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Editor's Note

One of the purposes of the creation of United Nations Organization (UN) was to ensure that human rights violations like those perpetrated by the Nazi regime in Germany could not be allowed to be repeated again. It looked like a distant dream in 1945 but over the course of the last six decades, the world has covered significant ground in realization of this dream. It started with the United Nations Declaration of Human Rights 1948 (UDHR), as for the first time human rights were internationalized. A common standard was provided to be achieved by all member states. The coming decades witnessed a slow but steady progress in this field, and in 1966, through the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), the principles espoused by the UDHR were made binding. Many states accepted the principles, ratified the treaties and started the process of bringing domestic law in consonance with the treaty principles.

However, during the same phase, Pakistan went through probably its darkest age under the military rule of General Zia-ul-Haq. The 1973 Constitution of Pakistan (Constitution) was held in abeyance and martial law was imposed. New laws were made which either completely or partially conflicted with the fundamental freedoms enshrined within the Constitution and principles of international human rights. The most radical interpretation of Islam was used to justify the promulgation of laws like Hudood Ordinance and Penal Code Amendments (Blasphemy laws). Minorities and women were relegated to second class citizens, and laws were used to persecute the political opposition and minorities. This Islamization left a lasting dent in Pakistan's human rights ambitions. While we no longer live in that time, today Pakistan is going through a challenging phase once again. The country is embroiled in an ongoing war on terror. The armed forces have been fighting terrorist elements for years now. Yet the law and order situation in Pakistan keeps on deteriorating. The pressure on the police and armed forces to respond forcefully to curb terrorism is immense, and therefore, the response at times is disproportional and in violation of human rights standards. Our domestic legal regime did not envisage these turbulent times.

One such problem is torture. It is a routine practice during physical remand of an accused. It is used mostly to elicit confessions and/or to recover incriminating evidence from the accused. The investigating agencies in Pakistan are so reliant on incriminating evidence recovered from the accused during his/her physical

remand, that Magistrates have stopped resisting applications for such remands. In turn, the entire system has become dependent on this type of evidence, and jurisprudence has developed which condones the mechanical allowance of a physical remand. While torture is prohibited in article 14 of the Constitution, in absence of any structural accountability mechanism there is virtual impunity for the perpetrators, who are mostly either policemen or members of the armed forces. Absence of any specific legislation in this area which criminalizes torture in Pakistan has exacerbated this problem. Thus it is extremely difficult to bring complaints against instances of torture and hold perpetrators responsible.

Therefore, the need for relying on international standards is important. While Pakistan may have ratified some international human rights instruments like the ICCPR, ICESCR, CEDAW and CAT (among others), Pakistan still hasn't opened up to the idea of international human rights laws application domestically. One of the major reasons is the lack of awareness. This dearth of adequate knowledge in the subject is due to a variety of factors, chief among those is the fact that international human rights law is not offered in the majority of law colleges across Pakistan. Therefore, many lawyers and judges are not well acquainted with this rather new stream of international law. Apart from law colleges, there is very little exposure opportunity in this area. No law college in Pakistan publishes an international human rights journal. While some research societies have publications which cover international human rights law, the primary focus of these research publications is in the area of Public International law.

In the circumstances, it is essential that awareness and activities which may generate interest in this area be given priority. It is also significant to create some legal scholarship in this area. This journal endeavors to serve these two purposes and balance them. As a result, it has provided a platform to students, some of whom have never written before, but simultaneously carries contributions from seasoned practitioners in the area. Since it is an exercise in public advocacy, it has the potential of being a stimulant for much needed dialogue and debate on many controversial issues.

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USING PUBLIC INTEREST LITIGATION TO ADDRESS MATERNAL MORTALITY AND MORBIDITY IN PAKISTAN

Zainab Qureshi[1]

INTRODUCTION

Reproductive rights advocates all over the world are recognizing judicial systems as avenues for developing standards for and attaining greater enforcement of women's rights.[2] Domestic courts are being approached to bridge the disjunctions between international human rights standards and domestic legislation and state practice, and between domestic legislation and state practice and the reality of women's lives.[3] In South Asia, public interest litigation (PIL) has emerged as a strategy to address high maternal mortality ratios (MMR) in the region by establishing government accountability for maternal deaths and pregnancy related morbidity.[4] Petitioners in public interest litigation draw upon government's international legal obligations and constitutional provisions to establish its accountability for the number of preventable maternal deaths occurring within its jurisdiction. Drawing upon similar constitutional frameworks and a shared set of constitutional norms, the courts in the region have progressively eroded procedural restrictions limiting access to courts and given expansive interpretations to fundamental rights and remedies.

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2 *See* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_ar_What_Role_Can_Int_Litigation_Play_LAC_2003.pdf

3 Id.

4 For India see Sandesh Bansal v. Union of India and Others, P.I.L W.P. 9061/2008, where the supreme court recognized that the right to survive pregnancy and childbirth is a fundamental right under Article 21 (Right to Life) of the constitution of India; *Remlata w/o Ram Sagar & Ors. v. Govt. of NCT Delhi,* W.P. Civ. 7687/2010, the court emphasized the need for nutrition and maternal health care facilities for the vulnerable populations in Delhi; Smt. Shakuntala Devi v. State of U.P. and Others, W.P. (Civ) No. 4999 (2008), the court directed the government of the U.P. to check incidents of pregnant women being turned away from health facilities; For Nepal *see* Lakshmi v. Government of Nepal, where the court ordered the government to promote safer abortion facilities for all women; pass a comprehensive abortion law; disseminating safer abortion information, available at http://reproductiverights.org/en/case/lakshmi-dhikta-v-government-of-nepal-amici-supreme-court-of-nepal

Pakistan, despite its rapid and progressive development in the jurisprudence on public interest litigation in several substantive areas, has failed to take advantage of the progress in the judicial recognition and development of reproductive rights taking place in the surrounding region. Despite being a signatory of both the International Conference on Population Development (ICPD) and the Millennium Development Goals (MDG), Pakistan has failed to incorporate reproductive rights in its political discourse, health policies and legislation. Similarly, the women's rights activists including NGO's, also lag behind their counterparts in neighboring countries in establishing government accountability and challenging the economic and social structures that perpetuate violations of reproductive rights of their constituents. On the other hand, Pakistan has the sixth highest number of maternal deaths in the world and is not on track to meet its proposed target under the MDG's.

It is within this context that this paper examines the effectiveness of public interest litigation as a strategy to address maternal mortality and morbidity in Pakistan. It evaluates the Public International Law (PIL) mechanism and its capacity to establish government accountability for maternal deaths and pregnancy related morbidity, particularly through the legal recognition of "right to survive pregnancy and childbirth", through an examination of constitutional norms and jurisprudence of the superior courts in Pakistan. It also examines the relationship between a judicial decision establishing government accountability for maternal mortality and a desired decrease in the country's Maternal Mortality Rate (MMR).

Part 1 examines the current state of maternal health in Pakistan and discusses the causes of maternal morbidity and mortality. Part 2 examines the constitutional norms and principles and the jurisprudence of the High Courts and Supreme Court under public interest litigation in Pakistan in order to determine the likelihood of success of a litigation seeking the "right to survive pregnancy and child birth." Part 3 examines whether the successful legal recognition of a right to survive pregnancy and child birth in Pakistan will be effective in addressing maternal mortality and morbidity in Pakistan.

The paper argues that despite the existence of a favorable framework of fundamental rights and procedural flexibilities in the constitution of Pakistan, the public interest litigation mechanism will only be effective in accordance with a partial legal recognition of the "right to survive pregnancy and childbirth." It also argues that even a successful PIL action will be unlikely to impact the MMR, as a result of the absence of a coordinated advocacy movement to complement the

litigation strategy and the backlash increasing the salience of the reproductive rights issues, may generate.

Part 1

MATERNAL MORTALITY: CURRENT STATE IN PAKISTAN

According to United Nations Population Fund (UNFPA), estimates contained in its report, *The State of World's Midwifery 2011: Delivering Health, Saving Lives*, Pakistan has a maternal mortality ratio of 260 deaths per 100,000 live births.[5] The report indicates that even though the national MMR has steadily declined since 1990, the rate of decrease is too low to reach its MDG (less than 140) target by 2015.[6]

In reality, however, the estimated MMR may be much higher due to an under registration of deaths, particularly the rural areas, and lack of documentation of information on causes of death in the country.[7] Similarly, the trends in the national averages mask the uneven distribution of MMR across different regions and populations. While the national average has decreased steadily, MMR rates have increased in certain regions. For example, the estimated MMR for the province of Baluchistan is around 850 deaths per 100,000 live births – more than 3 times the national average.[8] Women from lower socio-economic classes and rural areas experience maternal mortality at significantly superior rates than their counterparts. Evidence indicates that women in rural areas are at almost twice the risk of dying from maternal health concerns than women from urban areas. The MMR for the former is 319 and the latter is 175 per 100,000 live births.[9]

Haemorrhage, hypertensive disorders, sepsis and obstructed labour are the major direct causes of maternal mortality in Pakistan.[10] All of these causes are preventable and once detected they are treatable. The prevalence of these concerns

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[5] *See* http://www.unfpa.org/sowmy/resources/docs/country_info/profile/en_Pakistan_SoWMy_Profile.pdf

[6] Id.

[7] *See* http://www.ayubmed.edu.pk/JAMC/PAST/15-2/shamshad%20maternal%20mortality.htm

[8] *See* http://www.unpo.org/article/11087

[9] *See* MATERNAL AND NEWBORN HEALTH: POLICY CONTEXT IN PAKISTAN at http://rafpakistan.org/userfiles/MNH-PolicyContextPakistan.pdf

[10] *See* PAKISTAN: NATIONAL MATERNAL AND CHILD HEALTH POLICY AND STRATEGIC FRAMEWORK (2005-2015) (April 2005) at http://www.unfpa.org/sowmy/resources/docs/library/R208_MOHPakistan_2005_MCH_StrategyFinal_Final.pdf

persist due to a lack of provision of basic health facilities, trained staff, adequate medical supplies and equipment. The health system in Pakistan suffers from a lack of investment by the government,[11] which results from both a lack of political will and lack of government revenue.[12] Another direct cause of maternal deaths is unsafe abortion. Induced abortion in Pakistan is legal under limited circumstances.[13] However, due to low contraceptive use, the incidence of abortion is relatively high.[14] As a result of restricted access, women seeking abortions often resort to unsafe procedures and, therefore, put themselves at risk of long-term complications and death.[15]

Contributing to and perpetuating the direct causes, are the indirect causes that form the underlying basis for a significant proportion of the maternal deaths. These include the larger social, economic and political forces that discriminate against women, especially those belonging to poor and marginalised groups, and therefore limit women's access to maternal health care services.[16] Lower social status and lack of control over financial resources means that women are less likely to demand, or be allowed access to health care services.

Similarly the prevalence of early marriages in Pakistan is also an underlying cause of its high maternal mortality rate.[17] In Pakistan almost 40% of all women marry before the age of 18, and 13% marry before the age of 13.[18] Early marriage is associated with longer reproductive life, lower social status, and lower ability to exercise control over the number and spacing of children and contraceptive use. Therefore, research in Pakistan has shown that early marriage is linked to superior rates of unfavourable pregnancy and superior rates of unsafe abortions not just in all pregnancies.[19]

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[11] Id.
[12] Id.
[13] During the first four months of the pregnancy, abortion is legal for "necessary treatment" or to save the life of the mother. After four months abortion is only allowed to save the life of the mother. *See* ABORTION IN PAKISTAN at http://www.guttmacher.org/media/nr/2009/11/04/index.html
[14] In 2002, nearly 900,000 pregnancies were terminated through induced abortions. *See* Id.
[15] Id.
[16] *See* BRIEFING PAPER: GENDER INEQUALITY, SOCIAL EXCLUSION, AND MATERNAL & NEWBORN HEALTH at http://www.rafpakistan.org/userfiles/GenderAndSocialExclusionBriefingPaper.pdf
[17] The legal age to marry for women is 16 years and for men is 18 years. See Child Marriage Restraint Act, 1929 at http://pakistan.childrightsdesk.com/?p=1094
[18] *Supra* note 14
[19] Id.

Violence against women is also prevalent in Pakistan and continues to rise consistently. According to a study by Aurat Foundation there were 8539 cases of violence against women in 2011 – a 6.74% increase from 2010.[20] Over 70% of women in Pakistan experience domestic violence regularly.[21] Sexual coercion is also prevalent within marriage and marital rape is not a criminal offence as men are perceived as entitled to demand sex from their wives. Domestic violence, particularly sexual violence also continues during pregnancy for some women. Given the stigma attached to domestic violence and the lack of institutional and social support extended towards the victims, very few seek necessary reproductive health services.

The prevalence of risk factors and the incidence of maternal mortality and morbidity in Pakistan makes the government responsible under the international human rights framework. The formulation of maternal health as a human rights concern is to "characterize, women's multiple disempowerments, not just during pregnancy and childbirth, but from their own births as a cumulative injustice that governments are obligated to remedy."[22] International human rights law requires states to take "effective curative measures to protect women's reproductive health and to afford women the capacity for reproductive self-determination."[23] Therefore the international human rights framework can be used to establish government accountability for failing to address direct and indirect causes of maternal mortality and morbidity in Pakistan through a public interest litigation seeking constitutional recognition for a right to survive pregnancy and child birth.

Part 2

RIGHT TO SURVIVE PREGNANCY AND CHILD BIRTH

In its resolution on preventable maternal mortality and human rights, the United Nations Human Rights Council recognized maternal morbidity and mortality as a human rights concern that the governments have an immediate obligation to take

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[20] See *Incidents of Violence Against Women in Pakistan during 2011* at http://www.af.org.pk/PDF/VAW%20Reports%20AND%20PR/PR/Press%20Release%202011%20%20English.pdf

[21] *See Supra* note 16.

[22] Rebecca J. Cook, 'Human Rights Law and Safe Motherhood', 5 EJHL, 357-375, at 358 (1998) available at http://www.law-lib.utoronto.ca/diana/fulltext/cook3.htm

[23] Id 376

meaningful steps to address.[24] The resolution asserted that the staggering rates of preventable maternal death globally are a result of a government's failure to protect and promote women and girl's "rights to life, dignity, education, non-discrimination, to be free to seek, receive and impart information, to the benefits of scientific progress, and to the highest attainable standard of health, including sexual and reproductive health."[25] The right to survive pregnancy and child birth establishing the Pakistani government's accountability under the international human rights framework, therefore encompasses, at a minimum, the right to health, right to non-discrimination, and the right to reproductive self determination.[26]

A right to health care is based upon the "right to the highest attainable standard of health" protected by the Convention on the Elimination of Discrimination Against Women (CEDAW) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[27] The right to health is not a right to be healthy, but encompasses the "availability, accessibility, acceptability and quality" of health care and "the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health."[28] Similarly, the right to ensure adequate maternal health care is recognized as a core obligation under the ICESCR.[29] Article 12.2 of CEDAW enjoins upon state parties to "ensure to women appropriate services in connection with pregnancy, confinement and the post natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."[30]

Similarly discrimination against women under the Convention on the Elimination of Discrimination Against Women (CEDAW) is defined as

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[24] Preventable Maternal Mortality and Morbidity and Human Rights, HRC Res. 11/8 , U.N. Doc. A/RES/11/8 (Jun 17. 2009)

[25] Id.

[26] See for e.g. the case of Sandesh Bansal v. Union of India (PIL) W.P 9061/2008 the court stated that a woman's right to survive pregnancy and childbirth is a fundamental right recognized in the constitution. The litigation was filed as part of national litigation strategy recognizing reproductive rights as fundamental rights. In a legal memorandum submitted by the Center for Reproductive Rights, the right to survive pregnancy and child birth was defined as encompassing the right to health, right to non-discrimination and a right to reproductive self determination.

[27] International Covenant on Economic, Social and Cultural Rights (ICESCR), Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3. Art. 3.6 ; Convention on the Elimination of All Forms of Discrimination Against Women(CEDAW), Dec. 18, 1979, 1249 U.N.T.S. 13, Art. 12.

[28] CEDAW, Id, Art. 12.2.

[29] Committee on Economic, Social and Cultural Rights, General Comment 14: The Right to the Highest Attainable S Standard of Health, para 44(a), UN D.O.C E.C12/2000/4.

[30] CEDAW. *Supra note* 26, Art. 12.2

> "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[31]

A right to non-discrimination under this Convention would enjoin upon states to not only refrain from carrying out acts of discrimination themselves, but also aim towards the modification of social and cultural patterns of individual conduct in order to eliminate "prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."[32]

A right to reproductive self determination is the right to make informed decisions about your reproductive life. Article 16 of CEDAW defines this as the right to "determine the number and spacing of one's children."[33] The right enjoins upon states to guarantee a full range of "contraceptive choices; reproductive health services including safe abortion services; information on family planning and sexual and reproductive health."[34]

This paper evaluates the ability of the PIL mechanism to create a human rights based approach to maternal mortality in Pakistan through the legal recognition of a right to survive pregnancy and childbirth with all of the components described above.

CURRENT STATE OF LAW AND PUBLIC INTEREST LITIGATION IN PAKISTAN

Several of the international human rights implicated by the right to survive pregnancy and child birth are explicitly recognized as fundamental rights in Chapter 1, Part 2, of the Constitution of Pakistan, while some of the others have been recognized as constitutional guarantees through the superior courts' broad interpretation of the former. This section examines the provisions of the constitution and superior court jurisprudence that could form the basis of legal recognition to the "right to survive pregnancy and child birth" through public interest litigation.

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[31] Id., Art. 1.
[32] Id., Art. 5(a).
[33] Id., Art. 16
[34] *See* http://reproductiverights.org/sites/default/files/documents/pub_bp_surviving_0105.pdf

PUBLIC INTEREST LITIGATION IN PAKISTAN

Public interest litigation is a judicially created mechanism in Pakistan under which any individual and organization can bring an action against the federal and state government officials and authorities alleging violations of fundamental rights enshrined in the constitution of Pakistan.[35] The law on public interest litigation was created to take cognizance of the inability of Pakistan's inherited colonial legal system to address the needs of the vulnerable and socially and economically marginalized sections of society- most of whom lacked the ability, financial resources or knowledge to access the courts.[36] Through creative, and purposive constitutional interpretation, the superior judiciary recognized its obligation to develop a mechanism that allowed the courts to level the socio-economic differences between the different members of society in terms of their access to justice.[37] Given the fact that the majority of women who die from maternal health related problems belong to the poor and disadvantaged segments in society (as discussed above) they are, therefore, the groups for which the mechanism was tailored.

The courts in Pakistan derive their jurisdiction under Article 175(2) of the constitution.[38] Article 199(1)(c) confers on the High Courts the authority to, on the application of an "*aggrieved party*….. make an order giving such directions to any person or authority….as maybe appropriate for the enforcement of any of the Fundamental Rights..".[39] Similarly, Article 184(3) of the constitution confers original jurisdiction on the Supreme Court to exercise the powers conferred on the High Court under Article 199 for "question(s) of public importance with reference to the enforcement of any of the Fundamental Rights".[4041] Unlike Article 199, Article 184(3) imposes no restrictions or conditions on the Supreme Court except that the enforcement should relate to the fundamental rights as laid down in the

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[35] Avani Mehta Sood, Gender Justice through Public Interest Litigation: Case Studies from India, 41 Vand. J. Internt.l L. 833, 833- 904 (2008), 836

[36] Ahmed Rafay Alam, The Law of Public Interest Litigation in Pakistan, in PUBLIC INTEREST LITIGATION IN PAKISTAN 22 (Pakistan Law House, 2000)

[37] Id.

[38] See CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN, ZAIN SHAIKH, (1973) (Pakistan Law House 2004) [hereinafter PAK CONST] Art. 175(2), which provides that "no court shall have any jurisdiction save as is or may be conferred upon it by the constitution or under any other law".

[39] Id. Art 199(1) (c). This power is subject to the satisfaction of the court that there is no other adequate remedy provided under law.

[40] Id. Art 184(3).

[41] Id. Art 199.

Constitution.[42] The Supreme Court does not require a petition to be filed at the behest of an "aggrieved party" and therefore is not dependent on the traditional rule of locus standi.

PROCEDURAL FLEXIBILITY

The superior judiciary in public interest litigation has progressively loosened the procedural constraints surrounding traditional litigation in order to make the mechanism accessible to the constituency it was created to serve.[43] The hallmark of PIL is the liberalization of the traditional rule of locus standi that requires the litigants to have suffered a legal wrong or at least have a direct personal interest in the matter. The superior judiciary began relaxing traditional formalistic rules of locus standi to include any person acting bona fide on a question of public importance which was related to the fundamental rights enshrined in the constitution.[44] The court has read Article 184(3) as open-ended and as placing no restrictions or requirements with regards to who can make an application to the court.[45] It has on several occasion unequivocally confirmed that under Article 184(3) the public interest procedure can be invoked by any "person acting bona fide".[4647] Similarly, the Lahore High Court has also drastically relaxed the requirement of "aggrieved person" under Article 199, by stating that its jurisdiction can be invoked simply when the fundamental right of a person is violated and bought to the attention of the court.[48] The loosening of the rules of locus standi by the Supreme Court and the High Courts has also initiated the practice of the judiciary taking up cases *suo moto* i.e. taking "notice or cognizance of a

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[42] Mehreen Kasuri Raza, Reviewing the Law of Public Interest Litigation in Pakistan, PUBLIC INTEREST LITIGATION IN PAKISTAN 74 (Pakistan Law House 2004)

[43] *See* Imtiaz Ahmed v. Ghulam Ali,P.L.D. 1963 S.C. 382, at 400 where the court the Supreme Court stated: "I think the proper place of procedure in any system of administration of justice is to help and not thwart the grant to the people of their rights. All technicalities have to be avoided unless it be to comply with them on the grounds of public policy… Any system which by giving effect to the form and not to the substance defeats substantive rights… is defective to that extent."

[44] *See* Benazir Bhutto v. Federation of Pakistan, PLD 1988 SC 416, at 488-489, where the Supreme Court derided the traditional rule of locus standii as making "rule of law selective to give protection to the affluent or to serve in aid for maintaining the status quo of the vested interests".

[45] *See* PAK CONST. Art 184(3).

[46] Id. Art. 184 (3). Menski states that most Pakistanis as a result of being "poor, illiterate and rural" organize themselves "into groups of common interest. Therefore the rule set out in Fazal Din would enable them to enforce their claims to group rights through a representative. *See* Warner Menski, Introductory Overview of Public Interest Litigation in Pakistan: Past and Future, PUBLIC INTEREST LITIGATION IN PAKISTAN 3 (Pakistan Law House 2004).

[48] Muhammad Yousaf v. Inspector General of Police, P.L.D 1997 Lah. 135, at 139.

matter….upon its own initiative."[49] Courts regularly take notice of cases based on newspaper reports or letters addressed to the court by either the parties involved in the matter or bona fide bystanders.[50]

The loosening of the locus standi requirement in the PIL mechanism makes it an effective tool for addressing maternal mortality and morbidity as it does not require the affected woman and her family to directly bring the suit to the higher courts. The absence of a narrow standing requirement for public interest litigation allows lawyers and NGO's to take a leading role in public interest litigation by representing the interests of all women in the failure of the government to ensure and implement a right to survive pregnancy and child birth. This is especially beneficial considering the disproportionate impact of maternal mortality on poor, uneducated rural women who are unlikely to come forward as litigants given their lack of awareness of their rights and the deterrents they face with regards to their physical mobility and their limited access to the provincial High Court or Supreme Court and appropriate legal representation. Similarly, the relaxed rules of locus standi also present an opportunity for international organizations who have been engaged in successful reproductive rights litigation to participate in the arguments and submit legal memorandum to assist the court in the formulation of the right and the corresponding duties it imposes on the state.

In addition to a loosening of the requirement of locus standi, the judiciary has sought to increase the access of the PIL mechanism to the vulnerable and economically backwards parts of the population by keeping the process non adversarial. The court prefers a collaborative approach designed to achieve consensus between the petitioner, the parties affected, the state and relevant authorities in a way that ensures adherence to constitutional or legal principles and rights. In the Darshan Masi case, the court observed that the parties in PIL could not be categorized as "complainants", the "accused" or a contesting party nor could any of the orders passed in PIL be treated as successes or failures.[51] Courts have also dispensed with traditional rules of evidence and admitted NGO reports, newspaper articles, surveys, expert testimonies and government documents. Such a collaborative procedure allows all stakeholders in a particular issue to participate in the proceedings and therefore ensures a result that takes into account all

[49] *See Supra* note 41 at 80

[50] *See*, e.g., Darshan Masih v The State, P.L.D 1990 S.C. 513 , where the court treated a telegram sent to the Chief Justice by bonded laborers imprisoned in a brick kiln as a valid petition under Article 184 (3).

[51] Id. At 543

perspectives. Participation in the proceedings of all stake holders, particularly government officials and bodies, increases the likelihood of their adhering to the results. This is in contrast to a traditional adversarial approach where parties are agnostic and may view the decision with resentment and respond with some backlash. For example in a PIL case asking for the recognition of a "right to survive pregnancy and childbirth", the court can invite health professionals, women's rights activists, victims, traditional birth attendants, government officials and authorities, and even international donors and facilitate dialogue between them in order to reach a solution that takes advantage of all experiences and expertise while at the same time adheres to constitutional fundamental rights principles. Similarly, the court serves as a neutral umpire who balances the power inequalities between the different players and ensures that their perspectives are heard and accorded their due weight. This is especially essential in balancing out the power structures between those afflicted most the maternal health and the government authorities accountable.

Furthermore, the courts have under the PIL mechanism, taken upon the discretion to fashion creative remedies that far exceed those pleaded for in the original application (if any). The remedies range from setting up a committee of experts to draft policies[52] or recommending government to pass legislation.[53] The courts have taken the viewpoint that under PIL they have wide discretion to fashion remedies to effectuate the ends of justice. Therefore, PIL provides the ideal procedural mechanism to formulate remedies that can cater to the diverse and multi faceted causes underlying maternal mortality in Pakistan. The court could order a fact-finding into the inadequacies of the health system and policies and recommend the government to reform accordingly. It could also order an inquiry into legal and customary institutions and rules that perpetuate gender discrimination and facilitate the framing of appropriate relief.

NORMS AND JURISPRUDENCE: THE INTERSECTION BETWEEN ISLAMIC LAW AND FUNDAMENTAL RIGHTS

[52] *See*, for e.g., Shehla Zia v. WAPDA, P.L.D. 1994 S.C. 693, where the court appointed a commission of experts to examine the plan of the Water and Power Development Authority to set up a Grid station in a residential area and suggest alternative locations/plans.

[53] *See*, for e.g., Darshan Masih v. The State, P.L.D. 1990 S.C. 513, where the court directed the government to pass a legislation addressing different forms of forced labor.

Public interest litigation under Article 184(3) and Article 199 must be based on a concern related to the fundamental rights contained in the Constitution of Pakistan. The Pakistani constitution has a comprehensive chapter on fundamental rights that are judicially enforceable in the Supreme Court and the Provincial High Courts by means of writ petitions under Articles 184(3) and Article 199 respectively.[54] Article 8 of the Pakistan Constitution clearly states that any laws, any custom or usage having the force of law" shall be void. Additionally, the constitution also contains the Principles of Policy (Articles 29-33)[55] that are meant to serve as guidelines in enacting government policy and legislation but not directly enforceable judicially. They do, however, exercise persuasive value and are used, at times, to interpret the fundamental rights in a "dynamic, progressive and liberal manner."[56][57]

However, public interest litigation in Pakistan differs from its counterparts in India and Nepal as a result of its close link to the Islamisation of legal and judicial discourse. The Supreme Court has over time outlined the three main sources for public interest litigation in Benazir Bhutto v. Federation of Pakistan: fundamental rights, the Principles of Policy and the Objectives Resolution.[58] In 1985, General Zia ul Haq's regime reinstated the 1973 constitution with several amendments , including the insertion of Article 2-A which made the Objectives Resolution, the preamble to the constitution, a substantive part of the constitution. The Objectives Resolution provides guidelines on how the constitution should be interpreted and directions on framing government policy and legislation; it reifies the sovereignty of Allah and primacy of "the teachings and requirements of Islam as set out in the Holy Quran and Sunnah."[59]

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[54] *Supra* note 41 at 72

[55] The Principles of Policy contain provisions on the promotion of social and economic justice and well being of people , the greater participation of women in the public sphere and the promotion of the Islamic way of life. See PAK CONST, Art 29-40

[56] *See* Benazir Bhutto v. The Federation of Pakistan, P.L.D. 1988 S.C. 416, at 490. The Supreme Court held that the Principles of Policy operate as "subsidiary to the fundamental rights" and should be utilized to progressively interpret them so that the constitution "is not merely an imprisonment of the past, but is also alive to unfoldings of the future".

[57] Indian Courts raised the status of the Directive Principles to that of fundamental rights in the case, Keshvananda Bharati v. the State of Kerala and therefore made them directly enforceable. However, the Pakistani judiciary has not taken such a decisive step. *See* Kesavananda Bharati v. the State of Kerala, AIR 1973 SC 1461

[58] Benazir Bhutto v. Federation of Pakistan, PLD 1988 SC 416

[59] PAK CONST, Art. 2-A

Therefore, while interpreting fundamental rights, courts often make references to Islamic law and stress upon the application of rights in an "indigenized way"- namely in light of the principles of Islam.[60] In fact, the Islamisation discourse has often been privileged over the stipulations contained in the fundamental rights. In Zaheerudin v. State, the court stated that the constitution itself was subservient to Islam and therefore the fundamental rights should be "subordinated to that Islamic criterion."[61]

Therefore, the seemingly secular fundamental rights provisions contained in the constitution have become inseparable from Islam and the courts tend to rely on Islamic law to justify its orders. Religious considerations occupy center stage when issues of women's rights are decided – significantly more so than cases concerning other rights – with the result that feminists often have to base their arguments on the Quran and Sunnah in order to enhance their legitimacy. Secular bases, such as international women's rights law and fundamental rights, are considered as secondary and accepted only to the extent that they can be supported by corresponding Islamic injunctions.[62]

The relegation of women's rights concerns to the sphere of Islamic law explains the dearth of jurisprudence regarding the right to equality and non-discrimination under the secular rights framework. Therefore, while the text of the fundamental rights contained in the constitution provides an ideal framework for the recognition of a right to survive pregnancy and childbirth as enshrined under the international human rights framework, the judiciary's frequent invocation of the Islamic discourse in the context of women's rights severely limits its scope.

This section examines the fundamental rights and the corresponding jurisprudence developed by the higher judiciary, and evaluates how the intersection between the secular rights and the Islamic discourse will affect a PIL litigation seeking a legal recognition of a right to survive pregnancy and child birth.

RIGHT TO LIFE/ RIGHT TO DIGNITY

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[60] The trend can be traced to the 'Scheme for the Protection of Classes of Society in the Country' known more commonly as the 'Quetta Declaration' agreed upon by the Chief Justice of Pakistan, Chief Justices of the provincial courts and the Federal Shariat Court in 1991. The Declaration emphasizes the "Islamic dimension of human rights in Pakistan" and enjoins upon all courts to "strive for realizing the objectives set out in the "Objectives Resolution" as well as in the "Constitution" with particular emphasis on Islamic social justice". *See* Mehreen Kasuri Raza, Supra note 39 at 79

[61] *See* Zaheeruddin v. State, 1993 S.C.M.R 1718, at 1773-1774

[62] This can be seen from the lack of case law and jurisprudence under Article 25(2) and (3), right to non discrimination on basis of sex and special protection for women and children.

Article 9 of the Constitution of Pakistan stipulates that "no person shall be deprived of life or liberty, save in accordance with law"[63] and Article 14 guarantees the "inviolable" "dignity of man". The higher judiciary has often read the former in conjunction with the latter to formulate an expanded guarantee of the right to life. In Shehla Zia v. WAPDA, the Supreme Court interpreted the right to life to "cover all facts of human life." It went on to state that the word 'life', "does not mean nor can it be restricted only to the vegetative or animal life or mere existence of the conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally."[64] Similarly the court in Benazir Bhutto v. Federation of Pakistan further elaborated upon the right to life as including

> genuine freedom, but freedom from wants, illiteracy, ignorance and above all freedom from arbitrary restraint from authority. The right to life includes the right to personal security and safety, the right to have clean and lawful administration, the right to have honest ad incorruptible actions by authorities.[65]

The courts have over the years issued judgments recognizing Article 9 to encompass various socio-economic rights including the right to clean water and the right to a healthy environment. Most critical to the issue of maternal mortality in Pakistan are the judgments recognizing the rights to "preservation of life", "timely medical care" and "adequate medical facilities".

In the case, Muhammad and Ahmed v. Government of Pakistan, the Lahore High Court interpreted Article 9 in light of Article 2 and recognized the government's positive obligation to take "preventable operational measures to protect an individual whose life is at risk."[66] The court relied on case law of the Indian courts to stipulate that:

> The Constitution envisages the establishment of a welfare State at the federal level... In a welfare State the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare State. The Government

[63] PAK CONST. art. 9.
[64] *See* Supra note 55 at p. 714
[65] Id. at 607
[66] Muhammad and Ahmed v. Government of Pakistan, P.L.D 2007 Lah. 346, at 354

> discharges this obligation by running hospital and health centers which provide medical care to the person seeking to avail those facilities[67].

The court later also states that:

> Preservation of human life is thus of paramount importance. The Government hospitals run by the State and the Medical Officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life…[68]

As discussed above, the broad and expansive interpretation of the right to life while amenable to such claims has, unfortunately, not been invoked by either women's rights activists or the courts in response to women's rights violations in Pakistan.

RIGHT TO EQUALITY AND NON-DISCRIMINATION

Article 25(2) of the Pakistan Constitution stipulates that "there shall be no discrimination on the basis of sex" and Article 2 (3) qualifies this by stating that it will not prevent special measures taken to protect women and children.[69] The Article has been invoked mainly in the context of discrimination faced by women in superior educational institutions in admissions and occasionally in employment.[70] Its scope of the jurisprudence that has been developed under this Article is therefore limited to affecting the realities of an elite segment of women in Pakistan.

In contrast to its liberal and broad approach adopted towards the interpretation of the right to life, the judiciary has steered clear of expanding the scope of the rights to equality and non-discrimination particularly that based on sex. The existence of the Article 25 stands in sharp contrast to the pervasive subordination of women in all spheres of life. A part of this disjunction results from the court's unwillingness

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[67] Id.
[68] Id.
[69] PAK CONST, Art. 25
[70] *See*, for e.g. Shirin Munir v. Government of Punjab, P.L.D 1990 SC 292, The Court declared that a quota for women in admission to medical colleges violated Article 25.

to invoke the rights to equality and non-discrimination to challenge the inequality of women in Muslim personal laws in Pakistan.[71] The courts have also been hesitant to enforce these rights in the spheres of familial and kinship based ties and customs especially those pertaining to marriage.[72] Furthermore, as discussed above, Article 25 is rarely invoked in cases dealing with issues affecting women by both judges and litigants as women's concerns are mostly relegated to the sphere of Islamic law and therefore must be couched in those terms in order to be legitimate in the higher judiciary's Islamic discourse.

