978

198 2018 P.Cr.L.J 1328

199 2017 PLD 342

200 2010 GBLR Supreme-Appellate Court Gilgit 50

201 'Over 77,000 inmates lodged in 114 jails with capacity of 57,742, SC told,' (Dawn.com) 10 November 2019 available at: <https://www.dawn.com/news/1515932>

202 Suo Moto Case No. 1 of 2006 (Miserable Conditions of Women in Jails)

203 'Federal Ombudsman of Pakistan Proposals for Reform in Prisons and Initiatives taken to Provide Education and Skills to Prisoners Particularly Women and Children,' (Mohtasib.gov.pk) 24-25 November 2015 available at: <http://www.mohtasib.gov.pk/images/pdfs/JailReforms.pdf>

- In 2015, a three-member bench headed by Chief Justice Anwar Zaheer Jamali heard the case on a suo moto notice regarding poor condition of prisoners, particularly women, in jails all over the country. One of the major concerns was that the police do not take appropriate measures to accommodate female prisoners and often male and female prisoners are moved together without any proper arrangements. The Supreme Court directed all the provincial governments to submit detailed reports on the facilities provided to women prisoners in jail to administer and supervise the conditions of prisoners.²⁰⁴

The Islamabad High Court (IHC) has declared that overcrowding in jails was unconstitutional and ruled that a prisoner can sue the government and prison authorities for inhumane treatment during incarceration. The court issued directives to the federal government and Islamabad's commissioner for observance of provisions in jail manual as well as in the international conventions and treaties related to the well-being of inmates. The 38-page verdict authored by IHC Chief Justice Athar Minallah pointed out alarming conditions of prisoners, loopholes in the criminal justice system and how prisoners were subjected to inhumane treatment. "The intolerable and shockingly inhumane and degrading treatment highlighted in the proceedings in hand meets the threshold of the hypothetical illustration in the above judgement," the court observed. "It is, therefore, obvious that the incarcerated prisoners, subjected to the unimaginable degrading and inhumane treatment highlighted in these proceedings, may have become entitled to seek damages against the prison authorities and the state."²⁰⁵

Prisoners' rights also extend over their personal or private affairs including health and management of assets. As seen in the case of Khizar Hayat vs. Home Department and 8 others, the Court ruled in favour of the petitioner when the Medical Officer failed to give her the complete medical reports of her condition. It was held that she and other prisoners have the right to access their medical records and use them to build their defence if they desire.²⁰⁶

Additionally, the policy on Attestation of Power of Attorney, 2018 is intended to facilitate the convenience of the prisoner as well as their relatives and visitors by providing a duly signed power of attorney in a reasonable and respectable manner in accordance to the prisoners' fundamental rights. As seen in the case of Muhammad Idrees vs. Government of Punjab & others, the Jail Authorities have a responsibility to act in the best interests of the prisoners and facilitate them and their families in accordance with the policy and Standards of Procedure outlined within it.²⁰⁷ Although jail authorities can use their discretion when allowing such visits and providing duly signed Powers of Attorney to prisoners, they are expected to do so in compliance with the spirit and letter of this law.

204 'SC seeks report over facilities to women prisoners in Jails,' (Brecorder.com) 14 October 2015 available at: <https://www.brecorder.com/2015/10/14/257170/sc-seeks-report-over-facilities-to-women-prisoners-in-jails/amp/>

205 <https://www.outlookindia.com/newscroll/islamabad-hc-declares-overcrowding-in-jails-unconstitutional/1792693>

206 W.P.No.13010 of 2013

207 W.P.No.5717/2020

SECTION FIVE

RIGHT TO FAIR TRIAL

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RIGHT TO FAIR TRIAL

OVERVIEW

The Right to Fair trial is the cornerstone of any democratic society and constitutes various other rights relating to the treatment of individuals within the Criminal Justice System. International law has delved greatly upon the need to ensure compliance with the right to fair trial to enforce the Rule of Law and safeguard principles of natural justice and due process. The judiciary plays a significant role in the realization of this right as it requires judicial independence and decision making free from any external influences.

However, the right to fair trial is not a unidimensional right, due to which an understanding of its constituent rights is essential to realise the complete enforcement of this right. This Section aims to provide an explanation of the Right to Fair Trial and its constituent rights. Subsequently, this Section will outline the international standards for the protection of this right along with the safeguards as provided under the Constitution of Pakistan and the domestic legal framework.

5.1 CONSTITUENT RIGHTS

It is important that in order for the full realization of the right to fair trial, the interests of the accused, victim and society at large need to be balanced, without prejudice to one another.²⁰⁸

There are a number of rights that constitute the wider right to a fair trial. These include:

- Principles of the presumption of innocence which require that an accused in a criminal offence must be presumed to be innocent until he is shown to be guilty beyond reasonable doubt.
- Being informed of the nature of charge against the accused.
- Receiving adequate time and facilities to prepare his defence.
- Access to legal counsel.
- Representation by legal counsel.
- Receiving a fair and public hearing by an independent and impartial tribunal.
- Being tried without undue delay.
- Examination of witnesses against him.
- Receiving free assistance of an interpreter if he cannot understand or speak the language used in court.
- Protection against self-incrimination as well as double-jeopardy.
- Right of a convicted person to a review of a sentence by a higher court.

Moreover, the announcement of the judgement in open court also forms part of the right to a fair trial, though for a number of reasons restrictions may be placed on the press and public from attending all or part of a trial.

The right to a fair trial has been outlined in different international human rights treaties, conventions, and declarations. Furthermore, in addition to the Constitution and domestic legislation, the superior courts

208 'The Right to Fair Trial: Better Late Than Never' (Shaikh Ahmad Hassan School of Law) available at <https://sahsol.lums.edu.pk/law-journal/right-fair-trial-better-late-never>

have also expounded upon the constituents of the right to a fair trial. This has been discussed in the subsequent sections at length.

5.2 INTERNATIONAL HUMAN RIGHTS SAFEGUARDS AND STANDARDS

The Universal Declaration of Human Rights, a milestone document in the history of human rights adopted by the United Nations and now widely accepted as customary international law, outlines the right to a fair trial in Article 10 by stating that “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

Furthermore, the right to fair trial has also been defined in more detail in Article 14 of the ICCPR which has been ratified by Pakistan. While Article 14(1) establishes the basic right to a fair trial, Article 14(2) outlines the presumption of innocence, and Article 14(3) outlines the minimum fair trial guarantees that must be extended to those accused of criminal charges. These include being informed of the nature of charge against the accused, getting adequate time and facilities to prepare a defence, being tried without undue delay, having witnesses against the accused examined, having free assistance of an interpreter if the accused cannot understand or speak the language used in court, and not being compelled to testify against oneself or confess guilt. Finally, Article 14(5) establishes the right of the convicted person of a review of a sentence by a higher court, and Article 14(7) prohibits double jeopardy. However, this principle has its qualifications as summarized by the Human Rights Committee, which states that it does not apply to appeals or any retrials that may be ordered by a Court of Law or the reversal of guilt or innocence through the presentation of new evidence at a later stage.²⁰⁹

In its General Comment No. 32, the United Nations Human Rights Committee has expounded upon the rights associated with a fair trial. It states that the right to a fair trial must be afforded to persons of all nationalities irrespective of whether they are outside the country of their nationality or are stateless.²¹⁰ Furthermore, the Committee stated that a person must not be barred the protection of this right to fair trial due to “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²¹¹ Article 14 of the ICCPR applies unequivocally to Courts and Tribunals of any nature, be it specialized, civilian or military. In addition to this, Article 6 of the European Convention of Human Rights also outlines the right to a fair trial in a similar language as that of the ICCPR.

This right to a fair trial has also been outlined specifically in relation to children in Article 40(2) of the Convention on the Rights of the Child, also ratified by Pakistan. General Comment No. 10 on the Convention²¹² further explains that the atmosphere of the trial must be tailored in such a way that the child is able to express himself freely, and that the child's age be taken into account to modify courtroom procedures and practices. It states that the child must be given the opportunity to express his/her views freely, and those views should be given due weight in accordance with the age and maturity of the child. It places the responsibility of ensuring that the child understands the charges brought against him/her on the authorities, including the police, prosecutors and judges. Other than this, the gravity of offence must be taken into account particularly in cases involving death penalties. The Comment recognizes that in addition to a lawyer, social workers may also be appointed provided they are trained to work with children and possess an understanding of the law. Moreover, when questioning the child, some appropriate legal or other representative, as well as parents, if requested, must be present. Finally, it emphasizes that delay must be

209 HRC, 'UN Human Rights Committee: Concluding Observations: Portugal (Macao)' 4 November 1999, CCPR/C/79/Add.115, para 55 – 56.

210 HRC, 'General Comment No. 32: Article 14 Right to Equality before Courts and Tribunals and to Fair Trial' 23 August 2007, CCPR/C/GC/32, para 9.

211 HRC, 'General Comment No. 32: Article 14 Right to Equality before Courts and Tribunals and to Fair Trial' 23 August 2007, CCPR/C/GC/32, para 9.

212 CRC, 'General Comment No. 10: Children's Rights in Juvenile Justice' 25 April 2007 UN Doc CRC/C/GC/10.

avoided by setting time limits for the period between the commission of the offence and the final adjudication by the court, which are shorter than those set for adults.

International human rights safeguards regarding the right to fair trial also expound upon the right to complain against ill treatment. The report of the UN Committee against Torture highlights that States must inform the accused of their right to complain to or against the authorities. Moreover, the victim also has the right to complain to courts and non-governmental organizations, and to select a counsel and a doctor of their choice.²¹³ It is the responsibility of the State to thereon protect the complainants and to investigate the matter.

It is also important to note that reparation and redressal through compensation is an obligation under Article 14(6) of the ICCPR as well as Article 14 of the Convention Against Torture for miscarriages of justice that result in wrongful convictions, and for instances of torture. However, they do not provide for compensation if the verdict is overturned on appeal.

5.3 CONSTITUTIONAL SAFEGUARDS

The Constitution of Pakistan, 1973 certainly reflects many of the Articles found in the UDHR, ICCPR and ICESCR. However, the 'right to fair trial' was left out, in spite of Pakistan pledging to promote and respect human rights and to take effective measures both in the national and international spheres, in 1948. It was finally inserted in the Constitution in 2010 through the 18th Amendment as Article 10-A.²¹⁴

In addition to this, fundamental rights constituting the right to a fair trial including protection against retrospective punishment, double punishment and self-incrimination have been guaranteed through Articles 12 and 13 of the Constitution of Pakistan respectively.

- **Article 10A: Right to Fair Trial**

Article 10-A of the Constitution of Pakistan 1973 reads as follows,

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

This Article was included through the 18th Amendment as a fundamental, constitutional right belonging to every person, including all citizens of Pakistan, and extends not only to criminal charges but also to civil rights and obligations.

While the Constitution does not define what a fair trial constitutes, a seven-member bench of the Supreme Court termed it as “the right to a proper hearing by an unbiased competent forum”.²¹⁵ The Court, further stated that this means that a Judge must not hear a case in which he has a personal interest whether or not his decision is influenced by his interest, since "justice should not only be done but be seen to have been done". The Court stated that the right to fair trial was a long-recognized right, now constitutionally guaranteed and 'by now well entrenched in our jurisprudence'. It further outlined that since the legislature

213 CAT, 'Report of the UN Committee against Torture: Twenty-fifth Session (13-24 November 2000) and Twenty-sixth Session (30 April-18 May 2001)' 26 October 2001 UN Doc A/56/44; CAT, 'UN Committee Against Torture: Conclusions and Recommendations of the Committee against Torture, Bosnia and Herzegovina' 15 December 2005 UN Doc CAT/C/BIH/CO/1.

214 'The Right to Fair Trial: Better Late Than Never' (Shaikh Ahmad Hassan School of Law) available at <https://sahsol.lums.edu.pk/law-journal/right-fair-trial-better-late-never>

215 Criminal Original Petition No. 6 of 2012 in Suo Motu Case No. 4 of 2010 (Contempt proceedings against Syed Yousaf Raza Gillani, the Prime Minister of Pakistan, regarding non-compliance of this Court's order dated 16.01.2012), decided on 26th April 2012 2012 PLD Supreme Court 553

did not define the requisites of a 'fair trial', it showed that the intention was to give it the same meaning as is broadly universally recognized and embedded in jurisprudence in Pakistan.

Moreover, the Lahore High Court has also shed light on the ingredients of the right to a fair trial.²¹⁶ It held that all courts must be independent, impartial and established under the law. Moreover, all persons brought before the court shall be equal in determination of their rights and obligations, and shall be entitled to a fair hearing within a reasonable period of time. Everyone shall also have a right of counsel, and shall have a right of public hearing if not prohibited by law. Finally, the Court stated that the procedure of the trial as provided by the Statute shall be followed, and the remedy of appeal must also be provided.

Similarly, the Sindh High Court has also outlined the scope of the right to fair trial. It reasoned that the right to fair trial requires that no one be penalized without being given prior notice of the case, a fair chance to answer the said notice, and a fair opportunity to explicate it. Any action contrary to these principles is a violation of Article 10-A of the Constitution.²¹⁷ In another case, the Sindh High Court has stated that proper representation of a party including an accused through a counsel of choice is also one of the requirements to fulfil the term 'fair trial',²¹⁸ which was subsequently reiterated by the Lahore High Court as well.²¹⁹

Furthermore, the Lahore High Court has found that the concept of fair trial necessarily proceeds on the premise that a trial shall be held without inordinate delay.²²⁰ It is important to note that the right to a fair trial falls within the larger umbrella of due process. Due process refers to the right to have a fair trial and the right to have an impartial and independent judiciary separate from the executive.²²¹ The Supreme Court has stated that the basic requirements of the doctrine of due process entail the provision of an impartial forum within the relevant jurisdiction, due notice of proceedings and a reasonable opportunity to defend oneself.²²²

The Islamabad High Court has also shed light on the right to fair trial by stating that the superstructure of the principle of fair trial was built on the premise that justice should not only be done but manifestly and undoubtedly appear to have been done. Due to this, the Court stated, that every litigant, whether an accused or the prosecution, must have confidence regarding the impartiality and independence of the adjudicator, and that it is not the mind of the adjudicator that is relevant but the impression that one may even erroneously develop which must be dispelled.²²³ The Court further elaborated on the "equality of arms" principle by stating that principles of fair trial must be seen as promoting the principles of 'equating arms on both sides', which means that a fair balance must exist between the opportunities given to both the sides, and every party to a trial must have equal access to justice while ensuring that neither side is procedurally disadvantaged, making the right to fair trial equally important to the prosecution as well.

- **Article 12: Protection against Retrospective Punishment**

The right to fair trial also includes protection against retrospective punishment, which is provided for in Article 12 of the Constitution, and expounded upon in different judgments of the superior courts. This Article prevents a person from being punished for an act and omission which was not an offence when committed. This is because an individual cannot be punished for an offence that did not exist in the statute

216 Bilal Akbar Bhatti v. Election Tribunal Multan 2015 PLD Lahore 272

217 Inbox Business Technologies v. Pakistan 2018 PTD 621

218 Agha Zubair v. State 2019 YLRN Khi. 93

219 Muhammad Hashim Raza v. State 1997 MLD Lahore 1130

220 Qaiser Mehmood v. State 1996 MLD Lah 157

221 Muhammad Nadeem Arif v. Inspector-General of Police, Punjab, Lahore 2011 SCMR 408

222 Muhammad Nadeem Arif v. Inspector-General of Police, Punjab, Lahore 2011 SCMR 408

223 The Ministry of Interior, Government of Pakistan v. The Special Court 2020 PLD Isb 82

book on the date it was committed.²²⁴ Similarly, a person cannot be sentenced to a punishment higher or different than what was prescribed by law at the time of the commission of the crime.²²⁵

The Supreme Court has emphasized on the settled rule of law that any statute or a provision thereof forming part of a substantive law, which creates or extinguishes or effects the rights of citizens shall ordinarily have a prospective effect, except where by the clear command of the law, it is made applicable retrospectively.²²⁶ The Peshawar High Court has found that substantive law would not operate retrospectively but prospectively.²²⁷ The Courts also state that Article 12 prohibits giving retrospective effect to any new enactment that enhances the punishment for an offence from the one provided for the same offence under a pre-existing law.²²⁸

- **Article 13: Double punishment and self-incrimination**

The right to a fair trial also includes protection against double punishment and self-incrimination, which has been provided under Article 13 of the Constitution. This Article is based on the principle of double jeopardy according to which no person can be punished twice for the same offence.²²⁹ Article 13(b) embodies the principle of protection against compulsion of self-incrimination, one of the fundamental principles of criminal jurisprudence.

For the principle of double jeopardy to be applicable, there must have been an original trial conducted that resulted in an order of conviction or acquittal. If a further trial involving the same parties and identical facts, and the same issue is re-agitated, this second trial would be inconsistent with the protections provided for in Article 13, and therefore be invalidly constituted.²³⁰

However, it must be noted that if the extent of two offences is different and they fall under different statutes, their independent trials would not amount to double jeopardy.²³¹ Article 13(a) can only be applicable if a new trial is commenced against the convict, but a variation of sentence of a convict cannot be termed as double jeopardy.²³²

The Supreme Court has also clarified that when the conviction or acquittal of a person is under challenge in appeal or revision, the proceedings are not fresh prosecution, due to which there is no question of double jeopardy.²³³ This is because an appeal or revision is a continuation of the trial and therefore, any alteration of sentence would not amount to double jeopardy.

224 Muhammad Afzal, Ex-Assistant Sub-Inspector v. Senior Superintendent of Police, Operation, Lahore 2005 PLD Lahore 377

225 Atta-Ullah Khan Niazi, Advocate v. Muhammad Usman Khan, Advocate 2000 P.Cr.L.J 1962; Khan Asfandyar Wali v. Federation of Pakistan 2001 PLD Supreme Court 607

226 Mst. Sarwar Jan and others v. Mukhtiar Ahmad and others 2012 PLD Supreme Court 217

227 Mirza Ali Khan v. Hidayat Ullah Khan 2014 P.Cr.L.J 78 Peshawar

228 Jan Pervez v. Haji Fazal Hussain 2007 PLD Peshawar 179; Mukhtar Ali Qureshi v. Station House Officer, Police Station Westridge. Rawalpindi 2004 P.Cr.L.J 1545

229 Secretary, Local Government and Rural Development, Government of Punjab, Lahore v. Ahmad Yar Khan 2010 SCMR 861

230 Nazir Ahmed v. Capital City Police Officer, Lahore 2011 SCMR 484

231 Muhammad Ilyas Ashraf v. Aitzaz Ahmad, Magistrate 1st Class, Gujranwala 2004 YLR 1299

232 Khalid Iqbal v. Mirza Khan, 2015 PLD Supreme Court 50

233 Muhammad Arshad v. State 2015 SCMR Supreme Court 258

5.4 DOMESTIC LAW AND JURISPRUDENCE

A. Domestic Law

Although the right to a fair trial has been guaranteed explicitly in the Constitution of Pakistan, this fundamental right can also be found being protected, or sometimes being derogated from, within domestic legislation.

- **Code of Criminal Procedure 1898 and Qanun-e-Shahadat Order 1984**

A primary corollary of the right to a fair trial is the presumption of innocence in criminal trials, and for the burden of proof to be placed on the prosecution. This is codified in Article 117 of the Qanun-e-Shahadat Order 1984. On the right to have witnesses against the accused examined, Article 133 provides that cross-examination can take place after the examination-in-chief, while Article 137 allows leading questions to be asked during cross-examination. Furthermore, Articles 38 and 39 of the Order provide that confessions made to or in the custody of a police officer are not admissible in evidence, unless they are made in the presence of a Magistrate. These provisions were enacted to ensure the right to a fair trial since they reduce the possibility of convictions upon confessions extracted through torture. However, Article 40 allows for recoveries to be made, the text of which states that, "If the confession of the accused is supported by the discovery of a fact it may be presumed to be true and not to have been extracted." These inconsistencies in statute hamper the administration of a fair trial. Other rules relating to the right to a fair trial, including the admissibility of oral and documentary evidence, the relevancy of facts, and other concerns relating to evidence in trial are also outlined in the Order.