ISLAMIC LAW

Judges frequently valorize Islamic law as the best system for women and therefore prefer to limit their analysis of women's concerns within that paradigm. For example, in the case of Ghulam Ali and 2 others v. Ghulam Sarwar Naqvi the court compared Islamic law on inheritance and right to property for women with corresponding injunctions in Hindu, Roman and English common law and concluded that

> "It would, therefore, not be far from truth to say that under the Islamic law a woman occupies a superior legal position in comparison to her English or Hindu sister. Thus it is apparent that she occupies the best position as regards her legal status and no other system of law stands any comparison to the Islamic system in this respect".[73]

The court in this case chided social organizations working for women for relying on "alien manner(s) and method(s)" and stated that, "… they need to be equipped with more vigorous training in the field of Islamic learning and teachings. They should provide the bulk of research in Islamic Law and principles dealing with women."[74]

Within the judicial discourse on Islamic law, the predominant construction of women is that of the "virtuous Muslim woman" who is entitled to the "protection and maintenance" of her male relatives[75] and confined to her status as a daughter,

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[71] Infra at p. 22
[72] Id.
[73] Ghulam Ali et. Al v. Ghulam Sarwar Naqvi, P.L.D. 1990 S.C. 1, at p. 15
[74] Id at 22
[75] Id. 19

sister, wife or mother.[76] The discourse is perpetuated through the construction of the binary opposition between the "westernized woman" – who is a rights claiming individual – and the normative construction of the virtuous Muslim woman.[77] The court's jurisprudence on women's rights constitutes primarily of affording protection to women within the roles prescribed by Islamic society.[78] In cases where women have not conformed to the prescribed roles, restrictive interpretations of Islam are consistently invoked to curtail women's rights.[79] Even when the courts issue liberal orders on women's rights cases, the discourse surrounding the virtuous Muslim woman is used to reiterate their prescribed roles and limit the autonomy of women. Therefore, the recognition of a right to survive pregnancy and childbirth by the judiciary would be within the bounds of the judiciary's protectionist discourse and would therefore not encompass the essence of the right under the international human rights discourse, particularly in terms of a reproductive self-determination.

The most representative case of the judiciary's role in restricting women's autonomy through prima facie liberal judgments progressing women's rights is Hafiz Abdul Waheed v. Asma Jehangir.[80] The case, while not a traditional public interest case, is celebrated as a landmark case in the arena of women's rights for deciding that a sui juris girl can contract a valid marriage without the consent of her guardian.[81] However, the court's reluctance to recognize the free exercise of choice by women informs its reasoning. Justice Ramday, writing for the majority, lamented the deplorable influence of the liberal and individualistic values on Pakistani society and denounced "husband shopping"[82]. The judgment pointed out that while the woman's exercise of choice of husband was constitutionally sound, it was socially and morally precarious.[83] He stated, " let the elders of the family-males or females do the search and even research and then whatever is available be put before the boy or the girl, as the case may be, who should then have the final

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[76] *See* Id.

[77] Amina Jamal, 'Gender, Citizenship, and the Nation State in Pakistan: Willful Daughters or Free Citizens?' 31 Signs 2, 283-304 , 285 (2006)

[78] Nausheen Ahmed, The Superior Judiciary: Implementation of Law and Impact on Women in Pakistan, 24 SHAPING WOMEN'S LIVES: LAWS,PRACTICES AND STRATEGIES IN PAKISTAN (Farida Shaheed et al, 1998)

[79] Id at 23

[80] Hafiz Abdul Waheed, PLD 1997 Lahore 301

[81] *See* Id.

[82] Id. At 313

[83] Id.

choice in the matter."[84] Similarly, whilst according to women the same social and legal status as men in the decision to choose a spouse under Islamic law the court hastened to add that absolute equality in all spheres was not possible in order to ensure the smooth running of society.[85] The judgment also recommended that the constitutional permissibility of a women's choice to marry was the result of the state's failure to incorporate Islamic laws into the legal framework and therefore the state should introduce laws that would make extra marital relationships and marriages entered into without the consent of the women's guardian a criminal offense. Thereafter, the courts even while seemingly taking an important step forward in the empowerment of women, failed to validate the autonomy of women and reinforced the protectionist discourse surrounding the normative construction of virtuous Muslim women.

The protectionist paradigm of the Islamic law discourse adopted by the Pakistan judiciary is potentially incompatible with the recognition of reproductive rights. The framing of maternal health as a human right particularly in the form of a right to survive pregnancy and child birth conflicts with the judiciary protectionist discourse surrounding the virtuous Muslim woman. While it is likely that courts will accord recognition to a right to health care,[86] it is unlikely that courts will recognize a right to reproductive self-determination or a right to non-discrimination that extends to Muslim personal laws. The exercise of autonomy does not conform to the judiciary's conception of the virtuous Muslim woman in the protectionist discourse and, as was seen in the *Hafiz Abdul Waheed* case, the judiciary has consistently invoked restrictive Islamic interpretations to curb it.[87] While family planning within marriage has been incorporated within the context of Muslim law, the notion that a woman may choose her own contraceptive method for her own reasons is derided.[88]

Muslim personal law in Pakistan establishes a framework that codifies the inequality between men and women, particularly between husbands and wives, and denies to women a right to self determination. Men hold a right to unilateral divorce and are entitled to have up to four wives (albeit with the permission of

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[84] Id.
[85] *See* Id.
[86] Recognition of a right to maternal health care by the judiciary is likely considering its previous ruling recognizing a right to timely health care and adequate health facilities in previous case. *See* Infra at p. 16-17
[87] *See supra* note 81.
[88] Sajeda Amin et al, 'Religious and Cultural Rights: Women's Reproductive Rights and the Politics of Feminism: A view from Bangladesh' 44 Am. U.L. Rev. 1319, 1335 (1995)

previous wives).[89] Women can only possess a delegated right to divorce if expressly granted to them by their husbands in the *nikahnama* at the time of marriage and are not entitled to any rights over the property of their husbands or any other form of maintenance in the event of a divorce.[90]

The inequitable role of men and women in marriage are perpetuated through the wide spread acceptance of domestic violence in law and political discourse. A Bill criminalizing domestic violence was first tabled in the national assembly in 2009. The debate over the Bill has remained frozen in deadlock for over 3 years with a significant proportion of the parliament adamant that the Bill "legalizes anti-Islamic values in the name of so-called women's emancipation" [91] and that it amounts to an attack on "Islamic values and traditions"[92] through promoting Western culture.[93]

Similarly, traditionally notions of gender inequality are also inscribed in the law on evidence and on inheritance. The judiciary's complacency in perpetuating and conforming to the traditional Islamic law on women's role in marriage, makes it unlikely that it would transgress the bounds that make the woman's will subservient to obedience to her husband constructed by Muslim personal law in Pakistan. The judiciary has failed to exercise its wide discretionary power under Article 199 and Article 184(3) to challenge the apparent inequality between the sexes within the sphere of the family despite the explicit recognition of right to non-discrimination on the basis of sex under the constitution. Therefore, the judiciary operating through its dominant paradigm on Islamic law is unlikely to recognize legal protection against the inherent inequality of women, particularly in marriage, inscribed in social conventions and law.

Despite the procedural flexibilities and secular framework of rights contained in the constitution that are conducive to a PIL effort aimed to according legal recognition to a right to survive pregnancy and childbirth, it is unlikely that the courts will be willing to recognize and give effect to all aspects of the right. In fact, given the wide discretion exercised by the judiciary under PIL in relaxing rules of adversarial procedure, evidence and fashioning creative remedies, it is possible that a PIL effort seeking recognition of a right to survive pregnancy and childbirth may

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[89] *See* http://www.unhcr.org/refworld/country,,IRBC,,PAK,,4784deeec,0.html
[90] Id.
[91] *See* http://tribune.com.pk/story/365512/domestic-violence-bill-clerics-as-government-to-review-decision/
[92] Id.
[93] *See* http://tribune.com.pk/story/364897/law-against-domestic-violence-still-a-far-cry/

provide the judiciary an opportunity to reify its protectionist discourse. In an exercise of its powers under public interest litigation the court is likely to disregard formal rules of evidence in ways that disadvantage affected women under the guise of "protection", for example, by allowing the husbands and other male relatives of the affected women to provide evidence on their behalf because of the women's lack of physical mobility and observance of *purdah* (social exclusion). Similarly by using its broad power to fashion remedies the court is likely to effect an interpretation of the right that is radically distinct from its formulation in the human rights framework. For example the courts may enforce the right by entrusting the responsibility of maternal health care to the women's husbands and other male relatives.

PART 3

BACKLASH TO A RIGHT TO SURVIVE PREGNANCY AND CHILDBIRTH

In order to determine the effectiveness of PIL as a strategy to address maternal mortality in Pakistan, it is important to examine the impact of the court's judgment recognizing a right to survive pregnancy and child birth. It is likely that raising the salience of the issues of reproductive rights within the context of maternal mortality and morbidity through public interest litigation may generate conservative political back lash on some of these issues and may end up worsening the realities of victims. This can be illustrated through the example of access to abortion. Abortions are legal under only limited circumstances. However, as discussed above, there is a high incidence of women who resort to them. Similarly, while access to abortion services is limited, they are performed by both health care professionals and traditional birth attendants. Abortion, even though highly stigmatized socially, is generally tolerated and there have been virtually no arrests or convictions under the sections criminalizing it. However, raising the salience of the issue in public discourse will likely generate a strong negative reaction, most likely fueled by the Islamic political parties. This reaction can be gauged by the strong, negative public reaction incited by the Islamic political parties towards the Bill criminalizing domestic violence. A strong negative reaction can lead to stronger enforcement of the criminal laws and deter women from seeking abortion services. It may also deter women from seeking medical care for complications arising out of abortions.

Similarly private media in Pakistan, as a result of the fierce competition and limited regulatory oversight, thrives on sensationalism and is often accused of disregarding ethical and objective standards.[94] In order to increase ratings, media outlets often cater to the stereotypical and traditional portrayals of women with the result that women not conforming to the dominant stereotypes are portrayed in negative roles in both news broadcasting and entertainment. Urdu media, including Urdu broadcasting channels and newspapers, commands majority of the viewership in the country and is especially complicit in responding to the "conservative views and perspectives" of its readers.[9596] The media is likely to sensationalize issues of abortion and contraceptive use and present them in a negative light. This will not only fuel existing negative perspectives towards women's reproductive rights but also influence the opinions of people who have so far been ambivalent to the issue. A negative back lash will push law enforcement agencies towards more vigilant enforcement of criminal sanctions on abortions but may also off set the social change in acceptance of women's autonomy and reproductive self-determination.

WOMEN'S MOVEMENT

The success of PIL in achieving its desired social and political aims lies in the complementing the litigation process with a well-coordinated advocacy movement.[97] Several PIL litigation efforts in Pakistan that have been successful in gaining favorable remedies from superior courts, have failed to effect the desired social change as a result of the lack of advocacy movement to monitor and enforce the remedies. For example, in the *Darshan Masi* case the court ruled that the practice of bonded labor violated Article 11 (prohibition on slavery and forced labor) of the constitution and advised the government to pass appropriate legislation that would address different forms of forced labor.[98] The government responded by passing the Bonded Labor System (Abolition) Act 1992. Even though there were a few cases filed under the Act immediately after it was passed

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[94] *See* http://afpak.foreignpolicy.com/posts/2012/03/22/pakistans_pugnacious_press

[95] *See* http://i-m-s.dk/files/publications/1491%20Pakistan.final.web.pdf at 31

[96] A recent example is a column written by a prominent journalist Javed Chaudhry for a urdu newspaper for defending perpretrators of acid attacks on women. *See* Javed Chaudhry, Challa Goli, Daily Express, April 1 2012 available at http://cdn.criticalppp.com/wp-content/uploads/2012/04/1101487647-2.gif

[97] *See* supra note 33 at 885

[98] *Supra* note 52

not much has been done since then.[99] Human Rights organizations such as the Human Rights Commission of Pakistan, frequently report on the prevalence of bonded labor in Pakistan.[100] There have been limited community mobilization and policy advocacy efforts targeting bonded laborers, especially in rural areas, following the introduction of the Act. Most bonded laborers remain unaware of their rights and the remedies to which they are entitled. Therefore, the lack of an effective women's rights movement in Pakistan may mean that even a successful PIL effort is unlikely to translate into the desired social and political change necessary to address maternal mortality and morbidity in Pakistan.

The women's rights movement in Pakistan is dominated by the urban, middle and upper class women and has therefore focused largely on their interests.[101] It began in the late 1970's and early 1980's when women the urban, middle and upper class women felt like they were the main targets of the anti-women legislation and Islamisation of the General Zia-ul-Haq's regime.[102] Given the stratified and fragmented nature of Pakistani society and limited cross-cultural interaction the gains of the movement have failed to reach the lower class and rural women. Similarly the efforts of the movement have remained focused on legislative reform and participation in the political arena. These gains have failed to affect the realities of the urban and rural non-elite women the basis of whose oppressions lies not in the public but the misogynistic practices of the private sphere.[103] Therefore, the women's movement in Pakistan does not provide an effective avenue for ensuring that a favorable PIL decision on maternal mortality will affect the realities of the constituency it plagues the most.

CONCLUSION

Unlike in other countries of South Asia, Public Interest Litigation does not present an effective mechanism to address maternal mortality in Pakistan. The jurisprudence of the courts and their past treatment of women's rights concerns are incompatible with the agency and autonomy that underlies a right to survive

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[99] Ahmed Rafay Alam See *Supra* note 34 at 88

[100] *See* http://hrcpblog.wordpress.com/2008/06/24/hrcp-condemns-harassments-of-human-rights-defenders/

[101] Andrea Fleschenberg, *Military Rule, Religious Fundamentalism, Women's Empowerment and Feminism in Pakistan*, WOMEN'S MOVEMENTS IN ASIA : FEMINISMS AND TRANSNATIONAL ACTIVISMS, 167-8 ,(Mina Roces et.al, 2010)

[102] Id.

[103] Id.

pregnancy and child birth. Similarly the judiciary's broad discretion under the PIL mechanism is likely to lead to a reification of its protectionist discourse and therefore adversely affect existing women's rights. The secular rights framework enshrined in the constitution needs to be considered on par with or above with the judiciary's discourse on women on Islamic or alternatively there needs to be a feminist reinterpretation of the interpretations of Islamic law relied upon by the judiciary and the Muslim personal law. Similarly the country lacks a well-coordinated women's movement that can push for the realization of legal recognition of reproductive rights amongst the non-elite and rural women.

COUNTER TERRORISM LAWS OF PAKISTAN: A HISTORICAL PERSPECTIVE

Barrister Ahmed Uzair[1]

This paper provides a historical perspective of the recently promulgated Protection of Pakistan Act, 2014. The paper challenges the argument in support of PPO and the paradigm shift it represents. However, it concludes, that legal changes that will restrict civil rights are inevitable given the dilemmas posed by terrorism.

1. INTRODUCTION

The effect of terrorism has been felt on both economic and political fronts. Terrorist acts have caused loss of life, destruction of property and infrastructure and badly affected economic activity.[2] As a direct consequence of terrorism there is uncertainty surrounding the State's ability to establish its writ. According to official estimates[3] – as dependable as they can be – Pakistan has suffered a loss of around $ 102.51 billion since 2001- 2002.[4]

It is with above-mentioned perspective that we trace the history of anti terror laws and their merits and effectiveness in curbing terrorism. We will then look at Protection of Pakistan Act, 2014 (PPA) and why it has been termed as frontal assault on the fundamental rights protected by the Constitution of Pakistan by

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[1] Writer is a partner at a law firm in Pakistan. The opinion expressed here is the writer's own and does not necessarily reflect the views of others at the firm. The writer would like to give a special mention to two outstanding associates who helped with the research: Miss. Noor-ul-Ain Javed Dar and Mr. Qasim Mustafa. Any errors/omissions are the writer's sole responsibility.

[2] From 1974 to 2010, 4,438 terrorist attacks have been reported in Pakistan.

[3] Pakistan Economic Survey 2013-14, Ministry of Finance, Government of Pakistan (See Annexure III titled "Impact of War in Afghanistan and Ensuing Terrorism on Pakistan's Economy").

[4] Economic Cost Of Terrorism: A Case Study Of Pakistan by Arshad Ali, *http://pgil.pk/wp-content/uploads/2014/04/Economic-cost-of-terrorism.pdf* (Accessed on 12.07.2014) See also S. Michael, "Terrorism a Socio - Economic and Political Phenomenon with Special Reference to Pakistan", Journal of Management and Social Sciences, Vol. 3, No. 1 (Spring 2007), pp. 35 – 46 and A. Shukla, "Impact of Terrorism On Social, Economic And Legal Structure of The Countries Obstacle to Global Peace", Institute of Management Studies, Bareilly, *http://www.upscportal.com/civilservices/ mag/vol-3/article/Imapct-Of-Terrorism* (Accessed on 06.06.2014)

Human Rights Organizations.[5] It will be seen that the PPA represents a paradigm shift of counter-terrorism strategy. In the final part of this paper we will attempt to discuss the merits of this new strategy.

2. HISTORICAL PERSPECTIVE

History tells us that the immediate response of almost all governments to terrorist attacks has been to give greater powers to law enforcement agencies.[6] These actions are dictated by panic and are more akin to a knee-jerk-reaction.[7]

Our history of anti-terror laws starts from The Security of Pakistan Act, 1952[8] and the Defense of Pakistan Ordinance, 1955.[9] These laws were used by the government of the day to suppress civil liberties such as freedom of speech.[10] During General Ayub Khan's military rule Public Offices (Disqualification) Order, 1959 and Electoral Bodies (Disqualification) Order, 1959 were enacted to control political dissent.[11] By and large these laws had wide ranging applications, which were also used by the government of the day for countering terrorism.

The first law that specifically dealt with "terrorism" or "terrorist acts" was Suppression of Terrorist Activities (Special Courts) Ordinance (XVIII), 1974. It was promulgated by the Zulfiqar Ali Bhutto's government in response to the

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[5] Problems with the Ordinance, By Asad Jamal published by the The News on Sunday on 2nd February, 2014.

[6] Consider the India's Prevention of Terrorism Act, 2002 enacted in response to bombing of the Indian Parliament in 2001. The PATRIOT Act, 2001 passed by the US government days after the 9/11 attacks. Similarly UK passed Prevention of Terrorism (Temporary Provisions) Act, 1975 bombings by the IRA.

[7] For example Nazi Germany, one of the most repressive regimes in modern history, was established in a hysterical response to the Reichstag fire (arson attack on the German Parliament)

[8] On 30 January 1962 Huseyn Shaheed Suhrawardy, the 5th prime minister of Pakistan was arrested in Karachi under the Security of Pakistan Act, which authorized detention without trial for a year. He was accused of activities "fraught with such danger to the security and safety of Pakistan". When a habeas corpus petition was filed in Lahore High Court challenging his detention an Ordinance was promulgated that suspending the right of those detained under the Security of Pakistan Act to file a writ of habeas corpus. See *Bangladesh: Past and Present* by Salahuddin Ahmed

[9] Also see the Defense of Pakistan Rules, 1965

[10] Karl Von Vorys, Political Development in Pakistan, (Princeton: Princeton University Press,1965),p:189

[11] See generally Responding to Terrorism: Pakistan Anti Terrorism Laws by Shabana Fayyaz, Pakistan Institute of Peace Studies, 2008. See also "The Separation of East Pakistan" by Hasan Zaheer. Reportedly about 6,000 persons, half of them from East Pakistan, were disqualified under Article 5 of EBDO. Under Article 7, any person served with a notice could opt to retire from politics until 31 Dec 1966, in which case further proceedings against him were dropped.

"nationalist" movements in the NWFP (as it was then known) and Baluchistan.[12] This law, for the first time, established a parallel judicial system with exclusive jurisdiction for "speedy trials" of terrorists.[13] A few months later the Parliament approved the Ordinance and it became the Suppression of Terrorist Activities (Special Court) Act of 1975.[14]

In many ways the law went against the basic concept of fair trial. Thematically it followed, what I will refer to as the "War Model". In this model terrorism is treated as an existential threat and civil liberties are considered to be inferior viz-a-viz the state's interest of ensuring security of the citizens. For example Section 8 of the Act of 1975 was an affront to the basic concept of fair trial. It created a legal presumption of guilt against the accused if he was apprehended "in circumstances which tend to raise a reasonable suspicion." [15] Furthermore there was insufficient separation between the executive and the judges of the Special Courts for Terrorist Activities.[16]

Even as far back as 1959 the Supreme Court of Pakistan in *Lalu vs. The State* had observed that there was a legal presumption of innocence.[17] That being said the Lahore High Court in *Liaqat Pervaiz Khan vs. Government of Punjab*[18] held that under the Act of 1975 the burden of proving innocence on the accused was consequential to the prosecution having first established the prerequisite contained in the first part of Section 8 of the Act.[19] The Court, in other words, approved this new legal paradigm by holding a different standard for those tried under anti-terror legislations. It observed that the provision was not derogatory to the ordinary

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[12] Saeed Shafqat, Civil-Military Relations in Pakistan, USA: Westview Press, 1997. p: 98-106.

[13] Preamble of Suppression of Terrorist Activities (Special Courts) Ordinance (XVIII), 1974

[14] The definition of "terrorist acts" became much broader and the list of offenses that could be tried by "special" courts also expanded. Consider the observation of the High Court in *Muhammad Yousaf Ojla, Senior Civil Judge, Sialkot, Presently Additional District Judge, Faisalabad vs. Malik Muhammad Iqbal, Ex-Dig, Gujranwala And 17 Others* 2005 MLD 13 that "special enactment needs to be taken in perspective of its won object and any departure from the same would be negation of its object and sprit.

[15] Section 8 of Act (XV), 1975.

[16] See the observation of the Full Bench of the Lahore High Court in *Imran vs. Presiding Officer, Punjab Special Court* PLD 1996 Lahore 542. The Full bench observed that in some cases persons who were office-bearers of the party in power were appointed, others did not fulfill the criteria provided by law. To top it all off these appointments were made for short tenures with no security. As a result Sections 3 (Constitution of Special Courts) of the Act of 1975 was declared unconstitutional.

[17] PLD 1959 SC (Pak.) 258

[18] 1992 PLD Lahore 517

[19] *Ibid*

dispensation of criminal justice or for that matter in violation of Constitution of Pakistan.

Successive governments continued to introduce additional legislations, which were aimed at the apprehension of terrorist and the speedy disposal of their cases.[20] For example the Special Courts for Speedy Trial Act No. XV, 1987 was introduced to deal with serious crimes[21] which, in the opinion of the Federal Government, were gruesome, brutal and sensational in the character or shocking to public morality or led to public outrage or created panic or an atmosphere of fear anxiety among the public or a section thereof.[22] Other laws included the Terrorist-Affected Areas (Special Courts) Ordinance (1990) and the Terrorist-Affected Areas (Special Courts) Act (1992).[23] Despite the evolving socio-political landscape of the country, these changes were procedural in nature that touched only on the fringes of the counter terrorism strategy.

Even though the Act of 1975 was the primary Anti-Terror legislation another law i.e. Pakistan Army Act 1952 remained in field (it still does). A number of civilians have so far been tried under the law.[24] In the case titled *Col (Retd) M Akram vs State*[25] the Federal Shariah Court held that:

'Non supply of copy of judgment, deposition and other record of the case to a convict person/appellant would tantamount to denial of justice to him as he will not be in a position to furnish grounds to assail his conviction in appeal. '[26]

The Petitioner in 2008 sought review of the case after the governemt failed to ammend the laws. The FSC upheld its decision. It noted that:

'….. It is his basic right to be heard either in person or through his counsel by the appellate authority. Right of appeal is a substantive right, the denial of copy of judgment and of hearing in appeal would amount to denial of the substantive right

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[20] Najam U. Din, Human Rights Commission Of Pakistan, Terrorist Unless Proven Otherwise: Human Rights Implications Of Anti-Terror Laws and practices. (Page 7)

[21] Section 302, 303 (Murder) and 396, 397 (Dacoity) of the Pakistan Penal Code, 1860

[22] See section 2(c) of Special Courts for Speedy Trial Ordinance (1987)

[23] For a full account of all anti terror laws in Pakistan see Mian Ghulam Hussain, Manual of Anti-Terrorism Laws in Pakistan, (Lahore: Afsari Printers, 2006).

[24] For offence of convincing a military member to act against the state or offences related to official secrets. See Section 2(1)(d) of PAA, 1952

[25] FSC 44 / I / 1993

[26] *Ibid*

resulting into injustice on the touchstone of Quran and Sunnah of Holy Prophet (Peace be upon Him) …'[27]

In the end the Act of 1975 was ineffective and failed to prevent terrorism. A Law Commission report of August 1997 mentioned that by 1997 some 18,625 cases were pending under the Act of 1975.[28] The government repealed the law and the new Anti-Terrorism Act of 1997 (hereinafter referred "ATA") was promulgated.[29] The ATA was introduced with the "promise" of speedy justice, unencumbered by the procedural niceties of the regular court system.[30] ATA embraced the expanded objective of preventing "terrorism and sectarian violence".[31] This went beyond the classic definition of terrorism and vastly expanded the jurisdiction of Anti Terrorism Courts (ATCs). These crimes include murder, kidnapping, "robbery and dacoity", the malicious insult of the religious beliefs of any class and the use of derogatory remarks in respect of the holy personage.[32]

There were provisions that went against the basic tenants of procedural justice.[33] It was for this reasons that the provisions of the ATA were successfully challenged before the Supreme Court in the case titled *Mehram Ali vs. Federation Pakistan*[34] and they were held to be unconstitutional.[35] The Supreme Court noted that the newly constituted ATCs ought to be subject to the rules and procedures of the existing constitutionally established judicial system. The Court further held that the judges of the ATCs ought to have fixed terms and same procedural rules would apply and the decisions of ATCs would be subject to appeal before the relevant constitutionally mandated regular courts.[36] In other words the decisions of the ATCs would be subject to the Constitutional Jurisdiction (including writs of

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[27] Col. (Retd.) Muhammad Akram vs. Federation Of Pakistan PLD 2009 Federal Shariat Court 36

[28] See Pakistan: Legalizing the impermissible: The new anti-terrorism law by Amnesty International.

[29] Anti-Terrorism Act, 1997 (20 August 1997), PLD 1997 Central Statutes (unreported) 537.

[30] See for example The Creation and Development of Pakistan's Anti-terrorism Regime, 1997–2002 by Charles H . Kennedy published in Religious Radicalism And Security In South Asia 387, 389 (Satu P.Limaye, Mohan Malik, and Robert G. Wirsing eds., 2004)

[31] Preamble, Anti Terrorism Act, 1997.

[32] Performance on the anti-terror front, Mr. Imtiaz Gul *http://www.thefridaytimes.com/01042011/page4.shtml* accessed on 04.06.2014

[33] See Sec. 12, 14, 19, 24 -5, 29 & 31, ATA 1997. For example Section 19(10)(b) of the Act, which permitted trial of an accused in absentia on account of his misbehavior in the Court was held to be in violation of Article 10 of the Constitution. See generally *Mehram Ali vs. Federation Pakistan* PLD 1998 SC 1445

[34] PLD 1998 SC 1445

[35] As a result the government on October 24, 1998 passed the the Anti-Terrorism (Amendment) Ordinance.

[36] Ibid. See also Charles Kennedy, "The Creation and Development of Pakistan's Anti-Terrorism 1997-2002" in p: 397.

Habeas Corpus, *Certiorari* and *Mandamus*) of the Superior Courts. Therefore, the government was forced to make changes to the ATA, which "became" what I like to call the "Criminal Law Model".[37] Under the new (amended) law, terrorism was treated as a "criminal activity" which was a shift in legislative paradigm.[38]

While the Government amended the ATC in light of *Mehram Ali* case, it also promulgated the Pakistan Armed Forces (Acting in Aid of Civil power) Ordinance, 1998 after civil unrest in Karachi.[39] Under this Ordinance "Military Courts" were established where all pending cases before the ATCs could be transferred. The Ordinance allowed the trial in absentia and appeals could only be lodged in the Appellate Tribunals to be created by the military authorities. The effect of the legislation was essentially to overturn the effect of *Mehram Ali* case. The Ordinance also created a new crime of "civil commotion" punishable with a penalty of up to seven years.[40] The Supreme Court again intervened and in the case titled *Liaquat Hussain vs Federation of Pakistan*[41] held that the Ordinance, in so far as it allowed the establishment of Military Courts for trial of civilians was repugnant to the Constitution.[42] Interpreting Article 245 of the Constitution, the Supreme Court noted that the military powers with regard to "aid to civil authority" do not extend to the creation of courts or the exercise of judicial functions.[43]

In 1999, the ATA was once again amended to further expand the crimes cognizable before the ATC. These included crimes of abetment,[44] criminal conspiracy to commit a crime,[45] waging or attempting to wage war against

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[37] Anti-Terrorism (Amendment) Ordinance, 1998 (24 October 1998).PLD1999 Central Statutes 143

[38] See the observation of the Supreme Court in *Mehram Ali* supra. The Court held that ATA must hew closely to the procedural protections offered in other Pakistani courts, including the rules of evidence.

[39] Ordinance XII of 1998 made under paragraph (c) of clause (2) of Article 232 of the Constitution of the Islamic Republic of Pakistan on the 30th October, 1998

[40] Section 6, Pakistan Armed Forces (Acting in Aid of Civil power) Ordinance, 1998.

[41] PLD 1999 SC 504

[42] Ibid pp. 549 and 637

[43] Ibid. pp. 565. On 27 April 1999 the Pakistan Armed Forces (Acting in Aid of Civil power) Ordinance, 1998 was repealed.

[44] Section 109 of the Pakistan Penal Code

[45] Section 120 of the Pakistan Penal Code

Pakistan[46] amongst other provisions.[47]In another amendment the Appellate Tribunals for the anti-terrorist courts were established.[48]

A major amendment was the introduction of Anti-Terrorism (Amendment) Act, 2001 which empowered the government to proscribe militant "sectarian outfits"[49] and freeze their financial assets "if it (the Government) had a reason to believe that organization is concerned in terrorism."[50] It can be seen that prior to 2001, ATA focused on individuals. The only deterrence was the risk of incarceration after conviction. From the turn of the 21st century, anti-terror activities focused on the terrorist groups, their organizational structures and their support base. The Musharaf Government felt the need to be more proactive in preventing terrorist incidents. Therefore the phrases like "concerned in terrorism" were coined which included any organization that *inter alia* promotes or encourages terrorism or supports or patronizes or assists in the incitement of hatred or contempt.[51] The objective being that the state would be more proactive in countering terrorism. The list of offences cognizable before the ATCs was also enhanced. [52]

In the aftermath of 11th September, 2011 attack on the USA, anti-terror legislation took center stage. In January 2002 the Anti-terrorism (Amendment) Ordinance, 2002 was promulgated.[53] The amendment attempted to circumvent the *Liaquat Hussain* judgment. The bench of the ATCs was increased to three with the introduction of "military personnel" as a third member. All terrorism cases were to be transferred to the new Courts and the old ATCs would be disbanded by 30th

[46] Section 121 of the Pakistan Penal Code

[47] For a full list see Anti- Terrorism (Second Amendment) Ordinance 1999 (2 December 1999) PLD 2000 Central Statues 8.

[48] Anti-Terrorism (Second Amendment) Ordinance 1999 (2 December 1999) PLD 2000 Central Statues 8 and see also Anti- Terrorism (Third Amendment) Ordinance 1999 (2 December 1999) PLD 2000 Central Statues 78. These amendments were used by the Musharaf regime to run a trial against Nawaz Sharif, which otherwise would have had to take place before ordinary courts. The thread of evidence linking Nawaz Sharif to the "hijacking" was weak, at best. Certainly, a trial conducted through the regular courts would have taken far longer to complete.

[49] See for example SRO 260(I)/2003 dated 07.03.2003 against Al-Qaida.

[50] Anti-Terrorism (Amendment) Ordinance, August 15, 2001. In the days that followed the government implemented this amendment by proscribing two organizations: the Lashkar-i-Jhangvi (LJ), and the Sipah-i-Muhammed Pakistan (SMP), militant offshoots of the Tehrik Nifaz Fiqh-i-Jafaria and Sipah-i-Sahaba, respectively.

[51] Section 11-A Anti Terrorism Act, 1997 (Added by ordinance No. XXXIX of 2001 dated 15.08.2001)

[52] The definition of "terrorism" was amended by the Anti-Terrorism (Amendment) Ordinance, August 15, 2001.

[53] Ordinance No. VI of 2002 dated 31.01.2002.

November, 2002.[54] Again the focus was the entire "terrorist network".[55] The amendment was subsequently withdrawn to the effect that single bench ATCs were restored.[56] Later in 2002 the Anti-terrorism (Second Amendment) Ordinance, 2002 was promulgated by the government in line with the "proactive" approach against terrorism adopted by it in earlier amendments. It could keep an individual/organization under observation by placing their name on the newly created "Fourth Schedule" list added to ATA.[57] Similarly an individual could also be required to provide "security for good behavior".[58] But the most important amendment was the addition of Section 11-EEE to ATA, 1997 under which a suspect could be held by the law enforcement agencies for up to one year.[59]

In 2004 a need was felt that that the maximum punishment was an insufficient deterrent. Therefore the minimum and maximum sentences were enhanced through Anti Terrorism (Second Amendment) Act, 2004.[60] These enhancements only applied to offences committed after the promulgation of the offence.[61] It was also the intended purpose of the new amendment to deter those who were providing financial, logistical and infrastructure support to the terrorists.[62] Section 28-A was added to the ATA authorizing the government officials to seize the passport of anyone charged under the law.[63] Finally, the 2004 amendment further enhanced the jurisdiction of the ATCs and offence of abduction and kidnapping for ransom, finding and use of explosives in places of worship and court premises were added to the list of offences to be tried by ATCs.[64]

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[54] Section 14 of Anti Terrorism Act, 1997 as amended by Section 3 of the Ordinance No. VI of 2002.

[55] New anti-terror Courts in Pakistan , BBC News. *http://news.bbc.co.uk/2/hi/south_asia/1795193.stm* accessed on 06.06.2014]

[56] Ordinance No. CXXXIV of 2002, dated 23-11-2002

[57] 4th Schedule, Anti Terrorism Act, 1997.

[58] Section 11-EE to Anti Terrorism Act, 1997. It will be noted that the Courts have generally required cogent evidence before an order under Section 11-EE, Anti Terrorism Act, 1997 can be passed. The concerned officer is required to be satisfied, through credible evidence that the accused is acting in a manner prejudicial to the interest of Pakistan. Mere presumption will not suffice. See for example *Abdul Rauf vs. Chief Commissioner, Islamabad* PLD 2006 Lah. 111

[59] Anti Terrorism (Amendment) Ordinance, November 16, 2002

[60] Act II of 2005 dated 11.01.2005.

[61] PLD 2006 Lah. 64

[62] *http://www.arabnews.com/node/256842* (accessed on 07.06.2014)

[63] Inserted by Anti Terrorism (Second Amendment) Act, 2004, Act II of 2005 dated 11.01.2005

[64] Anti-Terrorism (Second) Amendment Act, 2005. Provision 13, Pages 6 – 10, Extra-ordinary Edition. Simultaneously international obligations regarding anti-terrorism laws were placed by the Security Council. See for example UN Resolution 1373 (2001) dated September 28, 2001. It called on States to "work together to prevent and suppress terrorism through all lawful means and obliges all states to criminalize assistance to terrorist activities, deny financial support and safe haven to terrorists and share information about groups planning terrorist attacks". UN Resolution 1624

By this time one of the original goals of speedy justice before ATCs seems to have been compromised and the statuary seven-day limit on trials was "largely ignored," and that "delays of several months in the disposition of cases were the norm rather than the exception."[65]

Despite renewed focus towards terrorist organizations, their financing, support network and trial of thousands of terrorists; the law and order situation became worse in 2007. The People's Party Government in response introduced the Anti-Terrorism Amendment Ordinance, 2009. The detention period was extended from 30 days to 90 days.[66] Further, reverting to the provisions of the Act 1975, in certain situations the onus of proof was shifted to the suspect.[67] The Ordinance subsequently lapsed and these provisions were later re-introduced through the Anti-Terrorism (Second Amendment) Act, XX of 2013 (discussed below).

The law and order situation continued to worsen. In response a military operation was initiated in the Federally Administered Tribal Area (FATA). Legal backing to the military operation against "miscreants"[68] was given through Actions (in Aid of Civil Power) Regulations, 2011. The Regulations invoked the "action in aid of civil power" clause of Article 245 of the Constitution. The Regulations gave wide-ranging powers to law enforcement agencies. They came into force from February 1, 2008 with the intended effect of giving retrospective legal cover to the detention of suspected "militants" picked up by the security agencies.[69] Under the Regulations, it is an offence for anyone to be "suspected of an act of challenging

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(2005) called on States to ensure "prohibition of incitement to commit terrorist acts". For further details see Pakistan's Challenges in Anti-Terror Legislation by Ms. Sitwat Waqar Bukhari <*http://crss.pk/wp-content/uploads/2013/11/Pakistan-Chalanges-in-Anti-Terror-Legislation.pdf*> (Accessed on 06.07.2014)

[65] The Creation and Development of Pakistan's Anti-terrorism Regime, 1997–2002 by Charles H . Kennedy published in Religious Radicalism And Security In South Asia 387, 389 (Satu P.Limaye, Mohan Malik, and Robert G. Wirsing eds., 2004) at P. 401. See also Najam U. Din Supra.

[66] Section 11-EEEE of Anti Terrorism Act, 1997 was added.

[67] 27A of Anti Terrorism Act, 1997

[68] "Miscreants" is defined by ATA as anyone intending to or having committed a terrorist act under the law, be it

an individual terrorist, a foreigner, a non-state actor or a group of such persons in volved in waging war against Pakistan by raising unlawful armies.

[69] Additionally, the law also laid out provisions regarding how evidence against terrorists would be collected and

preserved. Under Rule 19 of this regulation, all information and material collected by the interning authority of the Armed Forces would be considered credible evidence in court. Furthermore, a testimony by any member of the Armed Forces would be considered sufficient to convict the accused.

the authority and writ of the Federal or Provincial government"[70] and there is no express provision for the presumption of innocence as required by the right to fair trial. Furthermore, there is no right to legal representation or a right to call or cross-examine witnesses.

In recent years the terror networks have become increasingly sophisticated. Therefore, there was need for modern surveillance tools and admissibility of evidence collected through these tools before the ATCs. As a result in 2013 The Investigation for Fair Trial Act, 2013 was promulgated to allow law enforcement agencies to tap phone calls, SMS, electronic correspondences such as e-mail and carry out covert intelligence on anyone suspected of being a terrorist. This was subject to a warrant from a High Court Judge, which would be valid for up to 60 days.[71] The telecom operators and other corporations holding the information are required under the law to co-operate with the law enforcement agency.[72] It has been reported that the act has so far remained unutilized.[73]

In the international arena Financial Actions Task Force, tasked with advising member states with legislation to curb international terrorist financing,[74] recommended changes to the ATA. They were incorporated in the form of The Anti-Terrorism (Amendment) Act in 2013. The government agencies can now seize, freeze and detain property or money of anyone suspected to be using it for financing terrorism.[75]

Also in 2013 the National Counter-Terrorism Authority Act, 2013 was passed by the Parliament that created the National Counter-Terrorism Authority (hereinafter referred to as the NACTA). The basic objective of NACTA is to devise counter-terrorism strategy and facilitate the co-ordination between different law enforcement agencies in Pakistan. The Authority is directed by the Board of

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[70] Article 16(1) of the Regulations. See also "The hands of cruelty, Abuses by Armed Forces and Taliban In Pakistan's Tribal Areas", Published in 2012 by Amnesty International Limited.

[71] See Section 8 and 14 of the Investigation for Fair Trial Act, 2013 Act No. I of 2013.

[72] Section 17 read with Section 19 *Ibid*.

[73] Wrongs versus rights by Mr. Asad Jamal, Dawn *May 10, 2014*

[74] The Financial Action Task Force (FATF) is an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions. The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.

[75] See for example *http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403554_text* (accessed on 07.08.2014)

Governors, headed by the Prime Minister, and also includes a number of federal and provincial ministers and heads of law enforcement and intelligence agencies.[76]

The Anti-Terrorism (Second Amendment) Act 2013 was passed days before the expiry of the Parliament's term.[77] The new law reintroduce provisions to enhance the pre-charged detention period for suspected terrorists to 90 days.[78] Other offences added to the ATA include carrying of explosives without a lawful reason and running illegal FM radio stations.[79] Another step in the wrong direction was the amendment that permitted the ATCs to admit "extra-judicial confessions"[80] despite the fact that the Superior courts have disapproved the practice.[81] Moreover, the detainees could not be release on bail nor could they file a petition of habeas corpus in any court of law. Finally, the definition of the threat of terrorism now includes "intimidating and terrorizing the public, social sectors, business community, security forces, government installations, officials and law enforcement agencies".[82]

In July 2013 the new government developed a counter-terrorism policy referred as the National Counter-Terrorism and Extremism Policy, 2013. The Policy divided the counter terror strategy into five parts i.e. dismantle, contain, prevent, educate and reintegrate terrorists. The strategy proposed that imprisoned terrorists and former militants would be used to open dialogue with terrorist groups that may be willing to abandon violence. Thus, despite continued violence, the government wanted to maintain the option of holding dialogue with militants.[83] The policy gave the NACTA center stage in counter terror strategy.[84]

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[76] Section 5 of National Counter Terrorist Authority Act, 2013

[77] *http://www.dawn.com/news/790462/senate-passes-anti-terrorism-amendment-bill* (Accessed on 06.06.2014)

[78] Section 11-EEEE of Anti Terrorism Act, 1997. Also note that under the Amendment, this detention will be considered a preventive detention. This preventive or pre-charged detention cannot be challenged in any court and the detainee cannot ask for release on bail or file a petition for habeas corpus in any court of law. The detainee would be produced in-camera before the court within 24 hours of detention. See also Section 21-D of the Anti Terrorism Act, 1997.

[79] Sec. 11-W (a-b) of Anti Terrorism Act, 1997

[80] Section 21H of Anti Terrorism Act, 1997

[81] See the observation of the Supreme Court in PLD 1998 SC 1445 *Mehram Ali vs. Federation of Pakistan*

[82] Section 6 (1)(c) of ATA, 1997.

[83] See generally http://tribune.com.pk/story/589497/fighting-terror-draft-policy-aims-to-dismantle-terror- networks/ (accessed on 06.06.2014)

[84] *Ibid.* For further analysis on the Policy see DAWN http://www.dawn.com/news/1023175 (accessed on 07.06.2014)

Despite the continuous efforts of successive governments at dialogue and legal reform, the menace of terrorism continued unabated.[85] ATA did not result in putting a serious threat to terrorist networks. Law enforcement agencies have argued that the ATA was not strict enough.[86] People in government quarters started asking for a change in strategy, i.e. going back to the "War Model". It was argued that there is an inherent difficulty associated with collecting evidence against terrorists. They found it increasingly difficult to disclose classified information in open court. As a result the standard of proof required for conviction of ordinary crimes cannot be reached in terrorism related cases.

3. PROTECTION OF PAKISTAN ACT, 2014

While the Anti-terrorism Act, 1997 continues to be in force, latest in the series of Anti terror legislations came the Protection of Pakistan Ordinance, 2013 and now Protection of Pakistan Act, 2014. It has been argued that Pakistan is facing an existential threat, which required extraordinary measures and PPA is an extraordinary piece of legislation.[87] PPA curtails on the fundamental right of freedom of movement and requires an accused to prove his innocence.

As a result in PPA new terms like 'enemy'[88] and 'enemy alien'[89] have been coined. The law grants powers of arrest and permission to fire upon any person that the

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[85] See for example (*http://www.eopm.org/eopm_news.html* (Accessed on 06.06.2014)

[86] See for example the presentation given by NACTA *http://nacta.gov.pk/Download_s/Presentations/IFTA_AT_Amendment_NISP.pdf* (accessed on 06.07.2014)

[87] See for example the Op-Ed titled New law has some probability of success http://www.brecorder.com/editorials/0:/1199368:new-law-has-some-probability-of-success/ (accessed on 14.07.2014)

[88] Defined by the PPA, 2014 as follows: *"Enemy" means any person who raises arms against Pakistan, its citizens, the armed forces or civil armed forces or aids or abets the raising of arms or waging of war against Pakistan or threatens the security and integrity of Pakistan or commits or threatens to commit any scheduled offence and includes a person who commits any act outside territory of Pakistan for which he has used the soil of Pakistan for preparing to commit such act that constitutes an offence under the laws of Pakistan and the laws of the state where such offence has been committed and includes an act of aiding or abetting such offence;"*

[89] Defined by the PPA, 2014 as follows: *"Enemy Alien" means a person whose identity is unascertainable as a Pakistani whether by documentary or oral evidence or who has been deprived of his citizenship acquired by naturalization and is suspected to be involved in waging of war or insurrection against Pakistan or depredation on its territory by virtue of involvement in offences specified in the Schedule*.

Civil Armed Forces suspected of intention to cause death, grievous hurt or destruction of property.[90]

Once again special courts have been set up with power to try offences provided in the Schedule of the Act[91] and includes power to strip a Pakistani of his citizen acquired through naturalization.[92]

Despite the Supreme Court of Pakistan's clear observations against "enforced disappearances",[93] the legislature has once again come to the rescue of the law enforcement agencies by granting them immunity for all past transgressions.[94] While preventative detention has been permitted under ATA,[95] the new law goes further and the Government can "in the interest of the security of Pakistan" refuse to disclose the grounds for detention or divulge any information relating to a detainee.[96] Finally, a legal presumption against the accused for "waging war against Pakistan" has once again been introduced if "reasonable evidence" is available.[97]

It appears that many of these provisions have been enacted after the State has resigned to the fact that it will not be able to obtain sufficient convictions before ATCs. The average conviction rate under the ATA hovers around 18%.[98] Whereas in nearly half of the cases the accused are either not arrested or not brought before the court.[99] Perhaps the biggest issued faced by ATCs is the vast majority of the 4000 cases do not actually relate to terrorism or terrorist organizations.[100] This is in spite of the fact that through a number of amendments the ATCs were empowered to convict the accused based on limited or circumstantial evidence.

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[90] Section 3(2)(a) of the PPA, 2014. The corresponding provision of the Anti Terrorism Act, 1997 was declared unconstitutional in the *Meharam Ali* case.
[91] Section 8 of the PPA, 2014.
[92] Section 16 *Ibid.*
[93] For example see Order dated 10.12.2013 of the Supreme Court in the case 29388-K of 2013.
[94] See Section 6(5) of the PPA, 2014.
[95] Section 11-EEEE of ATA, 1997
[96] Section 9(2)(b) of PPA, 2014
[97] Section 15 Ibid.
[98] Antiterrorism Law by Zulfiqar Hameed published by Asia Society Independent Commission on Pakistan Police Reform, 2012 as part of Report titled Stabilizing Pakistan Through Police Reform.
[99] *Ibid.*
[100] *Ibid.*

4. THE LEGAL PARADIGMS

Anti-terror legislation is an amalgam of criminal law, military law, constitutional law and laws of war. There are a number of factors at play, not least the tussle between different law enforcement bodies and the organs of the State. Furthermore, successive governments have had their own role to play in the scope and nature of the anti-terror laws.

If we look at Pakistan anti-terror legislations from a broad perspective they have swung between two paradigms. At the time the Act of 1975 was promulgated, Pakistan was facing nationalistic movements in Baluchistan and North West Frontier Province (present Khyber Pakhtunkhwa). Similarly Pakistan was facing civil unrest in some parts of Karachi when, in response Pakistan Armed Forces (Acting in Aid of Civil power) Ordinance, 1998 was promulgated. Finally in 2014 Protection of Pakistan Act, 2014 has been promulgated in response to terrorism ostensibly emanating from FATA. All of these three legislations have one thing in common: they follow the `War Model' in combating terrorism. All of these legislations treat terrorism as a national threat that challenged the existence of the State and the onus of proof is lower. The ATA, on the other hand, followed the Criminal Law Model. Under the ATA terrorism was treated as a criminal activity like other serious crimes. Even though special courts were set up they, by and large, operated under the same rules of evidence.

PPA attempts to distinguish itself from the past with words like “Subject to the Article 10” and “Subject to the Constitution”. However the effect of the legislation is clear i.e. in case of greater national exigency rights of liberty and right to life do not carry the same weight. By promulgating the PPA the government is in effect saying that fundamental rights do not have the same status in times of war.

It may also be added that the narrative in favour of the PPO is misguided. Legal paradigm has had no effect on the terrorism related incidents. ATA, like its predecessor, was not unsuccessful because it was not stringent enough; rather the root cause of its failure has been, amongst other things, poor implementation. Past experience have repeatedly shown that draconian laws that derogate from internationally accepted human rights have not been effective in eliminating terrorism in Pakistan. The suggestion that the abysmal conviction rate before ATCs is due to lack of harsh laws is not only a misnomer, it misses the real issues completely i.e. lack of intelligence gathering and evidence collection (including crime scene investigation), ineffective use of community policing, poor resource allocation, lack of a high security prison for terrorist suspects and ineffective

witness protection program. It appears that the state only wants us to believe that it is doing "everything" to curb terrorism without actually making any real progress. It is therefore vital to challenge the narrative put forward by the government and its supporters.

3. A NEW APPROACH

There is a third way of thinking about terrorism and how to respond to it. Since technological developments have made it increasingly possible for small groups or individuals to cause devastations, the only way to counter this threat is to increase the ability of government to monitor and investigate individual behavior. The investigation for Fair Trial Act, 2013 is a case in point. However these challenges to the classic definition of civil liberties should be subject to safeguards. Dysfunctional though it may be; success in defeating terrorism is dependent on a criminal justice system that has some semblance of due process.

Any changes to the law and powers of the law enforcement personal fighting terrorism should be formulated based on recommendations by a commission composed of constitutional experts, parliamentarians, and law-enforcement experts. It is difficult to try to anticipate what such a commission would or should come up with. In broad terms the solution will involve a balance between effective counter-terrorist operations while preserving the spirit of our constitutional rights.

The arbitrary use of government powers can be checked by creating alternate institutions within the government to monitor and balance the actions of other arms of the government. If effective defense against terrorism requires, suspensions of habeas corpus, secret searches – as has been happening – then these actions should be subject to monitoring by the independent judicial bodies. The idea is to try to limit executive powers that may be subject to abuse by creating institutions and judicial procedures to monitor their application with power to conduct audits and make such audits available to the public.

We can conclude by saying that if our true goal is to protect the lives of citizens of Pakistan the last thing we should do is to adopt laws that limit their rights. If the objective is to deliver justice the only way is to strengthen the existing judicial system.

HEADSCARF AND RELIGIOUS ATTIRE: A MATTER BETWEEN GOD AND THE STATE? A COMPARATIVE PERSPECTIVE

Waqqas Mir and Hassan Niazi[1]

INTRODUCTION

It seems debates have been rekindled with the judgment of the European Court of Human Rights (ECtHR) in S.A.S. v France[2]. Debates that touch upon the ways in which individuals, most particularly Muslim women, seek to manifest their religion. S.A.S. is the story of a woman, adamant to adhere to her interpretation of the Islamic faith, whereby she chose to wear a burka (which for the remainder of this article, along with the niqab will be referred to as the 'full-face veil').

The story of S.A.S. is not just a deeply personal dilemma that many women will be facing in France, but is also a part of a wider dilemma being faced by the ECtHR as to how it must balance competing interests, such as the deeply ingrained secularism of some states with the freedom of religion encompassed by Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1990 ('The European Convention').

This article hopes to compare the judicial approaches adopted by courts in Europe and the United States when dealing with issues relating to religious attire being worn in public. Europe, particularly France, aims to keep religion out of the public space as part of its avowed commitment to secularism. The US faces a tension between various limbs of the First Amendment: Free Exercise, Free Speech and the Establishment clause. Focusing not on results but on approaches, we compare the case law from Europe (in Part I) and the US as well as the French philosophy of secularism versus the approach to religion in the US (in part II). We argue that the US judicial method of analysis and methodology of balancing competing interests has a lot to recommend. We conclude by drawing some important lessons

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[2] (S.A.S. v France no. 43835/11, 2014)

from a comparison of European and US case-law while also arguing that human rights battles are never won (or lost) in courtrooms and therefore political engagement, and shaping the discourse, remains essential. We hope that this article will compel readers to raise more questions while also generating a debate among legal practitioners, human rights activists, policymakers and citizens.

THE STAGE IS SET

Arguably, the seminal judgment that shows how the ECtHR will proceed in cases where an act of a Member State is alleged to be in violation of Article 9 is Kokkinakis v Greece[3]. The case concerned an allegation of proselytism against the applicant. It was alleged that he was trying to influence the religious beliefs of others through immoral and deceitful means, in contravention of a Greek Law prohibiting proselytism in general. The Court held that the right enshrined in Article 9 could undoubtedly be interfered with, but any interference must be:

i) Prescribed by law;

ii) directed at one or more of the legitimate aims given in paragraph 2 of Article 9 (which includes protection of public order, health or morals, or for the protection of rights and freedoms of others); and

iii) be necessary in a democratic society.

This three limb test finds its genesis in Article 9 itself. The Court also took broad steps in fleshing out the Article 9 right, and so, the freedom included the freedom to manifest ones religion[4], in community life and in public[5]. Yet, there is another limb to this test, which has proved be a very useful 'get out of jail free' card for the ECtHR: the 'margin of appreciation'.

With regards to the first limb of the test, this is relatively straightforward and means that the action of the State must find some basis in domestic law, and should also be accessible and foreseeable[6]. There were no problems in Kokkinakis regarding this. As for legitimate means, well clearly the aim was to protect 'the

[3] (Kokkinakis v. Greece 17 E.H.R.R. 397, 1993)

[4] Ibid at Para 31

[5] Ibid at Para 31

[6] Ibid, see also Sunday Times v. The United Kingdom no. 6538/74, 1979, Para 48-49

rights and freedoms of others[7]' (namely their religious beliefs) from being influenced by immoral and deceitful means[8]. So, it was to curb the potential of harm to the 'religious freedom' of other people that made the law fall within the parameters of 'legitimate means'. A concrete right, not an abstract one.

The question then becomes whether it was necessary in a democratic society. The Court held that in such circumstances it may be necessary to deter the issue to a State's margin of appreciation. This is because whether or not a measure is necessary in a democratic society must be answered by looking at the background and norms of that particular society[9] (in this case Greece). The ECtHR being aware that it is not a Court of fourth instance, and that national courts are often better placed to judge such matters, gives leeway to the Member States in the form of the margin of appreciation[10].This is the vital fourth limb of the test.

Now, this could have led to a very wide discretion being given to Member States, however, the margin of appreciation is subject to European supervision, and the Court would determine whether the measure taken was justified in principle and proportionate[11]. So it is proportionality that will supervise the margin of appreciation. In Kokkinakis, the Court adopted the stance that it would weigh the requirements of the protection of rights and liberties of others against the conduct of which the applicant stood accused[12] and because the Greek courts established the applicant's liability without sufficiently specifying in what way the accused had attempted to convince another through improper means, this meant that Greece was unable to show that the applicant's conviction was required because of a pressing social need[13]. That being so, the measure was deemed not proportionate to the legitimate aim being pursued, and an Article 9 violation was found by the ECtHR. It seems the Court was trying to say in so many words, that the least restrictive measure was not adopted by Greece when seeking to curtail the

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7 Paragraph 2 of Article 9 of the European Convention

8 (Kokkinakis v. Greece 17 E.H.R.R. 397, 1993) at Para 44

9 See Gerhard Van Der Schyff, Adriaan Overbeeke, 'Exercising religious freedom in the public space: a comparative and European Convention analysis of general burqa bans', European Constitutional Law Review, (2011)

10 Y. Arai-Takahashi, 'The Margin of Appreciation Doctrine in the Jurisprudence of the ECHR' (Intersentia 2002) p. 1-2, see also H.C. Yourow, 'The Margin of Appreciation Doctrine in the Dynamics of the European Human Rights Jurisprudence' (Kluwer 1996) p. 13

11 (Kokkinakis v. Greece 17 E.H.R.R. 397, 1993) at Para 47

12 Ibid at Para 47

13 Ibid at Para 49

applicant's Article 9 right, glimmers of this are echoed in the partly concurring opinion of Judge Pettiti[14].

It is usually the fourth limb of the test that is the pivot point of most cases decided by the ECtHR, but the Court is not bound to blindly obey the margin of appreciation of Member States, if that were true, its role would be rendered redundant. Buscarini v San Marino[15] is a good example of this where a mandatory oath on the Gospel was required before the taking of elected office.

The Government maintained that the wording of the oath in question was not religious, but rather, historical and social in significance and based on tradition. The Republic of San Marino had admittedly been founded by a man of religion but it was a secular State in which freedom of religion was expressly enshrined in law (Article 4 of the Declaration of Rights of 1974). The form of words in issue had lost its original religious character, as had certain religious feast-days which the State recognised as public holidays[16]. The Court held that even though the history and tradition of San Marino were linked to Christianity, since the State had been founded by a saint, and their margin of appreciating should not be criticised, it held that making an elected representative compulsorily swear allegiance to a religion was a clear contravention of Article 9[17]. Thus the Court found a violation of Article 9 regardless of the margin of appreciation.

This summary of the applicable test and the margin of appreciation lead us to look at 'the manifestation of religion' and the use of religious symbols. As will be seen, the ECtHR has not always been as daring as it was in Buscarini regarding the margin given to Member States.

A GUIDE TO MANIFESTING YOUR RELIGION

The first point to consider is that the ECtHR has sometimes treated cases of religious manifestation as Article 10 freedom of expression cases, rather than Article 9 cases, this is often credited with the ECtHR's reluctance to decide cases concerning the Article 9 right, but it is strange that cases with prominent religious overtones are decided along the lines of Article 10 and Article 9 is completely neglected, this is all the more surprising given that in cases where it has done so, it

[14] Ibid, Partly Concurring Opinion of Judge Pettiti
[15] (Buscarini v San Marino [30 E.H.R.R.208], 1999)
[16] Ibid at Para 32
[17] Ibid at Para 39

has used Article 9 Paragraph 2 as a means of interpreting Article 10. Where prima facie, Article 9 ought to be discussed; the ECtHR should fulfil its role, and not duck and dodge the Article 9 question. An example is Otto-Preminger-Institut v. Austria[18]; the applicant was facing criminal proceedings for his film, which satirized Christian beliefs and figures. The films seizure application was granted by an Austrian Court, and thus the public showing of the film was cancelled. The Government's argument was that the film disparaged religion.

In addressing whether the interference had a 'legitimate aim' the Court stated:

'Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith[19]*.'* Furthermore, the Court held that *'Indeed in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them*[20]*.'*

Consider for a moment the above mentioned views of the Court; it seems it is leaning towards saying that the films seizure was violative of Article 10 and intolerant, but the problems of resorting to a margin of appreciation are that the Court's own views become secondary. It held that since the measure was taken to protect the religious feelings of others, and thus their 'rights and freedoms' it was legitimate. The plot twist is even more strange when it is considered what the Court had to say about whether the measure was 'necessary in a democratic society' it held that '*Article 10…is applicable not only to 'information or ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that shock, offend or disturb the State, or any sector of the population. Such are the demands of pluralism, tolerance, broadmindedness without which there is no democratic society*'[21]

As for the margin of appreciation, the Court held that its supervision must be strict because of the importance of the freedom in question[22]. But the Court cannot say that the margin must be strictly guarded and boomerang back in such a way that its

[18] (Otto-Preminger-Institut v. Austria [19 E.H.R.R. 34], 1994)
[19] Ibid at Para 47
[20] Ibid
[21] Ibid at Para 49
[22] Ibid at Para 50

own views become redundant, because that would rob the Court of its very own function by kowtowing to the margin given to Austria.

For religious symbols, no discussion can continue without discussing Leyla Sahin v. Turkey[23], where the applicant alleged her rights under Article 9 had been violated by regulations on wearing the Islamic headscarf in institutions of higher education. The Court held that there was a legitimate aim being pursued, and this was namely the protection of the rights and freedoms of others and the protection of public order[24], in particular the secular character of Turkish society. In assessing whether it was necessary in a democratic society, the Court again viewed the fact that it was necessary in societies where several religions coexisted to place restrictions on ones religion so that all groups could co-exist, and the State was the neutral and impartial organizer of such faiths and beliefs, however its role was not to remove the cause of tension by eliminating pluralism, but to ensure that competing groups tolerate each other[25]. The Court left the question then to Turkey's margin of appreciation on the issue. The Court held that the rights and freedoms of others, public order and public safety were aims that needed to be protected by imposing conditions on the wearing of the headscarf, and cited Karaduman v Turkey[26] as an example. It held that secularism, as Turkey interpreted it, allowed the State to be free from manifesting a preference for a particular religion or belief, and it served to protect the individual not only against arbitrary interference by the State but from external pressure from extremist movements, and thus freedom to manifest religion needed to be restricted in order to defend these values[27].

But the next limb of the test, that of 'proportionality' of the margin of appreciation was sidelined by the Court by stating that it was not open to the Court to apply the criterion of proportionality in a way that would make the notion of an institutions (The Universities) 'internal rules' devoid of purpose[28].

The Court has often given much leeway to States when it comes to religious symbols in educational institutions. In Dahlab v Switzerland[29], the wearing of a headscarf by a teacher being banned was upheld by the Court on the basis that it

[23] (Leyla Sahin v. Turkey Application No. 44774/98, 2005)
[24] Ibid at Para 99
[25] Ibid at Para 107, also see Serif v. Greece Application No. 38178/97 1999
[26] Karaduman v. Turkey Application no. 16278/90 1993
[27] (Leyla Sahin v. Turkey Application No. 44774/98, 2005) at Para 113
[28] Ibid at Para 121
[29] (Dahlab v. Switzerland Application No. 43393/98, 2001)

would have a possibly proselytizing effect on the children concerned. The Court stressed, amongst other things, that the headscarf was a powerful external symbol which her wearing could not easily be reconciled with the principle of gender equality, tolerance, equality and non-discrimination, while in Karaduman v. Turkey[30] it was held that in a democratic society the State was entitled to place restrictions on the wearing of the Islamic headscarf. In Karaduman, measures taken in universities preventing certain fundamentalist movements from exerting pressure on students were not considered to be an interference for the purpose of Article 9.

Leyla Sahin, must however, raise the question as to why the ECtHR cannot at the very least determine whether or not the least restrictive measure was being adopted by the Member State in attempting to curtail the Article 9 right. Furthermore, in Leyla Sahin, the Court gave Turkey a very wide margin of appreciation on the basis that the diversity of practice in Member States on the issue of regulating the wearing of religious symbols in educational institutions pointed to a lack of European consensus on the issue. But doesn't the mere fact that none of the Member States had extended the ban to universities show a consensus on this issue? Similar bans were found in other Member States for educational institutions, however these were for younger people (such as in Dahlab) and not for adults. The other problem in Leyla Sahin is that the ECtHR fails to exercise the European supervision of the margin of appreciation which it expounded in Kokkinakis, Buscarini, and Otto Preminger. This is striking given the issue is of importance to Europe as a whole, and this shows how the margin of appreciation is being used as a 'get out of jail free card'. These points are echoed in the dissent of Leyla Sahin[31].

Yet, actions of Member States that are more general in nature, as opposed to those taking place in State institutions or educational institutions have found a stricter ECtHR. So, in Serif v Greece[32] a man was convicted for appearing in public clad as a mufti, without having the right to do so under Greek law. The Court held that he could rely on Article 9 and that his conviction amounted to an interference with such protection. While more recently in Arslan v. Turkey[33] a group of men were found in contravention of laws prohibiting religious headgear and dress being worn in public places, such as streets. The men belonged to an Islamic grouping which propagated Shariah law. In following their faith they wore black headbands, harem

[30] Karaduman v. Turkey no. 16278/90, 1993
[31] (Leyla Sahin v. Turkey Application No. 44774/98, 2005) Dissenting Opinion at Para 3
[32] Serif v. Greece Application No. 38178/97 1999
[33] Arslan v. Turkey, No. 41135/98, 2010

trousers, tunics and used walking sticks. Again, the Court afforded the men protection under Article 9 and identified their convictions as an interference with such protection.

The difference in these Judgments can be boiled down to the 'margin of appreciation' which, as has been stated earlier, is the usual pivot point that distinguishes the rulings. Why was it given greater weight in Leyla Sahin and Dahlab? It seems that where public or educational institutions are involved, a wide margin of appreciation would exist, however, if one's link to the state gets more remote, a slimmer margin is given[34]. So if a symbol is banned generally in public it seems the ECtHR will test the margin of appreciation to a greater extent, this was certainly the thrust of Arslan v. Turkey, where the Court emphasized that this was a case where the applicants were being punished for the wearing of a particular dress in public areas that were open to all, and not, as in other cases where the punishment had been in public establishments, where religious neutrality may take precedence.

Keeping this in view, one must now turn to the case of S.A.S. v France, to show the problems that the ECtHR's test has faced.

INTO THE STORM

The facts were that the applicant was a French national of about 24 years of age, who submitted that she was a devout Muslim, and wore the full-face veil of her own free will, her emphasis was on the fact that neither anyone in her family nor her husband pressurized her to wear the veil or how to dress[35]. She accepted that she would have to show her face when undergoing a security check, at the bank or in airports[36]. Her action of trying to wear the full-face veil violated Law no. 2010-1192 of 11 October 2010, introduced throughout France, prohibiting anyone from concealing their face in public places.

The French Government argued that the Law pursued two legitimate aims: public safety and 'respect for the minimum set of values of an open and democratic

[34] Gerhard Van Der Schyff, Adrian Overbeeke, 'Exercising religious freedom in the public space: a comparative and European Convention analysis of general burqa bans', European Constitutional Law Review, (2011)

[35] (S.A.S. v. France no. 43835/11, 2014)at Para 11

[36] Ibid at Para 13

society[37]'. The first of these is found in Article 9. However, the second is not, and the ECtHR was mindful of this fact, and thus, the ECtHR decided to mould the second aim into 'protection of the rights and freedoms of others[38]'. While discarding other arguments, the ECtHR accepted the view of the Government that the face plays an important part in social interaction, and thus could accept the fact that the veil could create a barrier to socialization and make living together ('le vivre ensemble') difficult[39].

The 'public safety' argument was shot down by the ECtHR , however, the Court found that the need to create a society, whereby people could 'live together' and breed 'social interaction', could be a legitimate aim, the question then became whether this aim was proportionate[40].

In answering that question the ECtHR stated that the policy maker's argument should be given special weight, and gave France a wide margin of appreciation. For the Court, the concept of 'living together' as described by the French Government could justify the ban.

With this, the ECtHR held that the ban was both proportionate, and also necessary in a democratic society.

SIFTING THROUGH THE AFTERMATH

PROBLEMS WITH THE 'LEGITIMATE AIM'

The test as described has been whether or not a legitimate aim was pursued by the measure adopted by the State. In S.A.S. the legitimate aim was the 'protection of the rights and freedoms of others', the problem is that the ECtHR has never defined this beyond the express rights mentioned in the European Convention. This is problematic, since the ECtHR held that the French Law pursued the aim of 'living together' and sociability. The concept of 'living together' does not fall within any of the rights of the Convention, nor can it be easily squared with them[41]. Consider for a moment the cases of Buscarini, Kokinnakis, and Otto-Preminger, all these cases dealt with competing 'concrete rights', which helped the ECtHR come to its decision, none of them posed the abstract. The ECtHR when faced with a

[37] Ibid at Para 114
[38] Ibid at Para 117
[39] Ibid at Para 122
[40] Ibid at Para 142
[41] Ibid Dissenting Opinion of Judges Nussberger and Jaderblom at Para 5

possible contravention of a Convention right must only allow it when it falls squarely within a 'legitimate aim' of protecting the 'Convention rights' of other people. Creating new and abstract concepts, on an ad-hoc basis, would shatter the sanctity of the rights themselves, and give too much leeway to the States in thinking up abstract ways to weasel their way out of these rights.

This is a problem with having a legitimate aim akin to 'protecting the rights and freedoms of others, it is too open-ended, and laws should not be open-ended. Arslan v. Turkey and Serif v. Greece showcase that wide general bans on religious attire are in contravention of Article 9. S.A.S. v France grabs an abstract concept like 'living together' out of the hat and discards these judgments. Assume, however, that we accept this principle, and let us say that now, through pure judicial interpretation; there exists some right akin to being able to 'live together'. What are its parameters? The Judgment gives us no clear answer on this point. One can still be social, as the dissenting opinion notes, without looking into each other's eyes[42]. The Court seems to have disregarded the points being made by the applicant who said that she did not find the veil a hurdle in her social life. It seems it was the symbolic thrust of the veil that played a major part in the Court's reasoning. Many musical artists promote, through their medium, a lifestyle that is secluded and withdrawn, if France were to ban those performers on the same principle, would the Court be so quick to employ this reasoning? Clearly then if the concept of 'living together, is to be such a trump card then it needs to be clearly defined and explained, however, the Court fails to do so and all that can be stated is that even though the veil did not disturb other people's rights, nor was it forced, yet it was still outlawed on the basis of an abstract principle which gives an impression of ad-hoc reasoning, based on presumptions about the veil. This is the problem with the legitimate aim limb of the test, if the Court does not define what 'protecting the rights and freedoms of others' means, it will result in even more open-ended abstract principles like 'living together'. Clarity would drown.