Moreover, the Code of Criminal Procedure 1898 highlights criminal procedure ensuring the right to a fair trial is granted to every individual. Safeguards against detention provided for in the Constitution and the Cr.P.C. 1898, although a part of the right to a fair trial and due process, have been discussed in previous sections (See Section 3.2 & 3.3). In addition to these, Sec. 56 provides that the person to be arrested must be notified of the cause for which the arrest is to be made. Other fair trial guarantees, including the process of appeal to the higher courts, reference and revision, are outlined in Part VII of the Cr.P.C. 1898. Furthermore, Sec. 361 outlines that whenever any evidence is given in a language not understood by the accused, and he is present in person, it must be interpreted to him in open Court in a language understood by him. Hence, this aspect of the right to a fair trial is also guaranteed through the Cr.P.C. 1898.

The right to a fair trial also comprises of a prohibition on double jeopardy. Sec. 403 of the Cr.P.C. 1898 bars the prosecution of an accused who has either been found guilty or has been acquitted to not be tried for the same offence on the existing facts. However, there are exceptions to this prohibition. For instance, Sec. 403 of the Cr.P.C. is applicable if, inter alia, the accused is to be tried for the same offence on the basis of either new facts or evidence, or the same facts are being utilized to charge the accused for an offence on which he was not acquitted or convicted.

However, there is great deal of inconsistency in what is being promulgated in the order and what is practised in real as traditionally courts have been receptive to the idea of accepting confessions made in front of the police as evidence.

- **Anti-Terrorism Act 1997**

Another aspect of the right to fair trial is the law relating to bail. The ATA restricts this right to a certain extent as Sec. 21D(2) of the ATA 1997 states that all offences carrying the death penalty or imprisonment of

longer than three years, under the Act, will be non-bailable,²³⁴ which means it is the discretion of only the Anti-Terrorism Court, a High Court or the Supreme Court to decide whether bail can be granted or not. Sec. 21D(4) of the Act lays out the considerations that the Court must keep in mind when exercising its powers in relation to a person seeking bail. The provisions include the nature and seriousness of the offence with which the person is charged, the character, antecedents, associations and community ties of the person, the time which the person has already spent in custody and the time which he is likely to spend in custody if he is not granted bail, and the strength of the evidence of him having committed the offence.²³⁵ However, the ATA has often been misused in practice- when ATA clauses are incorporated into the FIR mala fide, the chance of the accused receiving bail is greatly diminished, hence impacting his right to a fair trial.

The Supreme Court in October, 2019 issued a judgment reviewing the meaning and scope of the term 'terrorism' as defined in the Anti Terrorism Act, 1997 and recommended that Parliament bring changes to the current understanding of the term, which is "too wide". The judgment also outlined what offences cannot be viewed as terrorism. The court clearly distinguished in its judgment that acts of violence, such as setting things on fire and extortion, committed under a personal vendetta arising out of enmity or hostility are not 'terrorism'. Personal enmity as a result of contempt for a person's religion is not terrorism. A person's involvement in an act of violence owing to hostility or personal enmity against the police, army or government employees does not fall within the scope of terrorism, ruled the court.²³⁶ The judgment elaborates that "the meanings, scope and import of the term "terrorism" defined in S 6 of the ATA, as amended from time to time, have been a subject of controversy in this Court for some time and different Honourable Benches of varying strength deciding different cases have differed with each other in the past and have understood and interpreted the same term differently. It is in this backdrop that the present Larger Bench has been constituted so as to put an end to that controversy. It further clarified that 'any action constituting an offence, howsoever grave, shocking, brutal, gruesome or horrifying, does not qualify to be termed as terrorism if it is not committed with the design or purpose specified or mentioned in clauses (b) or (c) of subsection (1) of section 6 of the said Act. It is further clarified that the actions specified in subsection (2) of section 6 of that Act do not qualify to be labeled or characterized as terrorism if such actions are taken in furtherance of personal enmity or private vendetta."

According to the Judgment 'The definition of terrorism contained in section 6 of the Anti-Terrorism Act, 1997 as it stands at present is too wide and the same includes so many actions, designs, and purposes which have no nexus with the generally recognized concept of what terrorism is. Apart from that including some other heinous offences in the Preamble and the third schedule to that Act for trial of such offences by an Anti-Terrorism Court when such other offences do not qualify to be included in the definition of terrorism puts an extra and unnecessary burden on such courts and causes delay in trial of actual cases of terrorism.'²³⁷

In addition, Sec. 19(7) of the ATA 1997 imposes a seven-day time limit for the conclusion of an ATC trial, which is to be heard on a 'day-to-day' basis. If Sec. 19(7) is not adhered to, the matter is brought before the Chief Justice of the relevant High Court for appropriate directions. Sec. 19(8a) further states that such non-compliance may render the presiding officer of the Court liable to disciplinary action by the concerned High Court.²³⁸ Such an emphasis on speedy trials is likely to result in causing ATC Judges to pronounce judgments without affording adequate time for the defence to plead its case. This could then possibly result in a derogation from the right to fair trial granted in the Constitution.

234 Sec. 21-D(2) Anti-Terrorism Act 1997

235 Sec. 21-D(4) Anti-Terrorism Act 1997

236 <https://www.dawn.com/news/1513839>

237 Ghulam Hussain V The State, Cr Appeal No 95 of 2019

238 Sec. 19-(8A) Anti-Terrorism Act 1997

Another concern in ATA regarding the right to a fair trial is that Sec. 21H of the Act allows for the conditional admissibility of a confession before a police officer. This is a deviation from the general procedure as found in Sec. 164 of the Cr.P.C 1898, which requires that any such confession be made before a Magistrate. This provision deviates from the right to a fair trial since confessions made before police officers have a likelihood of being extracted through torture. However, case law suggests that without corroborating evidence, the ATC does not usually accept such a confession on its own.²³⁹

Regarding the presence of the accused at the trial, Sec. 19(10) of the Act an accused person may only be tried in his absence if the Court is satisfied that such absence is deliberate and brought about with a view to impeding the course of justice. Furthermore, the Act requires that prior to proceeding ex-parte, a proclamation must be published in newspapers requiring him to appear at a specified place, and that the Court must appoint an advocate to defend the absent accused.²⁴⁰

- **General Clauses Act 1897**

In addition to Article 13 of the Constitution which provides for the safeguard against double punishment as well as self-incrimination, Sec. 26 of the General Clauses Act 1897 also extends a similar protection.²⁴¹ It states that if an act or omission that is punishable under two or more enactments, the offender would only be liable to be punished under either one of them and not both.

- **Pakistan Bar Council Free Legal Aid Rules 1999**

Another aspect of the right to a fair trial is the right to a legal counsel, and in case the accused cannot afford a private lawyer, the right to be defended by an Advocate provided by the State. In this regard, the Pakistan Bar Council Free Legal Aid Rules 1999, which were framed under the Legal Practitioners & Bar Councils Act 1973, provide for “free legal aid to indigent litigants”. Pursuant to these rules, free legal aid committees were constituted at the federal, provincial and district level. According to these rules, any person desirous of free legal aid must submit an application to the appropriate Committee, which is then examined and processed. The funds are then generated through allocation by the “Pakistan Bar Council, the grants sanctioned by any Government, Local or other body or authority and voluntary contributions made by the Bar Councils, Bar Associations, Advocates, any other Institution, Foundation, Trust, Organization or an individual.” A list of legal practitioners are then appointed and paid the appropriate fee with a fixed ceiling for their professional services.²⁴²

239 Research Society of International Law, 'Human Rights and Pakistan's Counter-Terrorism Legislative Landscape' (2017) (pg. 73-74)

240 Sec. 19(10) Anti-Terrorism Act 1997

241 General Clauses Act 1897 (Act No. X of 1897)

242 'Legal Aid in Pakistan' (Dailytimes.com.pk) available at <https://dailytimes.com.pk/388951/legal-aid-in-pakistan/>

SECTION SIX

PROTECTION OF VULNERABLE GROUPS & THE CRIMINAL JUSTICE SYSTEM

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PROTECTION OF VULNERABLE GROUPS & THE CRIMINAL JUSTICE SYSTEM

OVERVIEW

The rights to equal access to justice and protection under the law are fundamental elements of the rule of law and various international instruments lay down obligations on State Parties to take affirmative action in order to establish protections for various classes of persons. The following sections provide an explanation of the protections accorded to women, persons with disabilities and religious minorities within the Criminal Justice System. The Section will begin by outlining the international human rights standards with regards to equality of treatment and the principle of non-discrimination. Within Constitutional and domestic law, the key focus of this Section will be to highlight the protections available for the above-identified vulnerable groups within Criminal Law in Pakistan to better delineate how cases related to these groups are dealt with.

6.1 PROTECTION OF THE RIGHTS OF WOMEN

6.1.1 International Human Rights Safeguards and Standards

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the United Nations General Assembly in December 1979 and Pakistan ratified the Convention in 1996. Among all the international human rights treaties, CEDAW is the most significant in terms of eradicating discrimination against women. The Convention includes articles pertaining to civil, political, social, cultural, legal as well as reproductive rights of women. The Convention guarantees equal rights to women including the right to vote (Article 7), right to education (Article 10), right to employment (Article 11), rights relating to marriage and family life (Article 16), etc. One of the most significant Articles of the Convention is Article 2 which establishes a positive duty on State Parties to ensure that appropriate measures are taken to legislate, 'modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women,'²⁴³ and goes on to state that State Parties must 'repeal all national penal provisions which constitute discrimination against women.'²⁴⁴ The essence of Pakistan's international legal obligations within the Criminal Justice System as laid down by CEDAW is then two-fold; establishing laws for the protection of women, and amending or repealing existing laws which continue to discriminate against women. In its recent review the committee on CEDAW has outlined several recommendations for the government of Pakistan. The committee has stressed on the need to take effective measures among others, the access to the parallel justice system, which does not discriminate against women.²⁴⁵ The committee has also suggested strengthening the judicial systems through building the capacity of the judges, lawyers, law enforcement agents and prosecutors on women rights.²⁴⁶ The committee has also called on the state to take into account the recommendations made by the National Commission on the status of women with regards to policy making, and legislations in the country.

243 UNGA, 'Convention on the Elimination of All Forms of Discrimination against Women,' 18 December 1979 1249 UNTS 13 Article 2(f)

244 Ibid Article 2(g)

245 CEDAW, 'Concluding observations on the fifth periodic report of Pakistan, CEDAW/C/PAK/CO/5

246 Ibid para 20(d)

Various other key human rights instruments also establish a prohibition on gender discrimination and promote the protection of the rights of women. Some of the most essential international instruments in this regard have been provided below:

THE PROHIBITION ON DISCRIMINATION AGAINST WOMEN IN INTERNATIONAL LAW	
UDHR	
Article 2	Principle of Non-Discrimination.
Article 7	Equality before the Law and Equal Protection under the Law.
Article 16	Right to Marriage.
Article 23	Right to Work.
ICCPR	
Article 2(1)	Principle of Non-Discrimination.
Article 3	Duty on State Parties to ensure equal right of men and women to enjoy all rights.
Article 26	Equality before the Law and Equal Protection under the Law.
CEDAW	
Article 2	Duty on State Parties to Eliminate Discrimination against Women.
Article 4	Duty on States to take affirmative action to accelerate equality between men and women.
Article 5	Duty to modify existing prejudicial norms and to ensure family education for women.
ICESCR	
Article 2(2)	Principle on Non-Discrimination
Article 3	Equal right of men and women to enjoy all economic, social and cultural rights.
Article 7	Right to Work.
CRC	
Article 2	Principle of Non-Discrimination.

CRPD	
Article 3(b)	Principle of Non-Discrimination.
Article 3(e)	Equality of Opportunity.
Article 3(g)	Equality between men and women.
Article 6	Principle of Non-Discrimination for the protection of Differently-abled Women and Girls.

Figure 6.1 – *Prohibition on Discrimination against Women in International Law*

These international instruments require State Parties to ensure women are not only provided equality before the law but equal protections under the law are also established for them. This duty has been translated to criminal law as well and it is the responsibility of the State and Justice Sector actors to ensure that equal protection is rendered to women within the Criminal Justice System as well.

The Committee on CEDAW over the years has recognized Pakistan's commitment towards extending legal protections to women however it has also noted and made recommendations on family law, discrimination, harmful traditional practices, women's access to health, education, right to employment, trafficking in persons as well as sexual and gender based discrimination. In 2020, the Committee recommended that Pakistan establish a coordination mechanism to ensure implementation of the Convention throughout the provinces in light of the 18th Amendment, increase the participation of women in national and international peace processes and also establish a comprehensive definition of discrimination within the Constitution. The Committee also recommended that the State raise awareness of the Convention as well as strengthen legal training and capacity building programmes for judges, prosecutors, lawyers and other law enforcement officials on applying the provisions of the Convention directly and interpreting national legislation in line with the Convention. In relation to access to justice, the Committee recommended that parallel justice systems and informal dispute resolutions be consistent with the provisions of the Convention and that awareness should be raised to give preference to judicial remedies over informal dispute resolution mechanisms in relation to women's rights, eliminate barriers to access to justice for women and girls by ensuring the availability of modern and accessible information and communications technologies and to raise awareness through social media regarding the rights and remedies available to women. It also noted the importance of strengthening the judicial system through capacity-building on women's rights and gender equality for judges, prosecutors, lawyers, police officers and other law enforcement officials. It also emphasizes on the introduction of systematic capacity building for justice sector actors and law enforcement officials on the strict application of criminal law provisions for gender-based violence against women and on gender-sensitive investigation procedures.

6.1.2 Constitutional Safeguards

The Constitution of Pakistan lays down a comprehensive framework for the protection of rights of women in the country. However, protections specific to women within the Criminal Justice System will be discussed in the subsequent section on Domestic Law. (See Section 6.1.3)

The following provisions broadly provide for the general protection of women rights within the Constitution:

ARTICLE	CONTENT
Article 25	Guarantees equality of citizens before the law and prohibits discrimination on the basis of sex.
Article 26	Prohibits discrimination on the basis of sex in respect of access to public places.
Article 27	Safeguard against discrimination on the basis of sex for employment in government services.
Article 32	Ensures representation of women in the local Government.
Article 34	Ensures full participation of women in all spheres of national life.
Article 37	Promotes social justice includes provision to ensure maternity benefits for women in employment.
Article 38	Secures the well-being of the people irrespective of sex by raising the standard of living.
Article 51	Reserves seats for women in the National Assembly.
Article 59	Reserves seats for women in the Senate.
Article 106	Reserves seats for women in Provincial Assemblies.

Figure 6.2 - Constitutional Safeguards for the protection of the rights of women in Pakistan.

6.1.3 Domestic Law and Jurisprudence

A. Domestic Law

- **Violence Against Women**
- **Domestic Violence (Prevention and Protection) Act 2012**

Each province with the exception of Khyber Pakhtunkhwa have enacted domestic violence laws. The Domestic Violence (Prevention and Protection) Act 2012²⁴⁷ (the domestic violence law enacted in Sindh²⁴⁸ and Balochistan²⁴⁹ have similar content with slight variations) defines domestic violence broadly and includes all intentional acts of gender-based or other physical or psychological abuse committed by the accused against women, children or other vulnerable persons, with whom the accused person is or has been

²⁴⁷ The Domestic Violence (Prevention and Protection) Act 2012

²⁴⁸ The Domestic Violence (Prevention and Protection) Act 2013 (Sindh Act No. XX of 2013)

²⁴⁹ The Balochistan Domestic Violence (Prevention and Protection) Act 2014 (Act VII of 2014)

in a domestic relationship.²⁵⁰ The Act allows the Court to pass interim orders,²⁵¹ protection orders²⁵² and residence orders²⁵³ for the protection of victims of domestic violence. Sec. 13 of the Act explains that any breach of such orders by the accused may be punishable by imprisonment for a period not less than six months and with a fine not less than one hundred thousand rupees. It further explains that if an accused violates such orders for the second or third time, then he may be liable to punishment not less than two years along with a fine not less than two hundred thousand rupees. In addition to this, Sec. 13(3) states that the offence committed under this section shall be cognizable, non-bailable and compoundable.

The Act further provides for the protection of victims of domestic violence in various ways, as it provides mandatory counselling services for the victims²⁵⁴ and allows residence in the house shared with the aggressor regardless of title or any beneficial interest in the property.²⁵⁵

Punjab has also enacted the Punjab Protection of Women Against Violence Act 2016.²⁵⁶ The Act aims to establish an effective system of punishment of the accused and the protection and rehabilitation of women against violence. It establishes Protective Centres and shelter homes for victims of domestic violence,²⁵⁷ and includes provisions about GPS tracking of the offenders to ensure protection of women.²⁵⁸ The Punjab Women Protection Authority Act 2017²⁵⁹ further facilitates the implementation of institutional measures stipulated under the Punjab Protection of Women Against Violence Act 2016 including, establishment of district women protection committees, violence against women centers and women protection officers.

- **Criminal Law (Amendment) (Offences in the name or pretext of Honour) Act 2016**

The Act amends certain sections of the PPC and Cr.P.C to deter and prevent offences committed in the name of honour. It amends Sec. 229 of the PPC 1860 to add a new clause relating to the concept of 'Fasad-fil-arz' which is used to decide the severity of punishment awarded by observing factors such as the offender's past convictions, nature of the offence, whether the offender is a danger to the community and whether the offender has committed any offences in the name of honour – which means that commission of honour crimes will now lead to harsher punishment for the offender.

A significant effect of the Act is the amendment to Sec. 311 of the PPC 1860 which now states that murder committed in the name of honour is punishable with death or imprisonment for life and even where the accused is pardoned by the Wali (guardian) or other family members of the victim the Court will still punish the accused with imprisonment for life.

250 Sec. 4 Domestic Violence (Prevention and Protection) Act 2012

251 Sec. 8 Domestic Violence (Prevention and Protection) Act 2012

252 Sec. 9 Domestic Violence (Prevention and Protection) Act 2012

253 Sec. 9 Domestic Violence (Prevention and Protection) Act

254 Sec. 6 Domestic Violence (Prevention and Protection) Act 2012

255 Sec. 7 Domestic Violence (Prevention and Protection) Act 2012

256 The Punjab Protection of Women Against Violence Act 20 (Act XVI of 2016)

257 Sec. 3(b) of the Punjab Protection of Women Against Violence Act 2016 (Act XVI of 2016)

258 Sec. 7(d) of the Punjab Protection of Women Against Violence Act 2016 (Act XVI of 2016)

259 The Punjab Women Protection Authority Act 2017 (Act X of 2017)

Other acts of violence which have been specifically criminalised to protect women under the PPC are as follows:

PAKISTAN PENAL CODE 1860	
Sec. 354	Assault or criminal force to woman with intent to outrage her modesty (punishable with imprisonment of either description for a term which may extend to two years or with fine, or with both).
Sec. 354-A	Assault or use of criminal force to woman and stripping her of her clothes (punishable with death or with imprisonment for life, and shall also be liable to fine).
Sec. 365-B	Kidnapping, abducting or inducing woman to compel for marriage or to force, or to seduce to illicit intercourse (punishable with imprisonment of life, and shall be also liable for fine).
Sec. 366-A	Inducement of any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, forced or seduced to illicit intercourse with another person (punishable with imprisonment which may extend to ten years and shall also be liable to fine).
Sec. 366-B	Importation of any girl under the age of twenty-one years with intent that she may be, forced or seduced to illicit intercourse with another person (punishable with imprisonment which may extend to ten years and shall also be liable to fine).
Sec. 371-A	Selling a person for purposes of prostitution, etc. (punishable with imprisonment which may extend to twenty-five years, and shall also be liable to fine).
Sec. 375 & 376	Offence of rape (punishable with death or imprisonment of either description for a term which shall not be less than ten years or more than twenty-five years and shall also be liable to fine. Additionally, when rape is committed by two or more persons in furtherance of common intention of all, each of such persons shall be punished with death or imprisonment for life).
Sec. 493-A	Cohabitation with any woman deceitfully inducing a belief of lawful marriage (punishable with rigorous imprisonment for a term which may extend to twenty-five years and shall also be liable to fine).
Sec. 496-A	Taking or enticing away any woman with intent that she may have illicit intercourse with any person, or concealing or detaining with that intent any woman (punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine).

Sec. 496-C	Falsely accusing someone of fornication (punishable with imprisonment for a term which may extend to five years and shall also be liable to fine not exceeding ten thousand rupees).
Sec. 498-A	Depriving any woman from inheriting property at the time of opening of succession (punishable with imprisonment for either description for a term which may extend to ten years but not be less than five years or with a fine of one million rupees or both).
Sec. 498-B	Coercing or compelling a woman to enter into marriage (punishable with imprisonment of either description for a term, which may extend to seven years or for a term which shall not be less than three years and shall also be liable to fine of five hundred thousand rupees).
Sec. 498-C	Compelling, arranging or facilitating the marriage of a woman with the Holy Quran (punishable with imprisonment of either description which may extend to seven years which shall not be less than three years and shall be liable to fine of five hundred thousand rupees).
Sec. 509	Insulting modesty or causing sexual harassment (punishable with imprisonment which may extend to three years or with fine up to five hundred thousand rupees or with both).