The problem in the ECtHR's approach to the pursuit of a legitimate aim is that it seems to take much of what Member States say as irrefutable. Arguments regarding the Islamic headscarf or the veil centre on the fact that women are pressurized into wearing them, and that it is a threat to secularism. This is an assumption. In both Leyla Sahin and S.A.S. the women chose to wear the attire. Only indisputable facts and reasons whose legitimacy is beyond doubt-not mere worries or fears-are capable of satisfying the requirements of interference in the

[42] Ibid Dissenting Opinion at Paragraph 9

Article 9 right[43]. The actions of the French Government may well prove counter-productive, as a general ban may cause those very families steeped in fundamentalism to stop sending the women of their house out in public or to school completely. Much of the reasoning seems to point to a fear that women may be pressurized into the full-face veil or the headscarf, but is the Court saying that women are incapable of making their own choices? More concrete examples need to be given and taken into consideration by the ECtHR when assessing whether a legitimate aim is being pursued.

The legitimate aim, as defined by the ECtHR in S.A.S. has further problems; what if an individual just does not want to be social? This consideration does not seem to have played a part in the Court's reasoning. Can the Court compel (as they did to the applicant in this case) someone to be social? This would infringe another right, namely that of an individual's privacy. It would mar a person's individuality. In the social contract, an individual can define to what extent he wants to be member of a society[44], as long as they do not harm others. The ECtHR failed to understand that a liberal democracy should allow the possibility to its members to withdraw and to appreciate critically the membership in their community. A liberal regime should accept a distinction between self-regarding and other-regarding acts and regulate the latter while abstaining from the former[45].

PROBLEMS WITH 'THE MARGIN OF APPRECIATION'

The Court's willingness to strictly supervise the margin of appreciation in some cases (Buscarini) while completely bowing to it in others (S.A.S.) has created judgments that are paradoxical, not in line with past precedents, and raise questions of intellectual cowardice. The Court has often stated that it looks to address the question of the correctness of a state's margin by referring to its proportionality. In S.A.S. though the Court never looks towards the least restrictive measure; nowhere is this principle more apt than in general bans of the nature employed in S.A.S. As already stated, the more remote the connection between a ban and a State institution (such as schools, government offices etc.) the more narrow will be the

[43] Leyla Sahin v. Turkey no. 44774/98, 2005, Dissenting Opinion at Para 5

[44] http://www.iconnectblog.com/2014/07/the-burka-ban-before-the-european-court-of-human-rights-a-comment-on-s-a-s-v-france/-Ioanna Tourkochoriti-Last checked on 28-7-2014

[45] See generally Ioanna Tourkochoriti, *The Burka Ban: Divergent Approaches to Freedom of Religion in France and in the USA*, 20 William & Mary Bill Of Rights Journal, 791, 847 (2012)

Member State's margin of appreciation[46]. One could argue that the higher the level of protection to be afforded the bearer of a particular right, the greater the need becomes to decide whether a less restrictive interference is not more suitable in a given situation[47]. In this regard, something that was neglected in the reasoning of the ECtHR was the fact that there did exist a less restrictive measure. This had been suggested by the Council of State for France: that the possibility be created to compel someone to show their face in public as soon as the protection of public order necessitated it[48]. If the margin of appreciation is to be narrower in general ban cases, why couldn't the ECtHR at least consider a measure that could be less restrictive? In fact, the ECtHR creates a scenario where either the general ban can exist, or it cannot. Such black and white decision making cannot possibly be the only way forward; yet, it seems to be the case in a number of decisions of the ECtHR (Leyla Sahin etc.)

An aspect that interestingly highlights the paradox judicial approaches being given to some cases by ECtHR, is that in cases of general bans like Serif v. Greece, the Court often comes to its conclusion by looking at whether or not there was a 'pressing social need' shown by the Member State to have resorted to the measure curtailing the Article 9 right. This was done in Kokkinakis, and there are shades of it Arslan v. Turkey. There is no analysis of this point in S.A.S. v France. This is surprising, since, as has been argued by Overbeeke, only a small number of women actually wear the full-face veil[49], and like in Arslan v. Turkey, there was no evidence that the applicant was a threat to public order, or that she had been involved in proselytism. It is hard to reconcile S.A.S. with this case law. As argued by Myriam Hunter-Henin, even a plea to secularism cannot be deemed proportionate in cases of general bans of this nature after Arslan v. Turkey, without a present proven threat[50].

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[46] See Adrian Overbeeke, 'Introducing a General Burqa Ban in the Netherlands', Chapter 7 of 'The Burqa Affair Across Europe: Between Public and Private Space', edited by Alessandro Ferrari & Sabrina Pastorelli

[47] Gerhard Van Der Schyff, Adrian Overbeeke, 'Exercising religious freedom in the public space: a comparative and European Convention analysis of general burqa bans', European Constitutional Law Review, (2011)

[48] Conseil d'Etat, *supra*, n. 16, p. 37-39

[49] Adrian Overbeeke, 'Introducing a General Burqa Ban in the Netherlands', Chapter 7 of 'The Burqa Affair Across Europe: Between Public and Private Space', edited by Alessandro Ferrari & Sabrina Pastorelli

[50] Myriam Hunter-Henin, 'Why the French don't like the burqa', International & Comparative Law Quarterly

There was also much debate on how the full-face veil would conflict with the views of members of French society who believed in being social, and would see the veil as a barrier to this. But does this not conflict with past case law? The views expressed in Serif v Greece where the 'role of the authorities…is not to remove the cause of tension by eliminating pluralism, but to ensure that competing groups tolerate each other.' and similarly in Otto-Preminger, wherein the Court stated that ideas, even if they shocked the State, would need to be tolerated. Neither of these views was respected in S.A.S. The ECtHR seems to not know when it has to step in and strictly guard its own pronouncements, and seems to recklessly indulge in the margin of appreciation, causing anomalous precedents that do not easily reconcile with its own findings. As pointed out by Janis, Kay & Bradley[51], the Court despite Article 9, seems reluctant to take an active role in interpreting it, this is clearly evident from cases like Sahin. The ECtHR arguing that it is up to the States, not Strasbourg, to decide the proper limits on manifestation of religion does not sit easily with the question: is not the role of the Court to help mould common European standards of human rights?

The margin of appreciation is invoked in S.A.S. because the ECtHR felt that there was no European consensus on the issue of a ban on the veil. As was stated in discussing Leyla Sahin, this does not sit easily when a cursory glance is given at other Member States. The fact that 45 out of 47 Member States did not deem it necessary to legislate and ban the veil, clearly shows a consensus, and thus one could argue that there was no need to deter the issue to the margin of appreciation in this case. More, and more, it seems, the ECtHR has indulged in this intellectual cowardice to not give concrete rights the proper interpretation they deserve. The ECtHR must harmoniously interpret such rights for the Member States, and not indulge in ad-hoc decision making. S.A.S. was a case that clearly showed a consensus and there was no reason to indulge in the margin of appreciation.

CONCERNS

From the case law, it seems that as long as the Court does not define clear, discernible tests to supervise the 'margin of appreciation' given to Member States, it will produce judgments that are difficult to reconcile with each other. The legitimate aims in Paragraph 2 of Article 9 are too broad, and result in abstract

[51] Janis, Kay & Bradley, 'European Human Rights Law, Texts and Materials', Third Edition, Pg 370, (2008)

principles being cited as 'legitimate'. Furthermore, there is no clear thread running through the judgments as to when the test of proportionality will actually be invoked, the Court goes from strict (Buscarini, Arslan, Serif) to lax (S.A.S.) with no real reason why. The ECtHR is a Court exercising the function of providing a harmonious interpretation of the rights enshrined in The European Convention, but Article 9 lacks harmony, and until the ECtHR takes a braver role in interpreting it, its judgments will appear ad-hoc and Europe will have religious freedoms varying between each end of a pendulum from Member State to Member State.

It is in the best interests of the ECtHR to address these concerns; a telling example of the problematic criticism it will have to place if it fails to do so is given by Janis, Kay & Bradley where they ask whether the ECtHR may be open to the charge that it is readier to protect some religions more than others? Otto-Preminger and Murphy v. Ireland[52] protected Catholic sensibilities, but Leyla Sahin did not protect those of Muslims[53]. It is most likely judicial inconsistency that is the cause.

PART II

UNITED STATES AND THE LESSONS FOR THE REST OF THE WORLD:

When it comes to religious attire (or 'religious garb' as it is more commonly referred to) case-law in the US, when compared to cases from the European Court of Human Rights, has a lot to teach human rights practitioners and policy makers all over the world. The analysis however should focus not on results but on contexts which lead to or make possible particular results.

WHAT IS TO FOLLOW?

This part begins by examining the constitutional concerns at play in the US when it comes to judicial examination of government regulation or prohibition of religious attire. These concerns are a by-product of the history and politics of the Constitution of the US—setting it apart from Europe, particularly France[54]. We

[52] Murphy v. Ireland, 38 E.H.R.R.13, 2003

[53] Janis, Kay & Bradley, 'European Human Rights Law, Texts and Materials', Third Edition, Pg 370, (2008)

[54] However, even within the US there is no absolute agreement on the precise politics and motivations underlying the First Amendment—particularly the Free Exercise and the Establishment clauses. For different arguments informing this debate see (Chemerinsky, 2009) p. 1666-1667 who relies on Tribe's treatise *American Constitutional Law* (1988). For arguments

draw a comparison with France since we feel that France best captures the arguments of a secularist state that has an interest in keeping religion out of the public sphere. We then briefly comment on how, despite some similarities, distinctions between approaches to religion in public sphere in France and the US should be acknowledged and appreciated—since these inform the debates (within and outside courtrooms) that shape results. We also examine the current state of the law on 'free exercise' of religion in the US. Following this we examine case-law from the US which focuses on issues of regulation or prohibition of religious attire- this examination and analysis shall also lay bare the different concerns and approaches at play.

We conclude by pointing out what we feel are important lessons flowing from a comparison of European and US case law. We hope that these lessons can inform the actions and debates of litigators, human rights activists as well as policy-makers.

THE OPPOSING FORCES IN THE US:

In the United States, one must keep in mind a constant tension between the requirements of two limbs of the First Amendment: the Free Exercise clause and the Establishment clause. One guarantees individual and collective religious freedom while the other prohibits state endorsement of a religion. An equally important (third) limb of the First Amendment, i.e. free speech, also informs the American approach when it comes to judicial treatment of legislation regarding religious attire.

WHY IS THERE A DIFFERENCE BETWEEN FRANCE AND THE US IN APPROACHES TOWARDS RELIGIOUS ATTIRE?

Why, if any, is there a difference between the way France and the US have treated the issue of the headscarf worn by Muslim women in particular and religious attire in general? Both the US and France are established liberal democracies with highly developed political systems. Like France, America is a society that has seen an increasing number of Muslim immigrants. Hence both societies have been exposed to Muslim practices and traditions, but is this where the similarities stop when it comes to addressing issues arising from religious attire? Why have we not seen a

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challenging conventional wisdom regarding the history and politics behind First Amendment's Establishment clause see (Hamburger, 2004).

headscarf ban in the US yet? The United States has suffered because of terrorism sponsored and carried out by those claiming to act in the name of Islam. It is no secret that many people in the US are suspicious of Islam and numerous polls establish this. So why, despite all the news of growing hostility towards Muslims in the US, do we hear of Americans being surprised by France's actions against the headscarf or the burqa? And why have legislators in the US not yet successfully passed a similar law?

It has been pointed out by scholars that the approach of two countries to immigrants, particularly their integration, is different—France expects immigrants to "shed their cultural identities and become French[55]" while the US espouses multiculturalism[56].

Invoking the religion in speeches by political leaders is routine in the US but a practice that political leaders in France stay away from[57]. Yet, USA and France both value state neutrality towards religion but in markedly different ways. Nuance would be a fatality if one said that both countries espouse secularism—one (France) overwhelmingly does so but in the US there is no broad agreement on whether neutrality and secularism are the same thing[58].

The root of the secularism espoused by France is the very French concept of *laicite* which is anchored in French history[59]. Motivated by a concern for equality and anti-clericalism[60], it does not celebrate religion in the public sphere. Its focus is on ensuring that religion does not appear in public. In the US, there is of course the pressure of the Establishment Clause to ensure that the state is not seen as endorsing or favoring one religion, but this is balanced with the Free Exercise and Free Speech clauses which celebrate free exercise of religion and speech through display of religious symbols. This tension means that the government cannot be seen to be endorsing or favoring one religion. Furthermore, the government will at times stipulate that government employees while performing certain duties may not wear religious garb because of the actual (and potential) interference with the

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[55] (Read, 2007), p. 233.
[56] (Read, 2007), Ibid. Also see (Killian, 2006)
[57] (Moore, 2002)
[58] See McCreary County v. A.C.L.U., 125 S. Ct. 2722, 2748 (2005) (Scalia, J., dissenting) (internal citations omitted).
[59] For an excellent history of the concept of laicite, see (Gunn, Jeremy, 2004)
[60] (Westerfield, 2006) relying on Gunn notes that the concept of laicite is linked to "anti-clericalism" at the time of the French Revolution. The term was not coined till 1870s and found its way into French law in 1905, before becoming a constitutional principle in 1946. See pp. 646-648 of Westerfield's article.

duty and the effect on those around them—think soldiers, school teachers and police. However, a private person in a public place is generally free to wear religious garb as part of free exercise of religion and in exercise of free speech.

Another difference between the American and French approaches to religious attire (particularly the Muslims' headscarf) that has been explained by scholars is the emphasis on freedom from the state/government in the American public imagination[61]. In a country founded on principles of resistance to despotism, there is likely to be significant suspicion against granting the government any additional power. Enforcing secularism in the US, as per the French model, would mean that Americans would have to trust their government with removing religion from the public space. The preservation of a freedom as precious as religion with the assistance of state power is essentially problematic to the American imagination. This, by default, limits the potential and actual power of a representative government. However, democracy does funny things and this should not be taken to mean that there can be no legislation generally or specifically targeting the headscarf or the burqa. Neither should this allow us to ignore the very real and well documented human experience of discrimination in the private, as opposed to public, sphere.

Carrying on, however, with distinctions between France and the US, one more persuasive reason is that in the US, there is a "qualitative" structure and concept of religion[62]. This means that regardless of their faith, people feel a connection with others who espouse religion. It is a precious shared belief that free exercise of religion in the private and public sphere matters[63]. Gordon, for instance, relying on Whitman's analysis argues that this explains why non-governmental faith-based organizations will come forward to agitate questions that affect other faiths, .e.g. a Christian organization will come forward to speak up and even initiate litigation in favor of a Muslim if her freedom to exercise her rights has been affected[64].

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[61] See (Gordon, 2008), pp. 40-55.
[62] *Ibid.*
[63] *Ibid.*
[64] A prominent example is the case of Nashala Hearn whose public school in Oklahoma prohibited wearing of hoods, caps and hats by students. When the school suspended Nashala for continuing to wear the headscarf, she filed a case citing her free exercise and free speech rights. She was aided by the Rutherford Institute, a Christian civil liberties organization. The school initially stood its ground, citing the Establishment Clause and its objective of disallowing headgear similar to that worn by gang members. However, when in 2004 the Justice Department filed a brief challenging the school's position, the school relented.

Add to this the culture of debate within America's institutions, particularly the judiciary. There is no concept of judicial review by courts of legislation in France—facial challenges cannot be brought and only 'as applied' challenges are allowed[65]. Furthermore, there are no dissenting opinions written in French cases whereas in America the debate between the majority and dissenters in the country's top court is often fierce. Hence, as Gordon says, there is no real public meaning in the US that is handed down by the state. Individuals are left to decipher meanings and answers in difficult questions themselves rather than be furnished with uni-dimensional answers from the state (as in France)[66]. Scholars have also written about the pre-eminence of the concept of the 'state' in France, i.e. it is impossible to imagine a French constitution without the French state[67]. This is distinct from countries like the United States (and others belonging to the common law world) where the constitution is not synonymous with the state but with the rule of law.

FREE EXERCISE OF RELIGION:

The promise of religious freedom was part of the reason that America was so attractive in its early days to those who were being persecuted and prosecuted in Europe for their faith. Since its birth, the US has promised to ensure religious freedom and one could argue that its record, in relative as well as absolute terms, has been admirable. Martha Nussbaum while celebrating America's record has gone as far as to say that America has a 'tradition of religious equality[68]'.

THE LAW ON FREE EXERCISE IN THE UNITED STATES:

When it comes to the law on free exercise of religion, there have been significant developments in recent years. After the Supreme Court's ruling in *Sherbert v. Verner* 374 U.S. 398 (1963), it was generally accepted that if a law substantially burdened religious freedom, the government had to pass the 'strict scrutiny' test, i.e. establish that the law was passed to achieve a compelling government interest and was narrowly tailored in the sense of adopting the least restrictive means to achieve the government's lawful objective. Then came *Employment Division,*

[65] (Westerfield, 2006), pp. 641-642 and footnote 21 in particular is relevant.
[66] (Gordon, 2008), pp. 55-56.
[67] (Beaud, 2013)
[68] (Nussbaum, 2008)

Department of Human Resources of Oregon v. Smith 494 U.S. 872 (1990) where Justice Scalia writing for the majority limited the reach of *Sherbert* without overruling it. He went on to write: "*We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate….[T]he right of free exercise does not relieve an individual of the obligation to comply with "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).*"[69] Hence laws neutral towards religion and aimed at prescribing or proscribing general conduct could legitimately burden a religious practice. Note that this is a standard similar to the one adopted by European Court of Human Rights in *S.A.S. v. France*.

However, as we argue even later in the article, US courts are extremely vigilant about evidence that establishes neutrality. Further, US courts always demand evidence from the government regarding the any 'government interest' that the government may be asserting. Hence in *Church of Lukumi Babalu Aye v. Hialeah* 508 U.S. 520 (1993) the Supreme Court held that if a law was not facially neutral, 'strict scrutiny' would still apply. In this particular case, it was held that local ordinances, prohibiting animal sacrifice, that by their text and operation, were aimed at religion could not be upheld. Therefore, a unanimous court ruled that laws lacking neutrality and burdening religious practice had to undergo strict scrutiny.

Smith however did cause a lot of controversy since it worried religious conservatives as well as liberals.[70] The protest post-*Smith* combined with activism and persuaded Congress to pass the Religious Freedom Restoration Act ("RFRA")[71] which did away with the *Smith* test and restored the 'strict scrutiny' standard for Free Exercise claims. In *City of Boerne v. Flores*, 521 U.S. 507 (1997) the Supreme Court held RFRA unconstitutional as applied to state and local governments.[72] RFRA still applies to Federal statutes in the US and *Smith* would arguably control state and local laws.

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[69] *Smith* at pages 878-880.

[70] *See, for instance, Employment Division v Smith* 494 U.S. 872, at 894 where Justice O' Connor notes: "Indeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such."

[71] 42 USC § 2000bb.

[72] (Chemerinsky, 2009) at p. 1695.

One must keep in mind that in many of the cases from the US jurisdiction being referred to in this article, the laws prohibited wearing of religious garb while performing particular official functions and did not involve outright bans on wearing religious garb in public places as a private citizen. Hence most cases involve government employees (public school teachers or law enforcement personnel) advancing the argument that wearing religious garb/religious attire while performing official functions was part of their right of free exercise of religion and free speech. Alternatively, cases also appear in which it was argued that denial of the right to wear religious garb at an official work place would be discriminatory and hence a violation of Title VII of the Civil Rights Act, 1964.

COURTS AND RELIGIOUS ATTIRE:

Cases from the US that we analyze can be divided into three categories:

(i) Cases involving wearing of religious attire by those serving in the military, law enforcement etc;
(ii) Wearing of religious attire by those teaching or holding a position of authority in a public school;
(iii) Cases involving wearing of religious attire by students.

In *Goldman v. Weinberger* 475 U.S. 503 (1986), the Supreme Court through a 5-4 ruling found no violation of the free exercise clause in the air-force's refusal to allow a Jewish serviceman to wear his yarmulke[73]. The ruling largely focused on military necessity for uniformity and discipline in the military. Although this case involves denial of right of free exercise, it should be read as limited to the military context where courts throughout the world have been deferential to decisions made by military leadership regarding military's internal discipline. The issue did not die down with the top court's ruling and generated debate. This led Congress to step in to protect the rights of those in uniform who felt orphaned of their free exercise rights. Legislation—through amendments to the National Defence Authorization Act—was enacted that allowed unobtrusive religious apparel to be worn as part of

[73] The contrast of the US with countries like India and Pakistan is quite striking here. India's army and police have a large number of Sikhs who wear their turbans as part of their uniform. Pakistan's military has also never interfered with Sikh soldiers wearing their turban. In the case of India, Sikhs are in too large a number for the government or military to risk annoying them. Also, it is arguable that the promise of post-colonial independence would be betrayed if countries such as India shunned religious diversity in the name of enforcing discipline. The politics is what is important.

a military uniform. Hence, the culture enabled legislation that allowed servicemen a victory even though they had lost in the court.

When Janet Cooper converted to the Sikh religion and decided to wear a white turban to the public school where she taught, she might have had little inkling of the constitutional issues she was about to raise[74]. Ms. Cooper married a Sikh man and then decided to adopt his religion. Oregon's law prohibited a teacher from wearing "any religious dress while engaged in the performance of duties as a teacher[75]." Since she chose not to abide by the law, her teaching certificate was suspended. She challenged this as a violation of her right of free exercise of religion under the Oregon constitution as well as the First Amendment of the US Constitution. She prevailed in Oregon's Court of Appeals. The school district and the Superintendent of Public Instruction sought a review before the Supreme Court of Oregon—which was allowed. The issues before the Supreme Court of Oregon, among other things, were whether Oregon's law in question violated Oregon's guarantees of religious freedom as well as the state law's potential incompatibility with the First Amendment.

Oregon's apex court was mindful of the fact that Oregon's law was not facially neutral since it took into account religious considerations when prescribing how public school teachers should dress. The court also did not accept that the case involved a regulation of conduct rather than religious beliefs. Importantly, it noted that such a view would allow the law to ban wearing of a religious dress in a private school or in the public generally[76]. This, the court noted, "would deny the importance of dress and other external symbols of individual and communal commitment to one's faith that certainly were widely understood to represent…the practice of one's religion when the constitutional guarantees were adopted[77]." The court went on to state: "In some branches of Judaism and Christianity particular modes of dress, although voluntary, may be essential to an adherent's sense of religious identity; in Islamic and other more encompassing religious communities, departure from prescribed dress may mean self-excommunication or lead to actual communal punishment[78]." This might suggest to some that the Oregon Supreme Court would have struck down a blanket ban on religious clothing in public places—a result markedly different from the way the European Court of Human

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[74] (Janet Cooper v. Eugene School District No. 4J, 723 P.2d 298, 1986)
[75] ORS 342.650
[76] (Janet Cooper v. Eugene School District No. 4J, 723 P.2d 298, 1986) at 305-307.
[77] (Janet Cooper v. Eugene School District No. 4J, 723 P.2d 298, 1986) at 307.
[78] Ibid.

Rights ruled in S.A.S v France. However, in the S.A.S case the law in France bans not just religious clothing in public places but any clothing designed to conceal the face. Hence this case should not be read too broadly.

The real issue in the *Janet Cooper* case boiled down to whether the religious dress interfered with the duties of a public school teacher. The competing interests were a teacher's right to free exercise of religion versus the rights of free exercise and enjoyment of religious opinion by children (i.e. the students). Furthermore, the state had to preserve the religious neutrality of government schools and this is of course a constitutional requirement in the United States[79]. As the Oregon Supreme Court noted, the burden on the state was to prove that the religious dress "necessarily contravene[d] the wearer's role or function at the time and place beyond any realistic means of accommodation." It was acknowledged that a state can prohibit teachers from wearing religious dress "to avoid the appearance of sectarian influence, favoritism or official approval in the public school[80]." The Oregon law in question was upheld as valid under both Oregon's constitution as well as the standards laid down under the First Amendment.

The court was mindful of the fact that schools serve a socializing function and not just an intellectual one. It noted that children in school were impressionable and susceptible to having their opinions shaped by the adults around them. Ms. Cooper's religious garb was found by the court to be a "constant and inescapable visual reminder of [her] religious commitment[81]." The teacher's appearance, it was held, could leave"conscious or unconscious impressions" among the school's students and their parents that the school endorsed the faith or practices of the teacher[82]. Hence Oregon's law survived the challenge. The opinion however is fragrant with multiple mentions of America's commitment to religious freedom. The court was clearly conscious of the difficult balancing exercise it is engaging it. It voices respect for democracy and the choice made by the Oregon legislature[83] while reminding us of the limits of the ruling. The court clearly was not caving in against anything akin to a margin of appreciation enjoyed by the legislators. It is worth noting that the court pointed out that a garb such as a turban is distinct from someone wearing a small cross or Star of David around her neck—suggesting that the ruling could have come out differently had a small necklace been involved.

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[79] (Janet Cooper v. Eugene School District No. 4J, 723 P.2d 298, 1986) at 308.
[80] Ibid.
[81] (Janet Cooper v. Eugene School District No. 4J, 723 P.2d 298, 1986) at 310
[82] (Janet Cooper v. Eugene School District No. 4J, 723 P.2d 298, 1986) at 313.
[83] (Janet Cooper v. Eugene School District No. 4J, 723 P.2d 298, 1986) at 308.

Also worth noting is the court's observation that the actions against Ms. Cooper survived the legal challenge because she had worn a religious dress while "dealing directly with children in a teaching or counseling role[84]."

Ms. Cooper's case shaped not just her own fate but that of others too. Meet Alima Delores Reardon, a Muslim by faith, who wanted to wear a headscarf while performing her duties as a public school teacher[85]. A 'religious garb statute' similar to Orgeon's was in force in Pennsylvania[86] where Ms. Reardon taught. When she was refused permission to teach, a challenge was brought before the District Court[87]. The claim was framed not in terms of free exercise of religion but alleged discrimination under Title VII of the Civil Rights Act, 1964. The District Court ruled in favor of Ms. Reardon. However, the US Court of Appeals for the Third Circuit reversed the District Court's ruling. One major reason was the legacy of Ms. Cooper's case from Oregon—since the Supreme Court of the United States SCOTUS had dismissed Ms. Cooper's appeal for lack of a substantive federal question[88]. The reasoning of the Third Circuit in Ms. Reardon's case is layered and might even be unsatisfactory to some. The Third Circuit held that since a similar case (Ms. Cooper's) had been dismissed by SCOTUS. It used SCOTUS's dismissal of Ms. Cooper's claim to reach three conclusions: (i) the dismissal of an appeal on a similar fact pattern showed there was no violation of free exercise claim, (ii) the law in question was narrowly tailored, (iii) laws focusing on religious neutrality in schools served a compelling state interest. Since forcing the School Board to sacrifice a compelling state interest would constitute undue hardship, hence there was no violation of the Civil Rights Act.

However, here too the statute in question related to religious neutrality in public schools being maintained through a prohibition on religious attire of teachers. The prohibition did not extend to all religious attire or even religious attire in public places. However, the particular 'religious garb' statute in question in this case generated a comment in a case years later when in *Nichol v. Arin Intermediate Unit*

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[84] (Janet Cooper v. Eugene School District No. 4J, 723 P.2d 298, 1986) at 312 -313.

[85] (United States v. Board of Education for the School District of Philadelphia, 911 F.2d 882, 1990)

[86] Pennsylvania's Public Law No. 282 enacted in 1895 (re-enacted as part of Pennsylvania's Public School Code of 1949.24 Pa. St. Ann. Secs. 1-101).

[87] The complaint/suit was filed by the Justice Department. As per 42 U.S.C. Sec 2000-5(f)(1) if the respondent to a charge filed under Title V (Gordon, 2008)II is a "government, governmental agency, or political subdivision" then a complaint can only be filed after the Equal Employment Opportunity Commission refers the aggrieved employee's charge to the Justice Department. Hence the case was filed by the United States against Commonwealth of Pennsylvania and the relevant board of education.

[88] Janet Cooper v. Eugene School District No. 4J, 480 U.S. 942, 1987.

28[89] the District Court in light of later doctrinal developments held that "it is unlikely that the Garb Statute would withstand the heightened scrutiny and endorsement analysis to which it now must be subjected[90]."

In *Webb v. City of Philadelphia* No. 07-3081, the Third Circuit held that there was no unlawful discrimination against a Muslim woman if she, being a member of a police force, was disallowed from wearing a headscarf[91]. Here too the court was balancing concerns regarding discipline and uniformity in a police force as well guarding against the appearance to public that a particular religion is favored. *Weinberger*, the Supreme Court case involving the yarmulke, was relevant here. The District Court, below, had also held and the appellate court affirmed that Ms. Webb's religious garb could not be accommodated without imposing an undue burden on the City of Philadelphia.

STUDENTS' RIGHTS TO WEAR RELIGIOUS ATTIRE:

In *Tinker v Des Moines Independent Community School District* 393 U.S. 503 (1969), SCOTUS held that students who had been suspended after having worn armbands to their public school to protest the Vietnam War had their conduct protected as 'speech' under the First Amendment. Furthermore, it was held that students cannot be expected to drop their First Amendments rights[92] at the school gates[93] and the wearing of armbands was held "akin to pure speech[94]". Hence, the First Amendment protects not just written or verbal expression but also 'symbolic speech'. A school can only prohibit students from conduct that materially and substantially interferes with the requirements of appropriate discipline in the operation of the school[95]. What really tilted the case against the school district was the lack of evidence regarding their fears and objections to arm bands. This focus on demanding clear evidence, rather than relying on state assertions or so-called interests, is an important feature of constitutional law adjudication in the US.

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[89] (*Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp. 2d 536., 2003)

[90] *(Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp. 2d 536., 2003) at p. 555.

[91] Webb v. City of Philadelphia, opinion available at http://www2.ca3.uscourts.gov/opinarch/073081p.pdf (last accessed 28th July, 2014).

[92] The same protections are mentioned in favor of teachers. However in cases of teachers wearing religious garb other arguments enter the fray: establishment clause as well as the effect on impressionable students.

[93] (Tinker v Des Moines Independent Community School District, 393 U.S. 503 , 1969) at 506

[94] *Id.* At 508.

[95] *Id.* At 509.

Although case-law from the European Court of Human Rights carries the rhetoric of evidence, it rarely cites any firm evidentiary basis for how a state's fears regarding wearing of a headscarf or a turban can be justified. A court in the US would be much more demanding of the government before upholding such restrictive measures[96].

When New Caney Independent School District imposed a prohibition on Catholic students wearing rosaries to school as part of a broader ban on "gang-related" apparel, this was struck down as an impermissible restriction on the students' rights of free exercise of religion and free speech under the First Amendment[97]. The Court chose to see the wearing of rosaries as symbolic speech under the standards laid down in *Tinker*—as opposed to seeing this as conduct alone with no element of speech[98].

The court combined the free exercise and free speech claims which resulted in 'heightened' scrutiny[99]. Lack of strong evidence here regarding gang-violence involving students wearing rosaries was also relevant. Just as important was the fact that the state action was not narrowly tailored—since there could have been other methods of controlling gang-related apparel or gang-violence other than a blanket ban on free exercise and speech involving rosaries. This law was not directed at religious attire but at gang-related activity and apparel. Hence one could argue that the law was neutral towards religion.

In *Nichol*[100], an instructional assistant at a school challenged a Pennsylvanian school district's 'religious affiliations policy' of prohibiting wearing of religious garb by teachers and their assistants. Ms. Nichol successfully obtained a preliminary injunction against the implementation of this policy since the District Court found the respondents to be among other things, in violation of the free speech and free exercise limbs of the First Amendment. The District Court held that the school district's policy was not 'neutral' since it only meant to prohibit attire motivated by religion or religious obligation. The policy could only be upheld if it survived 'heightened scrutiny' and if the government could show that the policy in question was substantially related to an important government

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[96](*Westerfield*, 2006), pp. 668-669
[97] (*Chalifoux v. New Caney Independent School District*, 976 F.Supp. 659 (1997))
[98] *See* the *O'Brien* case for the law on distinction between conduct and speech: *United States v. O' Brien* 391 U.S. 367 (1968)
[99] *Id* at 671.
[100] (*Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp. 2d 536., 2003)

interest[101]. The Court found there were no important government interests since the evidence did not establish any. There was nothing on the record which showed that the school's discipline had been affected or disrupted in way. Nor was there any complaint from any student indicating that the appropriate discipline of the school was being violated. The act of wearing a cross was held to be a perfectly legal exercise of "non-proselytizing, non-coercive religious symbolic speech[102]".

FUTURE CONCERNS AND LESSONS

The *Nichol* case serves as an important reminder of the important distinction between "government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protects[103]".

This difference is immensely significant since it highlights an important distinction between the militantly secular jurisdictions of France and Turkey compared to the United States. The former intend to keep religion out of the public place, even if a private individual is expressing her religious beliefs in public. The latter generally strives to accommodate private religious beliefs and in fact facilitate their free exercise unless there is the danger of one religion's endorsement by the government.

The *Nichol* and *Chalifoux* cases have also been used to comment that any prohibition on wearing of religious garb will be extremely difficult to sustain in a court of law[104]. This might be so but this does ignore one important point: why would a legislature impose a prohibition only on religious garb and not frame the law in broader, more general, terms[105]? Indeed this is the approach that has been followed by France in the latest *S.A.S v France* ruling at the European Court of Human Rights. Legislators, even if motivated by animus towards a particular

[101] *Id* at 550. Also note that this standard of 'heightened' scrutiny is different from the 'strict' scrutiny applied to view-point restrictions. Under strict scrutiny the government must show that its action/policy is narrowly tailored to achieve a valid compelling government interest.
[102] *Id* at 551.
[103] Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 841 while quoting 496 U.S. 226, 250.
[104] Westerfield, 2006
[105] *See, for instance, Employment Division v Smith* 494 U.S. 872, at 894 where Justice O' Connor notes: "Indeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such."

religion, would hardly be so naïve to pass a law aimed only at the headscarf or a Star of David necklace.

It is very difficult from a litigation standpoint, to successfully attribute malice or mala fide to the legislature[106]. Hence human rights litigators throughout the world will need to persuade judges to be mindful of applying or developing standards that are naïve. While Justice Scalia's standard in *Smith* is attractive because of its ostensible democratic nature as well as the picture of equality and cohesiveness it paints, such a standard is almost hopelessly naïve. So what can we do to ensure that liberal democracies are more accommodating of free exercise rights of their citizens—particularly Muslims wearing a headscarf? The answer lies in politics as well as the courts.