Figure 6.3 – Offences for the protection of women

- **Acid Attacks**

The Acid Control and Acid Crime Prevention Act 2011 (Criminal Law Second Amendment Act 2011) also made amendments to the PPC and the Cr.P.C to punish perpetrators of acid crimes by clearly including acid crimes in the definition of hurt.²⁶⁰ In Punjab in 2012, the Provincial Government inserted the causing of hurt by a “corrosive substance or attempt to cause hurt by means of a corrosive substance” into the Third Schedule of the Anti-Terrorism Act, 1997 allowing the fast-tracked Anti-Terrorism Courts to take up cases of acid attacks in the province.²⁶¹ Other provinces also mirror such an approach in their Anti-Terrorism Courts.²⁶²

Data collected by Acid Survivors Foundation (ASF), Pakistan chapter, shows a significant decrease in the cases of acid attacks in the country during the year 2015. According to ASF statistics, the total number of reported acid attack cases in 2015 was 69 as compared to 153 in 2014 and 109 in 2013. A position paper formulated by ASF says that the phenomenon of acid violence came under spotlight in Pakistan since 2012 when only 1 per cent of the cases of acid attacks notified by ASF had the initial First Incident Reports (FIRs) registered under the relevant law (article 336-A and 336-B). In 2013, one year after ASF Pakistan intensively trained stakeholders involved in the execution of law, 71 per cent of the cases notified to ASF were registered under the relevant law. Consequently, convictions have been more numerous, more rapid

260 Sec. 336-B Pakistan Penal Code 1860

261 Punjab Home Department Notification No. SO (Judl-I)10(I-36(I)/2010, dated 5th September, 2012

262 Vijay Pervaiz v. The State 2019 YLR 2540 Quetta

and more severe since 2013. The ASF believed that official notification from the government of Punjab in 2013 and 2015 demanding authorities to prosecute cases of acid attacks under the Anti-Terrorist Court (ATC) has actually impacted in a positive manner the victims' access to justice.²⁶³

The Acid Survivors Foundation Pakistan (ASFP) in 2017 said that reported cases of acid attacks on women have dropped by around 50 per cent compared to the last five years. In 2016 and 2017, there were a total of 71 victims of acid attacks, whereas between 2018 and 2019, there were 62 cases related to acid throwing, 11 cases of burning, and 4 about multiple burns.²⁶⁴

- **Rape Laws**

The Parliament enacted the Criminal Law (Amendment) (Offence of Rape) Act 2016. The Act introduced the following amendments to the Pakistan Penal Code 1860 and Code of Criminal Procedure 1989.

- **Pakistan Penal Code 1860**

Sec. 55 of the Pakistan Penal Code 1860²⁶⁵ was amended to ensure that life sentence given to an offender accused of assault, use of force or rape of women cannot be reduced to anything less severe. Sec. 166(2) of the PPC was also amended to prescribe a sentence of up to three years for a public official who fails to investigate rape cases diligently. Sec. 186 of the PPC supplements this and states that any individual accused of obstructing an official from carrying out an investigation will also face a sentence of a period of three months to a year along with a fine of up to fifty-thousand rupees.

Sec. 376(3) and Sec. 376(4) of the PPC have also been amended to the effect that more serious categories of rape will now be subjected to the death penalty or life imprisonment. Whereas, Sec. 376-A was added to protect the identity of rape victims. It states that any person publishing the name or any other material which has the effect of revealing the identity of the victim will be sentenced to imprisonment for up to three years and will be liable under a fine.

- **Code of Criminal Procedure 1898**

The Cr.P.C has been amended to provide safeguard to the victims of sexual violence. Sec. 53-A establishes a requirement for medical examination by a registered medical practitioner of the accused whereas, Sec. 164-A provides for the examination of the victim. Additionally, Sec. 164-B provides for the collection of DNA samples from the victim with their consent or the consent of a natural or legal guardian. The law provides that such samples are to be sent to a forensic laboratory at the earliest to ensure proper examination and preservation and these can be matched with DNA samples of the accused to determine criminal liability.

In addition to this, the Cr.P.C 1898 provides that information of the rape²⁶⁶ and the statement of the victim²⁶⁷ must be recorded in the presence of a female officer or in the presence of a person nominated by the victim. It also provides that information related to the crime may be recorded at the residence of the complainant, or at any other place of the complainant's choice if they are in a state of distress.

263 <https://www.thenews.com.pk/print/104093-Significant-decrease-in-acid-attacks-cases-during-2015>

264 <https://tribune.com.pk/story/1333711/asf-report-acid-throwing-cases-post-sharp-decline>

265 Pakistan Penal Code 1860 (Act XLV of 1860)

266 Sec. 154 Cr.P.C 1898

267 Sec. 161 Cr.P.C 1898

Under Sec. 161-A of the Cr.P.C provision for free legal aid for victims of sexual violence has also been introduced, and Sec. 352 allows for trials to be conducted in-camera and for the provision of screens to protect the identity and dignity of the victim or the witnesses to the crime. Sec. 344-A is of significance as well as it requires proceedings to be fast-tracked with the time for concluding the trial set at three months, whereas time for appeal has been limited to six months under Sec. 417 of the Cr.P.C. Additionally, provincial governments have been prohibited under Sec. 402 Cr.P.C from intervening to change or reduce sentences of rape.

- **Discriminatory Practices Against Women**

The Prevention of Anti-Women Practices Act 2011²⁶⁸ was passed to criminalise oppressive and discriminatory customs practiced in the country. The Act amended the Pakistan Penal Code 1860 to criminalise the following:

- Depriving women from inheriting their property by deceitful or illegal means²⁶⁹
- Forced marriages,²⁷⁰
- Marriage with the Holy Quran²⁷¹
- Giving a female in marriage or otherwise in badla-e-sulh, wanni or swara²⁷²

Apart from this, many other laws have been promulgated to protect the integrity of women including the Khyber Pakhtunkhwa Elimination of Custom of Ghag Act 2013²⁷³ which abolished the tradition of Ghag in different cultures. The Prevention of Trafficking in Persons Act 2018²⁷⁴ also imposes harsher penalties against who traffic women or children. Furthermore, Sec. 290, 302, 310, 311 and 338E of the Pakistan Penal Code 1860 and Sec. 345 of the Code of Criminal Procedure 1898 were also amended to make the punishments in relation to honour killings harsher. The Acid Control and Acid Crime Prevention Act 2011 (Criminal Law Second Amendment Act 2011) also made amendments to the PPC and the Cr.P.C to punish perpetrators of acid crimes by clearly including acid crimes in the definition of hurt.²⁷⁵

- **Women and the Criminal Justice System**

The following sections apply for the protection of women during arrest and detention:

ARREST AND DETENTION OF WOMEN	
Cr.P.C	
Sec. 52	Mode of searching women - “whenever it is necessary to cause a woman to be searched, the search shall be made by another woman, with strict regard to decency.”
Sec. 167	A Magistrate is barred from authorizing the detention of a female in police custody. In such case the police officer making an investigation shall interrogate the woman accused in the prison in the presence of an officer of jail and a female police officer. However, physical remand may be given in cases where a female is involved in qatl or dacoity.

268 Prevention of Anti-Women Practices Act (Criminal Law Amendment) 2011

269 Sec. 498A Pakistan Penal Code 1860

270 Sec. 498B Pakistan Penal Code 1860

271 Sec. 498C Pakistan Penal Code 1860

272 Sec. 310 Pakistan Penal Code 1860

273 Khyber Pakhtunkhwa Elimination of Custom of Ghag Act 2013

274 Prevention of Trafficking in Persons Act 2018 (Act No. XXXIV of 2018)

275 Sec. 336-B Pakistan Penal Code 1860

Police Rules 1934	
Rule 25.22	A medical examination if required to be conducted on a woman shall only be performed with her consent and upon a written order by a Magistrate. This order shall be addressed to a Medical Officer who shall be directed to conduct the necessary medical examination. Where a woman refuses to be examined by a male doctor, she may be examined by a female assistant or sub-assistant surgeon in the service of the government.
Rule 26.3	Where women arrested and not released on bail need to be searched, it shall be conducted by a female with due regard to decency. Moreover, when prisoners are first admitted to police custody and every time when they are readmitted to a lockup, shall be searched. In case of women, the search is to be conducted by female police officers.
Rule 26.18-A	<ul style="list-style-type: none"> • The arrest of women, whether without warrant or with a bailable or non-bailable warrant shall be effected by a police officer of a rank of Assistant Sub-Inspector (ASI) or above. If a police officer of this rank is not available, then a woman may be arrested by the Head Constable in the 'presence of responsible male relatives and village or town officials.' • Where the arrested woman is not sent to judicial custody or released on bail immediately, the Superintendent of Police shall forward a copy of the above-mentioned special report to the Deputy Inspector General of Police (DIG). • In cases where bail is admissible, women must not be detained for a period longer than that which is absolutely necessary for the production of bonds or sureties. • An application for physical remand of a woman accused shall only be made by the special order of a gazetted officer. • Sub-Rule 2 explicitly enunciates that a woman shall not be lodged in police lockups even for a night 'except in unavoidable circumstances.' Instead they shall be immediately produced in front of a Magistrate to obtain judicial remand and thereby handed over. However, where physical remand is unavoidable the application shall be made by the order of a gazetted officer only. Moreover, this gazetted officer shall be responsible for the decent custody of the accused prisoner. • Women when admitted to judicial remand shall immediately be transferred to police headquarters or other 'properly equipped sub-divisional female judicial lock-ups'; and the order of remand thereby reported to the District Magistrate. • An ASI shall escort women prisoners for the purposes of investigation. Where an ASI is not posted at a police station, then a Head Constable may lead the escort.

Figure 6.4 – Domestic Law relating to the Arrest and Detention of Women.

B. Jurisprudence

National Commission on Status of Women v. Government of Pakistan²⁷⁶

In the case it was contested that negligible representation of women before jirgas/panchayats which already mirrored a patriarchal mindset was a blatant violation of international law. The argument was built upon the doctrine of lack of justice and equality before the law. It was held that the representation of women could not be through a male-kin if their rights were involved and they must be allowed an opportunity of personal hearing if they so desired. It was iterated that the manner in which the jirgas/panchayats operate, they violated fundamental rights guaranteed in the Constitution of Pakistan including Article 25, as well as the international instruments (Universal Declaration of Human Rights (UDHR), Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and International Covenant on Civil and Political Rights (ICCPR)) that the country has ratified. They also violate the State's responsibility to ensure that all women in Pakistan have access to courts or tribunals, and are treated equally before the law.

Mst. Shahida Parveen v. The State²⁷⁷

In applying the protections available to women during arrest and detention, the Court held that where the police knew that they were required to search a woman but failed to take a lady constable with them for her search, the case of the prosecution became doubtful and the accused woman was acquitted.

Nasreen and Another v. Station House Officer, Police Station Batala Colony, Faisalabad and 10 Others²⁷⁸

The Lahore High Court declared that a search conducted without a female police officer was illegal and without lawful authority.

Haseena Taimor Afridi v. The State²⁷⁹

Where a fifteen-year old girl was arrested, kept in police custody for investigation and hereinafter remanded to judicial lockup while no evidence was brought on record which could incriminate her; the Supreme Court not only released the accused female child on bail, but also called for explanations from the police officer in-charge of investigation, the SHO, and the investigating officers. Moreover, the Magistrate who had granted physical and then judicial remand, which resulted in the girl being detained at Adiala Jail, was also directed to submit his explanation for not adhering to the relevant provisions of law.

Umer Taj v. The State²⁸⁰

Justice Roohul Amin Khan based his decision on the Protection of Women (Criminal Law Amendment) Act 2006, and the Criminal Law (Amendment) (Offences related to Rape) Act 2016, both of which have been introduced with the aim of protecting women in offences relating to sexual abuse, fornication, adultery etc. The Court stated that where an offence under Sec. 376 or 377 or 377-B of the Pakistan Penal Code, 1860, was committed or attempted to have been committed or was alleged to have been committed, the investigating officer (IO) shall proceed for collecting Deoxyribonucleic Acid (DNA) samples, where

276 2019 PLD 218 Supreme Court

277 1996 P.Cr.L.J 179

278 2001 P.Cr.L.J 685

279 2013 SCMR 1326

280 2017 – unreported, available at: <https://peshawarhighcourt.gov.pk/PHCCMS/judgments/Umar-Taj-Vs-the-State.pdf>

practicable, from the victim with his or her consent or with the consent of his or her natural or legal guardian and the accused during the medical examinations conducted under Sec. 164-A within optimal time period of receiving information related to commission of such offence. It also stated that by use of the word 'shall' in Sec. 164-B Cr.P.C, its application has been made mandatory in offence under Sec 376 PPC.

Ishrat Batool v. Government of Punjab²⁸¹

It was held that all citizens are to be treated equally and there cannot be any discrimination including gender discrimination, however, the State may make special provisions for protection of women and children. The Constitution of Pakistan allows positive classification for the protection of the women and children and where a provision is made for the benefit of women and children the State may provide them some benefits but cannot deprive them of the same.

Shaukat Ali Hayat v. Government of Punjab²⁸²

The petitioner challenged the constitutionality of advertisement for employment of educators which provided five years age relaxation for all candidates and three years further for female candidates. He contended that the additional age relaxation given to women was violative of fundamental rights guaranteed by Article 25 and Article 27 of the Constitution under which no citizen otherwise qualified for appointment in service should be discriminated and all citizens were equal and there should be no discrimination on basis of sex. It was reiterated in the case that Article 25(3) of the Constitution provided that the State was competent to make any special provisions for protection of women and children, and therefore the advertisement did not infringe any fundamental rights of men, rather it was a step towards protection and encouragement of the women of society.

Mst. Hina v. Province of Sindh through Secretary Home Department Sindh²⁸³

In the case, the High Court emphasized on the implementation of the Domestic Violence (Prevention and Protection) Act 2013. It was emphasised that each district should have a committee to deal with the cases falling under the ambit of the Act. The directions to implement the Act included, creation of a special task force to entertain the victims of domestic violence, training of protection officers, launching relevant campaigns, etc. to ensure better access to justice for female complainants.

6.2 PROTECTION OF THE RIGHTS OF PERSONS WITH DISABILITIES

6.2.1 International Human Rights Safeguards and Standards

Pakistan ratified the Convention on the Rights of Persons with Disabilities in 2011. It stipulates that the rights of persons with disabilities are to be fully protected and respected. It defines a person with disabilities as:

“Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

281 2018 PLC(CS)N 165

282 2017 PLC(CS) Lahore High Court 1325

283 2019 PLD Sindh 363

Article 3 of the Convention is significant as it lays down the protections available to all persons with disabilities, the content of which is provided below:

ARTICLE 3 - CRPD
Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of person.
Non-Discrimination.
Full and effective participation and inclusion in society.
Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity.
Equality of Opportunity.
Accessibility
Equality between men and women.
Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Figure 6.5 - Article 3 of the Convention on the Rights of Persons with Disabilities

Furthermore, Article 4 of the Convention requires State Parties to promote the full realization of all human rights of those with disabilities, by adopting legislation or by amending and modifying existing laws to ensure compliance with the Convention. It establishes that all individuals are equal before the eyes of the law and are entitled to equal protection of the law without discrimination, and any distinction based on an individuals' disability must be legally resolved. These responsibilities apply equally to the protections made available through the Criminal Justice System as well. (See Figure 2.11 for the complete content of the CRPD)

6.2.2 Constitutional Safeguards

- **Article 25: Equality of Citizens**

Article 25 is one of the most significant constitutional provisions as it guarantees the equality of all citizens before the law and prohibits discrimination.

The Courts of Pakistan have strongly guarded this right and expanded its ambit beyond what has been laid down in the Constitution. The Lahore High Court in 2017 observed that fundamental rights under the Constitution do not distinguish between a person with or without disabilities. In fact, the Constitution goes further and mandates that adequate provisions be made to safeguard the legitimate interests of marginalized communities.²⁸⁴

284 Hafiz Junaid Mahmood v. Government of Punjab 2017 PLD Lahore 1

6.2.3 Domestic Law and Jurisprudence

The rights of persons with disabilities to be protected within the Criminal Justice System have not been defined through one piece of legislation. Even though specific protections for mentally unfit persons have been established, a single piece of legislation defining disability and the rights of such persons cannot be found in Pakistan. The rights which has been discussed in Sections 3-8 of this Guide are to be applied equally, without discrimination for the protection of disabled persons as well, read in line with the fundamental guarantees available within the Constitution of Pakistan.

However, a key focus of this section will be the protections available for mentally unfit persons within the Criminal Justice System.

A. Domestic Law

6.3 MENTALLY UNFIT PERSONS

The first comprehensive legislation relating to the care of mentally unfit persons is the Mental Health Ordinance 2001 (MHO) that repealed the Lunacy Act 1912.²⁸⁵ Post-18th amendment to the Constitution, similar laws were either adapted or promulgated for each of the provinces.²⁸⁶ The MHO defines a 'mental disorder' as including mental impairment, severe personality disorder, severe mental impairment and any other disorder or disability of the mind.²⁸⁷ Furthermore, Sec. 2(1)(n) goes on to define a 'mentally disordered prisoner' as someone for whose detention in or removal to a psychiatric facility or other place of safety, an order has been made in accordance with certain provisions of the Cr.P.C, the Prisoners Act 1900, the Pakistan Army Act 1952, Pakistan Airforce Act 1953, or the Pakistan Navy Ordinance 1961.

Sec. 84 of the PPC provides for the exemption of criminal liability for mentally unfit persons and states that a person may not be held criminally liable by reason of unsoundness of mind. This section has been explained to mean that if a person is incapable of knowing the nature of an act and does not have the capacity to comprehend that such an act is contrary to law, then such a person cannot be held criminally liable.²⁸⁸ It is to be noted however that if an individual becomes mentally challenged after the commission of an offence, criminal liability may arise unless the individual is found not guilty on the basis of a plea of insanity as under Sec. 84 PPC and Sec. 470 Cr.P.C.

Chapter XXXIV of the Cr.P.C deals with mentally unfit persons and Sec. 464 to 475 lay down the law in relation to this special category of persons. Sec. 464 provides guidance to determine the mental capacity of an individual and states that if a Magistrate has reason to believe that the accused is of unsound mind, then an examination by a Civil Surgeon of the district must be carried out. Sec. 466 further explains that if an accused is found of unsound mind the Court may release him as long as the person is not a danger to himself or to another. If on the other hand, a mentally unfit person is to be detained then such persons must be detained in safe custody in a place chosen by the Court.

Sec. 54 of the MHO also provides that where a mentally unfit person is to be detained in accordance with

²⁸⁵ Mental Health Ordinance 2001 (Ordinance No. VIII of 2001)

²⁸⁶ Balochistan Mental Health Act 2019 (Act IX of 2019), Punjab Mental Health (Amendment) Act 2014 (Act XI of 2014), Sindh Mental Health Act 2013 (Act L of 2013)

²⁸⁷ Sec. 2(m) Mental Health Ordinance 2001: Ordinance No. VIII of 2001

²⁸⁸ *Naseebullah v. Special Judge, Anti-Terrorism Court II, Quetta and another* 2017 PLD Quetta 37: the maxim 'actus non facit reum, nisi mens sit rea'- Any act is not criminal unless there is criminal intent ... Law mandates that nothing is an offence, which is done by a person, who at the time of committing an offence by reason of unsoundness of mind, if incapable of knowing nature of the act or that whatever he is doing is wrong or contrary to law.

Sec. 466 at a jail then the Inspector-General of Prisons, or if he is detained at a psychiatric facility, then a duly constituted Board of Visitors or two of its members, shall visit him once every six months to ascertain his state of mind and make a report of the same to the detaining authority. Where the Inspector-General of Prisons or the Board of Visitors, as the case may be, finds the prisoner capable of standing trial under Sec. 473 the Magistrate or Court shall then deal with him as provided under Sec. 468, i.e. resume the inquiry or trial. Furthermore, if a mentally unfit person has not been detained, then a Magistrate or Court reserve the right to call the accused to Court at any time²⁸⁹ to resume inquiry or trial as under Sec. 467(2).

The Prisoners Act 1900 also deals with the detention of a mentally unfit person and under Sec. 30 states that where a person of unsound mind is detained on the basis of a judicial order, then the relevant Provincial Government has the power to issue a warrant for the removal of such a person from police custody to an asylum or any other place so developed by the Provincial Government.