Political discourse should be engaged with to maintain and preserve the distinction between actions and matters of belief. Non-endorsement of religion should not be equated with hostility to religion. Neutrality towards religion should not result in an insistence on absence of religion at the cost of the rights of free exercise. We will need to impress upon politicians and judges the necessity of avoiding laying down standards that endorse the tyranny of the majority. Civil society and media will be important partners in this struggle going forward.

Courts should be persuaded to lay down and adhere to minimum standards of evidence when accepting a government's assertions about the interests involved as well as the threats posed to the values it is claiming to uphold. The lessons from US cases such as *Tinker, Chalifoux, Nichol, Church of Lukumi Babalu Aye* etc. are particularly important when it comes to demanding evidence from the government. Furthermore, it is equally important to stress that treating religious attire as symbolic speech (as done by courts in the US) is a helpful tool of safeguarding individual and collective rights. Needless to say, merely recognizing religious attire as symbolic speech is not enough but using it as a rigorous tool of analysis for protection of precious rights is important.

Developments in the US subsequent to the *Smith* case, which led to the enactment of RFRA and congressional legislation subsequent to the *Weinberger* case (for protection of free exercise of religion of military servicemen and women) are an invaluable reminder of how human rights battles do not start or finish with court rulings; even with the highest court's rulings. Persuasion of politicians that lead to

[106] However, see the *Janet Cooper* and *Nichol* cases where anti-Catholic animus of the legislature was established by the record. This ceased to be relevant since the law had been re-enacted later by a new legislature.

favorable legislation is proof that battles fought outside the courtroom can help with standards being applied inside the courts.

If you care about particular communities then looking at their socio-economic development can also help you devise a more informed strategy for their well-being. For instance, Muslim immigrants in the US are better educated, have better jobs and earn more than their counterparts in France[107]. Hence, in France the ability or lack thereof of Muslims to influence politics has a class angle as well. As rightly noted by Read, the lack of individual and community resources to challenge state policies characterizes the experience of Muslim immigrants in France[108].

Any criticism of courts should keep in mind their role and their responsiveness to national politics. European Court of Human Rights inspires many and perhaps disappoints in equal measure. However, it is a supra-national court and is perhaps under more pressure than a national court to respect the democratic choices of particular countries[109]. This could be one reason why it applies a broader 'margin of appreciation' for Member States as opposed to the sliding scale applied by US courts—ranging from 'rational basis' to 'strict scrutiny'—depending on the area of law and the rights infringed.

Political matters and this should be kept in view when devising strategies or leveling criticisms. In the 1989, France's highest administrative tribunal (Conseil d'Etat) had ruled that students attending school had the right to wear headscarves if the symbols did not amount to an act of intimidation, provocation, proselytizing or propaganda. Furthermore, headscarves could be worn as long as there was no threat to the dignity and freedom of students or other members of the school community or without disrupting the normal functioning of the school[110]. When politics changed, the courts followed.

The sensitivity in the US to free exercise and free speech rights of individuals and communities should inspire and teach the rest of the world. This is not to suggest that there is no discrimination or hostility (especially in the private sphere) against Muslims or other religious minorities in the US. However, the secular world is better off maintaining distinctions between religious attire of public functionaries

[107] (Zogby, 2004)
[108] (Read, 2007)
[109] This is just one argument. Of course the push back would be that a supra-national court is immune from democratic pressures. This argument too has merit but it does not take into account the power of legitimacy of a court created by a domestic constitution as well as the popular legitimacy conferred on such a court through practice, history and tradition.
[110] (Beller, 2004) at p. 584

that may show state endorsement of religion (or undermine government interests) versus private citizens' wearing religious attire to celebrate diversity and their own faith. Forcing uniformity on a society is likely to breed disillusionment and render the vulnerable without the security they need. Any concern for uniformity and shared values needs to be balanced with respect for free exercise claims and free speech. This can produce results which exclude less and include more into the ambit of protections afforded by law—and the promises made by constitutions.

LOST IN TRANSMISSION
THE PROCESS OF INSERTING ARTICLE 10A IN THE CONSTITUTION AND ITS IMPACT

Amber Darr[1]

1. INTRODUCTION

The enactment on 19th April 2010 of the Constitution (Eighteenth Amendment) Act 2010 ('the Act') marked a watershed in the chequered history of the Constitution of the Islamic Republic of Pakistan 1973 ('the Constitution'). Not only did this Act claim to undo some of the extensive damage done to the Constitution by Pakistan's erstwhile military Presidents, Generals Zia-ul-Haque and Parvez Musharraf, but also it claimed to lay the groundwork for strengthening the institution of justice in Pakistan. Two amendments emphasized in this regard were the creation of the framework of a judicial commission for the appointment of the superior judiciary[2] and more importantly for the purposes of this paper, securing for individuals the right to a fair trial.[3]

The right to a fair trial as stated in Article 10A of the Constitution[4] is modeled on Article 10 of the United Nations Declaration of Human Rights[5] ('the UN Declaration') to which Pakistan is a signatory.[6] The express insertion of this right in the Constitution at a time when Pakistan was reasserting its commitment to democracy was perhaps intended to appeal to the ordinary litigant and to make him believe that he was empowered in one of two ways: First, if he were presently a litigant, that he could assert this right in the course of court proceedings and demand that courts deal with them fairly and in accordance with the norms of due

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[2] Article 175A of the Constitution. The term superior judiciary as used here means judges of the Supreme Court, the High Courts (including the Islamabad High Court) and the Federal Shariat Court.

[3] Article 10A of the Constitution. The right to free trial was one of three new rights created vide the Constitution (Eighteenth Amendment) Act 2010. The other two were right to information (Article 19A) and the right to education (Article 25A).

[4] **10A. Right to fair trial**. For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.

[5] http://www.un.org/en/documents/udhr/

[6] Article 10 of UNDHR: 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.

process and natural justice, and secondly, if he were a potential litigant, that he may approach the court for the settlement of his disputes with a greater sense of impunity and confidence that he will be treated fairly and justly.

The number of decisions of the superior courts since 2010 in which litigants have asserted their right to a fair trial, suggests that the first of the intended effects of inserting Article 10A in the Constitution has achieved a reasonable degree of success.[7] However, there is simultaneously a prevalence of incidents throughout the country in which people have preferred to take the law into their own hands rather than to approach the courts for the settlement of their disputes.[8] This suggests that the second hoped for effect has been largely lost in transmission. A large segment of Pakistani society remains either unaware or unconvinced that it now has the right to insist on a fair trial and courts rather than the proverbial streets, considering the latter a more suitable arena for dispute resolution.

Whilst a number of reasons have been put forward to explore factors inherent in our legal history and the legal system that may be responsible for the failure of transmission of legal rights to the general public,[9] the impact in this regard of the manner in which a country acquires these rights, or indeed any other law, has not been investigated in any great depth. This paper explores the hypothesis that an important factor in the failure of transmission of a newly created right to the general public may be attributable in considerable part to the mechanisms through which a country acquires the particular right. The paper further posits that this failure in transmission in-turn has the undesirable and perhaps unexpected impact of rendering superfluous, if not entirely meaningless; even the most well intended attempts at law reform.

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[7] A list of only the decisions of the Supreme Court in which Article 10A has been cited is as follows: (1) President Balochistan High Court Bar Association v. Federation of Pakistan 2012 SCMR 1958 SC; (2) Suo Motu action regarding allegation of business deal between Malik Riaz Hussain and Dr. Arsalan Iftikhar attempting to influence the judicial process 2012 SCMR 1235 SC; (3) Suo Motu case No. 4 of 2010 2012 PLD 553 SC; (4) Muhammad Azhar Siddiqui v. Federation of Pakistan 2012 PLD 774 SC; (5) Human Rights Case No. 29388-K of 2013 2104 PLD 305 SC; (6) Sarfaraz Saleem v. Federation of Pakistan 2014 PLD 232 SC. In addition to these there are a number of judgments of the High Courts in which Article 10A has been cited.

[8] The gang rape of a forty year old widow in Muzaffargarh, the mass killings made evident by the discovery of mass graves in Khuzdar and the gruesome murder of Farzana Parveen outside the presmies of the Lahore High Court are some of several incidents that suggest that rather than flocking to the courts to settle their grievances and taking advantage of the newly conferred benefit of a 'fair trial', would-be litigants are still preferring to settle their disputes through extra-judicial and extra-legal means.

[9] See in particular the author's column in Daily DAWN http://www.dawn.com/news/1111602/an-alien-justice.

2. PROCESS OF LAW REFORM: HOW DID PAKISTAN ACQUIRE ARTICLE 10A?

In analyzing the manner in which Pakistan acquired Article 10A it is important to examine the impact of several distinct aspects of the process of law reform in Pakistan particularly as they relate to the insertion of Article 10A. First, did Pakistan develop the legal concept embodied in Article 10A locally or did it acquire and adopt it from external sources? Second, what process did Pakistan follow for selecting this concept for its purpose, specifically, whether or not it engaged with the public in this regard? Lastly, what was the process through which the concept was formally introduced into the Pakistani legal framework and the extent to which it engaged with the public at this stage? In the following paragraphs we will examine the distinct bearing each of these factors has on whether or not the right created is likely to be transmitted to and, therefore, be utilized by the general public.

(a) The origins of the concept of a right to a fair trial and its implications

The concept of the right to a fair trial, particularly in the form and style in which it is expressed in Article 10A, is not indigenous to Pakistan. In fact it forms part of the UN Declaration adopted on 10th December 1948 by the United Nations General Assembly session held at Paris. An important rationale for the United Nations General Assembly in adopting this right was to affirm the commitment of signatories of the UN Declaration to upholding the rule of law in their respective jurisdictions.[10] Although Pakistan did not expressly include this right in its successive constitutions,[11] it cannot be taken to mean that the Pakistani government or the legal system was unfamiliar with its requirements or unaware that it had made a solemn international commitment in this regard. What it does mean, however, is that the Pakistani public was not made aware of the precise meaning or scope of this right or the manner in which it may be applied in Pakistan.

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[10] The UN General Assembly had adopted the United Nations Declaration on Human Rights by a vote of 48 in favour, none against and eight abstentions. The then USSR, Saudi Arabia and South Africa were among those who abstained.

[11] The reference here is to the Constitutions of 1956 and1962 and the present Constitution of 1973.

The only security available to an individual facing legal proceedings in Pakistan that he would be treated fairly lay in the application by the courts of the norms of due process and natural justice believed to be inherent in the Pakistani legal system.[12] Although these norms of due process and natural justice read with the provisions of the civil and criminal procedure codes in force within the country[13] largely met the parameters of a fair trial, the individual could not claim these as a right. Of course, a litigant aggrieved by the failure of a court to treat him fairly and in accordance with the norms of due process and natural justice as well as the rules of procedure, had the option to file an appeal against the court's decision. In reality however the litigant was ill equipped to do so, either because he was unfamiliar with court procedures and remained at the mercy of lawyers or because he had simply run out of funds and energy.

Therefore, even though a number of safeguards existed in the law books, the ordinary Pakistani litigant remained deprived of their benefits and, thus, remained largely unaware of what these entailed. All that the average Pakistani knew of the legal system was that it was a labyrinth of complex procedures which seemed to be designed specifically to confuse him; it was rooted in English, a language understood by a small minority and that too with middling ability and, most damningly, that it could be manipulated by the powerful and resourceful. It was for these reasons, and not for the fact that it was modeled on Article 10 of the United Nations Declaration that the right to a fair trial and what it entailed, remained alien and unknown to the average Pakistani litigant.

(b) The Mode of Selection of the right for the Pakistani Context

Selection by the Pakistani Parliament of the right to a fair trial as an express part of the Constitution was not only of symbolic but also of actual value for the ordinary litigant. This said it also offered a tremendous opportunity for the lawmakers to educate the public as to what it may expect from a functioning court system. The fact that the initiative to introduce this right in the Constitution was taken by a constitutionally elected, democratic government suggested that the democratic

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[12] These principles entailed that individuals facing legal proceedings in Pakistan could expect that their cases would be heard and decided within a reasonable time, that they would be heard and decided by an independent and impartial decision-maker, that they, the litigants, would be provided with all relevant information, their trials would be open to the public and the litigant would be able to engage a lawyer or other representative and, most importantly, be given a public decision at the end of the proceedings (Elements of a fair trial as provided in http://www.equalityhumanrights.com/your-rights/human-rights/what-are-human-rights%3F/the-human-rights-act/right-to-a-fair-trial).

[13] The Civil Procedure Code of 1908 and the Code of Criminal Procedure 1898.

institutions of seeking public opinion would be utilized in the process of the selection of the amendments to the Constitution. As is evident from the following paragraphs, whilst the Parliament observed the *form* of democratic institutions and traditions, it perhaps lacked the experience to observe them in their *spirit*.

The selection of this right for inclusion in the Constitution was the result of deliberations of a parliamentary committee established for the express purpose of recommending appropriate amendments to the Constitution ('the Committee'). The Committee formed on 23rd June 2009 by the then President Asif Ali Zardari, drew its members from all political parties and independent groups in both Houses of the Parliament and therefore, enjoyed the widest possible political and popular support[14] particularly given the fact that this was the first time since 1999 that the both the President and Prime Minister of the country were elected representatives of the people of Pakistan.

The Committee itself at least ostensibly had strong public roots, due to the fact that all its members were parliamentarians who had been democratically elected in the 2008 general elections in accordance with the electoral procedure provided in the Constitution. Further, the Committee had devised a transparent procedure for conducting its business, which had been shared with and accepted by all its members. A perusal of the report[15] ('the Report') of the Committee appended to the Constitution (Eighteenth Amendment) Bill 2010 ('the Bill') suggests that not only did the Committee meet frequently[16] and at regular intervals but also asked its members to provide recommendations for the proposed reform and attempted to engage the people of Pakistan by inviting suggestions from the 'public at large through the press'.[17]

It is interesting to note, that even though securing independence of the judiciary and strengthening fundamental rights was an integral part of the criteria followed by the Committee in drafting the Bill, the Report neither records a discussion on

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[14] The Parliamentary Committee established for this purpose, named the Constitutional Committee for Parliamentary Reforms, was officially constituted on 23rd June 2009 and comprised members of the following parties: PPPP (5 members); PML(N) (3 members); PML(Q) (3 members); MQM (2 members); ANP (2 members); ANP (2 members); JUI(F) (2 members); PML(F) (1 member); BNP(A) (1 member); JIP (I member); NP (1 member); PPP(S) (1 member); NPP (1 member); PKMAP (1 member); JWP (1 member) and Independent (1 member).

[15] http://www.na.gov.pk/uploads/documents/report_constitutional_18th_amend_bill2010_020410_.pdf.

[16] It met a total of 77 times in its approximately 9 month life.

[17] Report p.6.

the specific issue of the inclusion in the Bill of the right to a fair trial nor provides any reasons for which the Committee considered it desirable to insert this right in the Constitution. Further, and more importantly the Report does not provide any information as to the origin of the idea of inserting this right in the Constitution. Specifically, there is no indication as to whether the Committee itself conceived this idea or if it received impetus in this regard from its public consultations.

Understanding the origin of the idea of inserting this right in the Constitution is important for gauging whether and to what extent there was an indigenous, popular demand for this right. It is important to note that even if there had been evidence that the idea had emanated from comments received from the public it would have only been representative of a very small literate minority. The fact that the Committee had invited public comment through newspapers only, had automatically excluded a major portion of the Pakistani public which either due to reasons of illiteracy or poverty would not have had access to them. In the absence of any indication in this regard it is impossible to ascertain as to whether even the literate public had engaged with the Committee on this issue.

The members of the Committee themselves, by virtue of being elected representatives of the people, would have had greater opportunity to understand the real demands, grievances and needs of their constituencies. However, given the erratic history of democracy in Pakistan, the members of the Committee did not have a tradition of taking into account the concerns of their constituents or of being accountable to them. Consequently, in all likelihood the recommendations made by the Committee remained the domain of elite politicians and technocrats and, at best, of the literate minority of the country. This absence of an indigenous rooting of the reform process did not in any way help to build trust between the legal system and the litigant which should have been a crucial aspect of what the Parliament was hoping to achieve from inserting this right.

(c) Formally introducing the right into the Pakistani legal framework

On 2nd April 2010, once the Committee had completed the process of selecting what it considered the most appropriate recommendations for constitutional reform in Pakistan, it formally submitted the Bill for consideration of the National Assembly. This was necessary because in terms of the Constitution, only an Act of Parliament approved by two-thirds majority of both the National Assembly and the

Senate may amend the Constitution.[18] The National Assembly approved the Bill on 8th April 2010 and submitted it to the Senate, which approved it on 15th April 2010. On 19th April 2010, the then President Asif Ali Zardari gave his assent to the Act and the Constitution accordingly stood amended.

The fact that the Act was enacted strictly in accordance with the Constitution offered yet another opportunity to the Parliament to engage with the public. This opportunity arose not from the possibility of direct public consultations but through debate and discussion by Parliamentarians who, as has been stated earlier, were the elected representatives of the people and may be expected to have their best interests at heart. Two factors however, dampened any effort that may have been made in this regard: First, the speed with which the Act was passed through the Parliament (it was introduced on 2nd of April and enacted on 19th of April 2010) and second, the fact that the democratic institution of eliciting public opinion was almost non-existent in Pakistan.

Several factors may be considered to have contributed to the absence of this democratic institution in Pakistan. Most notable amongst these were the following: The fact that Pakistan had remained without a constitution for the first nine years of its existence and had thereby missed the chance to plant the seeds of democratic institutions and traditions at a time when the Pakistani public is likely to have been most eager for and receptive to new political norms. Secondly, that for more than half of the years following 1973, when it finally acquired the Constitution, the reigns of the government of Pakistan had remained in the hands of military rulers either under direct or quasi-military rule.

The legal and political turmoil in the country had not only led to an increasing sense of uncertainty and insecurity, but had also prevented Pakistani politicians from forging a bond with the Pakistani public which would enable them to elicit issues and opinion from the public. This was in large part due to the trend set in motion by military rulers who did not owe their position to the public and they did not consider themselves accountable to it. Furthermore, the fact that Pakistan's military rulers had wrested power from elected governments, they did not consider it in their interest to develop any institution that would empower the public. Pakistani politicians, particularly those who had served under military

[18] In terms of Articles 238 and 239 of the Constitution, a constitutional amendment is only possible by an Act of Parliament passed by a two-thirds majority by both Houses of the Parliament. The two Houses referred to herein are the Majlis-e-Shoora or the National Assembly and the Senate.

governments, had also imitated this attitude in order to safeguard their positions almost always at the expense of the interests of the public.

It may be argued that those elected in 2008 were different from their predecessors in that they had been elected by the people in a general election. Be that as it may, the fact remains that a single successful election does not lay the framework of democracy in a country, which has been long deprived of it. In such cases, not only are the politicians unused to turning to the people but also, and more damagingly, the people are unaware of their power whether it may be of electing suitable people to office or of successfully raising their demands in respect of law reform. In 2010, when the right to a fair trial was introduced in the Pakistani legal system, Pakistan was still too new to democracy to bind even the most well-intentioned politicians to the specific needs and concerns of the people.

3. CONCLUSION

An important factor in whether, and the extent to which people may assert a right, depends on their awareness of it. It is evident from the preceding analysis that the process through which Article 10A was inserted in the Constitution, despite being designed according to constitutional lines, did not meaningfully engage the public. Consequently, the public at large was not only unaware of the existence of this right but, more importantly, had no idea what this right may imply for a person seeking justice in Pakistan. This disconnect between politicians and the public, in turn only serves to further cement the barrier between the Pakistani public and the law that governs them: the average person remains beyond the law simply because he does not understand it and has no faith in it.

The above analysis suggests that Parliament had at least three opportunities to engage with the public to build the necessary understanding and trust. First in devising the right to a fair trial. Secondly, in selecting it for insertion in the Constitution. Thirdly, at the time of enacting the constitutional amendment. Had the Parliament engaged with the public at each, or indeed at any of these stages, it may have realized the actual problems faced by the ordinary litigant and appreciated that merely inserting the right would not solve them. At the very least it may have made an effort to tailor the right to the specific needs of Pakistan rather than copying it verbatim from the UN Declaration. More importantly, the Parliament may have succeeded in educating the ordinary litigant of what it means to have this right and thereby, meaningfully strengthened the system of justice in the country.

The limited public engagement relegated the status of the right to reform on paper to be utilized by the privileged few rather than impacting, even in the most limited way, the lives of the larger portion of people it was intended to benefit. Because the people of the country were not party to a discussion about whether or not they needed this right to enhance the quality of their lives they remained unconcerned and unaffected. Perhaps it is yet another example of the continuing paternalism of the state that it decided what is best for the people without consulting them, or perhaps it hoped that the people would gradually get educated to the meaning of the right as the superior courts handed down their decisions over time.

Whilst there is some merit in the argument that decisions of superior courts serve to educate the ordinary litigant, any education that is likely to take place through this process occurs very slowly (particularly given the problem of endemic delay in the country's legal system), is piecemeal (due to the fact that it relates to the set of facts before it) and limited (because it is intended for the litigants rather than the general public). A wider consultation and, therefore, wider dissemination of a right, particularly in a country like Pakistan where a major portion of the populace is either illiterate or semi-literate, was only possible at the stage at which the right is either being drafted or if it is borrowed from elsewhere as the right to a fair trial was, at the time it which is selected or formally introduced in the country's legal system.

Does this mean that if the right to a fair trial had been introduced in Pakistan through appropriate public consultation it would have eradicated the rampant problem of extra-judicial activities in the country? Certainly not. The problem of extra judicial 'justice' is too complex and too entrenched to be solved in a single shot or by a single reform. It does mean, however, that meaningful and consistent engagement with the public in respect of an issue which directly impacts their legal rights, would have led to a greater awareness, understanding and most importantly, ownership of these rights in the weak and perhaps a fear of the law in the would-be aggressors. In time perhaps it would have helped bridge the yawning gap that divides the ordinary person from the law through which he is governed.

A STATE OF PERMANENT EXCEPTION
A HUMAN RIGHTS ANALYSIS OF PAKISTAN'S PREVENTIVE DETENTION REGIME

Reema Omar[1]

INTRODUCTION

> *Human rights and humanitarian law were not drafted with peace and political stability in mind. Rather, the very raison d'être of this legal system is to provide States with the framework that allows them to respond effectively to even the most serious of crises. Accordingly, human rights are not, and can never be, a luxury to be cast aside at times of difficulty*
>
> Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights
>
> *A state which has security as its sole task and source of legitimacy is a fragile organism; it can always be provoked by terrorism to become itself terroristic…when politics…reduces itself to police, the difference between state and terrorism threatens to disappear.*
>
> Giorgio Agamben –on security and terror

Human rights have always been victimized against claims of national security. Even before the "global war against terror" was launched by the United States in the wake of the 11 September 2001 attacks, states facing situations of real or perceived crises justified human rights violations, including arbitrary deprivation of liberty, for "national interests", which included security, order and stability.

One such expression of the apparent contradiction between human rights protections and interests of the state can be found in *King v. Halliday*, one of the earliest UK House of Lords judgments on preventive detention. Lord Atkinson describes the tension between human rights and security, and argues why the latter must always prevail:

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[1] The author is a legal advisor for the International Commission of Jurists.

> *"…where preventive justice is put in force some sufferings and inconveniences may be caused to the suspected persons. This is inevitable. But the suffering is…inflicted for something much more important than his liberty or convenience, namely for securing the public safety and the defense of the realm.[2]"*

In the Indian sub-continent, fears about personal liberty damaging state security and public order, led to preventive detention being given constitutional protection in independent India's first constitution in 1949. Dr Bhimrao Ambedkar, the chief architect of the Constitution, justified preventive detention by claiming

> *"…it has to be recognised that in the present circumstances of the country, it may be necessary for the executive to detain a person who is tampering either with public order…or with the Defence Services of the country. In such a case I do not think that the exigency of the liberty of the individual should be placed above the interests of the State."*

[3]Such a pervasive discourse promotes the sacrifice of fundamental rights and freedoms in the name of security. It ignores the genesis of the modern international human rights framework, which was established because of, and not despite, the need for security. There is no inherent contradiction between upholding human rights and the rule of law and ensuring security by countering terrorism. Instead, "safeguarding persons from terrorist acts and respecting human rights both form part of a seamless web of protection incumbent upon the state."[4]

The right to liberty, or freedom from arbitrary detention, is a bedrock standard of human rights law, found in most generalized international human rights instruments and in domestic constitutions everywhere. Yet, as is evident from the examples discussed above, states often rely on preventive detention to deal with individuals suspected of terrorism or other conduct considered contrary to national security or public order, or for their real or imputed status or associational relationships.

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[2] *The King (at the Prosecution of Arthur Zadig) v. Halliday*, [1917] A.C. 260.

[3] Constituent Assembly of India, Volume IX, available at: http://parliamentofindia.nic.in/ls/debates/vol9p35a.htm

[4] International Commission of Jurists, *Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism* (Berlin Declaration), adopted on 28 August 2004. Available at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/04/Legal-Commentary-to-the-ICJ-Berlin-DeclarationNo.1-Human-Rights-Rule-of-Law-series-2009.pdf

Inherent in the definition of preventive detention is that it places detainees outside the full protection of law. The executive branch of the State deprives an individual of his or her freedom without adequate or useable evidence of criminal conduct, without the contemplation of criminal charge, and without the prospect of a trial in which his or her guilt or innocence can eventually be established. In practice, the detention is frequently shrouded in secrecy, with little or no respect paid to the rights of the detainees' family and friends, and in some cases their lawyers, to know about their whereabouts and well-being. Often, because of limited judicial oversight, the detainees are also subjected to torture and other proscribed ill-treatment. In some countries, the widespread use of preventive detention also poses a danger beyond the violation of rights in individual cases by severely eroding or even displacing the normal criminal justice system.

States may choose to rely on preventive detention for a variety of reasons: the grounds for suspicion may be based on inadmissible intelligence information, including testimonies obtained from the use of torture or other ill-treatment; there may be enough evidence to raise a reasonable suspicion, but not enough to prove guilt beyond a reasonable doubt in a court of law; or witnesses may be reluctant to testify because of fear or reprisals. In other instances, preventive detention may be undertaken with a view not necessarily to prosecute the detainee, but as a means to gather intelligence through interrogation.

Preventive detention, when time limited, may be taken for a proper reason, for example to ensure to detain a person where briefly while inquiry is conducted. Often, however, such detention is also considered a convenient tool to clamp down on dissidents, members of opposition parties, and human rights defenders.

This paper analyses Pakistan's preventive detention regime in light of international human rights law. It is divided into two parts. The first part considers the practice of preventive detention under international human rights law and standards, and argues that preventive detention will generally be unlawful, at least outside the context of an international armed conflict, unless adopted pursuant to a lawful derogation with requisite safeguards. The second part of the paper traces the development of preventive detention in Pakistan in light of the Constitution, statutory provisions, and judicial pronouncements to demonstrate how Pakistan's preventive detention regime violates its international human rights law obligations. The paper concludes with suggesting that instead of relying on harsher security laws and longer detention periods, Pakistan needs a paradigm shift in its legal

response to terrorism to move towards the recognition that human rights and security concerns are not antagonistic, but complementary of each other.

WHAT IS PREVENTIVE DETENTION?

Preventive detention is a form of "administrative detention",[5] often defined as "detention without charge or trial."

Under international law, there is no one agreed definition or unitary description of preventive detention. One United Nations publication defined preventive detention to include "a broad range of situations outside the process of police arresting suspects and bringing them into the criminal justice system."[6]

The UN Working Group on Arbitrary Detention (WGAD) has defined preventive detention somewhat differently as "arrest and detention of individuals by State authorities outside the criminal law context, for example for reasons of security, including terrorism, as a form of preventive detention, as well as to restrain irregular migrants."[7]

Most commonly, the term is used to describe deprivation of liberty ordered by the executive branch of the state without bringing forth criminal charges, often without judicial authorization or supervision. Under certain forms of preventive detention, the detainee is held on the assumption that he or she poses a future threat to national security or public order, or at least that there is a risk of such threat. In other cases, detention may be used for interrogation for the purposes of gathering intelligence.[8]

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[5] The terms preventive detention and administrative detention are used interchangeably in this paper.

[6] United Nations Centre for Human Rights and Crime Prevention and Criminal Justice Branch, *Human Rights and Pre-Trial Detention: A Handbook of International Standards Relating to Pre-Trial Detention, Professional Training Series No.3*, UN Doc HR/P/PT/3, UN Sales No. E94.XIV.6 (1994) s 177.

[7] *Report of the Working Group on Arbitrary Detention*, (WGAD), UN Doc. A/HRC/13/30, 18 January 2010, para. 77.

[8] See International Commission of Jurists, *Assessing Damage, Urging Action, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights,* 2009, Chapter 4. In 2005, the International Commission of Jurists (ICJ) convened the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights to conduct a detailed study on the global impact of counter-terrorism measures on human rights. This report was written on the basis of the Panel's comprehensive survey on counter-terrorism and human rights, including sixteen hearings in different countries throughout the world.

A detainee may also be deprived of his or her liberty pending trial, known as pre-trial detention in some jurisdictions,[9] or be detained pending immigration proceedings. The specific kind of preventative detention discussed in this paper, however, is preventive detention for purposes of national security, using the international human rights law framework. This paper will not discuss detention in situations of armed conflict under international humanitarian law.[10]

For the purposes of this paper, it would be useful to consider preventive detention as comprising of the following characteristics:

1. The deprivation of liberty is ordered by the executive, including administrative authorities;
2. The deprivation of liberty in context of the national security or public order, including the fight against terrorism;
3. Its immediate aim is often not to bring the detainee to justice in a trial before a court of law;
4. Detention is based on the assumption that the detainee poses a future threat to national security or public safety or that the individual is suspected of criminal behavior, but further evidence is required before he or she can be prosecuted in the regular criminal justice system.

PREVENTIVE DETENTION –A HUMAN RIGHTS ANATHEMA

Generally speaking, preventive detention is a practice anathema to respect for human rights and the rule of law, creating conditions not only for arbitrary detention, but also facilitating other human rights violations.

Detention is the deprivation of a person's liberty. The primary permissible basis for a lawful deprivation of liberty, with narrow and limited exceptions, is the enforcement of criminal law, in strict accordance with protections provided under

[9] For a detailed discussion on the differences between preventive detention and pre-trial detention, see D Cassell, *Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints under International Law,* Journal of Criminal Law and Criminology, Volume 98, Issue 3, Spring 2008.

[10] For international armed conflicts, rules governing detention are set out under the 3rd and 4th Geneva Conventions. For non-international armed conflicts and internal disturbances, international human rights law is the applicable framework. See International Commission of Jurists, *Memorandum on International Legal Framework on Administrative Detention and Counter-Terrorism*, March 2006, pp 44-49. Available at: http://www.mafhoum.com/press9/278S25.pdf

Article 9 of the International Covenant on Civil and Political Rights (ICCPR) to ensure that any such deprivation of liberty is not arbitrary.[11] The procedures, rules of evidence, and standard of proof in criminal proceedings minimize the risk of innocent persons being deprived of their liberty for prolonged periods. The practice of governments to circumvent these safeguards therefore is incompatible with the right to liberty.

At the global level UN treaty-monitoring bodies set up to interpret the provisions of the respective human rights treaties and supervise States' compliance with their treaty obligations, as well as the independent experts mandate under the UN special procedures systems established under the UN Human Rights Council, have denounced the practice of preventive detention.

The UN Human Rights Committee has frequently found the practice of preventive detention to be in breach of the State Party's obligations to respect and protect the right to liberty and the prohibition of arbitrary detention under Article 9 of the ICCPR, and has raised concern about purported security concerns as grounds to undermine the right to liberty.[12]

Similarly, the UN Working Group on Arbitrary Detention (WGAD) has stated that the detention of persons who are suspected of terrorist activities must be accompanied by concrete charges and "resort to administrative detention against

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[11] Article 9 of the ICCPR : 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. 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. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

[12] See for example: UN Human Rights Committee, *Shafique v. Australia*, Communication 1324/2004, UN Doc. CCPR/C/88/D/1324/2004, 13 November 2004, para. 7.2; UN Human Rights Committee, *David Alberto Cámpora Schweizer v Uruguay*, Communication No. 66/1980, 1982, para. 18.1. See also *Report of the Human Rights Committee* A/65/40 (Vol. I), 2010, p. 78, *Concluding Observations on Jordan*, UN Doc. CCPR/C/JOR/CO/4, 2010, para. 11; *on Colombia*, UN Doc. CCPR/C/COL/CO/6, 2010, para. 20; *on New Zealand*, UN Doc. CCPR/C/79/Add. 47, 1995, para. 14; *Comments on Jordan*, UN Doc. A/49/40, 1994, para. 241.

suspects of such criminal activities is inadmissible."[13]The WGAD has also highlighted the growing problem of

> *...the frequent use of various forms of administrative detention, entailing restrictions on fundamental rights", and a further expansion of States' recourse to legislation limiting fundamental rights of persons "detained in the context of the fight against terrorism, [whereby] States enacted new anti-terror or internal security legislation, or toughened existing ones, allowing persons to be detained for an unlimited time or for very long periods, without charges being raised, without the detainees being brought before a judge, and without a remedy to challenge the legality of the detention.*[14]

Preventive detention, particularly when prolonged, renders detainees vulnerable to torture or other ill-treatment. For this reason, the UN Special Rapporteur on Torture has recommended: "countries should consider abolishing, in accordance with relevant international standards, all forms of administrative detention."[15] The Committee against Torture has similarly found administrative detention to be inadmissible and a practice that should be abolished.[16]

Preventive detention for security purposes, without a lawful derogation, is also prohibited in the European human rights system. Article 5(1)(a) to (f) of the European Convention on Human Rights (ECHR) contains an exhaustive list of permissible grounds for deprivation of liberty. Judgments from the European Court of Human Rights have established that "the list of grounds of permissible detention in Article 5 § 1 does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time."[17]

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[13] Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/10/21, 16 February 2009.

[14] Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2005/6, 1 December 2004, para. 61.

[15] Report of the Special Rapporteur, UN Doc E/CN.4/2003/68, 17 December 2002, para. 26 (h).

[16] See for example Committee against Torture, *Concluding Observations* on: Jordan, UN Doc A/65/44, para. 60(13); Moldova, UN Doc CAT/C/CR/30/7 (2003), para. 6(d); Egypt, UN Doc CAT/C/CR/29/4 (2002), para. 6(f); and China, UN Doc A/55/44, para. 101. See also Report of the Working Group on Arbitrary Detention, UN Doc A/HRC/10/21, para. 54(b).

[17] See for example ECtHR (Grand Chamber), *Al-Jedda v. the United Kingdom*, Application no. 27021/08 (7 July 2011), para. 100; (Grand Chamber), *A. and others v. the United Kingdom*, Application no. 3455/05 (19 February 2009), para. 172, referring to *Lawless v. Ireland (No. 3)*, judgment of 1 July 1961, paras 13 and 14, Series A no. 3.