However, if a mentally unfit prisoner is to be detained in jail, then the following rules as laid down by the Prison Rules 1978 apply:

PRISON RULES 1978	
Rule 433	This defines a mental patient as an idiot ²⁹⁰ or a person of unsound mind. ²⁹¹ The term mental patient connotes a lunatic as well as defined under the MHO 2001.
Rule 434	Provides for two classes of mental patients; 'non-criminal mental patients' who have committed no crime but are sent for medical observation as under the MHO, and 'criminal mental patients' who have been accused of the commission of an offence.
Rule 435	Provides for separate accommodation for mental patients who have been detained.
Rule 436	Provides that mental patients are to be considered dangerous unless certified as harmless by a Medical Officer.
Rule 440	This establishes four categories of criminal mental patients; an accused person who is sent to a prison for medical observation under Sec. 464 of Cr.P.C, an accused person detained under Sec. 466 of the Cr.P.C, a person found to have committed an offence but acquitted due to unsoundness of mind and is detained in safe custody under Sec. 471 of Cr.P.C or a convicted prisoner who becomes a mental patient in prison.

289 Sec. 467(1) Cr.P.C 1989

290 *Jamila Begum v. Awam un Nass*, PLD 1978 Lahore 1376 at Para 31: An idiot ... is a natural fool or a person who has no understanding from his nativity and is by law presumed never likely to attain any. He is a person who from original defect has never had mental power. He is a human being in form but destitute of reason from birth, and deprived of the ordinary intellectual power of man.

291 *Ibid* at Para 24: A distinction has been recognised since early times between idiot that is to say natural fools who were incurable and whose lack of capacity was from birth and lunatics, who became insane after birth and where incapacity was or might be temporary or intermittent

Rule 441	Requires that where a mental patient has been detained in pursuance of Sec. 466 Cr.P.C then the Superintendent of the prison must apply to the District Coordination Officer for an order of his transfer to a mental hospital, and further provides that the Inspector-General of Prisons shall be informed whenever a person is detained in prison under Sec. 464 or Sec. 466 Cr.P.C for more than a month.
Rule 442	Provides that where a criminal mental patient is found to be dangerous, noisy or filthy he may be confined in a cell and kept under strict and continuous observation, while all others may, upon the Medical Officer's discretion, be detained in the prison hospital or a separate ward.
Rule 445	Provides for the procedure of transfer of a mental patient to a mental hospital.
Rule 446	Provides for the conditions of such a transfer to be made and states that a criminal mental patient shall not be transferred unless a Medical Officer certifies that he is physically fit to undertake the journey, and when the Medical Superintendent of the mental hospital provides that they are prepared to receive him.
Rule 452	Requires that mental patients who are confined in a mental hospital or prison are to be visited by the Inspector-General every six months to ascertain their state of mind.
Rule 453	Where a mental patient is found to be capable of making their defense they must be taken to a Magistrate or Court and are to be dealt with in accordance with Sec. 486 Cr.P.C.
Rule 455	Provides that a mental patient cannot be punished for any offence committed by him but necessary restraints may be imposed on him to prevent him from being a danger to himself or to another.

Figure 6.6 – Prison Rules 1978 pertaining to the treatment of mentally unfit persons.

B. Jurisprudence

Jamila Begum v. Awam un Nas²⁹²

In determining the procedure to declare a person 'insane' or of unsound mind, the Lahore High Court stated that the Court should have put homely questions keeping in view the feeble mindedness and weak intellect of the person alleged to be a lunatic and should have examined him in Court. He could also have been examined on his dietary habits as well as on other points, how he was treated by others, how much land he had, who cultivated it, whether he could plough his land, whether he had any complaint to make of his sister, brother-in-law and others, whether he had a wife or had had a child. In fact, a number of questions which can be put to a child of a few years of age could be put to him. The object of the Act is not fulfilled by a perfunctory

²⁹² 1978 PLD Lahore 1376

examination. He should also have been made to sit with the respondents for some time and to talk to them and then examined again with a view to find out his capacity of understanding and to judge the correctness of the observations of the medical expert.

Noor Jehan v. The State²⁹³

The Court stated that if there are any doubts as to the sanity of the accused, the Court must not only put questions to the accused to ascertain their state of mind, but should require an examination by a Civil Surgeon or Medical Officer to determine whether the accused has exhibited signs of insanity.

Ata Muhammad v. The State²⁹⁴

The Court explained that insanity at the time of commission of the offence and insanity at the time of trial are two independent matter which are to be judged separately in order to determine the criminal culpability of the accused. Each matter must be dealt with separately to ascertain the state of mind of the accused in such cases.

Munshi Khan v. The State²⁹⁵

The Court emphasised that Sec. 464 and 465 Cr.P.C acted as shields against the trial of insane persons, based on the principle that an accused must know and understand the criminal nature of the act committed by him for him to be criminally liable.

Salimuddin v. The State²⁹⁶

In this case the accused was of unsound mind however, the Trial Court had passed an order for trial to be conducted without a medical examination of the accused. The order was set aside and it was held that a medical examination determining the state of mind was required before deciding the mode of trial in such cases.

Yaseen Khan v. The State²⁹⁷

In this case, the accused was born deaf and dumb and an interpreter had only been provided to him up to the stage of framing of charges, and even though a State sponsored Counsel had been assigned to him, there was no evidence as to whether sufficient communication between the accused and the Counsel had been possible due to the accused's disability. The Court held that on the basis that the accused could not understand the judicial proceedings held against him at the level of the Trial Court, he was not capable of making his defence and the Trial Court had not sufficiently acted in accordance with Sec. 464 and 465 Cr.P.C due to which the accused's appeal was allowed.

293 1980 PLD Peshawar 103

294 1960 PLD Lahore 111

295 1983 P.Cr.L.J SC Azad Kashmir 778

296 1985 PLD Karachi 594

297 2019 P.Cr.L.J Karachi 1042

6.4 PROTECTION OF THE RIGHTS OF MINORITIES

6.4.1 International Standards and Safeguards

Despite the lack of consensus on a single definition of minorities, there are various safeguards that have been put in place by international instruments for the protection of all classes of persons, without any discrimination. The UDHR forms the basis for the provision of fundamental rights to all individuals based on their inherent humanity and Article 1 of the UDHR states that, “All human beings are born free and equal in dignity and rights.” Furthermore, Article 2 lays down the principle of non-discrimination and prohibits any difference in treatment on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The ICCPR further provides for State Parties to ensure protection of all rights without any distinction on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁹⁸ Moreover, specific protections for religious, ethnic and linguistic minorities exists within Article 27 of the ICCPR and Article 30 of the CRC which states that such classes cannot be denied the right to enjoy and practice their own culture, profess their own religion and to use their own language.

Various other instruments such as the ICESCR within Article 2, CRC under Article 2, the CRPD under Article 3, CEDAW within Article 1 and 2 establish the principle of non-discrimination and require State Parties to legislate, or amend existing legislation to ensure the protection of the rights of all persons without any discrimination. Even though international law characterises minorities as belonging to a common culture, religion or language, this Section will focus on the rights of religious minorities in Pakistan, as discrimination on the basis of religion continues to be expressly prohibited within international law.

In international law then, providing specific protection to minority rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.²⁹⁹ The right established is conceived as being both individual and collective and is an important recognition of the collective traditions and values in indigenous cultures.³⁰⁰

Much like the protection of the rights of women and persons with disabilities, the need to protect the rights of minorities is to be enforced within the Criminal Justice System as well to ensure the protections of those belonging to different religions.

6.4.2 Constitutional Safeguards

The protection of minorities is a cornerstone of Pakistan's ideology as a nation, created to allow the Muslims of the subcontinent the freedom of conscience to choose and practice their religion. Within the Constitution of Pakistan there are nine distinct provisions that deal with the matter of non-discrimination on the basis of religion and otherwise. However, these provide for general protections and specific protections within the Criminal Justice System will be discussed in the subsequent Section.

298 UNGA, “International Covenant on Civil and Political Rights,” 16th December 1966 999 UNTS 171 Article 2

299 CCPR General Comment No. 23, Fiftieth Session, CCPR/C/21/Rev.1/Add.5, 08-04-1994

300 Committee on the Rights of the Child, General Comment No. 11CRC/C/GC/11

The provisions within the Constitution are as follows:

PROTECTION OF MINORITIES WITHIN THE CONSTITUTION OF PAKISTAN	
Article 20	Freedom to Profess Religion
<p>This sets the groundwork for every citizen to profess their belief and manage religious institutions subject to limitations based on law, order and public morality. It provides that every citizen has the right to “practice, profess and propagate” his or her religion and to “establish, maintain and manage its religious institutions.”</p>	
Article 21	Safeguard against Taxation for Purpose of any Particular Religion
<p>Prohibits any imposition of tax based on religion that would be used for the maintenance of any religion but that of the taxpayer.</p>	
Article 22	Safeguards as to Education Institutions in Respect of Religion etc.
<p>States that no one attending an educational institution is required to receive education, instruction or to participate in any religious ceremony that is not their own. Additionally, no tax concession or exemption will be made to any particular religious institution. The Article also states that no religious group will be prevented from teaching pupils from their community and that no education institution receiving public funds shall discriminate students on the basis of caste, race, religion or place of birth.</p>	
Article 26	Non-Discrimination in Respect of Access to Public Places
<p>With respect to spaces not designated for religious worship, any and all public spaces cannot discriminate or deny access to admission on grounds of race, religion, caste, sex or place of birth.</p>	
Article 27	Safeguard against Discrimination in Service
<p>No citizen of Pakistan qualified for service in Pakistan will be discriminated against on the grounds of religion, caste, race, sex or place of birth. However, there is an allowance for special reserved seats designated for proportional representation and advancement of a depressed class of citizens.</p>	
Article 28	Preservation of Language, Script and Culture
<p>Every citizen and group of citizens has the right to preserve and promote their language, script and culture and establish institutions for the purpose of the same subject to the law.</p>	

Article 33	Parochial and Other Similar Prejudices to be Discouraged
Article 33 of the Constitution included in the Principles of Policy casts an obligation on the State to discourage parochial, racial, tribal, sectarian and provincial prejudice.	
Article 36	Protection of Minorities
Article 36, also a Principle of Policy, points to the importance of protection of the legitimate rights of minorities and their due representation on the Federal and Provincial level.	

Figure 6.7 – Constitutional Protections available to Minorities in Pakistan.

6.4.3 Domestic Law and Jurisprudence

A. Domestic Law

It is important to note that all domestic laws established for the protection of citizens (See Sections 2, 4, 5, 7 and 8 of this Guide) and for the regulation of arrest and detention as discussed in Section 3 of this Guide are to be applied to individuals belonging to religious minorities without any discrimination. However, specific laws effecting religious minorities have been discussed below:

- **Offences Relating to Religion**

The Pakistan Penal Code establishes offences to criminalise actions committed against religions other than Islam as well. Sec. 295 states that a person will be liable to punishment of up to two years or fine, or both if they destroy, damage or defile any place of worship or any object held sacred by any class of persons with the intention of insulting a religion or any class of persons or with knowledge that their actions are likely to insult another religion. Furthermore, Sec. 295-A stated that any person who deliberately and with malicious intent of outraging the religious feelings of a class of persons, by words written or spoken or in their conduct to insult a religion or the religious beliefs of a class will be liable for punishment of up to ten years, or fine or both. In addition to this, Sec. 296 aims to protect religious assembly and provides that if an individual voluntarily disturbs any assembly engaged in religious worship or any religious ceremonies then he may be liable to punishment for up to a year, or fine or both. Sec. 298 of the PPC also criminalises the use of words to deliberately wound religious feelings and states that, "Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year or with fine, or with both."

- **Laws against incitement**

Whilst there is no domestic legislation prohibiting the propaganda of war, there are a considerable number of laws which prohibit incitement of National, Racial or Religious Hatred. The difficulty arises where these laws have the collateral effect of impinging upon freedom of expression.

- **Pakistan Penal Code 1860**

Under Sec. 505(2) of the Pakistan Penal Code 1860, whoever makes, publishes or circulates any statement or report containing rumours or alarming news with the intent to create or promote on grounds (including religion), feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, is to be punished with imprisonment for a term which may extend to seven years and with a fine. The language used in the provision is overly broad and like blasphemy laws is prone to misuse to settle personal scores. However, its scope is tempered somewhat by the fact that under Sec. 196 of the Code of Criminal Procedure 1898 no court is to take cognizance of an offence punishable under Sec. 505 of the PPC 1860 unless the complaint is made by order of, or under authority from, the federal or provincial government or an officer empowered on their behalf.

Furthermore, under Sec. 153-A of the PPC 1860 anyone who 'by words, either spoken or written, or by signs, or by visible representations or otherwise, promotes or incites or attempts to promote and incite disharmony, enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever.' This provision often goes with those that criminalise blasphemy (namely, Sec. 295 and 298), however, they can also collide. For instance, the provision should prevent other religious groups from hosting abusive rallies against religious minorities such as Ahmedi, however these groups often get away with hate speech under the provisions of Sec. 295-C which criminalizes blasphemy.

- **Anti-Terrorism Act 1997**

Sec. 6(2)(f) of the Anti-Terrorism Act (1997) states that terrorism means an action that incites hatred and contempt on religious, sectarian or ethnic basis to stir up violence or cause internal disturbance. Sec. 8 of the Act also prohibits acts intended to or likely to stir up sectarian hatred through threatening, abusive or insulting words or behaviour, including the possession, display, publication and distribution of such material in recorded, visual image, or sound form.

- **Blasphemy Laws**

- **Pakistan Penal Code 1860**

Pakistan's blasphemy laws are found in Sec. 295 and 298 of the Pakistan Penal Code 1860 and consist of a variety of crimes including misusing religious epithets, defiling the Qur'an, deliberately outraging religious sentiment, and using derogatory remarks in respect to the Prophet Muhammad. Sec. 298-B and C further impose restrictions on the Ahmedi community from using Islamic titles and epithets and 'posing' as Muslims or referring to their religion as Islam. Some have argued for a more precise and clear formulation of the terms used in these sections to prevent misuse by unscrupulous elements in society.³⁰¹ They have argued that the provisions include broad and vague terms which are highly subjective and may breach the principle of legality. This requires the clear and precise formulation of terms prescribing unlawful conduct.

The blasphemy provisions of the PPC 1860 carry severe penalties, including the mandatory death penalty for Sec. 295-C (defaming the Prophet Muhammad) and long terms of imprisonment or fines. The alternate punishment of life imprisonment had existed for Sec. 295-C, however, the Federal Shariat Court ordered it be deleted in the Muhammad Ismail Qureshi³⁰² case, as repugnant to the injunctions of Islam. Pakistan has

301 Saba Aziz, 16 Aug 2017. 'Pakistan court seeks to amend blasphemy law'. Al-Jazeera Online. Available at: <https://www.aljazeera.com/indepth/features/2017/08/pakistan-court-seeks-amend-blasphemy-law-170814120428595.html>

302 1991 PLD 10

come under intense international criticism for these laws where it is stated that the laws criminalise the exercise of the right to freedom of expression and religion or belief and thus violate Pakistan's international human rights obligations.

- Code of Criminal Procedure 1898

In order to deter abuse of blasphemy laws, Sec. 211 of the Penal Code 1860 criminalises the intentional institution of criminal proceedings based on false charges for any offence. This risk of misuse has been tempered somewhat by Sec. 196 of the Code of Civil Procedure 1898 which states that no court is to take cognizance of any offence punishable under Sec. 295-A (deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious belief) unless a complaint is made by, or under authority from, the Federal or Provincial Government. Unless prior permission is granted, a judge cannot take cognizance of a private complaint. Moreover, in *Muhammad Sharif v. the State*,³⁰³ the Lahore High Court acknowledged that blasphemy cases were being filed to settle scores and directed that the Inspector General Punjab ensure that whenever a blasphemy case is registered, it must be entrusted for investigation to a team consisting of at least two gazetted officers who are preferable well-versed in Islamic laws. However, given the numbers of cases filed over the years it does not seem that this has had much effect.

B. Wide Application of Blasphemy Laws

According to HRCP's State of Human Rights Report 2016, at least 1472 individuals have been accused under blasphemy laws between 1987 and 2016, out of which 730 were Muslims, 501 Ahmedis, 205 Christians and 26 Hindus. According to the 2017 US State Department Report on Religious Freedom, police registered new cases against at least 17 individuals under blasphemy laws during the year, compared with 18 new cases in 2016. Blasphemy complaints were issued to settle personal disputes against neighbours, peers, or business associates or to intimidate vulnerable persons rather than for the actual offense. Though the law requires a senior police official to investigate any blasphemy charge before a complaint can be filed, rarely is this procedure uniformly followed. Also, the police continued not to file charges against individuals who made false blasphemy accusations, and if charges were filed, courts most often acquitted those accused.³⁰⁴

However, a review of the jurisprudence developed by the Superior Judiciary shows that many instances of misuse have been corrected by the Courts. The Judiciary has been active in ensuring that the rights of minorities are protected and that special measures are taken to ensure their safety and well-being. This is manifested in the fact that since 1986 more than 4000 cases of blasphemy have been handled, however, not a single conviction has been upheld by the Superior Courts.³⁰⁵

C. Jurisprudence

Asia Bibi Case³⁰⁶

Asia was a Christian woman who had been sentenced to death for blasphemy under Sec. 295-C in 2010. The three-member bench acquitted her in a well-reasoned decision on the basis that the prosecution had failed to meet evidentiary requirements. The grounds for the decision were, inter alia, inconsistencies in

³⁰³ 2008 YLR 387

³⁰⁴ 1991 PLD 10

³⁰⁵ No Execution under Blasphemy Law in Pakistan So Far', (The News, 2018) available at: <https://www.thenews.com.pk/print/388047-no-execution-under-blasphemy-law-in-pakistan-so-far>

³⁰⁶ 2019 PLD Supreme Court 64

witnesses' testimonies, the late lodging of the FIR and the fact that the complaint was based on a personal quarrel over the issue of fetching water. It was held by the Supreme Court that while blasphemy is a serious offence, insulting the accused's religion and religious sensibilities and mixing truth with falsehood in the name of the Holy Prophet is not short of blasphemy itself. The Judgment was concluded by the Chief Justice with a tradition of the Holy Prophet wherein it was stated that: "whoever is cruel and hard on a non-Muslim minority or curtails their rights or burdens them with more than they can bear, or takes anything from them against their free will; I (Prophet Muhammad) will complain against the person on the Day of Judgment."

Wajeeh-ul-Hassan v. The State³⁰⁷

The accused was alleged to have written letters with blasphemous content and had made an extra-judicial confession. The Trial Court convicted the accused and sentenced him to death which was confirmed by the High Court as well. The Supreme Court had to deliberate upon whether the accused had authored the letters, and whether the extra-judicial confession was supported by the expert's report or not. The Supreme Court recognised that the penalty of death was irreversible and warranted the highest degree of caution due to which one weak piece of evidence could not be used to corroborate another weak piece of evidence. Absconding alone could not be seen as proof of commission of a crime. The Supreme Court stated that all citizens were equal before the law regardless of religion and prosecution of a crime had to be based on positive proof of commission. Due to this, the conviction of the accused was set aside.

Malik Muhammad Mumtaz Qadri v. The State³⁰⁸

In this case, the accused contended that he did not deserve the death penalty as the deceased had allegedly committed blasphemy. The Supreme Court stated that religious upbringing of the accused should have taught him to distinguish between hearsay and fact and should have made him conscious of the fact that Allah Almighty has warned against believing hearsay and unverified information and distinguishing it from fact. The Court further stated that even though commission of blasphemy was abhorrent, a false allegation regarding such commission was equally abhorrent and detestable as the religion of Islam came down heavily upon commission of blasphemy but at the same time Islam was tough against those who level false allegations of a crime. Due to this, it is the duty of the State to ensure that no innocent person was compelled or constrained to face trial on the basis of false allegations levelled against them.

Suo Motu action against violence in Christian colony in Badami Bagh Area over alleged blasphemy³⁰⁹

The Supreme Court took suo motu action with regards to violence committed by a mob in a colony of religious minority where police officers had failed to stop such violence and the mob had set houses on fire. The Supreme Court stated that the actions of the police in failing to protect the residents of the colony was a violation of the Fundamental Rights of citizens as enshrined within the Constitution of Pakistan and an order was made for the appointment of a competent person on the vacant post of the Provincial Inspector General of Police to ensure the protection of the right to life and property of all citizens.

Suo Motu action regarding suicide bomb attack on the Church in Peshawar and regarding threats being given to Kalash tribe and Ismailies in Chitral³¹⁰

In this case, the Supreme Court recognised the special status of minorities under the Constitution of

307 2019 SCMR Supreme Court 1994

308 2016 PLD Supreme Court 17

309 2013 SCMR Supreme Court 918

310 2014 PLD Supreme Court 699

Pakistan and stated that 'the very genesis of Pakistan was grounded in the protection of religious rights for all, especially those of minorities.' The Court observed the lack of awareness with regards to the protection of rights of minorities, and stated that the continued desecration of places of worship of minorities and their forced conversions coupled with the inaction on the part of law enforcement agencies was a violation of the Constitution. The court asserted that desecration of the places of worship of a religious minority under the Pakistan Penal Code and the State must ensure the enforcement of all protections for minorities as well.

SECTION SEVEN

THE RIGHTS OF THE CHILD AND JUVENILE JUSTICE SYSTEMS

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THE RIGHTS OF THE CHILD AND JUVENILE JUSTICE SYSTEMS

OVERVIEW

The primary international framework for the protection and rights of children is the Convention on the Rights of the Child (CRC). In addition to the Convention on the Rights of the Child, Pakistan has also ratified two of the three Optional Protocols to it. Moreover, Pakistan has also actively legislated on various rights of children in areas such as the juvenile justice system, sexual abuse, harassment, labour, health, education etc.

However, there remain discrepancies in Pakistan's laws in relation to a child's age, particularly in the context of the criminal justice system; the age of criminal culpability, the age at which specific child related offences can be committed against a child, including child marriage, child labour, certain sexual offences, etc. While international standards mandate that eighteen years be the age beyond which a child is considered an adult for most criminal and civil matters, in Pakistan, this age has traditionally been lower. However, the enactment of the Juvenile Justice System Act of 2018 has helped bring some clarity in relation to the criminal justice process.

The State is also making efforts for the protection of children and is in the process of developing an action plan on preventing child abuse and enhancing the implementation of the Juvenile Justice System Act 2018. Moreover, the Government of Pakistan also aims to establish a National Commission on the Rights of the Child at the federal level. Nevertheless, there is still a long list of problems in the legal framework relating to the rights of the child and Pakistan has been subject to grave criticisms by the international community in the past due to the lack of protection and care provided to children.

This Section seeks to explain the international scope of the rights of the child, its correlating constitutional obligations and the jurisprudence on the matter. Furthermore, this Section will focus on the rights of the child in the juvenile justice system to outline the protections that must be available to children within the legal system.

7.1 INTERNATIONAL HUMAN RIGHTS SAFEGUARDS AND STANDARDS

International law has established a comprehensive framework setting standards for the protection of children against abuse, neglect and exploitation. It also lays down essential standards for the juvenile justice system in order to protect the rights of children in the administration of justice. Though the primary framework of protection is provided under the Convention on the Rights of the Child ratified by Pakistan, Article 24 of the ICCPR and Article 10(3) of the ICESCR seek to protect the rights of a child as well. While Article 24 of the ICCPR grants every child "the right to such measures of protection as are required by his status as a minor, on the part...the State", Article 10(3) of the ICESCR requires that States "set age limits below which the paid employment of child labour should be prohibited and punishable by law" and protect children from "economic and social exploitation".

For a summary of the framework established by the CRC please refer to Figure 2.5 in Section 2 of this Guide.

In addition, Pakistan has also ratified two Optional Protocols to the CRC, including the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in Armed Conflict (25 May 2000), ratified on 7 November 2016, and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (25 May 2000), ratified on 5 July 2011.

The Convention on the Rights of the Child, in Article 1, defines a child as a person below the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier. The Committee on the Rights of the Child, the monitoring body established under Article 43 of the Convention, continues to encourage States to review their laws and increase the age of adulthood to 18 universally. The Committee has identified four provisions of the Convention which highlight the general principles of protection of children. These include the non-discrimination, best interests of the child, survival and development, and the right to express his or her views.³¹¹

The Convention also outlines provisions on various areas within the criminal justice system, including protection from specific offences committed against children such as violence, child labour, trafficking and sexual exploitation, and protections afforded to children within the juvenile justice system including detention, punishment, and rehabilitation.

Article 19 of the Convention requires all States to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, sexual abuse, neglect or exploitation. Article 32 protects against child labour by requiring States to take measures to protect the child from economic exploitation and hazardous work, and also provide for a minimum age for admission to employment, appropriate regulation of hours and conditions of employment, and penalties to ensure implementation of the laws. The Convention also requires parties to take all measures to prevent the use of children in the illicit production and trafficking of such substances in Article 33. Protection from sexual exploitation and abuse is provided in Article 34 of the Convention, which also includes protection against child prostitution and child pornography, while Article 35 protects against the abduction of, the sale of or traffic in children.

With regard to the juvenile justice system, the relevant provisions include Article 37 on detention and punishment, and Article 40 on juvenile justice. Article 37 provides protection against torture or other cruel, inhuman or degrading treatment, and explicitly protects against the imposition of the capital punishment or life imprisonment without possibility of release on children. On arrest and detention, the Convention protects against arbitrary or unlawful deprivation of liberty, and states that the arrest, detention or imprisonment of a child must be in conformity with the law and shall be used only as a “measure of last resort and for the shortest appropriate period of time”. Moreover, it grants the right of the child to maintain contact with his or her family through correspondence and visits unless it is not considered in the child's best interests. Article 37(d) grants the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of liberty before a court or other competent authority.

For the administration of juvenile justice, Article 40 of the Convention provides general human rights guarantees of a fair trial to children accused of infringing the penal law, such as treatment of children consistent with their dignity and worth, right to the presumption of innocence, right to privacy, right to be informed of the charges against him/her, and the responsibility of the State to establish a minimum age of criminal capacity. It further requires the States to have the matter determined “without delay” by a competent, independent and impartial authority or judicial body. It further protects the child against forced confessions, and extends rights including the right of appeal and the free assistance of an interpreter if needed. The failure to provide these rights to children, as highlighted by the UN Committee on the Rights of the Child “has very negative consequences for the child's harmonious development and seriously hampers his/her reintegration in society.”³¹²

311 CRC, 'General Comment No. 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child' 27 November 2003, UN Doc CRC/GC/2003/5, para 12

312 UN Committee on the Rights of the Child (CRC), General Comment No. 10 (2007): Children's Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10.

Other than this, General comment No. 24 (2019) on children's rights in the child justice system states that children below the minimum age of criminal responsibility must be provided with assistance and services according to their needs, by the appropriate authorities, and should not be viewed as children who have committed criminal offences. Furthermore, if there is no proof of age, the child is to be given the benefit of the doubt and not held criminally responsible.³¹³ Moreover, it states that a child who does not have a birth certificate should be provided with one promptly and free of charge by the State, whenever it is required to prove age. It also recommends that the laws should contain a wide variety of non-custodial measures and should expressly prioritize the use of such measures instead of depriving the child of his liberty, which is a measure of the "last resort for the shortest appropriate amount of time".

Moreover, the General Comment outlines that the reaction to an offence should always be proportionate not only to the circumstances and the gravity of the offence, but also to the personal circumstances including age, lesser culpability, circumstances and needs, as well as mental health. It also states that a comprehensive child justice system requires the establishment of specialized units within the police, the judiciary, the court system and the prosecutor's office, as well as specialized defenders or other representatives who provide legal or other appropriate assistance to the child.

Pakistan has also ratified the International Labour Organization's (ILO) core Conventions relating to child labour. This includes the Minimum Age Convention 1973 (No. 138), ratified in 2006 by Pakistan, after which Pakistan specified the minimum age for admission to employment or work as 14 years in its declaration as required by the Convention. Pakistan also ratified the Worst Forms of Child Labour Convention 1999 (No. 182) in 2001, which aims to protect children against the worst forms of child labour including child trafficking, selling children for prostitution, child pornography, and other illicit activities including the production and trafficking of drugs, as well as work which is likely to harm the health, safety or morals of children.

Other international human rights law instruments include Guidelines for Action on Children in the Criminal Justice System recommended by the Economic and Social Council Resolution,³¹⁴ which recommends specific targets including the effectiveness of birth registration programmes, independent panels to review existing juvenile justice laws, legal assistance programmes, easy access to detained children by relatives etc., an independent body to monitor conditions in custodial facilities, and for trainings and education in human rights to be provided to all those responsible for children in the criminal justice system including the police, judges, prosecutors, health personnel and prison officers.

Another regional instrument dealing with trafficking in children and women for prostitution is the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, to which Pakistan is also a signatory.³¹⁵ It defines a child as a person under the age of 18 years, and requires State parties to take effective measures to ensure that trafficking in any form is an offence under their respective criminal law with appropriate penalties while taking into account aggravating circumstances. It also requires State Parties to the Convention shall grant to each other the widest measure of mutual legal assistance in respect of investigations, inquiries, trials or other proceedings.

Other than this, some international and regional instruments of child rights include SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia; the Stockholm Declaration and

313 CRC, 'General comment No. 24 (2019): Children's Rights in the Child Justice System', UN Doc. CRC/C/GC/24 (2019)

314 Guidelines for Action on Children in the Criminal Justice System Recommended by Economic and Social Council Resolution 1997/30 of 21 July 1997

315 SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, available at: <http://un-act.org/wp-content/uploads/2015/11/South-Asian-Association-for-Regional-Cooperation-SAARC-Convention-on-Preventing-and-Combating-Trafficking-in-Women-and-Children-for-Prostitution.pdf>

Agenda for Action, 1996 against Commercial Sexual Exploitation of Children; the South to South Cooperation on Child Rights 2010; the Yokohama Global Commitment, 2001 against Commercial Sexual Exploitation of Children; the Third World Congress against Sexual Exploitation of Children and Adolescents Rio De Janeiro, 25 - 28 November 2008; and the South Asia Initiative to End Violence Against Children (SAIEVAC).

7.2 CONSTITUTIONAL SAFEGUARDS

Constitutionally, the rights of children are protected and provided for in various different Articles relating to the several issues that children in Pakistan face. The Constitution through Article 11 requires the State to fully diminish all forms of exploitation, slavery, human trafficking and forced labour. It stipulates that children under the age of 14 should not be made to work in mines, factories or in other hazardous occupations. Article 11 of the Constitution is widely interpreted by the Courts to also include prohibition of child labour and bonded labour as well. In *Muhammad Siddique v. Mansha*³¹⁶ the Lahore High Court took the view that brick kiln owners could not engage labour after making advance payments as it is not only a direct violation of the fundamental guarantees provided under Article 11 of the Constitution but also constitutes an offence under Sec. 11 and 12 of the Bonded Labour (Abolition) Act 1992.

The Constitution also provides safeguards against arrest and detention which extend to children as well. In *Abdul Khattab v. the State*,³¹⁷ the Lahore High Court observed that “there is a complete procedure and mechanism provided for the trial of the child under the Juvenile Justice System Ordinance, 2000 and if some provision of the Ordinance is not followed, the trial will become illegal”. Although the Ordinance has now been replaced by the Juvenile Justice System Act 2018, the principle outlined by the Court may still be applicable.

In *Arbelo Kalhoro v. the State*, the Karachi High Court took note of the fact that a minor accused had been kept in inhuman conditions and handcuffed against the mandate of the law. The juvenile complained that he was not served any water throughout the journey and was under threat of torture throughout. In such circumstances, the High Court ordered the accused to be released on executing a personal bond.³¹⁸

The Constitution also provides for free and compulsory education for all children between the ages of five and sixteen by the State.

ARTICLE	CONTENT
3	Elimination of Exploitation
11	Slavery, Forced Labour etc. Prohibited
25A	Right to Education
37E	Promotion of Social Justice and Eradication of Social Evils

Figure 7.1 – Constitutional Safeguards for the protection of the rights of children in Pakistan.

316 1997 PLD Lahore High Court 428

317 *Abdul Khattab v. the State*, 2003 YLR

318 *Arbelo Kalhoro v. the State*, 2010 YLR 1750

7.3 DOMESTIC LAW AND JURISPRUDENCE

A. Domestic Law

The right to proper administration of justice at trial to a juvenile is a fundamental right which has been protected under international law. International standards in this regard require that a person is to get a free birth certificate whenever he/she needs to prove their birth.³¹⁹ Lack of proof of juvenility persists as one of the most significant causes of injustice in the Pakistani legal system.

Only 27 per cent of births are registered in Pakistan, and in rural areas this number is at a low 23 per cent.³²⁰ This leads to injustice in many cases as the prosecution seeks to benefit from doubt as to the age of the accused and place the burden of proof of proving juvenility on the accused. An unsympathetic application of this rule is illustrated by the Supreme Court dicta in the case of Shafqat Hussain where the Court refused to overturn the accused's death sentence after refusing to consider a government issued birth certificate showing him to be a juvenile.³²¹

Moreover, in the case of Ansar Iqbal where the trial Court refused to admit a certified Form-B National Registration Document issued by NADRA, on the grounds that no record-holder had been called as a witness to verify its authenticity.³²² Age remains a key factor in numerous instances in the criminal justice system of Pakistan and for this reason the following aims to provide an overview of the issues that arise in relation to the age of a child under Pakistani criminal law as well as various child protective laws currently in force.

- **The Age of a Child in Pakistani Criminal law**

The Pakistan Penal Code 1860, in Sec. 82 and 83, creates general exceptions to criminal liability for children. Under Sec. 82 of the PPC, 'nothing is an offence which is done by a child under ten years of age' whereas under Sec. 83, 'nothing is an offence which is done by child above ten years of age and under fourteen, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion'.

The Juvenile Justice System Act 2018 on the other hand, defines a child as a person under the age of eighteen years for the purposes of the Act. There also remain procedural problems in the Pakistani legal system relating to how a child's age may be determined upon arrest, how children are to be treated and what sentences children are awarded.

Moreover, age discrepancies also exist in case of different offences committed against a child. The minimum age for marriage according to the Child Marriage Restraint Act 1929 is sixteen for females and eighteen for males. While this was adopted by the provinces, only Sindh amended the Federal Act to make the legal age of majority eighteen for both men and women.

In addition to this, the Prevention of Trafficking in Persons Act 2018 defines a child as a person under eighteen years of age. However, there are numerous offences in the Pakistan Penal Code committed

319 CRC, 'General Comment No. 10: Children's Rights in Criminal Justice' UN Doc. CRC/C/GC/10 (2007) at 39

320 Justice Project Pakistan (JPP), Reprieve World Organisation Against Torture (OMCT), 'Pakistan: Alternative Report to the Committee Against Torture Violations of the Convention Against Torture Arising from the Application of the Death Penalty in Pakistan 60th Session of the Committee Against Torture 18 April - 12 May 2017' (2017).

321 Justice Project Pakistan, 'Comments on Pakistan's Replies to the List of Issues in Relation to its Fifth Periodic Report to the Committee on the Rights of the Child'.

322 Justice Project Pakistan, 'Comments on Pakistan's Replies to the List of Issues in Relation to its Fifth Periodic Report to the Committee on the Rights of the Child'.

against children which outline different ages of the victim for the offences to be applicable. For instance, the offence of kidnapping from lawful guardianship outlined in Sec. 361 of the Pakistan Penal Code 1860 (PPC) is applicable for males under fourteen years of age and females under sixteen years of age. Sec. 364-A prohibits the kidnapping of a child under fourteen if the child was abducted for murder, or to inflict torture/grievous hurt, for slavery, or to satisfy the 'lust' of any person. For offences affecting the human body defined in the PPC, an adult refers to a person above the age of eighteen years. For the offence of abandonment of a child or cruelty towards the child, the child must be under twelve years of age according to Sec. 328 and 328-A of the PPC.

Other than this, the age of a child in laws on child labour is also not consistent with international standards. For instance, Sec. 2 of the Employment of Children Act 1991 defines a child as a person below fifteen years of age and an adolescent as a person below eighteen years of age, which is inconsistent with ILO's definition. Similar child labour laws in KPK and Punjab also define a child as a person below fifteen years of age.

- **Juvenile Justice System Act 2018**

The 2018 Act has been promulgated to deal with cases of juvenile offenders. The Juvenile Justice System Ordinance 2000 which was the primary legislation dealing with the juvenile justice system now stands repealed. The 2018 legislation aims to counter a problem that persisted within the JJSO 2000 by declaring that the Act has the effect of overriding other laws.³²³ It is important to note that Article 2(b) of the Act defines a child as any person under the age of eighteen years. The Act provides for the establishment of juvenile courts by the High Courts.³²⁴ Thus, the exclusive jurisdiction of the Juvenile Courts created under the Act now extends to juveniles tried under laws with special courts, including the Anti-Terrorism Act, 1997.

While this provides for greater protection of child rights in the justice system through the availability of specialized courts to deal with juvenile offenders, a report states that the provincial High Courts have given the power of dealing with juvenile cases to the District and Session Judges, which is especially problematic as juveniles continue to be tried with adults in the same courts which defeats the purpose of establishing juvenile courts.³²⁵

There are a number of changes which were brought about by the promulgation of the JJSA 2018. Under the JJSO 2000, Sec. 7 laid out the guidelines for the determination of age of the offender, which was based on an inquiry which "shall include a medical report for determination of the age of the child." However, the JJSA 2018 widens the scope of the law and states that an investigating officer shall make an inquiry on the basis of the offender's birth or educational certifications or any other pertinent document for the determination of his/ her age. In the absence of these documents, a medical examination report by a medical officer may be relied upon.³²⁶ Moreover, when the juvenile is brought before the Court, the Court, before granting further detention, must record its findings regarding age on the basis of available record including the report submitted by the police or medical examination report by a medical officer.³²⁷

The JJSA 2018 also provides safeguards against arrest to juveniles in Sec. 5(1). It states that the juvenile must be kept in an observation room and the police officer shall inform the guardian of the juvenile as soon as possible of his arrest, while informing him of the date, time and name of Juvenile Court before which the

323 Sec. 23 Juvenile Justice System Act 2018

324 Sec. 4 Juvenile Justice System Act 2018

325 Justice Project Pakistan, 'Comments on Pakistan's Replies to the List of Issues in Relation to its Fifth Periodic Report to the Committee on the Rights of the Child'

326 Sec. 8 Juvenile Justice System Act 2018

327 Sec. 8(2), Juvenile Justice System Act 2018

juvenile shall be produced. Moreover, the police officer is also required to inform the concerned probation officer so he can obtain information about the juvenile and other material circumstances of assistance to the Court for making an inquiry.

The JJSA 2018, in Article 5(2), also states that a juvenile cannot be arrested under laws dealing with preventive detention or provisions under Chapter VIII of the Code of Criminal Procedure 1898 relating to security, keeping the peace, and good behaviour. Furthermore, it requires that the report of the police-officer under Sec. 173 of the Code of Criminal Procedure 1898 must also contain steps taken by the police officer to refer the matter to the Juvenile Justice Committee for disposal of the case through diversion where required.