LAWFUL DEROGATION UNDER INTERNATIONAL HUMAN RIGHTS LAW

If a state is to resort to preventive detention, it must do so only in limited and exceptional circumstances, only to the extent strictly necessary in times of an officially declared state of emergency or pursuant to a lawful derogation from human rights treaty obligations.

The ICCPR allows States Parties to temporarily derogate from some treaty obligations in exceptional circumstances, defined under the treaty as "times of public emergency threatening the life of nation."[18] Examples of emergency situations may include armed conflicts, civil and violent unrest, and natural disasters. It should be noted that only certain rights are subject to derogation. These rights include the right to liberty, but not the right of the detainee to seek prompt judicial review of the lawfulness of the detention.[19]

The derogation regime, however, does not allow States Parties *carte blanche* to suspend human rights whenever and however they please. The UN Human Rights Committee has stressed that **"**derogating from the provisions of the Covenant must be of an exceptional and temporary nature and be limited to the extent strictly required".[20] Indeed, the requirements of necessity and proportionality mean that derogation does not constitute a suspension of the right, but only the permissible narrowing of its scope of application. Or, as the Human Rights Committee has affirmed that in practice, "this will ensure that no provision of the Covenant, however validly derogated from, will be entirely inapplicable to the behavior of a State party."[21]

Furthermore, for a state of emergency to be lawful, a number of other requirements have to be met:[22]

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[18] Article 4(1), International Covenant on Civil and Political Rights.

[19] UN Human Rights Committee, *General Comment 29 – States of Emergency* (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001 (General Comment 29).

[20] UN Human Rights Committee, *Concluding Observations* on Israel, UN Doc. CCPR/C/ISR/CO/3, 3 September 2010, para. 7.

[21] General Comment 29, *supra* fn. 18, para. 4.

[22] For a detailed discussion on requirements of a lawful derogation under the ICCPR, see International Commission of Jurists, *Submission to the Human Rights Committee on its half-day of general discussion in preparation for a general comment on Article 9 of the ICCPR*, 2012, pp 12-18, available at: http://www.ohchr.org/Documents/HRBodies/CCPR/GConArticle9/ICJ.pdf

1. Legal certainty, as a general principle, must be observed at all times in a context of deprivation of liberty;[23]
2. A state of emergency should be officially proclaimed, ratified by the legislature, and notice should be given to the UN Secretary General;[24]
3. Derogation measures must serve the legitimate goal of responding to a public emergency, and must be the least restrictive means of achieving that goal;
4. Derogation measures must be of "an exceptional and temporary nature", and States Parties must aim at "restoration of a state of normalcy" as expeditiously as possible;
5. Derogation measures must not discriminate on grounds of "race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status";[25]
6. The right to initiate *habeas corpus* proceedings to allow a court to promptly decide on the lawfulness of the detention is a right that cannot be derogated even during a state of emergency.

PREVENTIVE DETENTION SAFEGUARDS

Even when preventively detaining an individual for reasons of public security in a declared state of emergency following a lawful derogation from human rights law obligations, States are still required to provide certain safeguards.

The UN Human Rights Committee, in its General Comment on Article 9 of the ICCPR, has stated that if preventive detention is used for reasons of public security

> *…it must not be arbitrary, and must be based on grounds and procedures established by law... information of the reasons must be given... and court control of the detention must be available* **...** *as well as compensation in the case of a breach*[26]

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[23] General Comment 29, *supra* fn. 18.

[24] *Ibid.*, para. 2.

[25] International Covenant on Civil and Political Rights, Article 26. See also ECtHR, Judgment of 19 February 2009, *A. and Others v. United Kingdom*, *supra* fn. 16, paras 164, 172, and 190.

[26] UN Human Rights Committee, *General Comment 8* on Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994), para 4.

The minimum required safeguards that must at all times be provided include[27]:

1. The grounds and procedures for detention must be prescribed by law and reasonable time limits must be set on the length of preventive detention. Detainees must be provided guarantees against prolonged incommunicado and indefinite detention;
2. Detainees must be informed of the reasons for their detention; and have prompt access to legal counsel, family and medical care and assistance. Foreign nationals have the right to access to consular assistance;
3. Detainees must be treated humanely at all times;
4. The detention should be judicially controlled, which means that at the minimum, detainees should be brought promptly before a court, and the legality and necessity of continuing detention must be periodically reviewed;
5. Furthermore, as discussed in the previous section, detainees must have the right *habeas corpus* to challenge the legality of their detention in prompt and expeditious proceedings;
6. Detainees must be held in official places of detention. Authorities must register the detention of every individual and keep up to date, thorough and accurate records throughout their detention.

As will be discussed in detail in the following sections, Pakistan's preventive detention regime falls short of many of these safeguards.

PREVENTIVE DETENTION IN PAKISTAN

Despite the colonial legacy of draconian preventive detention laws and their abuse, the constitutions of many post-colonial states specifically provided for "preventive detention."[28] Pakistan is one such example.

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[27] See the International Commission of Jurists, *International Legal Framework on Administrative Detention and Counter-terrorism*, Geneva, March 2006, and the International Commission of Jurists, *Beyond Lawful Constraints*: Sri Lanka's Mass Detention of LTTE Suspects, September 2010, pp 21-25.

[28] See for example, the constitutions of India (1949), Singapore (1965), Malaysia, (1957), and Zimbabwe (1980).

Under British colonial rule, executive authorities had sweeping powers to preventively detain individuals on a wide range of grounds including: threat to public order, national security, or the maintenance of supplies and services essential to the community.[29]

In Pakistan, provisions for preventive detention were made in all four post-independence constitutions: 1956, 1962, 1972 and 1973. Pursuant to these provisions many laws have been passed providing for preventive detention. These include: Pakistan Public Safety Ordinance in 1949; the Security of Pakistan Act in 1952; the East Pakistan Public Safety Ordinance in 1958; the West Pakistan Maintenance of Public Order Ordinance in 1960, the Anti-Terrorism Act in 1997, and most recently, the Protection of Pakistan Act in 2014.

States usually present preventive detention as an "exceptional measure" for "exceptional circumstances." Preventive detention laws in Pakistan, however, are not part of a state of emergency or any other state of exception associated with human rights derogation regimes under international law. Instead, they can be understood as being part of a "permanent state of exception," in which supposedly provisional extensions of state control and the curtailment of individual rights over time became a normal paradigm of governance.[30] The danger that exceptional "temporary" counter-terrorism measures are becoming permanent features of law and practice, including in democratic societies, was also highlighted as a major source of concern in ICJ's eminent jurists' panel report in 2007.[31]

PREVENTIVE DETENTION UNDER ARTICLE 10 OF THE CONSTITUTION OF PAKISTAN, 1973

Pakistani law gives sweeping powers to the executive to detain individuals without charge on a wide array of grounds and with little protection during peacetime.

Similar to Article 7 of the Constitution of 1956 and Article 10 of the Constitution of 1962, Article 10 of the Constitution of 1973, which is currently in force, allows Parliament to make laws to preventively detain people "acting in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof, or

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[29] See, for example, the Rowlatt Act, 1917, the Bengal Criminal Law Amendment Act, 1930, and the Defence of India Act, 1939. For a detailed discussion on the use of preventive detention laws in colonial India, see A. G. Noorani (ed) and South Asia Human Rights Documentation Center, *Challenges to Civil Rights Guarantees in India*, 2012, Chapter 1.

[30] See Giorgio Agamben, *State of Exception*, University of Chicago Press, 18 July 2008.

[31] International Commission of Jurists, *Assessing Damage, Urging Action*, *supra* fn. 7, pp 40-42.

external affairs of Pakistan, or public order, or the maintenance of supplies or services".[32]

In contradistinction to the protections applicable to ordinary detention, Article 10 expressly denies those detained preventively the constitutional right to be represented by a legal representative, to be informed about the reasons for their detention promptly, or to be brought before a magistrate within 48 hours of arrest.

Rights afforded to detainees held preventively are minimal, and include the "earliest possible opportunity" to make a representation against the detention order, and being furnished grounds of detention with fifteen days. The authority making the order of detention, however, may refuse to disclose facts if it considers it to be against public interest.[33]

Article 10 allows for detention initially for a period of three months. If the government wishes to extend the period of detention, it must seek permission from a standing review board, appointed by the provincial or federal chief justice, comprising three judges of the superior judiciary. In a period of 24 months, a person may be preventively detained for a maximum of eight months if he or she is suspected of behavior "prejudicial to public order" and a maximum of 12 months for other grounds. If the individual is suspected of acting on the instructions of the "enemy", or is suspected of acting against the integrity, security or defense of Pakistan, or has attempted to commit "anti-national" activity or is a member of an association that has "anti-national" objects, he or she may be detained indefinitely.[34]

None of the protections of Article 10 apply if the individual is an "enemy alien"; a term that has not been defined by the constitution, but has been used in various contexts in statutory law.[35]

STATUTORY PROVISIONS FOR PREVENTIVE DETENTION

Multiple laws are in operation in Pakistan that provide for preventive detention. These include: the Security of Pakistan Act, 1952; the West Pakistan Maintenance

[32] Article 10(4), Constitution of Pakistan, 1973.
[33] Article 10(5), *ibid*.
[34] Article 10(7), *ibid.*
[35] Article 10(9), *ibid.* See also section 2(d) of the Protection of Pakistan Act, 2014.

of Public Order Ordinance, 1960; the Anti-Terrorism Act, 1997; and the Protection of Pakistan Act, 2014.[36]

Section 3 of the Security of Pakistan Act 1952 allows for detention "to prevent any person from acting in any manner prejudicial to the defense or external affairs or the security of Pakistan."

Section 3 of the West Pakistan Maintenance of Public Order Ordinance 1960 allows the Government to powers of detention to prevent any person from "acting in any manner prejudicial to public safety or the maintenance of public order."

Section 11 EEE of the Anti-Terrorism Act (ATA) 1997, allows for preventive detention where "it is necessary to prevent a person whose name is on the proscribed organization list, organization under observation, involved in any group suspected of terrorism", and section 11 EEEE allows preventive detention for purposes of investigation of a 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".

Section 6 of the Protection of Pakistan Act 2014 allows detention of persons acting in a manner "prejudicial to the integrity, security, defense of Pakistan or any part thereof or external affairs of Pakistan or public order or maintenance of supplies and services".

Not all preventive detention legislation expressly incorporates the constitutional protections found in Article 10 of the Constitution. However, the Supreme Court of Pakistan has held that where a law relating to preventive detention does not include the constitutional safeguards, they must be read into such laws, and aggrieved persons may seek redress if they are disregarded.[37]

JUDICIAL REVIEW OF PREVENTIVE DETENTION ORDERS

Under Article 199 of the Constitution of Pakistan, the High Courts have original jurisdiction to hear *habeas corpus* petitions. Courts have exercised this jurisdiction

[36] Various other statutory provisions exist that provide for preventive detention including laws with regional applicability such as Actions (in aid of civil power) Regulations, 2011, for Federally Administered Tribal Areas (FATA) and Provincially Administered Tribal Areas (PATA).

[37] *Abdul Aziz v. West Pakistan*, PLD 1958 SC 449.

liberally and have assumed jurisdiction to review whether detention has been made according to procedures established by law.

The Supreme Court of Pakistan has held on multiple occasions that preventive detention curtails the right to liberty, and has presumed that "every imprisonment without trial and conviction is *prima facie* unlawful."[38]

Over the years, a rich jurisprudence has developed on the exercise of preventive detention and the contours of the judiciary's powers to review such detention.

Various courts, including the Supreme Court, have held that the initial burden lies on the detaining authority to show lawfulness of the preventive detention and the information before the detaining authority should be such that a "reasonable person" should be satisfied that making a preventive detention order is necessary. Further, courts have interpreted "satisfaction" to mean that it should be regarding all grounds of detention and even if one ground is shown to be bad, nonexistent or irrelevant, the whole order would be rendered invalid.[39]

Regarding the grounds of detention, courts including the apex court have held that grounds for detention must be delivered to the detainee in the period recommended by law, and if no period is prescribed, they must be delivered as soon possible. While courts have accepted that grounds of preventive detention do not have to be as precise and detailed as a charge in a criminal trial, they have held that they should at the minimum not be vague and indefinite, and should be comprehensive enough to enable the detainee to make a representation against his or her detention to the authority prescribed by law.[40]

In *Hakim Muhammad Anwar Babr,* for example, the Government claimed that by criticizing the president of Pakistan in public speeches, the detainee was "bringing the lofty personality of the President into public contempt", thereby endangering public order. The Peshawar High Court held the detention order was unlawful, as the authorities had been unable to provide evidence that the speeches were likely to lead to a breach of peace.[41]

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[38] Justice Hamudur Rahman, authoring the judgment of the Supreme Court in *Government of West Pakistan and another v. Begum Agha Abdul Karim Shorish Kashmiri*, PLD 1969 SC 14. See also PLD 1969 Lahore 985, 1988 PCRLJ 486 Karachi, and PLD 2003 SC 442.

[39] See *Abdul Baqi Baloch v. Government of Pakistan*, PLD SC 1968 313.

[40] See *Federation of Pakistan v. Mrs Amatullah Jalil Khawaja*, PLD SC 2003 442.

[41] PLD 1969 Peshawar 55.

In another case, the Sindh High Court quashed a preventive detention order made on the ground that the detainee was acting in a manner prejudicial to the safety of Pakistan because as the Secretary of the Karachi Communist party, he was engaged in activities of the Communist Party. The Court held that the grounds for detention only showed the detainee's party membership and ideology, not any specific activity that could reasonably be considered prejudicial to the safety of Pakistan.[42]

The Supreme Court has also read other safeguards into the law of preventive detentions including: the authority prescribed in the relevant law must make the preventive detention order; each requirement of the law must have been met; and the detaining authority must place all information on the basis of which the order of detention was made before the court as claims of privilege cannot be used to justify keeping information from the court.[43] On some occasions, courts have also ordered that detainees preventively held unlawfully must be compensated.[44]

Through exercise of judicial review and the writ of *habeas corpus,* Pakistani courts have at times acted to ensure that the implementation of preventive detention legislation is strictly according to law. However, courts have in most cases been more concerned with the procedural aspect of the detention, and have been less inclined towards questioning the government's use of preventive detention laws to limit the permissible sphere of the exercise of human rights and freedoms, such as freedom of expression, including of political expression, freedom of association and freedom of assembly.

For example, grounds upheld by courts to allow for preventive detention have included: public speeches made by a leader of a religious party condemning the government's role in the war against terrorism;[45]providing "financial and moral support" to known terrorists during their stay in Pakistan;[46] engaging in conspiracy

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[42] PLD 1954 Lahore 142. Examples of other grounds dismissed by courts include allegations that the detainee is "hazardous, dangerous and notorious" and "always indulges in anti-government activity" and is therefore likely to disrupt peace of the area (PLD 2005 Karachi 538); claims that alleged involvement in gambling and narcotics business would disturb peace (PLD 1999 Peshawar 82); and that the detainee's being at large would be prejudicial to the maintenance of public order because he was considered an "ace criminal and most desperate bad character" (PLD 1955 PLD Sindh 73).

[43] *Ibid.* Also see *Liaquat Ali v. Government of Sind*, PLD 1973 Karachi 78 and *Government of West Pakistan and another v. Begum Agha Abdul Karim Shorish Kashmiri*, PLD 1969 SC 14.

[44] See *State v. Taji Bibi*, 2002 SCMR 914 and *Province of Sindh v. Roshan Deen*, PLD 2008 SC 132.

[45] 2003 YLR 330.

[46] 1996 PCRLJ 326 Lahore.

with Communist leaders to plan the overthrow of the government;[47] taking part in anti-state activity and instigating others to do the same by showing intent to damage public property if the leader of his or her political party is given the death sentence;[48] making speeches that allegedly incited "class hatred" by claiming the poor were at war with "the rich and the capitalists", and urging people to unite against General Zia-ul-Haq's government;[49] and discussing political affairs and deciding to launch a campaign of agitation and subversion if the Chairperson of the detainee's political party was not released.[50]

Judicial review therefore has not prevented subsequent civilian and military governments from abusing preventive detention laws for political reasons.[51]

It is also important to note that it takes many months for *habeas corpus* cases to be adjudicated, so even if courts eventually quash an order of detention, the detainee usually ends up in unlawful detention for a long period of time. Further, in some instances detainees and their families or friends may not have the legal assistance, access or resources to pursue a case in the high courts. In such cases, the option of judicial review does not always provide an adequate safeguard against arbitrary detention.

PAKISTANI LAW ON PREVENTIVE DETENTION –AN AFFRONT TO HUMAN RIGHTS

As discussed above, preventive detention is generally unlawful during peacetime without a lawful derogation under international human rights law treaties. The very premise of Pakistan's preventive detention regime, therefore, is manifestly incompatible with its international law obligations and risks making what should be a temporary state of exception a permanent feature of law and practice.

Furthermore, preventive detention laws, including Article 10 of the Constitution, fall short of safeguards that must be provided to detainees at all times. In their

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47 PLD 1954 Lahore 142.
48 1979 PCRLJ 658 Karachi.
49 1980 PCRLJ 494 Lahore.
50 1979 PCRLJ 562 Lahore.
51 For a detailed discussion on the misuse of preventive detention laws for political purposes, see Paula R. Newberg, *Judging the State, Courts and Constitutional Politics in Pakistan, Cambridge University* Press, *1995, pp 101-109. See also Andrew Harding and John Hatchard, Preventive detention and security law: a comparative survey,* Martinus Nijhoff Publishers, 1993, *pp 173-192.*

current form, preventive detention laws allow government authorities to refuse to disclose grounds of detention they consider to be against public interest. Furthermore, the rights to legal assistance and representation and to be promptly brought before a judge are not guaranteed, in national law and in practice. The right of family members, friends, national human rights institutions and civil society representatives with legitimate interest to know the whereabouts of the detainees is also not protected.[52]

The limited safeguards provided to individuals detained preventively do not apply to "enemy aliens", allowing for an indefinite detention of individuals without any protection of the law. By the express terms of the ICCPR and as affirmed by the Human Rights Committee, with very few exceptions (notably article 25 concerning the right to take part in public affairs and to vote), the human rights protections of the ICCPR must be guaranteed equally to all citizens, as the obligation under Article 2(1) of the ICCPR is that State Parties must ensure the rights to "all individuals within its territory and subject to its jurisdiction."[53] Exclusion of "enemy aliens" from certain human rights protections is also inconsistent with Pakistan's obligations under Article 16 of the ICCPR guaranteeing the rights of all people to recognition as a person before the law.[54]

It is also of concern that persons detained preventively may be handed over to the police or any investigation agency including the armed forces, during the detention period for interrogation. In light of the prevalence of custodial violence in Pakistan, particularly in remand, this provision puts detained persons at risk of torture and other ill- treatment.[55]

Finally, while Pakistani courts are empowered to hear writs of *habeas corpus* against orders of preventive detention and have used this jurisdiction to strike down a number of preventive detention orders, it is important to remember that courts have only reviewed preventive detention cases on the touchstone of relevant domestic law and the Constitution. This still falls short of the requirements of

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52 Section 9(a) of the Protection of Pakistan Act, 2014. See also, International Commission of Jurists, *Protection of Pakistan Bill, 2014: An affront to Human Rights,* 2014, pp 15-19. Available at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Pakistan-Bill-Full-Report.pdf

53 UN Human Rights Committee, *General Comment 15*, The position of aliens under the Covenant (Twenty-seventh session, 1986), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 18 (1994), para 1.

54 Section 2(d) of the Protection of Pakistan Act, 2014, defines an enemy alien as a militant whose identity as a Pakistani is unascertainable.

55 See Redress, *Torture in Asia: Law and Practice*, October 2013, pp 123-127.

judicial review under international human rights law. The UN Human Rights Committee, for example, has explained that

> *...court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release "if the detention is not lawful", article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant. This conclusion is supported by article 9, paragraph 5, which obviously governs the granting of compensation for detention that is "unlawful" either under the terms of domestic law or within the meaning of the Covenant.*[56]

CONCLUSION

Not only is preventive detention incompatible with international human rights law and standards the history of the practice, both before and after the launch of the global war against terrorism, suggests that there is more need for restricting than for expanding its existing scope.

While advocacy for the need for preventive detention laws often rests on hypothetical scenarios, actual experience of States that have grappled with preventive detention as a national security strategy makes a convincing case for a paradigm shift from thinking of security and human rights as opposing goals, but rather, to see the two as complementary objectives.

Pakistan has a long history of preventive detention laws being used to silence and intimidate political opponents, resulting in weakening of the rule of law and igniting resentment towards the State.[57] But Pakistan is not the only country where preventive detention has had disastrous consequences.

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[56] UN Human Rights Committee, *A v. Australia*, Communication No. 560/1993, UN Doc CCPR/C/76/D/560/1993 (1997) para 9.5.

[57] See Paula R. Newberg, *Judging the State, Courts and Constitutional Politics in Pakistan, Cambridge University* Press, *1995, pp 101-109; Human Rights Watch, Destroying Legality: Pakistan's Crackdown on Lawyers and Judges, December 2007; and Amnesty International,*

The United Kingdom for example, rejected the use of long-term preventive detention after its experience with the failure of the practice of preventive detention in Northern Ireland. The United Kingdom started a campaign to arrest individuals suspected of belonging to the Irish Republican Army (IRA) in 1971. Over two thousand people, predominantly working class Catholic men, were detained in the first six months of the operation.[58]

The preventive detention policy was a failure. It alienated large sections of the Catholic community, and broadened the support for the IRA.[59] Former British Intelligence officer, Frank Steele, who served in Northern Ireland during this period, stated that the internment "barely damaged the IRA's command structure and led to a flood of recruits, money and weapons."[60] Home Secretary Reginald Maudling, who sanctioned the action, also admitted that it "was by almost universal consent an unmitigated disaster which has left an indelible mark on the history of Northern Ireland."[61]

A more recent example of a preventive detention program is the practice of the United States in the aftermath of the 11 September 2001 attacks of detaining people as "unlawful enemy combatants" in places such as Guantanamo Bay in Cuba, Bagram Airbase in Afghanistan, and, most notoriously, in secret places of detention around the world.[62] Ironically, these practices are decried by Pakistan's policy makers as violating the rule of law and due process rights, but are being

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Pakistan: Arrests of political opponents in Sindh province, August 1990 - early 1992, 1992, available at: http://www.amnesty.org/en/library/asset/ASA33/003/1992/en/e25a24cc-eda8-11dd-9ad7-350fb2522bdb/asa330031992en.html

58 See Daniel Moeckli, *The Selective "War on Terror": Executive Detention of Foreign Nationals and the Principle of Non-Discrimination*, 31 Brooklyn Journal of International Law, 2006, pp 495, 503.

59 See David R. Lowry, *Internment: Detention Without Trial in Northern Ireland, 5 Hum. Rts*, 1976.

60 Frank Steele, quoted in Tom Parker, Testimony before Senate Subcommittee on Homeland Security, 2006. Available at: http://www.gpo.gov/fdsys/pkg/CHRG-111shrg56832/html/CHRG-111shrg56832.htm

61 See Human Rights Watch, *Testimony on Improving Detainee Policy : Handling Terrorism Detainees within the American Justice System*, June 2008. Available at: http://www.hrw.org/news/2008/06/04/testimony-improving-detainee-policy-handling-terrorism-detainees-within-american-jus

62 The purpose of the detention was varied; some were detained for preventative reasons, some, including many subjected to torture in secret detention, were held pursuant to intelligence gathering operations. Many others were captured by mistake or pursuant to transfer by "bounty hunters" and these remain among those captured today.

replicated in Pakistan's own national security and anti-terrorism measures, most recently in the Protection of Pakistan Act, 2014.[63]

The US administration initially described all Guantanamo Bay detainees as the "worst of the worst", but has subsequently released more than 600 of them, suggesting that hundreds of innocent people were unlawfully and arbitrarily detained for many months. Of the nearly 800 persons who passed through Guantanamo Bay, only a very small number have been prosecuted or are under contemplation of prosecution.

The detention policy at Guantanamo Bay has come under immense criticism, even from people closely involved with its implementation. In December 2013, retired US Marine Major General Lehnert, who oversaw the construction of the Guantanamo Bay detention facility, characterized the detention center as "our nation's most notorious prison — a prison that should never have been opened". His insights also illustrate other dangers associated with anti-terrorism policies that are dismissive of human rights

> *In retrospect, the entire detention and interrogation strategy was wrong. We squandered the goodwill of the world after we were attacked by our actions in Guantánamo, both in terms of detention and torture. Our decision to keep Guantánamo open has helped our enemies because it validates every negative perception of the United States* [64]

Former Chief Prosecutor for Terrorism Trials at Guantanamo Bay, Colonel Morris Davis, who resigned from his position because of disagreement over the legal regime prevailing at Guantanamo, including pressure to plead on the basis of

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63 There are, of course, clear differences in the legal framework adopted by the US and most other States that engage in abusive preventive detention practice, including Pakistan. Principally, the US has adopted the "war paradigm", by which, through a distorted (mis)application of international humanitarian law (IHL), it has imprisoned large number of persons as "unlawful enemy combatants", by which they are denied a large number of protections of both IHL and human rights law. In this context, a detainee may be held "until the end of hostilities", meaning until the "war" with "al-Qaeda and associated groups" comes to an end, i.e., indefinitely. Many, probably most, of these detainees were captured not in the context of hostilities pursuant to an armed conflict, but within law enforcement operations, where criminal law and human rights law should be the governing legal regime. For detailed discussion on detention under the "war paradigm" invoked by the United States, see International Commission of Jurists, *Assessing Damage, Urging Action, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, 2009, Chapter 4.

64 Detroit Free Press, "Michael Lehnert: Here's why It's long past time that we close Guantánamo", 12 December 2013, available at: http://www.freep.com/article/20131212/OPINION05/312120025/Guantanamo%20Bay%20prison

information obtained by torture or other ill-treatment, has been urging the Obama administration to close down Guantanamo

> ***As the Chief Prosecutor for the Terrorism Trials at Guantanamo Bay, I saw many things that I regret seeing. Since its beginning Guantanamo has been costly, inefficient, and morally wrong. Now there are over 100 inmates on hunger strike to protest their current situation. Obama must uphold the promise that he made on Tuesday and close Guantanamo Bay Detention Center before someone dies.***[65]

These examples have important lessons for states relying on harsh anti-terrorism laws that seek to compromise on human rights protections in the interests of security and order. Preventively detaining suspects on the basis of thin evidence, or as is often the case not in contemplation of any criminal charges but for associational or status reasons would inevitably lead to the detention of innocent people. Detention shrouded in secrecy would often result in the practice of torture and ill-treatment for the purposes of interrogation. These violations would in turn generate new resentment, fuel existing hostilities, and accentuate a sense of victimization, resulting in a vicious cycle of human rights abuses and violations that would further damage peace, order, and security.

It is therefore no longer a matter of choice, but an imperative need of our times that states undertaking counterterrorism measures should strictly stay within the ambit of the rule of law and the human rights framework.

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[65] One World News, "Former terror prosecutor petitions for Guantanamo closure", 2 May 2013, available at: http://oneworld.org/2013/05/02/former-terror-prosecutor-petitions-for-guantanmo-closure/

CRIMINALIZING TORTURE

Khwaja Aizaz Ahsan[1]
and
Namra Gillani[2]

Jeremy Bentham, the 18th century British Philosopher, came up with an elaborate idea for a structure called the Panopticon. According to his plans, the building allowed a single watchman to observe all inmates residing within the Panopticon, without the inmates being able to tell whether or not they are being watched. Extending this concept to modern societies, human rights (and more obtusely, the rule of law) act like this proverbial watchman, with members of the society keeping in line due to the fear of being caught. Unfortunately, the scenario in Pakistan in relation to human rights, and in particular, the freedom from torture, is quite different. The watchman in the Panopticon is probably asleep.

Whether it be the infamous dungeons of the Lahore Fort being used to suppress criticism against the state during Zia Ul Haq's regime[3], or officials at the Adiala Jail turning prosecution into persecution to increase the ratio of convictions[4], the use of torture, or as the euphemism goes, "coercive interrogation techniques" has always been a live subject in Pakistan. The aim of this article is to highlight the prevalence of torture in Pakistan despite the existence of the international and national legal frameworks and to then eventually address possible reforms to improve upon what has already been built.

PREVALENCE OF TORTURE IN PUNJAB

The Punjab Crime Perception Survey[5] provides an insight into some of the factors

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3 Slavery in the Modern World - A History of Political, Social and Economic Oppression by Junius P. Rodriguez, p. 358.

4 Prisoners' complaints: Court orders arrest of Adiala Jail's top officials - http://tribune.com.pk/story/558498/prisoners-complaints-court-orders-arrest-of-adiala-jails-top-officials/

5 The Crime Survey was sponsored by the Asian Development Bank (ADB). Detailed results and analysis of the Crime Survey are a part of a study entitled O. Siddique and S. Anjum, Punjab

that have resulted in a culture of using torture as an interrogation technique in Pakistan. The main aim of the survey was to highlight the broad contours of the Punjabi landscape of crime and vulnerability, but the data collected from 2,108 households across four Tehsils/Towns in Punjab is also useful to shed light upon the nexus between the use of torture and the socio-cultural factors that inadvertently allow for its use, but before individual statistics are used to draw upon complex correlations, it is important to know how Punjab has evolved as a province, so as to fully understand the issue of the persistent use of torture.

Punjab was annexed by the British in 1849. Its first major use to the colonialists came in silencing the Sepoy Mutiny/War of Independence of 1857, as a major part of the native army came from the province. Since Punjab primarily consists vast tracts of fertile land, the British saw the immense economic benefits agriculturally developing the land. As Osama Siddique in "Pakistan's Experience with Formal Law" explains:

"The most significant development introduced in British Punjab was the colonisation of large tracts of semi-arid areas in Western Punjab (otherwise sparsely populated by semi-nomadic populations) through the construction of nine canal colonies which collectively constituted the largest canal irrigation scheme in the world. This project entailed massive rural emigration from Eastern Punjab in order to settle these areas. Once the Canal colonies were settled, the colonial state enjoyed special authority over the 'hydraulic society' - not just over the land (which it designated as 'Crown Waste Lands') and water, but also over the manner in which land was to be disposed of, to whom land was to be allotted, and the type of terminal rights that were to prevail. Land distribution based on state fiat was essentially: to reward loyalty and service to the Crown by strengthening the status and authority of loyalist classes of Punjabi society that assisted the colonial authorities in its governance of the Punjab; to extract greater revenues from increasingly productive agricultural and the newly emerging economy of the land; and for various military schemes in order to boost, reward and incentivise the military." [6]

It was this scheme of land distribution introduced by the British that resulted in the creation of a feudal class, with the less fortunate being bound to serfdom. The most obvious consequence of having this hierarchy in place was that of social

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Crime Perception Survey Report 2009, which is available from the ADB (official publication pending).

6 p. 184-185

inequality, a factor that to this day considerably maligns the administration of the province by the Police.

The police station is the lowest independent office and first point of contact in the Punjab Police. The Punjab Police currently have 648 police stations and 200 police posts.[7] According to the population census of 1998, the Punjab's total population at the time was 73.621 million, with 68.25 percent of the figure residing in rural areas.[8] The figure for literate population from the time of the census has risen from 46.6 percent to 58 percent in 2006, but the number still is a sharp reminder of the current state of the most populous province of Pakistan. With the rate of population growth increasing across Pakistan[9], the job for the Police in apprehending criminals is unlikely to get any easier.

One of the main findings of The Punjab Crime Perception Survey was that collectively, as many as 58 percent of the overall respondents found the prevalence of crime in their area to be "alarmingly high" (4.5 percent) or "high" (53.5 percent), while only 7.5 percent found it to be low.[10] These figures taken across the rural/urban spectrum[11] of Punjab illustrate that policing system currently in use needs to be sufficiently improved. It is entirely possible that due to the high prevalence of crime, the police, when they do successfully apprehend a suspect, are less concerned with following the due process of law and are more preoccupied with ensuring a conviction. With the vast majority of all crimes being committed by the unemployed and those with the weakest economic backgrounds,[12] the vulnerability of the suspects to the possibility of torture is more pronounced due to their social class. The Police in these circumstances thus get a chance to abuse the powers granted to them and hence use torture as a means of interrogating suspects.

Justice Project Pakistan's (JPP) recent report on systematic brutality and torture by the Police in the Faisalabad District of Punjab, "Policing as Torture", highlights

7 Bureau of Statistics, Government of the Punjab (Lahore Bureau of Statistics, Planning & Development Department, Government of the Punjab, 2008), p. 14.

8 Siddique and Anjum, Punjab Crime Perception Survey Report 2009, p. 268-269.

9 Pakistan: Where the Population Bomb is Exploding - http://www.newgeography.com/content/002940-pakistan-where-population-bomb-exploding

10 O. Siddique, Pakistan's Experience with Formal Law. p. 189.

11 It should be noted that the figure was relatively more pronounced in the socio-economically backward areas of the Punjab, specifically in the Kehror Pacca Tehsil, where 77.5 percent of the responders reported "alarmingly high" and "high" prevalence of crime.

12 Unemployment, Povery, Inflation and Crime Nexus: Cointegration and Causality Analysis of Pakistan by Syed Yasir Mahmood Gillani, Hafeez ur Rehman and Abid Rasheed Gill - http://pu.edu.pk/images/journal/pesr/currentissues/5%20YASIR%20Employment%20Poverty%20Inflation%20n%20Crime%20Nexus.pdf

that most suspects suffer from some form of torture. JPP obtained 1,867 Medico-Legal Certificates (MLCs), prepared by the Faisalabad District Standing Medical Board (DSMB), which was set up by the government to conduct medical examinations in response to allegations of torture. The Physicians at the DSMB found conclusive signs of abuse in 1,424 of the 1,867, while in 96 cases physicians found signs indicating injury but required further testing to confirm the injury.[13] With the 1,867 reports representing the figure of only those were willing to come forward and allege mistreatment, they are likely to be many more victims who chose to stay back to avoid the hassle of making the complaint against the Police.

One of the main factors why the current institutionalisation of torture has not received widespread criticism is the lack of any narrative being created by the victims. Most of the victims of systemic torture either don't report the crime committed against them or face great difficulties in getting a First Information Report registered against Police officials.[14] This means that their story in most instances never gets heard**.** The Punjab Crime Perception Survey sheds further light on this area as it was found that only 33 percent of victims of all crimes of the respondents reported the crime to the police.[15] According to the survey, those belonging to the less privileged castes, the less affluent, less educated, those employed in "Low Access" jobs, and female respondents, all displayed less willingness to report a crime in the future. Over 55 percent of the poorest respondents said they would not report a crime or were unsure, compared to 84 percent of the most affluent households saying the opposite.[16] Thus, one inference that can be drawn is that victims of torture are generally less inclined to even report their crime as the general state of the Police has made it difficult for the population to trust its administration.