On provisions relating to bail, JJSA 2018 outlines that a juvenile accused of a bailable offence must be released by the Juvenile Court on bail without surety unless it appears that the bail may bring him in association with criminals or expose him to any danger, in which case he must be placed under the custody of a suitable person or Juvenile Rehabilitation Centre under supervision of a probation officer, but not in any circumstances be kept in a police station or under police custody or jail.³²⁸ Furthermore, if the juvenile is not so released, the Court must direct the police to trace his guardian to hand over his custody to him. However, in case of heinous offences by juveniles older than 16 years, he may not be released on bail.³²⁹

Moreover, unlike the JJSO 2000 which was silent on these distinctions, Sec. 7 of the JJSA 2018 provides a direct investigation procedure for a juvenile offender, according to which investigation must be carried out by a police officer above or at the same rank as that of a sub-inspector, under the supervision of the superintendent of police or the SDPO. The investigating officer must also be assisted by the probation officer or social welfare officer, as notified by the Government, to prepare a social investigation report to be annexed with the report prepared under Sec. 173 of Criminal Procedure Code, 1898.³³⁰

Furthermore, the Act provides for the right of legal assistance,³³¹ observation home,³³² juvenile rehabilitation centres³³³ and the Juvenile Justice Committee³³⁴ that may alternatively dispose of cases through the process of diversion to avoid undergoing the formal judicial proceedings, a novel concept introduced in this Act which was not discussed under the JJSO 2000.³³⁵ This channel of diversion would be used to determine his responsibility, and treatment on the basis of his social, cultural, economic, psychological, and educational background.³³⁶ Possible modes of diversion as specified in the Act include restitution of movable property, reparation of the damage caused, written or oral apology, participation in community service, payments of fine and costs of the proceedings, placement in the Juvenile Rehabilitation Center, and written or oral reprimand. The Act states that diversion shall be exercised in minor cases, and in major cases if the age of the juvenile is not more than 16 years.³³⁷

The Act also requires that a separate challan³³⁸ and trial of juvenile offenders must be carried out.³³⁹ It also has a specific safeguard for female juveniles regarding their arrest and interrogation,³⁴⁰ which did not exist

328 Sec. 6, Juvenile Justice System Act 2018

329 Sec. 6(2), 6(3), Juvenile Justice System Act 2018

330 Kashif Iftikhar, "Does a Juvenile Get a Better Law this Time? A Comparative Review of the New & Old Juvenile Laws of Pakistan" LUMS Law Journal Volume 6, Legislative Reviews

331 Sec. 3 Juvenile Justice System Act 2018

332 Sec. 20(1) Juvenile Justice System Act 2018

333 Sec. 20 Juvenile Justice System Act 2018

334 Sec. 10 Juvenile Justice System Act 2018

335 Sec. 9 Juvenile Justice System Act 2018

336 Kashif Iftikhar, "Does a Juvenile Get a Better Law this Time? A Comparative Review of the New & Old Juvenile Laws of Pakistan" LUMS Law Journal Volume 6, Legislative Reviews

337 Sec. 9, Juvenile Justice System Act 2018

338 Sec. 7(2) Juvenile Justice System Act 2018

339 Sec. 4 Juvenile Justice System Act 2018

340 Sec. 17 Juvenile Justice System Act 2018

in JJSO 2000. These include the prohibition of their apprehension or investigation by a male officer, or release on probation under the supervision of a male officer. It also provides for exclusive juvenile rehabilitation centres established for female inmates.

Other than this, the JJSA 2018 has played a significant role in protecting the sanctity of a child's privacy. The Act provides that the trials of a juvenile shall not be made public and only a specified number of individuals may be part of the trial.³⁴¹ Moreover, publishing the details of the trial in any form disclosing the name, address, or any form of identifications of the child, constitutes an offence, punishable by imprisonment or a fine.³⁴² The Act also requires that any report made by the Probation Officer regarding the child's character, education, social and moral background be treated as confidential to protect the child's privacy.³⁴³

All these changes introduced in the new law enables Pakistan to be more compliant with its international human rights obligations.

In *Raja Amanullah and another v. the State*,³⁴⁴ the Sindh High Court held that as the JJSO has to be interpreted liberally, a margin of error, if any, should be given to the accused. While the Court stated this about the Ordinance, it may still be relevant as a principle for the Act as well.

- **Pakistan Penal Code 1860**

There are a number of offences specifically against children defined in the Pakistan Penal Code 1860. In 2016, the Criminal Law (Second Amendment) Act 2016 was promulgated, which amended the Pakistan Penal Code 1860 to increase the minimum age for criminal culpability, and introduce offences relating to children including child seduction, pornography, human trafficking, sexual abuse and cruelty to a child.

In Sec. 82 of the PPC, the minimum age of criminal culpability has been increased from 7 to 10 years of age. Under Sec. 83, 'nothing is an offence which is done by child above ten years of age and under fourteen, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion'. These age specifications have been changed from 7 and 12 to 10 and 14 respectively through the aforementioned amendment.

Under illustration (a) to Sec. 6 of the PPC, although none of the offences defined in the PPC specifically mention or exclude a child, they are to be understood subject to the general exception contained in Sec. 82. However, the onus of proof is on the person invoking the plea.³⁴⁵

Other than this, with the promulgation of the amendment, Sec. 377-A and 377-B were also inserted in the PPC, which criminalize sexual abuse of children "with or without consent where age of person is less than eighteen years" and state that offenders shall punished with imprisonment of up to seven years and shall also be liable to fine of up to five hundred thousand rupees, or both.

Moreover, Sec. 292A, 292B and 292C were also inserted in the PPC, which relate to exposure to seduction, child pornography and the punishment for it respectively. Sec. 292A states that whoever seduces a child with intent to involve him in any sexual activity or exposes him to sexually explicit material would be punished for imprisonment of up to seven years or fine of up to five hundred thousand rupees or both. Sec.

341 Sec. 12 Juvenile Justice System Act 2018

342 Sec. 13 Juvenile Justice System Act 2018

343 Sec. 14 Juvenile Justice System Act 2018

344 *Raja Amanullah and another v. the State*, 2002 MLD 1817

345 *Kishor Kumar v. the State* 1993 P.Cr.L.J 55

292B defines child pornography and states that it would be an offence “with or without the consent of the child” or his/her guardian, while Sec. 292C prescribes its punishment as imprisonment of up to seven years or fine of up to seven hundred thousand rupees or both.

Cruelty to a child also became an offence through the insertion of Sec. 328A to the PPC through the aforementioned amendment of 2016. Sec. 328 criminalizes the abandonment of a child under 12 years by his/her parent with an imprisonment of up to ten years, while 328A criminalizes willful assault, illtreatment, neglect, abandonment, or any act that has the potential to harm a child by causing physical or psychological injury to him, and states that the offender would be punished with imprisonment of up to three years, or a fine of up to fifty thousand rupees or both.

Furthermore, corporal punishment is allowed in the home under Sec. 89 of the Pakistan Penal Code as a means to correct the behavior of children if done in 'good faith' under 12 years of age by or by consent of the guardian. However, this exception does not apply if the act is done with the intention to cause death, or with the knowledge that it would likely cause death, or to voluntarily cause grievous hurt.

It is important to note that Sec. 90 of the PPC outlines that the consent of a child is not a consent if given by a child under 12 years of age, unless specified otherwise in the Code.

Other offences relating to children in the PPC include Sec. 361 which prohibits the kidnapping of a child (under 14 years of age if a boy and under 16 years if a girl) from their legal guardian. Moreover, Sec. 364-A prohibits the kidnapping of a child under 14 if the child was abducted to murder them, subject them to torture/grievous hurt or slavery, or to satisfy the 'lust of any person.' The provision allows for such an individual to be punished with death or imprisonment for up to 14 years and not less than 7 years.

It is important to note that parental consent in handing over a child for employment is not sufficient to negate the charge of kidnapping under this provision, as held by the Court in the case of *Azam Watto and others v. The State*. In this case, the parents of an 8/9 year old girl demanded her return after she was sent to work in the house of a couple in Lahore who contended that they had obtained her with her parents' consent.³⁴⁶ The Court rejected an appeal for bail before arrest of the couple who had obtained the child for employment while stating that parental consent does not provide an exception to the offence.

Sec. 498B of the Code prohibits forced marriages of females under the age prescribed under the Child Marriage Restraint Act, 1929, which is sixteen years, and prescribes imprisonment of up to seven years for the individual coercing a child into marriage. Accordingly, in the provision on rape, the PPC states that a man is said to commit rape if he has sexual intercourse with a woman under sixteen years of age “with or without her consent”,³⁴⁷ and states that the offender shall be punished with death or imprisonment of not less than ten years or more than twentyfive years, and shall also be liable to fine.

Moreover, Sec. 329 criminalizes the concealment of the birth of a child by a secret disposal of his/her dead body with imprisonment of up to two years or fine or both. Other than this, kidnapping a child with intent to steal movable property from him is punishable under Sec. 369 with imprisonment of up to seven years and fine.

³⁴⁶ *Azam Watto and others v. The State* 2002 YLR 136

³⁴⁷ Sec. 375(v) Pakistan Penal Code 1860

- **Prevention of Trafficking in Persons Act 2018**

This Act was introduced by the Parliament in 2018, hence repealing the previous law on human trafficking, namely the Prevention and Control of Human Trafficking Ordinance, 2002. The Ordinance had a number of shortcomings, including a limited definition of trafficking, no distinction between human trafficking and human smuggling, victims often being charged with the crimes themselves, and restricted punishments that did not take aggravating circumstances into account. The Ordinance also did not deal with internal trafficking within Pakistan, and did not focus on preventive mechanisms or victim safety and protection, but only on offence creation.

The new Act, on the other hand, provides for a broader definition of trafficking by including 'psychological pressure' as a means of coercion under Sec. 3(3)(a) of the Act. Moreover, it omits the Ordinance's requirement of "transportation out of or into Pakistan", hence bringing internal trafficking within its ambit. It also imposes harsher penalties for aggravating circumstances including serious injury, death, confiscation/destruction of travel documents, repetition of offence, or acting in an organized criminal group, which carries a maximum term of fourteen years in prison and a fine which may extend to two million rupees according to Sec. 4 of the Act.

With regard to children, it is important to note that if the offence of trafficking is committed against children under the age of 18 years, the punishment is enhanced from a maximum of 7-year imprisonment to a 10-year imprisonment and a fine of up to one million rupees. Moreover, an important provision introduced in the new law is the presumption in case of child victims specified in Sec. 7. According to this provision, a child need not prove the actual use of force, fraud or coercion and the Court may not consider the consent of the victim, his parent or guardian as a defence.

More improvements in the new law include no criminal liability of the victim for an offence under the Act, while allowing the victims of trafficking to become witnesses in the case according to Sec. 6. Special procedures introduced for the protection of victims and witnesses include relocation and non-disclosure of identity provided in Sec. 11, and in-camera proceedings, sealed court records and witness obscuring via screen/video-link.

- **Employment of Children Act 1991**

The legislation regulating child labour includes the Employment of Children Act (1991) which prohibits the employment of children in certain occupations and regulates the conditions of work or children. Sec. 2 of the Act, however, defines a child as a person below 15 years of age and an adolescent as a person below 18 years of age. The Act punishes anyone who employs a child in a forbidden occupation with imprisonment for up to 1 year or a fine.

Other similar laws relating to protection against child labour by the provinces include the Punjab Prohibition of Child Labor at Brick Kilns Ordinance, 2016, the Punjab Restriction on the Employment of Children Act, 2016, Khyber Pakhtunkhwa Prohibition of Employment and Children Act, 2015, and the Children (Pledging of Labour) Act, 1933.

- **Zainab Alert, Response and Recovery Act 2020**

The Zainab Alert, Response and Recovery Act, 2020 is a recent legislation passed by the National Assembly

on 10th January 2020, and the Senate on 4th March 2020.³⁴⁸ It is important to note that the Act only extends to the Islamabad Capital Territory and the provinces have not yet adopted the Act through the provincial assemblies.

The preamble of the Act establishes the need for the Act to be passed. It states that it is necessary to make provisions for the protection of missing and abducted children under the age of 18 years, and to ensure their right to life and protection from exploitation, violence, abuse, neglect, as envisaged under various national and international laws, conventions and other instruments relating to the rights of children. It further recognizes that such children, if abducted, are at a high risk of such violence and abuse, due to which it is essential to provide an institutional response, which entails a system raising alerts, and a response and recovery mechanism for such children, so that offences like the abduction, rape and murder of a 7-year old Zainab from Kasur in January 2018 are not repeated.

The Act provides for a Zainab Alert, Response and Recovery Agency (ZARRA) to be set up. Its functions would include maintaining an online database of missing or abducted children,³⁴⁹ while working closely with the Legal Advice on Human Rights Violation Helpline 1099 created by the Ministry of Human Rights, which will forward all the reported cases to the Agency. Upon a child being missing, the Agency will send alerts across the federal capital and law enforcement agencies regarding the child's information, including their physical characteristics, habits, clothes etc.³⁵⁰ through the Pakistan Telecommunication Authority and PEMRA.³⁵¹ The Act provides for the establishment of a cellular app linked to the database, and also for administrative arrangements to be made for the safe return of the child, as well as the facilitation of the provision of legal aid and coordination with concerned authorities if it is a transnational offence.

Sec. 7 of the Act provides for coordination between ZARRA and the local police stations, and requires that the police shall inform ZARRA of the missing child within two hours of the filing of the complaint, following which ZARRA shall immediately launch the investigation, rescue, recovery and rehabilitation operations with the help of the police. Similarly, ZARRA would, upon receiving a direct complaint of a missing or abducted child, coordinate with the police to launch such actions, including the registration of the complaint at the police station on behalf of the complainant.

Another notable feature of the Act is that it also prescribes the punishment of kidnapping or abduction of a child under the age of 18 years for murder, rape, grievous hurt or slavery to an imprisonment for life, or rigorous imprisonment of up to 14 years and not less than 10 years.³⁵² Moreover, it also states that kidnapping or abducting a child under 18 years of age to steal movable property from him/her would be punishable with imprisonment of up to 14 years and a fine of one million rupees.³⁵³ This is different from the offence in Pakistan Penal Code in that the age specification has been increased to eighteen.

- **Child Marriage Restraint Act 1929**

Since the Convention on the Rights of Child, 1989 does not mention marriage per se, no minimum age for the right to marry has been provided under international law. Nevertheless, the CRC itself recognizes that a child is any individual below the age of 18 years.

348 Alvi, M. 2020. 'Senate adopts Zainab Alert, Response and Recovery Act 2020' The News.

349 Sec. 5 The Zainab Alert, Response and Recovery Act 2020

350 Sadiq, N., 2020. The Zainab Alert Bill. The Express Tribune.

351 Sec. 5 The Zainab Alert, Response and Recovery Act 2020

352 Sec. 13 The Zainab Alert, Response and Recovery Act 2020

353 Sec. 14 The Zainab Alert, Response and Recovery Act 2020

The child marriage law in Pakistan is primarily the Child Marriage Restraint Act 1929, which sets the age for marriage for girls at the age of 16 years and for men at the age of 18 years. While each province has enacted their own version of the Federal Act, only Sindh has increased the minimum age of marriage for females to 18 years.³⁵⁴

Through the Punjab Marriage Restraint (Amendment) Act, 2015, the punishment for child marriage was increased from a one-month imprisonment to a six-month imprisonment and the fine was increased from one thousand rupees to fifteen thousand rupees. While the Punjab Assembly was lauded for doing so, a comparative analysis with the Sindh Assembly's enactment demonstrates that Punjab still has a long way to go. The Sindh Child Marriages Act, 2013 places a punishment of a minimum of two years and a maximum of three years and a fine, for any person not a minor that has contracted the child marriage.³⁵⁵ The legislation also creates criminal liability for any parent or guardian that does any act to promote a child marriage or negligently fails to prevent such marriage from being solemnized,³⁵⁶ and for the person solemnizing and performing the marriage.³⁵⁷

It is important to note that through Sec. 2(3) of the Criminal Law (Amendment) Act, 2017, the Pakistan Penal Code was amended to increase the punishment against a female child marriage to serve a minimum of five years and up to ten years in prison and a fine of one million rupees.

- **Code of Criminal Procedure 1898 and Reformatory Schools Act 1897³⁵⁸**

In relation to juveniles, Sec. 29-B of the Cr.P.C. 1898 allows for children under fifteen, who have committed an offence other than one which is punishable with death or transportation for life, to be tried by a Magistrate specifically provided for by the Provincial Government in accordance with the Reformatory Schools Act 1897. However, in light of the Juvenile Justice System Act 2018, the age under C.r.P.C must be interpreted in accordance with the 2018 Act which prescribes the age of a child to be eighteen years. Moreover, the reference made to the Reformatory Schools Act 1897 in Sec. 29 of the C.r.P.C should be interpreted to now replace it with Sec. 4 of the Juvenile Justice System Act 2018 which establishes Juvenile Courts.

Sec. 399 provides that youthful offenders can be confined in reformatories under the Reformatory Schools Act 1897 established by the provincial governments where they can receive suitable education and vocational training rather than in a criminal jail. Moreover, Sec. 497 prescribes leniency in bail for juveniles.

- **Prisons Act 1894 and Pakistan Prison Rules 1978**

Sec. 27 of the Prisons Act 1894³⁵⁹ and Rule 231 of the Pakistan Prison Rules 1978³⁶⁰ requires the mandatory separation of convicted prisoners, under-trial detainees, male and female prisoners, and juveniles and adults.

Moreover, under Rule 289 of the Prison Rules, 1978, "before passing an order of detention under any Act pertaining to detention of juvenile delinquents the Sessions judge or Court, as the case may be, shall enquire or cause an enquiry to be made into the question of the age of the offender and after taking such evidence (if any) as may be deemed necessary or proper shall record the evidence thereon."

354 Sec. 2(a) Sindh Child Marriages Restraint Act 2013 (Act No. XV of 2014)

355 Sec. 3 Sindh Child Marriages Restraint Act 2013 (Act No. XV of 2014)

356 Sec. 4 Sindh Child Marriages Restraint Act 2013 (Act No. XV of 2014)

357 Sec. 5 Sindh Child Marriages Restraint Act 2013 (Act No. XV of 2014)

358 Reformatory Schools Act 1897 (Act VIII of 1897)

359 Prisons Act 1894 (Act IX of 1894)

The Jail Manual also stipulates that women and juvenile prisoners are to be kept separate from the other prisoners. Rule 154 of the Prison Rules 1978 provides that all male prisoners under 18 years old with sentences of three months or more shall be transferred to a borstal institution and juvenile prison. However, this has not been implemented and Pakistan only has seven juvenile detention facilities in total. Two of these are located in Punjab, four in Sindh, and one is in KP which has not been made functional yet.

Due to lack of juvenile detention centres and prisons in Pakistan, it is reported that adult prisoners and juvenile prisoners are kept together, whereby consequently they suffer from physical and sexual abuse. In 2015, a child abused in the Peshawar Central Prison complained to the concerned judicial authority to remedy his situation. The victim stated that other juvenile inmates had not been raising their voice out of fear of torture by the prison officials as well as adult prisoners. Many a times these adults are hardened criminals or already convicted ones. In Khyber Pakhtunkhwa prisons, there are approximately four to five hundred minors and often convicted prisoners are detained with under-trial prisoners.³⁶¹

B. Domestic bodies:

- **National Commission for Child Welfare and Development (NCCWD) and Provincial Commissions for Child Welfare and Development (PCCWD)**

The National Commission for Child Welfare and Development (NCCWD) was established on 16th December 1979, and is currently under the ambit of the Ministry of Human Rights. It ensures compliance with the UNCRC and submits mandatory Periodic Reports on the implementation of the CRC to the Committee on the Rights of the Child. It seeks to bolster the implementation and consideration of the CRC in every legislation and enactment by the Government. A part of its core objectives is to “formulate legislation to deter the child abuse in all its forms, including physical violence, child mutilation, exposure to drugs, child labor and protection to children who are handicapped (mentally or physically) or otherwise in need of social protection and services.”³⁶² The Commission can also recommend amendments to existing legislation to ensure they take into consideration the welfare of children in accordance with the CRC and other international obligations. UNICEF has supported the NCCWD in drafting of the Child Protection Law and the Child Protection Policy and initiated the establishment of Child Protection Monitoring and Data Collecting System.

The Provincial Commissions for Child Welfare & Development (PCCWD) also liaise and coordinate with the NCCWD for child rights.³⁶³

- **Punjab Child Protection and Wellness Bureau (CPWB)**

The Bureau, established under the Punjab Destitute and Neglected Children Act 2004, sees to the care, rehabilitation, education and training of destitute and neglected children. The initiative was started with the primary goal of protecting children from falling victim to criminals and seeks to provide children with the education, healthcare and psychological counseling necessary to ensure their transition into

360 Pakistan Prison Rules 1978

361 Human Rights Commission of Pakistan (HRCP), World Organisation against Torture (OMCT), Society for the Protection of the Rights of the Child (SPARC), 'Shadow Report to The Committee Against Torture on the Occasion of the Examination of the Initial Report of Pakistan at its 60th Session' (2017).

362 National Commission for Child Welfare and Development, (Mohr.gov.pk, 2020) available at: <http://www.mohr.gov.pk/Detail/MzFjMTM5ODctODkwYS00NTUyLTk2NjQtMmNjZjEwNzJIN2Fk>

363 Committee on the Rights of the Child "Consideration of reports submitted by States parties under article 44 of the Convention: Fifth periodic report of States parties due in 2012 – Pakistan" (7 January 2015) CRC/C/PAK/5

productive members of society.³⁶⁴ Currently, the Child Protection & Welfare Bureau is functioning in seven major cities of Punjab including Lahore, Gujranwala, Faisalabad, Multan, Rawalpindi, Sialkot and Bahawalpur.

UNICEF supported the CPWB to develop rehabilitation and reintegration services for beggar, street and handicapped children. UNICEF has also collaborated with the CPWB to provide support to more than 600 camel jockey children repatriated from the U.A.E.

- **Vigilance Committees Against Bonded Labor (Provincial and District).**

The Bonded Labour Systems (Abolition) Act 1992 mandated the creation of “Vigilance Committees,” a requirement that was reiterated by the Supreme Court in *Darshan Masih v. The State*.³⁶⁵

The purpose of these Committees is to ensure the enforcement of the Bonded Labour Systems (Abolition) Act, to oversee the rehabilitation of any such persons who have or are suffering under bonded labour and to aid District and Provincial administration in implementing the Act properly. A report by the ILO states that in accordance with Sec. 15 of the Act, Vigilance Committees have been formed in almost all the districts of Punjab, that the Act mainly envisages an advisory and supervisory role for the Vigilance Committees, and that “it is a matter of general observation that aggrieved persons do not approach the vigilance committees but instead they prefer to invoke the jurisdiction of the High Court for prompt relief”.³⁶⁶ In addition, it was noted that so far the Vigilance Committees have been less than vigilant in providing the necessary support to ensure the elimination of bonded labor and rehabilitation of individuals who suffer under it.

- **The Sindh Child Protection Authority**

In Sindh, under the Sindh Child Protection Authority Act, an 11- member Sindh Child Protection Authority (SCPA) has been set up to coordinate and monitor child protection issues at provincial and district levels. The Authority is working for establishing an institutional mechanism for child protection and setting minimum protection and standards for all institutions relating to children, including educational institutions, orphanages, shelter homes, child parks and hospitals, and ensure implementation.

- **KP Child Protection and Welfare Commission**

Under the KP Child Protection and Welfare Commission Act 2010, a Child Protection and Welfare Commission has been established which reviews provincial laws and regulations affecting the status and rights of children and proposes new laws; implements policies for protection, rehabilitation and reintegration of children at risk; monitors implementation and violation of laws.

- **Federal Child Protection Advisory Board and Child Protection Institute**

Under the Islamabad Capital Territory Child Protection Act 2018, a Child Protection Institute and a Child Protection Advisory Board was set up to provide for protection and care of children in Islamabad Capital Territory from all forms of physical or mental violence, injury, neglect, maltreatment, exploitation and abuse. The functions of the Board included advising the Government on matters relating to policy, legislation and implementation of the rights of child, while the powers of the Child Protection Institute

364 Overview | Child Protection & Welfare Bureau' (Cpwb.punjab.gov.pk, 2020) available at: <https://cpwb.punjab.gov.pk/overview>

365 *Darshan Masih v. the State* (PLD 1990 SC 513)

366 Comments Forced Labour Convention' (Ilo.org, 1996) available at:

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:2130979

include receiving reports of children who are in need of protection and care, maintaining a record of case management reports of children in need of care, maintaining and updating data on child abusers and persons convicted of offences against children.

- **Balochistan Child Welfare Commission and District Child Protection Units**

The Balochistan Child Protection Act, 2016 provides for the establishment of a Child Welfare Commission, within the Social Welfare, Special Education, Literacy, Non-formal Education and Human Rights Department for providing vision, policy guidelines, and appropriate strategies for child protection, analysis of trends and adjusting policies and measures for the protection of children. District Child Protection Units are also formed under the Act, holding full and comprehensive responsibility for case management and referral of all reported cases of child abuse in the district.

- **Federal and Provincial Ombudsmen and Child Complaint Offices**

The institution of the Federal Ombudsman is an independent statutory body with a mandate to provide relief to complainants and redress their grievances against government departments. Under the offices of the Ombudsmen at federal and provincial levels, Child Complaint Offices have been established at Federal and Provincial levels. They address concerns and complaints regarding child protection in schools, residential institutions and public services. It is notable that the CCO in Punjab has placed complaint boxes at public and private schools in Lahore, Sargodha, Multan, Rawalpindi, Faisalabad, Gujranwala, Mianwali, Kasur, Muzafargrah, Chakwal, Shakar Garh (Ikhlaspur), Katas Raj, Essa Khel, Bhalwal and Khushaab for children to put their complaints against teachers, parents and others. In May 2013, the Federal Ombudsman also appointed a Commissioner for Children, who focuses on individual complaints, suo moto cases to address child rights violation, carries out advocacy and awareness raising on child rights with the public, civil society and media.³⁶⁷

- **Child Protection Court**

The first child court in Pakistan was established in Lahore in December 2017, the second one in Peshawar in March 2019, and the third and fourth one in October 2019 in Mardan and Abbottabad respectively. Establishment of child courts is in process in Karachi, Quetta, Islamabad and the district Mohmand.

Provision of care, protection, maintenance, welfare, rescue, training, education, rehabilitation, reintegration of homeless and neglected children, and other such matters regarding a child are adjudicated upon by these Courts. These Courts are also empowered through the Juvenile Justice System Act 2018. The Juvenile Justice System Act 2018 requires that juvenile courts be established at the level of districts or divisions. Sec. 4 (1) states: "The Government in consultation with the concerned High Court shall (by notification in the official Gazette) establish or designate one or more Juvenile Courts, within a period of three months of the commencement of this Act."

- **National Commission on the Rights of Child**

Pakistan enacted the National Commission on the Rights of the Child Act 2017, in September 2017, for establishment of the commission having multiple functions. Although, all four provincial governments as well as Islamabad Capital Territory have separate child protection laws, this act is applicable to the entire country.

³⁶⁷ Committee on the Rights of the Child "Consideration of reports submitted by States parties under article 44 of the Convention: Fifth periodic report of States parties due in 2012 – Pakistan" (7 January 2015) CRC/C/PAK/5

Even though the law was passed in 2017, the State has only recently, in March 2020, notified the establishment of the Commission. The functions of the commission, as set out in Article 15, include examining existing or proposed legislations and making recommendations, liaising with provincial commissions set up under provincial laws, recommending measures for effective implementation of laws and policies, inquiring into the violation of child rights and recommending the initiation of proceedings, as well as examining international instruments and recommending actions for compliance.

- **Punjab Human Rights and Minorities Affairs Department**

The Department was established in July 2008 to uplift minorities and promote human rights in Punjab. Amongst their other functions, they also inspect prisons and juvenile institutions for potential human rights violations.³⁶⁸

C. Jurisprudence

The Zainab Amin Rape Case

In January 2018, a six-year-old girl Zainab Amin, was found in a heap of waste, raped and murdered in Kasur, Punjab, Pakistan. The crime sparked outrage across the country and created an uproar for speedy justice in the country.

During the investigation period, each detail was heavily scrutinized by the media and the public, due to which the law enforcers faced immense pressure in dealing with the situation. Two weeks after the incident, the investigation team's inability to establish a legitimate headway into the search for clues was considered as a failure by the Lahore High Court, following which the Supreme Court took suo moto jurisdiction over the matter and chastised the team for not leading to any tangible leads in the investigation. The general public, in its outrage, demanded capital punishment for the culprit, while the provincial governments blamed each other for not being competent enough to prevent or handle such situations efficiently.³⁶⁹

After a few weeks of investigation, the suspect Imran Ali was arrested and was tried in the Anti-Terrorism Court. He was a 24-year-old mechanic residing in the same neighbourhood as Zainab, and had even attended the protests for Zainab's justice. The Polygraph test and the DNA of the suspect matched the samples of Zainab and eight other minor girls who were also raped and murdered in the same neighbourhood.³⁷⁰ He confessed to the crimes and the Court handed him four counts of the death penalty, one life term, a seven-year jail term and Rs. 3.2 million in fine. He was found guilty of rape and murder of Zainab and twelve other underage girls.³⁷¹

This was a landmark case in the recent history of Pakistan relating to child rights, and DNA testing played a key role in the arrest of the suspect in this case. The Punjab Forensic Science Agency went door to door to collect oral swabs for six consecutive days, and collected 1,187 samples of men between the ages of 20 and 45 years to match tissue samples found from the crime scene. Imran Ali was the 814th suspect of the tissue samples found at the crime scene. This was one of the largest DNA Tracing exercises done in the history of Pakistan.³⁷²

368 'About Us | Human Rights & Minorities Affairs Department' (Hrma.punjab.gov.pk, 2018) available at: https://hrma.punjab.gov.pk/about_us

369 2018. Zainab's Murder: Heinous Crimes, Speedy Trial And The Challenge Of Procedural Rights. Ali Chughtai.

370 Mahmood, A., 2018. DNA Helps Police Catch Suspect In Zainab Case. Dawn News.

371 2019. What Is The 'Zainab Alert Bill'?. Girls.pk.

372 Yasif, R., 2018. Zainab Murder Case: Imran Ali To Be Executed On Oct 17. The Express Tribune.

The Zainab case had a considerable impact, and far-reaching implications, as can be seen from the fact that it led to the recent promulgation of the Zainab Alert, Response and Recovery Act 2020, which has been discussed in the section on domestic laws.

Kasur Child Pornography Ring

Child abuse had remained a prevalent issue in Kasur since many years. The Zainab case took place two years after the huge scandal of Kasur's pornography ring was exposed by private investigators.

In 2015, the child pornography ring was discovered in Hussain Khanwala village in Kasur, whereby more than 280-300 children (boys under the age of 14) had become victims of sexual abuse and were being filmed. Hundreds of video tapes were found whereby children were made to perform forced sexual acts. These films were being sold as child pornography to porn sites and were being used to blackmail and extort money from the families of the victims.³⁷³

When this sparked national outrage, the State faced public pressure, following which arrests of men between the ages of 20s and 30s were made. The alleged patron of the ring, Malik Ahmed Saeed Khan, was a Member of the Parliament belonging from the then ruling political party Pakistan Muslim League-Nawaz. He was accused of protecting the gang and financing their bail.³⁷⁴ The then Chief Minister of Punjab, Shehbaz Sharif requested Chief Justice of the Lahore High Court to constitute a judicial inquiry into the case. However, the request was rejected, observing that the Punjab police was already investigating the case therefore there was no need of a separate judicial commission.³⁷⁵

The case was being tried in the Lahore Anti-Terrorism Court. However, in 2018, 12 men accused of being involved in the case were acquitted.³⁷⁶ ATC Judge Chaudhry Ilyas acquitted the men citing lack of evidence. During the hearing, the prosecution had brought forward 16 witnesses, but after the arguments concluded, the court ruled in favour of the 12 accused. A report released by the Federal Ombudsman in 2019 revealed the failure of authorities, while stating that the families of the rape victim children had been forced to withdraw their cases by the influential accused.³⁷⁷ The document highlighted the authorities' failure in controlling such incidents and tracing culprits of the mafia involved in child pornography. The report added that only a few of the accused were sentenced in more than 272 registered cases, the investigation was put on the back-burner by the influential by paying bribes to the police.

Tajammul Abbas v. the State³⁷⁸

This case in the Lahore High Court expounded upon the determination of the age of the accused, according to the Juvenile Justice System Act 2018, and the procedure when investigation cannot be completed within twenty-four hours. It highlights that Sec. 2(b) of the 2018 Act defines a child as a person who at the time of commission of offence has not attained the age of 18 years, and states that the Juvenile Court is established under Sec. 4 of the Act to deal with such cases. It highlights that certain privileges are granted to the "child" accused through the Act, some of which pertain to arrest, bail, release on probation and prohibition of inflicting capital sentence, etc. The Court states that Sec. 8 the Act obligates the Officer Incharge of Police Station or the Investigating Officer to determine the acclaimed age of juvenile from his birth certificate, educational certificates or any other relevant document from the very inception of investigation. It further

373 2018. Hussain Khanwala: Village Scarred By Child Abuse Scandal. Al Jazeera.

374 Jalil, X., 2018. Is Something Wrong With Kasur? Dawn News.

375 2015. LHC Rejects Govt's Application To Form Judicial Commission Over Kasur Child Porn Case. The Express Tribune.

376 2018. 12 men acquitted by ATC in 2015 Kasur child pornography case. The Express Tribune.

377 2019. Report over Kasur pornography scandal reveals authorities' failure. The Nation.

378 2020 P.Cr.L.J 627 Lah

held that the juvenile is to be medically examined only if there is no other trustworthy documentary proof in support of his age plea. The Court further elaborates on the procedure by stating that the findings of the age of an accused who physically appears to be a juvenile is to be given by the court before whom he is brought under Sec. 167, Cr.P.C. and that too before granting his further detention. The Court stated that such findings must be based on the record made available before the court including report prepared by the police officer or the medical examination report, if any.

Saqlain v. the State³⁷⁹

In this case, the Lahore High Court enunciated similar principles as outlined above on the determination of age of the accused person claiming himself to be minor under the Juvenile Justice System Act 2018. The application for the ossification test was dismissed by the Judicial Magistrate as well as by the Sessions Judge. The Court held that the Birth Certificate and Education Certificate were relevant material to inquire the actual age of the accused, and the absence of stipulated documents was a condition precedent for seeking a medical examination report. The Court, before authorizing further detention of an accused, must record its findings regarding his age on the basis of the available record. The Court held that Sec. 8 of the Act was suggestive of holding medical examination only when the documents stipulated in the said section were not forthcoming.

Mir Ghulam v. the State³⁸⁰

In this case, the petitioner was referred to the hospital for the assessment of his age on the basis of request of both the parties. The Medical Board assessed the age of the petitioner to be above 19 years however the petitioner himself contended that he was a minor as per his matriculation certificate. The Matriculation Certificate was not considered conclusive proof of age. Sec. 7 of the Juvenile Justice System Ordinance 2000 provided that the method of assessing the age of the accused in case a question arose, then the court would record a finding after such inquiry which would include a medical report for the determination of the age of the child. The petitioner challenged the order of the Trial Court belatedly. No application for condonation of delay was filed. The Trial Court had passed the order after due application of mind. Therefore, the revision petition was dismissed.

Suo Motu Case regarding detention of Three Minor Boys³⁸¹

This case expounds upon the protections granted in the Juvenile Justice System Ordinance, but may still be relevant because those protections, including against preventive detention, have also been granted in Sec. 5 of the Juvenile Justice System Act 2018.

In the *Suo Motu Case regarding detention of Three Minor Boys*, the police had kept the juveniles in custody for two days before one of them, aged 6, was released and the other, aged 14-15, was taken to the Court of Judicial Magistrate for police/physical remand. The Judicial Magistrate without taking cognizance of the child's age through a short order remanded him to police custody for 14 days. However, the Magistrate wrote a subsequent order which was much more detailed and claimed that he had followed the provisions of JJSO to locate the child's guardian. The Supreme Court held that the subsequent order was written by the Judicial Magistrate to save himself, that he had failed to take notice of illegal detention of the boys, had acted illegally, and contrary to law. The apex Court recommended the concerned High Court to

379 2020 P.Cr.L.J 374 Lah

380 2019 MLD 348

381 2006 SCMR 1805

proceed against the Judicial Magistrate and, until the completion of the disciplinary proceedings, he be restrained from exercising judicial functions.

Ghulam Qadir v. The State³⁸²

The Court held that the Juvenile Justice System Ordinance, 2000 (an older version of the current 2018 Act) is aimed at extending protection to the children involved in criminal litigation and their rehabilitation in the society. The Ordinance safeguards the human rights of a section of society who deserve reasonable concessions because of their tender age and therefore it is to be construed liberally in order to achieve the said object.³⁸³

Muhammad Razi alias Muhammad Khalil v. State³⁸⁴

The petitioner contended that he was a juvenile and was entitled for concession of post-arrest bail under the provisions of the Juvenile Justice System Ordinance 2000. His school leaving certificate also illustrated that he was a juvenile, under the age of 16 years at the time of the occurrence. He was facing the trial and was behind the bars for the last more than one year and nine months. The prosecution had failed to conclude the trial of the petitioner therefore the petitioner was entitled for concession of bail under Sec. 10(7) of the JJSO 2000. He was admitted to bail, in circumstances.

Raja Amanullah v. The State³⁸⁵

This case held that the Juvenile Justice System Ordinance, 2000 was promulgated to provide for protection to children involved in criminal litigation and their rehabilitation in the society. The 2000 Ordinance had to be given a liberal interpretation to achieve its objects and to create conditions and environment so that children below the age of 18 years involved in criminal litigation could be provided an opportunity to become useful and respectable members of society. A person below the age of 18 years would be entitled to benefits and privileges under JJSO 2000. No child would be charged with or tried for an offence together with an adult and every child would have the right of legal assistance at the expense of State. Any proceedings of the Juvenile Court would not be published through print media. A child in ordinary course would be released on bail or placed under custody of a Probation Officer and no punishment of death would be awarded to him and he would not be handcuffed, put in fetters or given any corporal punishment.³⁸⁶

Mujahid Iqbal v. State³⁸⁷

It was held that Anti-Terrorism Courts have jurisdiction over Juvenile Courts as well. It was also stated that the Courts have “exclusive” jurisdiction to hear all cases that come under the Anti-Terrorism Act 1997.³⁸⁸

382 2006 MLD Lahore 406

383 2006 MLD Lahore 406

384 2002 YLR Gilgit-Baltistan Chief Court

385 2002 MLD Kar. 1817

386 Raja Amanullah v. The State 2002 MLD KAR 1817

387 P.Cr.L.J 2019 PHC 1432

388 Mujahid Iqbal v. State P.Cr.L.J 2019 PHC 1432

SECTION EIGHT

RIGHT TO LIFE AND SECURITY OF PERSON

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RIGHT TO LIFE AND SECURITY OF PERSON

OVERVIEW

The right to life and security is a fundamental human right available to all individuals under international human rights law irrespective of whether the individual is a citizen or not. Although non-derogable, the right to life is not absolute, so deprivation of life must be in accordance with law and non-arbitrary. Protections extended to individuals regarding the right to life and security include safeguards against arrest and detention, limitations on pre-trial and preventive detention, and protection against torture.

While these aspects have been discussed before, two additional aspects to the right to life merit discussion, specifically the death penalty and extra-judicial killings. This has been discussed in this Section, as outlined under international law, the domestic law of Pakistan, and the jurisprudence developed by the superior courts.

8.1 INTERNATIONAL HUMAN RIGHTS SAFEGUARDS AND STANDARDS

▪ Capital Punishment

International law has increasingly restricted the scope and implementation of the death penalty. In addition, 106 countries have abolished the death penalty in law for all crimes, and 142 countries have abolished the death penalty in law or practice.³⁸⁹

Although Article 6 of the ICCPR states that "no one shall be arbitrarily deprived of his life" and does not expressly prohibit capital punishment while terming it as an exception to the right to life surrounded by a number of specific safeguards, in General Comment No. 6 on Article 6 of the ICCPR adopted in 1982, the Human Rights Committee established that this article "refers generally to abolition [of the death penalty] in terms which strongly suggest (...) that abolition is desirable." The Committee further concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life.³⁹⁰

It is pertinent to note that while Pakistan has ratified the ICCPR, it has made partial reservations to Articles 3, 6, 7, 18 and 19, stating that the articles would apply to the extent they are not repugnant to the Constitution or Islamic law.³⁹¹

Article 6(2) of the ICCPR, and General Comment No. 6 also highlight that State parties are obliged to limit its use and, in particular, to abolish the death penalty for crimes other than the 'most serious crimes'. The United Nations Economic and Social Council published a set of Safeguards Guaranteeing the Protection of the Rights of those Facing the Death Penalty which outlines that the scope of 'the most serious crimes' should not go beyond "international crimes with lethal or other extremely grave consequences."³⁹²

Furthermore, the UN Office on Drugs and Crime, the Human Rights Council, the Human Rights Committee and the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions as well as the UN Special

389 'Death Penalty in 2019: Facts and Figures' (Amnesty.org, 2019) available at <https://www.amnesty.org/en/latest/news/2020/04/death-penalty-in-2019-facts-and-figures/>

390 HRC, General Comment No. 6, 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' 1994 UN Doc HRI/GEN/1/Rev.1

391 'The Death Penalty in Pakistan' (Dpw.pointjupiter.co, 2011) available at <https://dpw.pointjupiter.co/country-search-post.cfm?country=Pakistan>

392 'International Standards on The Death Penalty' (Amnesty.org, 1997) available at <https://www.amnesty.org/download/Documents/156000/act500061997en.pdf>

Rapporteur on Torture and other Inhuman or Degrading Treatment or Punishment have specified that drug-related offences do not meet the international threshold for 'most serious crimes'.

Furthermore, the Rome Statute of the International Criminal Court and the UN Security Council resolutions establishing the International Criminal Tribunals for the Former Yugoslavia and for Rwanda do not provide for the death penalty as a possible sanction even though the forums have been established to try the most serious crimes.³⁹³

Moreover, there are a number of specific international and regional instruments seeking the abolition of the capital punishment. These include the UN Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), the Protocol on the Abolition of the Death Penalty (Organization of American States), Protocol 6 and the new Protocol 13 to the European Convention on Human Rights (Council of Europe) require the abolition of the death penalty.³⁹⁴ However, the Second Protocol does allow state parties to use it in times of war if they make a reservation to that effect at the time of ratifying the Protocol. Nevertheless, it has not been ratified by Pakistan.