The Survey also found deplorable statistics concerning the respondents who had made the effort to tell the Police of any crime committed against them. 26.5 percent of the respondents said that the Police did not register the crime while 22.5 percent were unaware that whether their account had been formally registered or not, taking the total up to 51 percent.[17] Keeping the social inequality prevalent in Punjab in perspective, rural respondents reported a higher degree of failure of

13 Policing As Torture - A Report on the Systematic Brutality and Torture by the Police in Faisalabad, Pakistan, p. 1.
14 Policing As Torture - A Report on the Systematic Brutality and Torture by the Police in Faisalabad, Pakistan, p. 25.
15 O. Siddique, Pakistan's Experience with Formal Law. p. 201.
16 Ibid.
17 O. Siddique, Pakistan's Experience with Formal Law. p. 203.

getting a report registered,[18] thus adducing more evidence to the accounts of the added challenges that they face. It was also reported by the respondents who were eventually successful in getting the FIR registered that the single most important factor for their success was having used the help of influential people (40 percent), using political influence (21 percent), using personal links with the Police (13 percent) or offering a bribe (12 percent).[19] Looking at these statistics, it becomes obvious that victims of torture are up against an even tougher task as the crime committed against them is by the same institution that in theory should help them with providing justice. If the victims of torture are the ones who also stare in the face of social inequality, the situation becomes even tougher for them, as even if they are willing to report their crime, they will most likely need the association of someone above them in the social strata or considerable financial strength to eventually get the report of the crime committed against them registered.

In 1971, Philip Zimbardo, through his Stanford Prison Experiment, showed us how normal individuals, if put in positions of power, begin to behave in ways in which they would normally not act during their everyday lives. With the steep socio-economic gradient present in Punjabi Society, the Police in Punjab are a further testament to Zimbardo's findings as they have consistently abused their positions of power against the most susceptible. This has resulted in a loss of faith that although has not reached anarchic proportions yet, but threatens to do so in the future. Reforms for the Police Administration are the need of the hour if this loss of confidence is ever to have a chance of being repaired but before any such discussion on possible reforms is undertaken, it is important to understand the existent legal framework, which in theory protects the public from the use of torture.

LEGAL FRAMEWORK

I. INTERNATIONAL LAW

Pakistan is party to the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights, but not the optional protocols. It has ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), on 23 June 2010,

18 Ibid. Respondents from Potohor Town reported the least degree of success (70.5 percent).
19 O. Siddique, Pakistan's Experience with Formal Law. p. 205.

though with several reservations.[20] Under CAT 'torture' is defined as:

"...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."

Pakistan has not, however, accepted the Committee's competence to consider individual complaints and is not party to the Optional Protocol to CAT. The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

Apart from the fact that a person is unable to pursue an individual complaint against the Torture Committee, the remaining mechanisms are unreachable to the majority of victims. Since most torture victims are at or close to the poverty line,[21] their social standing and lack of resources leaves them unable to pursue any remedies at the international level. However, the Supreme Court of Pakistan has affirmed that although the international conventions are not directly applicable without national legislation, they can be used as a guiding principle that should be upheld by the courts.[22]

The gap between international human rights law and its enforcement on the domestic level, forces victims to put heavy reliance on the national legal system. Any victim or their legal representatives, must climb all the rungs of the criminal procedure to be able to 'exhaust all domestic remedies', in order to get international assistance.

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20 Pakistan has made reservations to Art 8 (2) (which provides for States Parties to consider the Covenant a legal basis for extradition with respect to torture), Art 20 (relating to the competence of the Committee Against Torture to inquire into systematic cases of torture and the obligation of states to cooperate) and Art 30 (dispute solution).

21 Policing as torture: A report on systematic brutality and torture by the police in Faislabad,

22 1999 SCMR 1379, 1395 Al-Jehad Trust v Federation of Pakistan

II. NATIONAL LEGAL SYSTEM

Article 14(2) of the Constitution of the Islamic Republic of Pakistan 1973[23] stipulates that "no person shall be subjected to torture for the purpose of extracting evidence," which has been re-affirmed by the Supreme Court.[24] Although the prohibition of torture under this provision may appear to cover only the extracting of evidence, it could be broadly construed since the preceding paragraph guarantees that the dignity of man shall be "inviolable" in accordance with the law.[25]

Torture has not been recognised as a specific crime under domestic legislation. Acts of torture are therefore only punishable under related offences proscribed in the Penal Code such as "causing hurt to extort confession or to compel restoration of property," "wrongful confinement to extort confession or compel restoration of property," or the provisions governing "criminal force and assault." However, these crimes do not fully cover the components of torture in accordance with international standards. The term "hurt" under Article 337 (k) of the Penal Code is ambiguous, and it is uncertain as to whether it encompasses physical or mental forms of "severe pain or suffering." Moreover, neither the element of official capacity as a torturer nor the act of torture by way of the instigation of, or with the consent or acquiescence of, a person acting in an official capacity is specified under these provisions.

To understand how the practice of torture is pervasive despite the existence of substantive laws, albeit inadequate ones, procedural rules and their application must also be considered.

Article 10(2) of the Constitution provides that "Every person who is arrested and detained in custody shall be produced before a Magistrate within a period of twenty-four hours of such arrest… and no such person shall be detained in custody beyond the said period without the authority of a Magistrate". The above protection is also reinforced through Article 61 of the Code of Criminal Procedure

23 Constitution of the Islamic Republic of Pakistan 1973

24 *Muhammad Pervez and others v State* (2007 SCMR 670). The Supreme Court found that the complainants had been tortured into confessing to a crime, and duly set aside their convictions.

25 Art 14 (1) of the Constitution provides that *"the dignity of man and, subject to law, the privacy of home, shall be inviolable"*

(CrPC).[26]

However, this protection does not extend to individuals that are detained or arrested under a law that allows for preventive detention.[27] Furthermore, Article 10(4) of the Constitution provides that those individuals "acting in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services" can be placed in preventive detention for 3 months in the first instance. With the authorisation from a Review Board, the period of detention can be continued for up to 12 months.

Furthermore, legally sanctioned form of corporal punishment exists in Prison Act of 1984 and Prison Rules of Pakistan; these statutes permit the use of fetters and chains to punish "prison offences", and prisoners may be subjected to these punishments for more than three months on the discretion of the superintendent[28]. The High Courts have made rulings that the use of fetters is in breach of Article 14 of the Constitution[29], but it is still available to be used with prior approval of the Inspector General of prisons.

The practice also, according to the UN Special Rapporteur on Torture, amounts to "a clear violation of the Standard Minimum Rules [for the Treatment of Prisoners]" and constitutes "a form of inhuman and degrading treatment"[30].

The legally sanctioned forms of pre-trial detention and corporal punishment are only allowed in specific circumstances; where there is a security threat and physical danger to others. Though it may seem justified *prima facie*, the practical implications of such power vested in officials gives way to abuse and an arbitrary system. Since the practice of ethical use of power has proven to be an arduous task for the police force in Pakistan, it is appalling that there is no system of checks and accountability attached to these powers.

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26 Code of Criminal Procedure 1898 (CCP)

27 Art 10(3) of the Constitution states that "[n]othing in clauses (1) and (2) shall apply to any person who is arrested or detained under any law providing for preventive detention."

28 The Prison Act of 1894, ss. 46 (7) and 57(1) and (2).

29 Decisions of Sindh High Court dated 30 December 1993 concerning Cr. Misc. No. 245 of 1989 and C.P. No.D-901 of 1989, cited in U.N. Commission on Human Rights, Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, Visit by the Special Rapporteur to Pakistan, U.N. Doc. E/CN.4/1997/7/ Add.2 (1996) (Nigel Rodley, Special Rapporteur) para. 59

30 Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, Visit by the Special Rapporteur to Pakistan, U.N. Doc. E/CN.4/1997/7/ Add.2 (1996) (Nigel Rodley, Special Rapporteur) para. 59.

However, there are substantive provisions that provide protection against police brutality in Pakistan. The Pakistan Penal Code prohibits a public servant from knowingly disobeying the law and acting in a way that would injure another person.[31] Moreover, the Penal Code prohibits the use of wrongful imprisonment and injury to extort a confession[32] and any confession made in police custody is not admissible in court[33]. The Police Order of 2002 also imposes fines or imprisonment for up to five years on police officers who torture or abuse a person in their custody.

In spite of these seemingly efficacious measures for protection against police torture, there has been considerable failure in their enforcement. These protections and punishments exist *de jure*, but the procedural steps in which the Police is inevitably involved are barriers in and of themselves. Section 154 of the CrPC requires the police to register a FIR after a crime has been committed or reported. However, the police will often register the FIR without substantial evidence – leading to the abuse of arrestees – or demand a bribe from complainants in order to register an FIR.[34] The non-registration of an FIR made up the overwhelming majority of complaints regarding police inefficiency since 2003, according to data taken from the Annual Reports of the Lahore High Court.[35]

Even where a complaint is successfully recorded, allegations of torture are often investigated by the same police officers that have been implicated in the violation.[36] In addition, there is a lack of adequate training, poor management of evidence and insufficient financial and human resources. All these factors aid in the perpetuation of this culture of impunity of a corrupt and abusive system.[37]

Role of Prosecutors and Judges

In case victims are unable to afford their lawyers, the only option they have is to rely on a state-appointed lawyer. These lawyers are extremely overworked and underpaid. They are also reported to have a lack of comprehensive knowledge of

31 Pakistan Penal Code (1860), ch. XV, § 166 (Pak.)
32 Pakistan Penal Code (1860), ch. XVI, § 337-K (Pak.)
33 Qanun-e-Shahadat Order (1984) (Pak.); Parliamentarians Commission for Human Rights,supranote 56, at 11
34 US Department of State, Country Reports on Human Rights Practices for 2011: Pakistan, p. 19
35 Cited in Humans Rights Commission of Pakistan, Revisiting Police Laws, 2011, p. 3, Table 2
36 Asian Human Rights Commission, The State of Human Rights in Ten Asian Nations – 2011: Pakistan, 2012, p. 323
37 International Crisis Group, Reforming Pakistan's Criminal Justice System, pp. 1, 13-14

the system, which results in the abuse being unchecked and unpunished similarly.[38] Similarly judges are also susceptible to external influence and pressure from the parties.

The conviction rate in Pakistan is between 5 and 10 percent. Furthermore, intimidation and external interference compromise cases before they even come to court.[39] There is also an absence of scientific evidence collection methods and operational witness protection programs, because of which testimonies of victims are not valued and puts them in fear of reporting the crimes against them.

Redress

Since there is no specialised law criminalising torture, and due to the procedural bars discussed above; the victims of torture are not provided justice. The typical problem that is faced by all victims is the inability to get rehabilitation or compensation from the perpetrators. The best course of action is perhaps making a tortious claim on the basis of personal injury. However, this course of action is near to impossible for the subjugated class that makes up the majority of victims.

There are two parts to the aftermath that victims face following torture; they are unprotected and are left uncompensated. There has been no move towards legislation on torture in Pakistan, in terms of criminalisation of torture or compensation and protection for victims.

Despite the prevailing issued related to victim protection and realisation of related fundamental human rights, a review of the key human rights treaties and instruments have no clear and unambiguous references to the right of victims to be protected from threats and reprisals. For example the Universal Declaration of Human Rights speaks of ‘inherent dignity’ and ‘equal and inalienable rights’, and includes among its enumerated rights, ‘the right to life, liberty and security of person’ and the right to ‘equal protection of the law’,[40] though it includes no specific reference to the right of victims to security or protection from reprisals. The International Covenant on Civil and Political Rights (ICCPR) refers to the ‘inherent dignity of the human person’ and states that ‘no one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor

38 International Crisis Group, Reforming Pakistan’s Criminal Justice System, pp. 17-19
39 *Ibid*, pp 1.
40 Proclaimed by the UN General Assembly in Paris on 10 Dec. 1948, the preamble, arts. 3 and 7, respectively

to unlawful attacks on his honour and reputation', however its discussion of fair trial rights, refers mainly to the obligations to safeguard defendants' rights, but makes no clear reference to the rights of victims of crimes. However, the following are some provisions of international human rights law that may assist lawyers and human rights activists in their effort to protect victims and getting them the compensation that is due.

The obligation to afford protection to a victim can be considered and applied in a number of ways. It can be; a right in itself or a protection as a condition precedent of the realisation of other rights.[41]

Firstly, as a right in itself, Article 13 UN Convention Against Torture stipulates that:

'.... Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.'

Pakistan is a party to this Convention, and thus, has an obligation to comply with this provision. Furthermore, The Disappearances Convention provides:

'A*ppropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defence counsel.... are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.'*

Pakistan has been urged to sign and ratify this particular Treaty by the international community and human rights organisations,[42] but it has yet to do so. A particular hurdle in this regard has been due to the country's involvement in the "war on terror". The UN Working Group on Enforced or Involuntary Disappearances in its 2012 report on Pakistan found that the country's counter-terrorism laws, in particular the Anti-Terrorism Act 1997, and the FATA/PATA Action (in aid of civil powers) Regulations 2011, allowed arbitrary deprivation of liberty, which have enabled enforced disappearances. It does not seem likely that Pakistan will ratify this treaty in the near future, but it may still hold persuasive value.

There have also been specific reference made in criminal law treaties to protection of victims; The Protocol to Prevent, Suppress and Punish Trafficking in Persons,

41 Redress, Ending Threats and Reprisals Against Victims of Torture and Related International Crimes: A Call to Action, pp.15

42 http://www.hrw.org/news/2013/08/28/pakistan-ratify-treaty-enforced-disappearance

Especially Women and Children ('Trafficking Protocol) and, Protocol against the Smuggling of Migrants by Land, Sea and Air[44] ('Smuggling Protocol') supplementing the United Nations Convention against Transnational Organized Crime (UNCTOC). Both protocols have not been signed by Pakistan, but the UNCTOC has been signed (2000) and ratified (2010).

Secondly, the idea of protection as a condition precedent to realisation of other rights is based on fundamental legal principles such as a guarantee of the right to security of the person and the right to life and as a guarantee of the right to justice (incorporating the right to individual petition; the right to be heard; a condition to fulfil the obligation to investigate). Pakistan is a party to both UDHR and ICCPR, and is thus obligated to enforce these rights in the context of protection of victims of torture.

Courts and treaty bodies have taken this approach. The Rules of Procedure and Evidence of both ad hoc international criminal tribunals for Rwanda and the former Yugoslavia contain specific provisions on the protection of victims and witnesses, as do the equivalent rules of the International Criminal Court, Special Court for Sierra Leone, and Extraordinary Chambers in the Courts of Cambodia[43]

Reparation

"*It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form*."[44] (Permanent Court of Arbitration, Chorzow Factory Case (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17 at 29). Under international law, *"reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.*[45]"

The International Law Commission affirmed this principle in its 53rd Session when it adopted the draft articles on responsibility of States for internationally wrongful acts[46]. The right is also embodied in international human rights treaties

43 Redress, Ending Threats and Reprisals Against Victims of Torture and Related International Crimes: A Call to Action, pp.19

44 *Permanent Court of Arbitration, Chorzow Factory Case (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17 at 29.*

45 *Ibid.*

46 Report of the International Law Commission - 53rd session (23 April - 1 June and 2nd July - 10 August 2001), UN Doc. (A/56/10). Ibid., para 23

and instruments[47] and has been further refined by a large number of international and regional courts, as well as other treaty bodies and complaints mechanisms.[48] In 2005, the UN General Assembly also adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.[49]

There is no specific right for victims to seek reparation in Pakistan although they could seek compensation through a fundamental rights petition under the Constitution. Under Section 337-K of the Penal Code[50], those who cause hurt to extort a confession may be required to pay compensation to the victim, in addition imprisonment. However, these provisions do not impose an obligation on the State to provide reparation for violations committed by its agents. Moreover, fear of retaliation on the part of the victims and the weaknesses of the judiciary referred to above serve to undermine the possibility of seeking and obtaining reparation through the court system.

International human rights treaties and instruments provide that victims of international crimes have the right to seek and obtain effective remedies for the violation of their rights.[51] The term 'victim' includes those who have individually or collectively suffered harm, and may include family or descendants of the direct victims, and people who have suffered harm in intervening to assist victims in distress. The right of victims to seek reparation has been extended to the international sphere by the Rome Statute of the International Criminal Court. Victims of crimes under jurisdiction of the Court may seek Reparation and the Court may also make direct orders against a convicted person to make reparation to them. The different forms of reparation that exist are:[52]

a. Restitution: The restoration of liberty, legal rights, social status, family life,

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47 For example, the Universal Declaration of Human Rights (Art. 8); the International Covenant on Civil and Political Rights (art.2 (3), art 9(5) and 14(6)); the International Convention on the Elimination of All Forms of Racial Discrimination (art 6); the Convention of the Rights of the Child (art. 39); the Convention against Torture and other Cruel Inhuman and Degrading Treatment (art. 14) and the Rome Statute for an International Criminal Court (art. 75)

48 e.g. ruling of the Inter-American Court of Human Rights in the Velásquez Rodríguez Case, Serial C, No 4 (1989), par. 174

49 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 (Basic Principles).

50 Pakistan Penal Code (1860) Part II.

51 See *45*.

52 Basic Principles, par.18

property and employment.[53]

b. Compensation for any quantifiable damage resulting from crime including "physical or mental harm, including pain, suffering and emotional distress, loss of opportunities and earnings, harm to reputation or dignity; and costs required for legal or expert assistance, medicines and medical services, and psychological and social services."[54]

c. Rehabilitation: This includes medical and psychological care as well as legal and social services.[55]

d. Satisfaction and guarantees of non-repetition: include such individual and collective elements as revelation of the truth, public acknowledgment of the facts and acceptance of responsibility, prosecution of the perpetrators, search for the disappeared and identification of remains, the restoration of the dignity of victims through commemoration and other means, activities aimed at remembrance and education and at preventing the recurrence of similar crimes.[56]

The types of reparation appropriate to remedy the harm suffered will differ depending on the individual circumstances.

Reform

There is a lot that can be done to improve the status quo in terms of preventing torture and helping its victims. The most urgent and obvious area of reform is the administration of the Police. Presently, Pakistan does not have an independent state-sponsored mechanism for investigating or documenting allegations of torture.[55] The Police Order 2002 regulates the provincial police force in Punjab, but by 2004, the Order had been amended, greatly weakening its potential for police reform. One such amendment weakened the mechanism for registering complaints against the Police as the previously separate Police Complaints Authority (PCA) was merged with the public safety commission, thereby compromising its efficacy in favour of administrative reform. The previously mentioned public safety commissions, which were to include both elected and appointed members for exercising oversight of police units, have also not been formed, meaning that the reforms brought by the Order have had little or no

53 Id, par. 19
54 Id, par. 20.
55 Id, par. 21
56 Id, par. 22 and 23.
55 Policing As Torture - A Report on the Systematic Brutality and Torture by the Police in Faisalabad, Pakistan, p. 25.

impact. The establishment of an independent mechanism that oversees the actions of the police is thus essential as not only will act as a curative measure, but also as a preventive one.

Apart from the executive reform of the Police, legislative and judicial reform will also go a long way in improving the current situation. National laws can be amended to incorporate the intimidation of victims as an offence while human rights institutions can also be given the power to order interim measures. Other possible areas of reform include the setting up of a national body by the legislature that would be responsible for the protection of victims and witnesses of serious crimes. The judiciary, for the protection of victims, may include reforms such as closing hearings to the public, encouraging the use of pseudonyms, redacting and expunging victim/witness identities from public records, and using pre-trial statements as an alternative to in-court testimony, amongst other such initiatives. Along with all these measures, what remains most important though is the establishment of a societal narrative that criticizes the usage of torture so that these possible reforms in theory can take actual shape in reality.

JUDICIALISATION OF POLITICS

Ummar Ziauddin[1]

After the Second World War, many liberal democracies ceded power to judiciary for enforcement of human rights. In our Constitution we too empowered our superior courts to secure civil liberties. As was held in the Al Jihad Trust case reported as 1990 SCMR 1379:

> "The Fundamental Rights enshrined in our Constitution in fact reflect what has been provided in some of the above quoted Universal Declaration of Human Rights. It may be observed that this Court while construing the former may refer to the latter if there is no inconsistency between the two with the object to place liberal construction as to extend maximum benefits to the people and to have uniformity with the comity of nations…"

For the purpose of this essay, the writer would elaborate on the entrenched human rights as articulated in the Constitution which the superior courts are empowered to protect. Chapters I & II of Part II of the Constitution incorporate fundamental rights and directive principles of policy. Austin called such chapters "conscience of the Constitution". They have been acknowledged widely as occupying place of pride in our Constitution. The directives contained in Chapter II may not be directly enforceable in our courts but serve as guiding principles in protecting the fundamental rights enshrined in our Constitution. As such, the directive principles of policy in our scheme of the Constitution must conform and operate as subsidiary to the fundamental rights guaranteed in Chapter I of Part II, otherwise the protective provisions of the said Chapter would be a "mere rope of sand".

Mr Justice Anwarul Haq in the case of Manzoor Elahi vs. Federation of Pakistan reported as PLD 1975 SC 66 held as under:

> "Articles 3, 37 and 38 of the Constitution juxtapose to advance the cause of socio-economic principles and should be given a place of priority to mark the onward progress of democracy. These provisions become in an indirect sense enforceable by law and thus, bring about a phenomenal change in the idea of co relation of Fundamental Rights and directive principles of State policy. If an egalitarian society is to be formed under the rule of law, then necessarily it has to be by legislative action in which

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> case it would be harmonious and fruitful to make an effort to implement the socio-economic principles enunciated in the Principles of Policy, within the framework of the Fundamental Rights, by enlarging the scope and meaning of liberties…."

The Supreme Court under Article 184(3), like the High Courts under Article 199(1)(c), can pass orders as may be appropriate for the enforcement of any of the fundamental rights conferred by Chapter 1 of Part II. Article 184(3) does not have the clogs of Article 199 of the Constitution. Under Article 184(3) there are no trappings of sub Articles 1(a) and 1(c) of Article 199. However, the power under Article 184(3) can only be exercised if element of "public importance" is involved in the enforcement of fundamental rights. The jurisdiction under Article 184(3) is remedial in character and exercise of the jurisdiction is conditioned by three pre-requisites: there is a question of public importance; such question involves enforcement of the fundamental rights; and fundamental rights to be enforced are conferred by Chapter 1, Part II of the Constitution.

Article 184(3) does not on the plain reading go so far as to show who has the right to approach the Supreme Court nor does it say by what proceedings the Supreme Court may be so moved or if the proceedings under the said Article are confined to the enforcement of the fundamental right of an individual only or they extend to the enforcement of the rights of a group of class of persons whose rights are violated. In the Supreme Court case of Ms Benazir Bhutto vs. Federation of Pakistan and another reported as PLD 1988 SC 416 these issues were considered. It settled the debate, *inter alia*, on the rule of standing i.e. only a person wronged can initiate proceedings of a judicial nature for redressal against the wrongdoer. The court held that the rule of standing does not apply under Article 184(3). Ergo, in contradistinction to Article 199 of the Constitution, the rigid notion of "aggrieved person" is not implicit in Article 184(3). The Court further held that Article 184(3) outlines what proceedings should be followed, therefore, they must be judged in the light of the purpose, that is, the enforcement of any of the fundamental rights. The Court ruled:

> "If the framers of the Constitution had intended the proceedings for the enforcement of the Fundamental Rights to be in a strait jacket, then they would have said so, but not having done that, I would not read any constraint in it. Article 184(3) therefore, provides abundant scope for the enforcement of the Fundamental Rights of an individual or a group or class of persons in the event of their infraction. It would be for the Supreme

> Court to lay down the contours generally in order to regulate the proceedings of group or class of actions from case to case."

The powers to pass appropriate orders under Article 184(3) have to be read in conjunction with Article 187(1) of the Constitution that provides for Supreme Court to issue such directions, orders or decrees as may be necessary for doing complete justice. This is a unique power and has tremendous bearing on the proceedings initiated under Article 184(3) of the Constitution. Mr Justice Muhammad Afzal Zullah in Darshan Masih's case reported as PLD 1990 SC 513 expanded on the multifarious considerations the Supreme Court needs to consider before passing orders, directions or decrees under Article 184(3):

> "Treating with public interest litigation requires more than legal scholarship and a knowledge of textbook law. It is of the utmost importance in such cases that when formulating a scheme of action, the Court must have due regard to the particular circumstances of the case, to surrounding realities including the potential for successful implementation and the likelihood and degree of response from the agencies on whom the implementation will depend. In most cases of public interest litigation, there will be neither precedent nor settled practice to add weight and force to the vitality of the Court's action. The example of similar cases in other countries can afford little support. The successful implementation of the orders of the Court will depend upon the particular social forces in the back drop of local history, the prevailing economic pressures, the duration of the stages involved in the implementation, the momentum of success from stage to stage, and acceptance of the Court's action at all times by those involved in or affected by it."

The powers of the apex court to enforce the enshrined fundamental rights have become – to put it mildly, controversial in the last decade, especially post-2007. The Court deliberated on a number of issues with little or no deference shown to other arms of the Government. The matters included, *inter alia*, failure of government to have proper control on the prices; particularly of articles of daily use and essential commodities (*Suo Motu Case* No. 10 OF 2007 reported as 2008 PLD 673 Supreme Court), vires of National Reconciliation Ordinance, 2007 (PLD 2010 SC 265), promotions of officers of various occupational groups from BS-21 to BS-22 (2010 SC MR 1301), closure and suspension of broadcasting and transmission of media houses (2010 SCMR 1849), Hajj Scam of 2010 (*Suo Motu Case* No. 24 of 2010 reported as 2011 P L C (C.S.) 1489), issues concerning

housing schemes (2011 PLD 163 and *Suo Motu Case* No. 11 of 2011), contamination of water in Mancher Lake (*Suo Motu Case* No. 10 of 2010 reported as 2011 SCMR 73), law and order situation in Karachi (*Suo Motu Case* No. 16 of 2011 reported as PLD 2011 Supreme Court 997), arrangements needed to be made by the Election Commission to organize and conduct the elections in accordance with law (PLD 2012 Supreme Court 681), violation of Public Procurement Rules, 2004 by National Insurance Company Ltd (2012 P L C (C.S.) 394), the Speaker's decision not to refer the question of disqualification to the Election Commission after the Prime Minister's conviction by the 7-member Bench of the Supreme Court (PLD 2012 SC 774), Appointments to public offices such as Oil & Gas Regulatory Authority (2012 PLD SC 132) and Securities and Exchange Commission of Pakistan (2013 SCMR 1159), energy crisis and alleged corruption in rental power plants etc. (2012 SCMR 773) and the objective criteria for promotion to make a civil servant an honest officer and free from political pressure (Const. Petition No.22 of 2013).

The afore-referred cases drew mixed response from the legal fraternity and media alike. Judicial activism became the catch-phrase. This was the time period when the extended scope of jurisdiction under Article 184(3) reached its optimal. The Supreme Court actively engaged in reviewing administrative acts that it considered were violative of the fundamental rights. In all fairness, the trend of judicial activism is not exclusive to Pakistan only. The US saw two particularly pronounced phases of judicial activism (once called as judicial supremacy or government by the judiciary). The first one began in 1890s and lasted till 1935-6. It was called the age of rampant judicial activism. The next phase, popularly called the era of the Warren Court judicial activism continued through 1962-69 and is accredited for both expanding the scope of fundamental rights and suspect classes.

The UK once dictated by the norms of judicial restraint underwent a radical change in approach in the 1960s. The superior courts became far more active in reviewing the administrative acts. The Bentham Club Presidential Address[2] of Lord Edmund Davies is perhaps reflective of that change. He said "by the act of interpretation they [judges] are themselves making law". For him judicial activism was synonymous with the law making activity of the judges. Lord Edmund Davies in the said Presidential Address after citing the cases went on to say "...how enormous is the debt owed by this country to the judicial activism of Lord Denning…"

[2] Current Legal Problems 1, Reprinted in (28) 1975

India also had its phases of judicial activism[3] .The first phase that began in late 1970s and continued through 1980s, in essence, focused on rights of disadvantaged sections of society and relief was primarily sought against the actions and omissions of the executive in enforcing the fundamental rights. The Supreme Court became the institutional defender of the rights of the disadvantaged and issued the government appropriate directions to redress their grievances.

The second phase that began in 1990s saw a surge in the issues and included concerns *vis-à-vis* environment, corruption and accountability of the ruling regimes, education, harassment at workplace, fair market practices in the industries etc. The judiciary also intervened to: identify the legislative gaps (Vishaka vs State of Rajasthan AIR 1997 SC 3011) and enforce fundamental rights against private individuals (Bodhisattwa Gautam vs Subhra Chakraborty AIR 1996 SC 922). This phase also saw the Supreme Court taking strict action against non-compliance of its orders against civil servants and even went as far as to monitor the investigative agencies. The second phase thus transgressed beyond the chartered territory of public interest litigation despite the clear instructions contained in The handbook of the Indian Supreme Court: ‘‘Public International Law [PIL] is meant for enforcement of fundamental and other legal rights of the people who are poor, weak, ignorant of redressal system or otherwise in a disadvantageous position, due to their social or economic background[4].” The third phase began at the turn of century and only saw a further expansion in issues raised under public interest litigation. Judicial activism bordered on judicial excessivism. The over-reach of judiciary far outweighed the under-reach of other branches of the government. However as time has gone by, collateral trend of judicial restraint also seemed to have resurfaced. The second and third phases in India are similar to judicial trends in Pakistan. If post-2007 was the period of hyper judicial activism, then post-2013 that trend has ebbed. Judicial restraint has seemingly carried the day.

Judicial activism has been rightly termed “judicial creativity” by Justice (Retd.) Mr Fazal Karim[5]. It was the outcome of valiant efforts of “that invincible warrior” Lord Denning, the doctrines of “promissory estoppel” and “legitimate expectation” became part of the English jurisprudence. A good example of judicial creativity in Pakistan is the famous case of Ashraf Tiwana reported as 2013 SCMR 1159. It was a constitutional petition under Article 184(3) of the Constitution challenging the

[3] Deva, S: Public Interest Litigation in India: A critical Review. Civil Justice Quarterly, Issue 1, 2009
[4] Practice and Procedure—A Handbook of Information (New Delhi: Supreme Court of India, 2007),p.41
[5] Karim, F: Judicial review of Public Actions, Vol 1, Pakistan Law House, 2006.

appointment of Chairman, Securities and Exchange Commission of Pakistan for the want of transparency, objectivity, due diligence and fairness in the selection process. The Court also delved on issues; *inter alia*, statutory discretion, scope of powers under Article 184(3), selection process for the appointment of Chairman, termination simpliciter of contract employees etc. The Court reasoned that SECP being apex regulator in the economic sector in Pakistan had wide mandate affecting economic life of people at large. More specifically, placing reliance on the Muhammad Yasin case (PLD 2012 SC 132), the court considered the appointment of its Chairman and Commissioners as matter of public importance with reference to the enforcement of fundamental rights. It handed down a well-reasoned judgment, a hallmark of judicial creativity, which ushered the jurisprudence under Article 184(3) of the Constitution into a new era. The judgment has been widely lauded and the principles laid down therein on host of issues have been followed by the courts subsequently, including the Supreme Court of Pakistan, in number of cases.

At the same time, however, the power of judicial review is not unqualified or unlimited. The authority of the superior courts rests on moral sanction, which is enabled by sustained public confidence. If the superior courts clash with political institutions or appear to be getting entangled in political controversies, then the courts, a symbol of detachment, do not inspire confidence of the public. If courts tend to think they must intervene and review administrative acts to enforce fundamental rights which they feel are "unfair", then the courts would end up assuming jurisdiction on those very things, and by extension, everything that falls in the domain of other organs of the government. This would also put the legitimacy of the superior courts at risk. Justice Frankfurter in Trop vs Dulles (356 US 86) laid down the potent legal position:

> "All power is, in Madison's Phrase 'of an encroaching nature'. Judicial Power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint."
>
> [Emphasis Added]

On another occasion in the case of Barnett and Baker vs Carr (319 US 624) Justice Frankfurter penned down:

> "As a member of this court I am not justified in writing my private notions of policy in the constitution, no matter how deeply I may cherish them or

> how mischievous I may deem their disregard… it can never be emphasized too much that one's own opinion about the wisdom or evil of law should be excluded altogether when one is doing one's duty on the bench…judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged."

Article 187 of the Constitution enabling the Supreme Court to do complete justice in any case or matter pending before it helped anchor the expansion of jurisdiction from 2007 onwards. It could also be attributed to a number of other factors. But independence of judiciary deserves a comment here. It does not mean that the judges are not humans. They too have their political and moral leanings. The decisions, in part, are motivated by their own sense of worldview. It is naive to expect that while handing down a judgment, a judge would detach from his core beliefs completely. There is nothing against it. But absent judicial discretion, deference and restraint, the drive stemming from one's set of core beliefs and values thereof, especially while exercising jurisdiction under Article 184(3) becomes a source of controversy. Alexander Bickel was of the view "discharge [of judicial function] by the courts" must not "lower the quality of other departments' performance by denuding them of the dignity and the burden of their own responsibility[6]". In the post-2007 phase seemed more of an exercise of diminishing other branches of government and departments with a strong presumption invariably in all such cases of public interest that others are corrupt and incompetent.

The reason why Justice Frankfurter said only restraint upon judicial power is self-restraint is because courts enforce indeterminate human rights. Most of the entrenched fundamental rights are indeterminate in the context they are invoked. There is room aplenty for reasonable difference about the judgment enforcing a particular fundamental right concerning what it forbids or requires. The Ashraf Tiwana case *supra* might have introduced a different outcome and conclusion on the number of issues before a different bench of the Supreme Court, even though most of the facts were clear and beyond controversy.

When the courts undertake the inductive exercise of interpreting the indeterminate human rights they have the interpretative latitude to specify limits on those rights. The courts enjoy the wide powers to postulate concrete contextual meaning of those rights. Consider Article 9 of the Constitution that provides no person shall be

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[6] Alexander M. Bickel: The least dangerous Branch: The Supreme Court at the Bar of Politics 24, 1962.

deprived of life or liberty save in accordance with law. In the case of Ms Shella Zia and others reported as PLD 1994 Supreme Court 693, the Court held:

> "The word `life' is very significant as it covers all facts of human existence. The word `life' has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country, is entitled to enjoy with dignity, legally and constitutionally."

The scope is so broad that it includes "quality of life" as well which envelops all the comforts needed for one's well-being. The courts, rightly pointed out by Lord Edmund Davies, act as law makers supplying context, boundaries and meaning to the abstract notion of law.

Justice Jackson aptly enunciated the purpose of the fundamental rights in his judgment in the case of West Verginia State Board of Education vs. Barnette (319 US 624):

> The purpose was to "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

Incumbency indeed is a reality in democracies. Politicians invariably play out to the galleries. Surfing the high tides, they are constrained to opt for popular decisions. With eyes firmly set on elections, they want to preserve their incumbency and that of their own party members. They may not be inclined to make unpopular decisions. This is where the argument for enforcing the human rights by the courts gains currency. If protecting minorities is not high on the priority of the politicians in order to avoid displeasing their respective constituencies, then the courts must intervene to safeguard the interests of marginalized sections of the societies. If some are more relevant than others in first-past-the-post-system then the courts act as institutional guardians of all citizens to protect their rights from arbitrary acts or wilful omissions by the government.