Finally, there exists an international consensus on prohibiting death penalty for persons under the age of 18 years old and pregnant women, with Article 6(5) of the ICCPR also prohibiting it. Furthermore, Article 6(4) states that anyone sentenced to death shall have the right to seek pardon or commutation of the sentence, and this has also been outlined in Safeguard 7 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.

8.2 DOMESTIC LAW AND JURISPRUDENCE

A Domestic Law

Capital punishment is a legal penalty in Pakistan for a number of offences. The legal method of execution is hanging according to Sec. 368 of the Code of Criminal Procedure 1898.

However, a moratorium on executions was imposed in 2008, when the then-President Asif Ali Zardari signed it into effect.³⁹⁵ Therefore, no executions occurred from 2009 to 2011, while one occurred in 2012. The moratorium was lifted temporarily for terrorism-related cases in 2014 following the Army Public School massacre of 132 students and 9 members of staff. Then, in 2015, the moratorium was completely lifted.³⁹⁶ Pakistan carried out 7 executions in 2014, 326 in 2015, 87 in 2016, 65 in 2017, 14 in 2018, and 14 in 2019.³⁹⁷

There are more than 33 offences in Pakistan that are punishable by death,³⁹⁸ including murder, rape, blasphemy, high treason and drug smuggling, among others. However, Article 45 of the Constitution of Pakistan grants the President the "power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any Court, tribunal or other authority".

A second or subsequent mercy petition on new grounds, under Pakistan Prison Rule 101, can also be forwarded to the Provincial Government for consideration. Pakistan Prison Rule 104(viii) outlines that

393 'Report - Slow March to The Gallows, Death Penalty in Pakistan' (Fidh.org, 2007) available at <https://www.fidh.org/IMG/pdf/Pakistan464angconjointpdm.pdf>

394 Ibid

395 'Pakistan Ends Death Penalty Moratorium' (International Business Times, 2015) available at <https://www.ibtimes.com/pakistan-ends-death-penalty-moratorium-1841946>

396 Ibid

397 'The Death Penalty in Pakistan' (Dpw.pointjupiter.co, 2011) available at <https://dpw.pointjupiter.co/country-search-post.cfm?country=Pakistan>

398 'Death Penalty Offences' (Hrcp-web.org) available at <http://hrcp-web.org/hrcpweb/death-penalty-offences/>

mercy petitions submitted on behalf of a prisoner on death row are considered petitions from the prisoner himself.

In addition, redressal for the execution of pregnant women is provided for under Sec. 382 of the Code of Criminal Procedure 1898 and Sec. 314 of the Pakistan Penal Code, 1860. The provision regarding the prohibition for carrying out the death penalty on a minor is found in Sec. 16 of the Juvenile Justice System Act 2018.

B Jurisprudence

Over the last decade, the Supreme Court has established the principle that the death penalty should only be applied in exceptional circumstances. The Supreme Court has also upheld death sentences only for offences which cause death and involve exacerbating circumstances. There is also a presumption in favour of life imprisonment over death sentences, as can be seen by jurisprudence developed by the Supreme Court. For instance, the Supreme Court commuted the death sentence in 35% of over 300 judgments between 2010 and 2018³⁹⁹.

An analysis of the Supreme Court on judgements by the lower courts reveal that acquittals or commutations ordered by the Court usually include reasons for miscarriages of justice including reliance on unreliable witness testimony, sentencing an accused to death who has not been properly identified, the application of death sentences despite a lack of evidence, reliance on evidence that was planted or manipulated by corrupt police officers, an arbitrary application of a death sentence for one accused while acquitting co-accused on the same evidence, conviction despite prosecution failure to establish “intention, guilty mind or motive” of the accused, and reliance by the lower courts on confessions which were involuntary, retracted or obtained using improper procedure.⁴⁰⁰

Moreover, the superior courts have also established that the existence of mitigating factors must be fully considered before a death sentence is awarded. Typical forms of mitigating factors as identified through the Supreme Court's jurisprudence include the type and gravity of the offence, lesser participation, a lack of premeditation, provocation, social and familial circumstances, partial compromise with the victim's family, the age of the offender, acting under the influence of an elder, the mental state of the accused, capacity for reform, and time spent on death row.⁴⁰¹

Some such cases have been discussed subsequently.

Muhammad Sharif v. State⁴⁰²

In an appeal to the Supreme Court after High Court had set aside the judgment of acquittal passed by the Trial Court and awarded death sentence to the accused, the case was re-examined through a reappraisal of evidence. This landmark ruling established the presumption in favour of life sentences over the death penalty, while relying upon Article 9 of the Constitution. It further emphasized on the Court's duty to consider the aggravating and mitigating circumstances before the option of a death penalty is exercised. The Court held that the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability, and that life imprisonment is the rule and death sentence is an exception. The Court further

399 'Counting the Condemned - Justice Project Pakistan' (JPP, 2018) available at <https://www.jpp.org.pk/report/counting-the-condemned/>

400 'The Capital Punishment Study: A Study of The Jurisprudence of The Supreme Court of Pakistan' (Reprive.org.uk, 2019) available at <https://reprive.org.uk/wp-content/uploads/2019/04/Pakistan-Capital-Punishment-Study.pdf>

401 Ibid

402 2009 PLD Supreme Court 709

stated that it could inflict the death penalty without hesitation, if the victim had been done to death in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner, so as to arouse intense and extreme indignation of the community. It further held that the Court is expected to proceed very carefully and cautiously in the exercise of such discretion and not to ignore the gravity of the offence committed. In the case, the Court stated that the lack of apparent planning, premeditation or intention to kill the deceased was a sufficient mitigating factor to reduce the sentence. Therefore, the Court found this case as one in which a life imprisonment would meet the ends of justice, and converted the death sentence to life imprisonment.

Iftikhar Ahmed Khan v. Asghar Khan⁴⁰³

In an appeal for the enhancement of sentence against the order of the Lahore High Court that reduced the death sentence awarded by the Sessions Court for murder to one of life imprisonment, the Supreme Court outlined the discretion of the Court to award sentence of death or punishment of imprisonment for life. The Court highlighted that the facts and circumstances of each case must be observed to see in which case the penalty of death must be imposed. However, the Court maintained that the penalty of death must be imposed if the Court finds the manner and method of incident to be in the nature of a brutality, horrific, heinous, shocking involving terrorist nature, creating panic in the society as a whole or in part, callous and cold blooded. In such cases, the penalty of death must not be withheld; in other words, grave inhuman attitude, acts, manners, methods and the criminality of actions are the constituents, elements and the instances, where punishment of death must be awarded. The appeal for enhancement of sentence was hence dismissed.

Tariq Mehmood v. The State 2011 SCMR 1880 SC⁴⁰⁴

In this appeal filed against the conviction of a death sentence for a double murder case, the accused had entered into a compromise with the legal heirs of deceased persons, and had filed an application accordingly. The Court found that a compromise with some members of the victim's family, in addition to the fact that the incident in question was neither brutal nor gruesome or shocking, was sufficient to dismiss the appeal and the application for compromise, hence converting the death sentence to life imprisonment. The Court also recognised the fact that the offender had no previous criminal record as a mitigating factor in such commutation.

Sabeeha v. Ibrar & others⁴⁰⁵

In an appeal in a case of murder and unlawful assembly armed with deadly weapons, the Court upheld the reduction of the sentence of death awarded to the accused into imprisonment for life by the High Court. It was a case involving multiple shooters firing indiscriminately. The Court stated that "it was not possible to identify as to whose fire hit whom and, in such circumstances, award of maximum sentence (i.e. death) would not be in consonance with safe administration of justice." Hence, it declined to interfere in the judgment passed by the High Court by stating that it is neither arbitrary nor unjust, and dismissed the appeal.

403 2009 SCMR Supreme Court 502

404 2011 SCMR Supreme Court 1880

405 2012 SCMR Supreme Court 74

Hassan & others v. The State & others⁴⁰⁶

In an appeal for a reduction of sentence from death to imprisonment for life in a case of murder, the Supreme Court held that there is no 'normal penalty' for murder. The Court further advanced the principle that prisoners who spend a period on death row that is "equal to or more than a term of imprisonment for life [are] reasonably entitled to an 'expectation of life.'" It said that if a convict sentenced to death for murder has undergone a period of custody equal to or more than a term of imprisonment for life during the pendency of his legal remedy and failed to obtain a final judicial determination for such a long time, the State, acting through its judicial organ, might acknowledge a failure of its constitutional responsibility of ensuring expeditious justice and might reduce the sentence from death to imprisonment for life. Although such a case may not strictly be termed as a case of double punishment, it could more appropriately be called a case of an unconscionably delayed punishment, delayed to such an extent that the punishment was aggravated beyond the contemplation of the relevant law itself. The Court further stated that the legislative intent might also lean in favour of extending some relief to a convict placed in such a predicament which was not of his own making. However, it also held that such a relief shall not be applicable to a case wherein the convict was himself demonstrably and significantly responsible for the delay occasioned in conclusion of his judicial remedies.

Ghulam Mohy-ud-din alias Haji Babu v. the State⁴⁰⁷

In this appeal for a reduction in sentence of death in a case concerning murder, the Court ruled that a "single mitigating instance, available in a particular case, would be sufficient to put on guard the Judge not to award the penalty of death but life imprisonment," if it creates reasonable doubt in the mind of the Judge. The Court stated that judicial caution must be exercised to award the alternative sentence of life imprisonment, so that an innocent person might not be sent to the gallows, and that it is better to respect human life, as far as possible, than to put to at an end. In this case, the Court found that the motive of the incident remained unproven, due to which the sentence of death awarded to the accused and co-accused was not warranted in law. The Court further noted that once the legislature had provided for awarding alternative sentence of life imprisonment, it would be difficult to hold that in all the cases of murder, the death penalty was the 'normal penalty' and should ordinarily be awarded, due to which the intent of the legislature was not to necessitate the death penalty. Hence, the Court found that awarding one or the other sentence essentially depended upon the facts and circumstances of each case. Moreover, the Court also held that it is highly desirable and legally appropriate to reduce sentence of an accused from death to life imprisonment if the accused has already remained in jail and death cell for a significant period, for instance in this case, as under-trial prisoner for about two years and almost 16 years in the death cell. The conviction of the accused individuals was maintained but their sentences of death were reduced to life imprisonment.

Azeem Khan v. Mujahid Khan⁴⁰⁸

This appeal in a case of kidnapping for ransom and murder was filed before the Supreme Court after the Lahore High Court confirmed the death sentence awarded by the Anti-Terrorism Court to the two appellants. Even though, in the case, a DNA report of bones was admitted into the evidence and relied upon, the Court stated that it would in no manner be sufficient to connect the necks of the accused persons with the commission of the crime when the bulk of other evidence against them was found to be unbelievable, and thus, such a DNA report is not sufficient to award a capital sentence. Moreover, the Court found illegalities committed by the Magistrate in recording confession of accused, due to which the judicial

406 2013 PLD Supreme Court 793

407 2014 SCMR Supreme Court 1034

408 2016 SCMR Supreme Court 274

confession was considered unworthy of reliance. It also stated that extra-judicial confessions are a weak type of evidence on basis of which conviction on capital charge could not be recorded. With regard to circumstantial evidence, the Supreme Court stated that different pieces of circumstantial evidence must make one chain, an unbroken one where one end of it touched the dead body and the other the neck of the accused; any missing link in such chain, would break the whole chain, and no conviction could be recorded in crimes entailing capital punishment. Due to this, Courts must take extraordinary care and caution before relying on the circumstantial evidence to award capital punishment. The Court also warned lower courts to remain impartial, even when adjudicating particularly gruesome murders. The Court found that the Trial Court had relied on highly cryptic and infirm evidence to award death sentence to accused persons, set aside convictions and death sentences awarded to accused persons and acquitted them of the charge.

Muhammad Ismail v. the State⁴⁰⁹

In this case, Muhammad Ismail, the accused was sentenced to death by the trial court in 2005, and his sentence was commuted to life by the Supreme Court in 2017. The Court through this case, adopted a more lenient approach for crimes committed in rural areas by offenders motivated by community or familial enmities. The basis upon which the commutation was granted was that “some detestable affairs in the family of the deceased were prevailing, rendering the appellant unable to bear the stigma/blot on the escutcheon (family honour). The Court stated that “the rustic and conservative mind, a distinct feature of our rural society, is always susceptible to drive away a person to a point, retrieval wherefrom, becomes impossible.” It further stated with regard to the death penalty that “once the prosecution sets up a particular motive but fails to prove the same, then, ordinarily capital sentence of death is not awarded, which is a consistent view of the Supreme Courts since long.”

Amjad Shah v. The State⁴¹⁰

In this case, the Supreme Court held that “youthful tendency toward excitement and impulsiveness” should be “treated by the law as a mitigating circumstance” against a death sentence. Moreover, the Court highlighted that the accused's intention, guilty mind or motive to commit the offence, if unproven, the Court must, for the sake of administration of justice, adopt caution and treats the lack of motive as a mitigating circumstance for reducing the quantum of sentence awarded to a convict.

Muhammad Sharif v. State⁴¹¹

In this appeal in an anti-terrorism case, upon a reappraisal of evidence, a reduction in the quantum of sentence was sought. The Court altered the death sentence to imprisonment for life, and the reason stated was that the casings found wedded with the recovered gun were dispatched subsequent to the arrest of accused. This factor was viewed by the High Court as a mitigating circumstance for the co-accused.

Iftikhar Ahmad v. State⁴¹²

In this case under the Anti-Terrorism Act on murder and abduction for extorting property, valuable security etc., the death sentence was commuted to life imprisonment since the Court found that no DNA identification of swabs had been carried out. The Court stated that the Prosecution's failure to carry out DNA profile generation of rectal and vaginal swabs was a grievous lapse, which, in retrospect, made a case

409 2017 SCMR Supreme Court 713

410 2017 PLD Supreme Court 152

411 2019 SCMR Supreme Court 1368

412 2019 SCMR Supreme Court 1224

for the revisiting of the sentence of the accused. Hence, the death penalty awarded to the accused on all counts was altered to imprisonment for life.

Mst. Safia Bano v. Home Department, Govt. of Punjab thr. its Secretary, Lahore & others⁴¹³

In this case, the Supreme Court reviewed several civil and criminal petitions and had to determine questions relating to liability of, competence to undergo trial and execution of sentence for accused persons who suffer from mental illness. The Court dealt with cases of Imdad Ali, Mst. Kaneezan Bibi and Ghulam Abbas to explain whether execution of death sentence against the accused, could be allowed in light of their mental illness. The following legal questions were posed by the Court: how a trial Court should deal with a plea by an accused should that he/she was suffering from mental illness at the time of commission of the crime, how should the trial Court deal with claims that the accused is incapable of presenting a defence owing to their mental illness, and finally whether a mentally ill prisoner should be executed.

These legal questions have been a focus of much debate in Pakistan. Before embarking on a discussion on the legal questions, the Court determined the definition of 'mental illness' in Pakistan. The Court referred to the Mental Health Ordinance, 2001 which defines mental disorder as mental illness, mental impairment, severe personality disorder and any other disorder which may amount to a disability of mind. Furthermore, mental impairment has been defined within the Ordinance as when an individual suffers from arrested or incomplete development of the mind due to which intelligence, social functioning and a person's conduct is impacted. The Ordinance also defines severe personality disorder as a persistent disability of the mind which may lead to aggressive or abnormal behaviour in a person. Severe mental impairment has been defined as well, as a state of incomplete development which severely impacts the social functioning and conduct of a person, and finally a mentally disordered prisoner has been defined as a prisoner, subjected to detention, or removed to a psychiatric facility in accordance with the law. Post devolution, these definitions have been adopted through the Punjab Mental Health (Amendment) Act 2014, the Sindh Mental Health Act, 2013, the Khyber Pakhtunkhwa Mental Health Act, 2017 and the Balochistan Mental Health Act, 2019.

In assessing domestic, and foreign definitions of mental illness, the Court conclude that mental illness, or mental disorder are both used to refer to mental ailments, and recognised that with the advancement of medical science, the definition may evolve.

In answering the first legal question, the Court further explained that in a criminal trial, two situations regarding the mental health of an accused could arise: firstly, the state of mind of the accused at the time of the commission of the crime, and secondly, the mental state of the accused prior to the commission of the crime. The first instance is dealt with under Section 84 of the PPC, to understand the application of which the Court referred to cases such as *Khizar Hayat v. The State*,⁴¹⁴ *Lal Khan v. The Crown*,⁴¹⁵ and *Ghulam Yousuf v. The Crown*,⁴¹⁶ and stated that the onus to prove the plea under Section 84 lays with the accused which must be supported by material and evidence available on record. The Court laid down guidance in relation to a Section 84 plea and stated that in assessing the applicability of the Section, the following must be considered: that the prosecution is under a duty to prove its case against the accused beyond reasonable doubt, but where the accused raises a specific plea, then the onus shifts to the accused who may use oral or documentary evidence to support their plea.

413 C.R.P.420/2016

414 2006 SCMR 1755

415 PLD 1952 Lahore 502

416 PLD 1963 Lahore 213

With regards to the second question, the Court referred to Section 464 and 465 of the Cr.P.C which deal with trial of an accused before a magistrate, and trial before a Court of Sessions or High Court respectively. Both sections reflect that if the Court has a 'reason to believe' that the accused suffers from a mental illness which makes him incapable of presenting a defence in his favour, then the Court must investigate the mental capacity of such individual. The Court, in this case, explained that a reading of these sections leads to consideration of the question that whether a trial Court could determine the incapacity of the accused, owing to their mental illness, without seeking the opinion of a medical expert? After assessing relevant case law in this area, the Supreme Court stated that 'reason to believe' and 'appears to the Court' within Section 464 and 465 are to be seen as synonymous and constitute a tentative opinion of the Court with regards to the incapacity of the accused. However, the opinion of the Court must be based on an objective assessment of the material and the information found within the police and case file. To make this assessment, the Court may look towards factors such as the demeanor of the accused person, whether they are being represented by a Counsel, by asking the accused questions to assess their mental capacity, by determining whether the accused understands the nature of the proceedings against him, the process which is being followed in the trial, the role of the people around the accused etc. However, the Supreme Court clarified that a tentative opinion as to the mental capacity of the accused may not only be made on the basis of these questions, and an objective assessment must be made. Once, a tentative opinion has been formed that the accused is incapable of presenting his defence, then the Court must embark on an inquiry to support their tentative opinion. This will require consideration of adequate medical opinion as well. The Supreme Court laid guidance as to the nature of the medical examination as well and stated that the Medical Board must provide a detailed report of the observations they have made of the accused, supported by medical evidence and referring to psychopathology if required.

The Court then moved on to assess the final question which was to identify whether a mentally ill prisoner may be executed or not? It recognised that Statute or Rules in the Country do not place a restriction on the execution of a convicted mentally ill patient. However, it referred to certain rules within the Prison Rules which provide for safeguards for the protection of mentally ill patients. The Court referred to Rule 107(iv) which provides that the Superintendent must submit two copies of the medical report of the prisoner along with a mercy petition to the President of Pakistan where a prisoner takes a plea of mental illness. Moreover, it referred to a conjoined reading of Rule 362 and the warrant issued under Section 381 Cr.P.C which shows that the purpose behind the rule is to ensure that the prisoner understands the reason behind his execution. In the same way, the reason for informing a condemned prisoner that his appeal or mercy petition have been rejected is that the prisoner must be aware that he doesn't have any further legal remedies. Rule 362 also allows a condemned prisoner to make a will prior to their execution. The Court refers to the Rules discussed as implied safeguards against execution of a mentally ill prisoner as their mental illness will inhibit their capacity to understand the reason for their punishment.

The Court also pays heed to the treatment of mentally ill prisoners in other jurisdictions such as the United States and India and refers to Resolution 2000/65 adopted by the United Nations Commission on Human Rights where it was insisted that the death penalty must not be imposed upon a person suffering from a mental disorder and thus, such a person must not be executed. In addition to this, reference was made by the Court to Rule 109 of the United Nations Standard Minimum Rules for the Treatment of Prisoners which provides for the protection of prisoners who suffer from mental illness or disability. On the basis of this material, the Court concluded that if a prisoner is found to be suffering from mental illness due to which their ability to comprehend the reason behind their punishment is impeded, then execution of such a person will be against the principle of justice.