At this point, it may be pertinent to refer to the judgment handed down in *Suo Motu Case* No. 1 of 2014 (*Suo moto action regarding suicide bomb attack of*

22.9.2013 on the Church in Peshawar and regarding threats being given to Kalash tribe and Ismailies in Chitral) authored by the then Chief Justice Mr Justice Tassaduq Hussain Jilliani. He pointed out "There is a general lack of awareness about minority rights among the people and those entrusted with enforcement of law are also not fully sensitized to this issue either."

Drawing, *inter alia*, on Article 20 of the Constitution his Lordship critiqued the imperfect institutions of democracy; its culture of false binaries and the failure of the state to adequate afford protection to the rights of minorities:

> "Pakistan is a transitional democracy and like all other countries (similarly placed) is confronted with competing political and social challenges. Most of the political institutions of consequence are in the process of evolution. However, the defining feature of democratic governance is complete dedication and adherence in everyday life to the seminal principles of equity, justice and inclusion of all irrespective of their colour, creed, caste, sex or faith. The sustainability of democracy depends on how best these challenges are met. Democracy is not an unmixed blessing; on the one hand it confers respect for minorities' rights and on the other it provides a platform where intolerance and hatreds get leeway leading to societal friction and violence. Such intolerance and hatreds have found their way in the social media as well and no effort has been made to check it… It is because of absence of effective State action that despite elaborate textual guarantees for minorities' rights, empirical realities reflect a mixed bag, rather a dismal state of affairs."

The Court directed, *inter alia*, that appropriate curricula should be developed at school and college levels to promote a culture of religious and social tolerance, ensure that hate speeches in social media are discouraged and a National Council for minorities' rights is constituted. The judgment is the epitome of how public interest litigation to enforce fundamental rights should be treated as was pointed out by Mr. Justice Muhammad Afzal Zullah in Darshan Masih's case (supra). The jurisdiction under article 184(3) was exercised to safeguard the rights of the underprivileged or socio-politically irrelevant class of the society. The judgment is likely to have far reaching consequences in terms of future trajectory of the Supreme Court's orientation as well. A roll-back on the already extended scope is unlikely; greater restraint would be seen in the future.

In human rights cases judicial deference is of utmost importance. Strong argument of judicial restraint has been made by James Bradley Thayer in his essay "*The Origin and Scope of American Doctrine of Constitutional Law*[7]"

> "[The Court] can only disregard the [challenged] Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one, – so clear that it is not open to rational question. That is the standard of duty to which the courts bring legislative Acts; that is the test which they apply, – not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it. This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and whatever choice is rational and constitutional…"

In Pakistan, especially with its by and large subject and parochial political culture - marred by periods of despotic dictatorial rule and inert attitude towards the legal system, it is important for the courts to extend concession to other branches of the government. The courts need to exercise their powers of enforcing the fundamental rights sparingly aimed only at the politically disfranchised classes of the society. If the courts are so much as perceived to be undermining both the legislature and the executive then it does not only risk their own legitimacy and dampen the public confidence but - with organs of the government at odds with one another, democracy as a whole loses.

[7] Bradley, J. Thayer: "The Origin and Scope of American Doctrine of Constitutional Law". The Harvard Law Review October 1893.

THE REALITY OF THE DRONE STRIKE ATTACKS IN PAKISTAN
THE REAL PERPETRATOR(S) AND THE ILLUSION OF INTERNATIONAL LAW

Sonia Riaz[1]

I. INTRODUCTION

…"Einstein defined madness as doing the same thing over and over again and expecting a different result. Eight years we've been bombing them and what are the results? This is not the way. The way to do it is to win the people to your side,"[2]

This was a statement made in 2012 by an eminent political figure in Pakistan in relation to the drone strike attacks which are carried out by the CIA on Pakistani territory. Not only at the domestic level, but also internationally the drone attacks have raised a hue and cry and there is no debate on the illegality of these drone attacks. However, despite the apparently illegal nature of the targeted killings by means of such attacks, the international community has failed the victims of these drone attacks by not having been able to put an end to them. It is pertinent to point out that the victims are not necessarily "militants"; rather, they involve a considerable number of civilians as well who have been made targets either intentionally or unintentionally.

Before a detailed discussion of the pertinent issues can take place, it is imperative to understand what the exact problem is and what solutions, if any, have been posed to address the same. This paper is primarily focused on highlighting drone strikes as a human rights concern in Pakistan. It shall first look at the history of how and when the drones began. It shall then go on to identify the methods through which drone warfare is conducted. Then a glimpse will be shown of the consequences of these drone attacks. Furthermore, the drone attacks shall be

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[2] Asif Mehmood, *Drone Strikes Immoral, Illegal, says Imran* Daily Times (July 22, 2012) <http://droneswatch.org/2012/07/22/drone-strikes-immoral-illegal-says-imran/#more-637> accessed 4 August 2014. The author is an LLM graduate from SOAS, UCL alumna and part-time lecture at UCL.

briefly discussed in light of international law and the reality of these strikes shall be highlighted further. Then, the position of the relevant actors, that is, the US, Pakistan and the UN shall be looked at and finally a conclusion shall be reached on the basis of the same which shall illustrate that each of these actors needs to honestly want to put an end to the drone attacks and act in collaboration before any concrete measure can be taken.

II. ORIGINS OF THE DRONE STRIKES

The US has been conducting drone attacks on North West Pakistan since June 2004 to date.[3] These attacks are carried out by the US Intelligence Agency, the CIA, by using unmanned aerial vehicles, better known as "drones". These attacks commenced during the Bush administration and escalated radically under the administration of Obama.[4] Initially these attacks commenced in Afghanistan as a response to the horrific events of 9/11 against suspected members of Al Qaeda and other armed groups.[5]

In response to the events of 9/11, Security Council Resolution #1368 and Resolution #1373 were passed in September 2001 which 'affirmed the inherent right of the USA to defend itself and emphasized that defensive force may be used where a state fails to prevent or suppress terrorist activities originating from its territory'[6].

After the US invasion of Afghanistan in October 2001, many Taliban crossed the Afghan border and sought refuge in the Federally Administered Tribal Areas of Pakistan.[7] It is alleged that the first US attack on Pakistan took place in June 2004 when it launched a strike against a Pakistani Taliban Commander, Nek

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[3] International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at NYU School Of Law, *'Living Under Drones: Death, Injury, and Trauma To Civilians from US Drone Practices in Pakistan'* (2012).

[4] Richard D Rosen, *'Drones and the US Courts'* (2011), 37, William Mitchell Law Review, 5280.

[5] International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at NYU School Of Law, *'Living Under Drones: Death, Injury, and Trauma To Civilians from US Drone Practices in Pakistan'* (2012).

[6] Micheal Ramsden, *'Targeted Killings and International Human Rights Law: the Case of Anwar Al-Awlaki'*, (2011), 16, Journal of Conflict & Security Law, 385.

[7] International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at NYU School Of Law, *'Living Under Drones: Death, Injury, and Trauma To Civilians from US Drone Practices in Pakistan'* (2012).

Muhammad.[8] From that day onwards to date, the drones have been persistently present in North West Pakistan. The strikes take place regularly, even though there are pauses between the strikes. The longest pause under the administration of Obama was from the 25th December 2013 to the 10th of June 2014[9] inclusive. However, there has been no sign of these strikes stopping altogether, at least not for the moment.

A total of 386 strikes have taken place in Pakistan to date killing between 2310 to 3743 people.[10] Further, between 416 to 957 people out of the killed were reported to be civilians. In addition, 168 to 202 of these civilians were reported to be children. Apart from the number of people killed, between 1091 to 1647 people have also been injured to date. The mass destruction of property brought about by these drone strikes is a separate grievance altogether.[11]

III. THE CONDUCT OF DRONE WARFARE

An unmanned aerial vehicle (UAV) has been defined by the US Department of Defense as a "powered aerial vehicle that does not carry a human operator…can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or non-lethal payload"[12]. The drone attacks being carried out in Pakistan are primarily undertaken by two types of combat drones: the MQ-1 or Predator and the MQ-9 or Reaper. The Reaper is similar in design and function to the Predator, but the Reaper is newer and has the ability to carry a greater number of missiles.[13]

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[8] Ibid; Peter Bergen & Jennifer Rowland, *Drones Decimating Taliban in Pakistan*, CNN (July 4, 2012) <http://www.cnn.com/2012/07/03/opinion/bergen-drones-taliban-pakistan/index.html> accessed 4 August 2014.

[9] Alice K Ross, *The Drone Strikes Resume in Pakistan After Five-Month Pause* The Bureau of Investigative Journalism (12 June 2014) <http://www.thebureauinvestigates.com/2014/06/12/drone-strikes-resume-in-pakistan-after-five-month-pause/> accessed 4 August 2014.

[10] Covert Drone War, *Get the Data: Drone Wars* The Bureau of Investigative Journalism <http://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/> accessed 12 July 2014.

[11] Reuters, *Drone Strike Wipes Out Man's Family, Faith* DAWN NEWS, (14 February 2011) <http://www.dawn.com/news/606183/drone-strike-wipes-out-mans-family-faith> accessed 4 August 2014.

[12] The Department Of Defense Dictionary Of Military And Associated Terms 579, Joint Publication 1-02, April 12, 2001 (amended Oct. 17, 2008).

[13] Christopher Drew, *Drones Are Weapons of Choice in Fighting Qaeda*, N.Y. TIMES, (16 March 2009) <http://www.nytimes.com/2009/03/17/business/17uav.html?_r=1&hp> accessed 4 August 2014.

The precise blast radius of the hellfire missiles is unknown but it could go up to 20 metres radius as per the footage compiled by special Rapporteur Ben Emmerson, on a website[14] linked to the recent inquiry report regarding drones.[15] A single strike has the ability to kill up to 70 people and injuring many more in addition to that.[16] Before the events of 9/11, the role of drones was primarily confined to purposes of aerial reconnaissance. However after 9/11, the drones began to be used as a method of engaging in warfare rather than just the gathering of information.

Drones have the ability to remain in the air for up to at least 24 hours at altitudes which exceed 60,000 feet providing real time intelligence to commanders[17] who could choose on the basis of the intelligence when and where to conduct a strike. Drones do not suffer from human weaknesses and can be used without the fears inevitably involved in a war where the attacker is a human entity. "Dull, Dirty or Dangerous"[18] battlefield operations can be undertaken without the risk of the life of the attacker. What makes drones most unique is their ability to launch an intended attack despite the fact that the operator of the drone itself is far away from the target, nowhere near the vicinity of the attack and sitting in another continent altogether.

Despite the claim that the hellfire missiles launched from these drones have laser-like precision[19] when they target a victim, it is clear that "the use of drones in Pakistan has resulted in a large number of civilians being killed along with the intended targets"[20]. That is because there are several drawbacks to this technology

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[14] UN SRCT Drone Inquiry <http://unsrct-drones.com/> accessed 4 August 2014.

[15] Ben Emmerson, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (28 February 2014) <http://justsecurity.org/wp-content/uploads/2014/02/Special-Rapporteur-Rapporteur-Emmerson-Drones-2014.pdf> accessed 4 August 2014.

[16] Nathan Hodge, *Deadliest Strike Yet in Pakistan Drone War*, Wired Magazine (June 24, 2009) <http://www.wired.com/2009/06/deadliest-strike-yet-in-pakistan-drone-war/> accessed 4 August 2014; Human Rights Council, *Complaints Against the USA for the Killing of Innocent Citizens of the Islamic Republic of Pakistan* (23 February 2012) <http://www.reprieve.org.uk/media/downloads/2012_02_22_PUB_drones_UN_HRC_complaint.pdf?utm_source=Press+mailing+list&utm_campaign=89f3db0a75-2012_02_23_drones_UN_complaint&utm_medium=email> accessed 4 August 2014.

[17] Keith Somerville, *US Drones Take Combat Role*, BBC NEWS (5 November 2002) <http://news.bbc.co.uk/2/hi/in_depth/2404425.stm> accessed 4 August 2014.

[18] Mary Ellen O'Connell, *Unlawful Killing with Combat Drones, A Case Study of Pakistan 2004-2009*, University of Notre Dame Legal Studies Research Paper No 09-43, 2010 at 5.

[19] Thomas G. Mahnken, *The Growth & Spread of the Precision-Strike Regime* 140 No. 3 Daedalus-The Modern American Military 45.

[20] Mary Ellen O'Connell, *Unlawful Killing with Combat Drones, A Case Study of Pakistan 2004-2009*, University of Notre Dame Legal Studies Research Paper No 09-43, 2010 at 6.

as well. At the end of the day, the drones are dependent on cameras and sensors to transmit the information that is needed in order for an attack to take place. There is still uncertainty about the targets.[21] The weather and the attitude of the drone operator both play an important role. The drone operator is relying upon whatever data is being transmitted by the computer and even though the computer is not technically autonomous in deciding to strike, but in reality this is what is happening.[22] Moreover, there is very little on-the-ground information to affirm or reject the information being provided by the computer particularly in the case of Pakistan. And whatever little on-the-ground information is available is also unreliable.[23]

A case study on the effect of combat drones on Pakistan notes the following: "A media report drawing attention to problems with target identification explained: 'Somebody operating a Predator will see a bunch of vehicles and they'll say, "We know they're not ours."' The Air Force's standard tactics have been 'to bring in other recon, like special operations teams, and try to figure out what they're seeing. But to start with, all they know is that there's movement'[24]. 'Looking through the Predator's camera is somewhat like looking through a soda straw. … Your field of view tends to become distorted. … [Y]ou might be able to tell a Saudi headdress from an Afghan one. They are different. But it'd be pretty hard to do.[25]

These strikes are carried out by unmanned aerial vehicles, the drones, which lack the ability to differentiate between civilians and militants who reside conterminously in the areas where the attacks take place. The intelligence of these drones has proved to be faulty as well at times.[26] "This explains why ―between January 14, 2006 and April 8, 2009, only 10 [strikes] were able to hit their actual

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[21] Peter Bergen and Katherine Tiedemann, *No Secrets in the Sky*, N.Y. TIMES, (5 April 2010) <http://www.nytimes.com/2010/04/26/opinion/26bergen.html?_r=1> accessed 4 August 2014.

[22] Peter W. Singer, *Robots at War: The New Battlefield*, The WILSON Quarterly., Winter 2009, at 30.

[23] Jane Mayer, *The Predator War, What are the Risks of the C.I.A.'s Covert Drone Program?*, THE NEW YORKER, (26 October 2009) < http://www.newyorker.com/magazine/2009/10/26/the-predator-war> accessed 4 August 2014.

[24] Eric Umansky, *Dull Drone: Why Unmanned U.S. Aerial Vehicles Are A Hazard to Afghan Civilians*, (13 March 2002) <http://www.slate.com/id/2063105/> accessed 4 August 2014.

[25] Mary Ellen O'Connell, *Unlawful Killing with Combat Drones, A Case Study of Pakistan 2004-2009*, University of Notre Dame Legal Studies Research Paper No 09-43, 2010 at 6.

[26] Gareth Porter, *Errant Drone Attacks Spur Militants in Pakistan*, IPS, (15 April 2009) < http://www.ipsnews.net/2009/04/politics-errant-drone-attacks-spur-militants-in-pakistan/ > accessed 4 August 2014 ; *60 Drone Hits Kill 14 Al-Qaeda Men, 687 Civilians*, NEWS (10 April 2009) <http://www.liveleak.com/view?i=61e_1239494906> accessed 4 August 2014.

targets, killing 14 wanted al-Qaeda leaders, besides perishing 687 innocent Pakistani civilians. The success percentage of the U.S. Predator strikes thus comes to not more than six per cent."[27]

In light of the same, these weapons have their own drawbacks and the view that the use of drones saves lives since no human being is involved in launching the attack, is not necessarily accurate. Rather, the fact that they are unmanned means that the reliance is on a computer source and the accuracy of the same cannot be confirmed by human intelligence until after the attack has been launched thus costing more lives overall.

IV. THE STORY OF THE DRONES BEYOND THE TARGETTING OF MILITANTS

The alleged targets of the drones are individuals from Al-Qaeda, the Taliban or associated forces[28]. It is alleged by the US that the drone attacks are precise and enable "targeted" killings, while causing minimal collateral damage. However, upon examination of the relevant data it becomes evident that this is not the case. The amount of civilian damage caused by the drone strikes is substantial and to term it as "collateral damage" is a euphemism.[29]

Despite the fact that the US has not declared war on Pakistan, the people living in the drone struck areas of Pakistan are living under war conditions and are in constant terror of their own lives, the lives of their children, family and friends.[30] As a result of these attacks, the social life of the civilians living/residing in these areas has been completely disrupted. In a discussion by Democracy Now with two

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[27] *60 Drone Hits Kill 14 Al-Qaeda Men, 687 Civilians*,
NEWS (10 April 2009) <http://www.liveleak.com/view?i=61e_1239494906> accessed 4 August 2014.

[28] Wilson Centre, 'The Efficacy and Ethics of US Counterterrorism Strategy' (30 April 2012) <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy> accessed 4 August 2014.

[29] David Luban, 'Drones, Morality and International Law' (Event at School of Oriental and African Studies, London, 4 December 2012)

[30] Amy Goodman and Juan Gonzalez, 'Study Finds US Drone Strikes in Pakistan Miss Militant Targets and "Terrorize" Civilians', *Democracy Now* (26 September 2012)<http://www.democracynow.org/2012/9/26/study_finds_us_drone_strikes_in> accessed 4 August 2014.

of the authors of the Stanford and NYU Report on Living Under the Drones[31], the effect of the attacks were discussed in detail.[32]

The drones fly in these areas 24 hours a day and the civilians cannot carry on with their life without being in fear of an attack. There has also been significant evidence of secondary strikes. This refers to a situation where a second strike is made at the scene of an attack. As a result the relatives, friends, rescuers, doctors and humanitarian organisations do not go to the drone struck area for until almost six hours. By that time if there was a chance that anyone could have been saved by medical help, that person would have died in any case due to the delay in the medical aid. The strikes carried out in North Waziristan on 11th June 2014 after a five month pause, is one instance where a secondary strike was made.[33]

In addition there are two types of strikes that take place, personality strikes and signature strikes. The personality strikes are focused on a certain named target and refer to an attack where the intended target is a pre-determined, named person. However what is more worrying are the signature strikes that take place. They are not carried out on a named target like the personality strikes, rather they are carried out based on a certain pattern of behaviour or life analysis. The criteria for these strikes is unclear and given the high number of civilian casualties, it is doubtful whether a distinction is being made between civilians and terrorists.[34] It is a matter of great concern that apparently the CIA counts civilian casualties "in a self-serving, dishonest way. Any dead military-age male in the vicinity of a targeted strike is presumed a "militant" unless proven otherwise."[35]

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[31] International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at NYU School Of Law, *'Living Under Drones: Death, Injury, and Trauma To Civilians from US Drone Practices in Pakistan'* (2012).

[32] Amy Goodman and Juan Gonzalez, 'Study Finds US Drone Strikes in Pakistan Miss Militant Targets and "Terrorize" Civilians', *Democracy Now* (26 September 2012)<http://www.democracynow.org/2012/9/26/study_finds_us_drone_strikes_in> accessed 4 August 2014.

[33] Alice K Ross, *The Drone Strikes Resume in Pakistan After Five-Month Pause* The Bureau of Investigative Journalism (12 June 2014) <http://www.thebureauinvestigates.com/2014/06/12/drone-strikes-resume-in-pakistan-after-five-month-pause/> accessed 4 August 2014.

[34] Amy Goodman and Juan Gonzalez, 'Study Finds US Drone Strikes in Pakistan Miss Militant Targets and "Terrorize" Civilians', *Democracy Now* (26 September 2012)<http://www.democracynow.org/2012/9/26/study_finds_us_drone_strikes_in> accessed 4 August 2014.

[35] David Luban, 'What Would Augustine do? The President, Drones, and Just War Theory', *Boston Review* (6 June 2012) <http://www.bostonreview.net/david-luban-the-president-drones-augustine-just-war-theory> accessed 4 August 2014; Jo Becker and Scott Shane, 'Secret "Kill List" Proves a Test of Obama's Principles and Will', *The New York Times* (29 May 2012)

Apart from the physical harm, the psychological effect of the drones was also apparent.[36] The drones make a buzzing sound and if one happens to be underneath a drone then there is this threat that it can strike any moment, at anyone. If at the moment of the strike, one is caught in the radius of the blast then regardless of who is the target, there is danger of death or serious injury. The shrapnel of the missiles fired from the drones from the blast are sufficient for that. As a result, these "targeted killings" also end up being indiscriminate killings.[37] There are numerous examples of the same of which some are provided in the report, discussed below, by the Special Rapporteur Ben Emmerson, in particular the incident of the attacks on the *Jirga*.

V. THE REALITY OF THE ATTACKS: A MOCKERY OF INTERNATIONAL LAW?

A. Self Defence or Pre-emption

The attacks by the US fall foul of international law and it is apparent that despite this, the US has no qualms about continuing with the same. It is difficult to call it self-defense. One needs to comply with the customary international law requirements of immediacy, necessity, and proportionality (the *Caroline* paradigm)[38] in order to invoke self-defence. None of these requirements are fulfilled by the US.

Rather than self-defence, it would perhaps be more apt to refer to these as pre-emptive strikes which have the purpose of weakening al-Qaeda and the Taliban to eliminate the possibility of any future attacks happening on the US. There is no imminent danger which requires such a reaction, no necessity since other peaceful means of resolving the threat have not been exhausted and no proportionality since these strikes have been going on ever since 2004 and are continuing to date.

<http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all> accessed 4 August 2014.

[36] Marion Birch, Gay Lee and Tomasz Pierschionek, '*Drones, the Physical and Psychological Implications of a Global Theatre of War*' (2012), Medact.

[37] Amy Goodman and Juan Gonzalez, 'Study Finds US Drone Strikes in Pakistan Miss Militant Targets and "Terrorize" Civilians', *Democracy Now* (26 September 2012)<http://www.democracynow.org/2012/9/26/study_finds_us_drone_strikes_in> accessed 4 August 2014.

[38] Sikander Ahmed Shah, (2010) *'War on Terrorism: Self Defense, Operation Enduring Freedom and the Legality of US Drone Attacks in Pakistan'* 9 Washington University Global Studies Review 77.

Not only that, the territorial integrity of Pakistan is being violated continuously because to date Pakistan officially condemns these attacks.[39] The US did show a willingness to conduct joint operations with Pakistan in these tribal areas.[40] However, Pakistan apparently rejected the offer and suggested conducting these operations by itself with the requisite intelligence, missiles and drones[41]. "The United States, however, has ignored this proposition and continues to violate the territorial integrity of Pakistan without showing any real willingness to negotiate a compromise under which Pakistan is given a real chance to effectively deal with militarism thriving within its borders, absent U.S. armed unilateralism."[42]

B. THE NEW BREEDS

Rather than ending the threat posed by the Taliban, these drone attacks are adding fuel to the fire by increasing militancy and insurgency in these tribal regions. Consequently, there is an intense amount of resentment amongst the civilian population. There does not need to be any link with the Taliban, if a drone attacks kills a family or friend of a civilian, that person will hold resentment against the US. It is this very resentment that is exploited by the "fanatical factions through organized propaganda to successfully recruit thousands of disillusioned and impressionable young fighters for their causes. Consequently, these burgeoning

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[39] Latest Press Releases/Speeches, Ministry of Foreign Affairs, Government of Pakistan (12 June 2014) <http://www.mofa.gov.pk/pr-details.php?prID=2034> accessed 4 August 2014; Latest Press Releases/Speeches, Ministry of Foreign Affairs, Government of Pakistan (18 June 2014); <http://www.mofa.gov.pk/pr-details.php?prID=2046> accessed 4 August 2014; Latest Press Releases/Speeches, Ministry of Foreign Affairs, Government of Pakistan (01 November 2013) <http://www.mofa.gov.pk/pr-details.php?prID=1517> accessed 4 August 2014; Latest Press Releases/Speeches, Ministry of Foreign Affairs, Government of Pakistan (21 November 2013) <http://www.mofa.gov.pk/pr-details.php?prID=1565> accessed 4 August 2014; Latest Press Releases/Speeches, Ministry of Foreign Affairs, Government of Pakistan (22 November 2013) <http://www.mofa.gov.pk/pr-details.php?prID=1570> accessed 4 August 2014; Latest Press Releases/Speeches, Ministry of Foreign Affairs, Government of Pakistan (26 December 2013) <http://www.mofa.gov.pk/pr-details.php?prID=1631> accessed 4 August 2014.

[40] Bridget Johnson to *Report: Pakistan Rejects U.S. Plan, Wants Drones* (8 April 2009) < http://thehill.com/homenews/news/19134-report-pakistan-rejects-us-plan-wants-drones > accessed 4 August 2014.

[41] *President Asif Ali Zardari Replies to Questions from* The Independent, INDEPENDENT NEWS, (8 April 2009) <http://www.independent.co.uk/news/world/asia/president-asif-ali-zardari-replies-to-questions-from-the-independent-1665034.html> accessed 4 August 2014;

[42] Sikander Ahmed Shah, (2010) *'War on Terrorism: Self Defense, Operation Enduring Freedom and the Legality of US Drone Attacks in Pakistan'* 9 Washington University Global Studies Review 77.

violent movements embedded in religious fanaticism have dangerously engulfed many parts of Pakistan[43] propagating insurgency, civil unrest, and terrorism."[44]

These drone strikes have become a basis for grievances. Every civilian casualty results in a broken home, and acts as a fuel for militarism amongst the survivors. Such casualties are likely to lead to sympathies with the terrorist population and breed new terrorists who have the aim of combating the perpetrator of the attack on their family.[45] It could also increase recruitment in the terrorist organisations. Faisal Shahzad was a Pakistani immigrant who attempted to bomb Times Square in 2010 and he testified at his trial that he did it as a reaction to the US Drone attacks on Pakistan. However for the major part the backlash is suffered primarily by Pakistan and unfortunately, the country suffers more and more with each drone attack. The US on the other hand has nothing to lose since the retaliation of the drone attacks is taken out against Pakistan itself, not the US.

C. THE VIOLATIONS

These drone strikes infringe many rights such as the right to life and many other rights enshrined in even the most basic of international documents such as, the International Convention for Civil and Political Rights, 1966. Former President Jimmy Carter said that the US was indulging in human rights violations that "would never have been dreamed of before 9/11"[46]. He also said that the US breached 10 out of the 30 articles set out in the Universal Declaration of Human Rights 1948 "including perpetually detaining people in prison without informing

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[43] Saeed Shah, *Pakistani Taliban Claim Police Academy Attack*, GUARDIAN (1 April 2009) <http://www.guardian.co.uk/world/2009/mar/31/pakistan-taliban-lahore-police-attack> accessed 4 August 2014.

[44] Sikander Ahmed Shah, (2010) *'War on Terrorism: Self Defense, Operation Enduring Freedom and the Legality of US Drone Attacks in Pakistan'* 9 Washington University Global Studies Review 77.

[45] Jane Mayer, 'The Predator War. What Are the Risks of the CIA's Covert Drone Program?' *The New Yorker* (26 October 2009) <http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer> accessed 4 August, 2014.

[46] 'US Drone Attacks amount to Human Rights Violations, Carter Says' *The Gazette* (13 September 2012)<http://thegazette.com/2012/09/13/u-s-drone-attacks-amount-to-human-rights-violations-carter-says/> accessed 4 August 2014.

them of any charges, providing them access to legal counsel or bringing them to trial and more recently by killing people via the use of unmanned drones"[47].

Article 6 of the International Covenant on Civil and Political Rights 1966, to which the US is a party[48], stipulates that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[49] The human right to life is also recognized in several other international and regional human rights documents. Article 2 of The European Convention on Human Rights; Article 4 of the American Convention on Human Rights and Article 4 of the African Charter on Human and Peoples' Rights all enshrine the right to life. Article 9 of the Constitution of Pakistan itself states " No person shall be deprived of life or liberty save in accordance with law". [50]

The targeted killings conducted by the US violate the right to life of all individuals that are killed, including not only militants but also civilians and children. Sebastian Wuschka aptly quotes Philip Alston, "under human rights law (HRL), targeted killings are likely never to be lawful, as 'it is never permissible for killing to be the *sole objective* of an operation'".[51]

In the report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston defines a targeted killing as the "intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator".[52]

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[47] 'US Drone Attacks amount to Human Rights Violations, Carter Says' *The Gazette* (13 September 2012)<http://thegazette.com/2012/09/13/u-s-drone-attacks-amount-to-human-rights-violations-carter-says/> accessed 4 August 2014.

[48] Mary Ellen O'Connell, 'When are Drone Killings illegal?' *CNN* (16 August 2012) <http://edition.cnn.com/2012/08/15/opinion/oconnell-targeted-killing/index.html> accessed on 4 August 2014.

[49] International Covenant on Civil and Political Rights, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed on 4 August 2014.

[50] The Constitution of Pakistan, available at <http://www.pakistani.org/pakistan/constitution/part2.ch1.html> accessed 4 August 2014.

[51] Sebastian Wuschka, (2011) *'The Use of Combat Drones in Current Conflicts-A Legal Issue or a Political Problem?'* 3 Goettingen Journal of International Law 902.

[52] Philip Alston, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (28 May 2010) <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> accessed on 4 August 2014.

As stipulated under Article 6 of the ICCPR, no one shall be arbitrarily deprived of life and the use of lethal force is forbidden without a lawful reason.[53] Use of lethal force is legal only when it is strictly and directly necessary to protect a life. Such force must be proportionate and should be a measure of last resort only and when "there is no other means, such as capture or nonlethal incapacitation, of preventing that threat to life (making lethal force *necessary*)"[54].

VI. THE DIFFERENT ACTORS INVOLVED

A. The US

The US provides little information about the procedure and conduct of the drone attacks. There is no transparency and these drone attacks are shrouded in secrecy. Hina Shamsi, the Project Director for National Security for the American Civil Liberties Union (ACLU) and Philip Alston were particularly critical about the CIA operating a secret drone killing programme in the border region between Afghanistan and Pakistan because the US "refuses to disclose the programme's legal justification, the safeguards designed to minimise civilian harm, or the follow-up enquiries conducted".[55]

Recently after a year-long effort, the Obama administration has compiled a detailed counterterrorism booklet referred to as the "playbook"[56]. This manual aims to establish clear rules for targeted killing operations but unfortunately it leaves open a major exemption for the CIA's campaign of drone strikes in Pakistan.[57] It was stated by US officials that a temporary exemption for Pakistan was made to put a stop to the disagreements among the State Department, the CIA

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[53] Human Rights Committee, Chongwe v Zamibia, Un Doc CCPR/C/70/D/821/1998, (9 November 2000), Para 5.2; Mary Ellen O'Connell, (2010) 'The Choice of Law Against Terrorism', 4 Journal of National Security Law and Policy 343.

[54] Philip Alston, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (28 May 2010) <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> accessed on 4 August 2014; *McCann and Others v. United Kingdom,* ECHR (1995), No.18984/91, para. 145.

[55] Philip Alston and Hina Shamsi, 'A Killer Above the Law' *The Guardian* (8 February 2010) <http://www.guardian.co.uk/commentisfree/2010/feb/08/afghanistan-drones-defence-killing> accessed 4 August 2014.

[56] Greg Miller, Ellen Nakashima and Karen DeYoung, 'CIA Drone Strikes Will Get Pass in Counterterrorism "Playbook", Officials Say', *The Washington Post* (January 19 2013) <http://www.washingtonpost.com/world/national-security/cia-drone-strikes-will-get-pass-in-counterterrorism-playbook-officials-say/2013/01/19/ca169a20-618d-11e2-9940-6fc488f3fecd_print.html> accessed 4 August 2014.

[57] Ibid.

and the Pentagon while drafting the manual and to move forward with the compilation of the playbook.[58]

This manual has been viewed with criticism and is seen as a symbol of the extent to which the "CIA's paramilitary killings"[59] have been institutionalized.[60] Susan Lee, Director of Amnesty International Americas said, "There already exists a rulebook for these issues: it's called international law. Any policy on so-called 'targeted killings' by the US government should not only be fully disclosed, but must comply with international law". [61]

The stance of the US government is that these killings are lawful and that the targets of the drones are individuals from Al-Qaeda, the Taliban or associated forces.[62] In his speech in April 2012, when questioned about signature strikes, John Brennan, Director of the CIA, specifically refused to comment on them. He clearly stated that he was only referring to individual strikes.[63] He also said that all the actions of the US were in accordance with the rule of law. He also stated that the drones had "laser-like precision" and the target was merely Al-Qaeda and associated forces. He admitted that the US was giving limited information but he stated that such information is classified and that secrecy is necessary for the operation.[64]

B. The UN

The UN Special Rapporteur Christof Heyns, in his report dated 30th March 2012 stated that, "Since June 2004, some 300 drone strikes have been carried out in Pakistan and the number of resulting deaths has allegedly reached quadruple figures according to unconfirmed reports, of which about 20 per cent are believed to be civilians. According to the non-governmental Pakistan Human Rights

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[58] Ibid.
[59] Ibid.
[60] Ibid
[61] 'USA's Drones "Manual" Must Be Fully Disclosed', *Amnesty.org.uk*, (21 January 2013) < http://www.amnesty.org.uk/press-releases/usas-drones-manual-must-be-fully-disclosed> accessed 4 August 2014.
[62] Wilson Centre, 'The Efficacy and Ethics of US Counterterrorism Strategy' (30 April 2012) <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy> accessed 4 August 2014.
[63] Ibid.
[64] Ibid.

Commission, United States drones strikes were responsible for at least 957 deaths in Pakistan in 2010".[65]

Addressing a conference in Geneva, Heyns is quoted in the Guardian, dated June 2012, to have stated "It's difficult to see how any killings carried out in 2012 can be justified as in response to [events] in 2001...Some states seem to want to invent new laws to justify new practices".[66]He also said the alleged US practice of secondary drone strikes on rescuers after an initial drone amounts to a war crime.

The US perception is that since drones are unmanned aerial vehicles, they save American lives which would not have been the case if manned systems were used. For the US, minimising US casualties amounts to success. Vicki Divoll, a former CIA lawyer and current professor at US Naval academy in Annapolis noted that "people are a lot more comfortable with a predator strike that kills many people than with a throat slitting one that kills one"[67]

At a conference in Geneva in 2012, organised by the American Civil Liberties Union (ACLU) Christof Heyns, said that the attacks by the US threaten long established human rights standards and could encourage other states to breach international law.

At the same conference, Ben Emmerson stated that the issue of drone attacks was being addressed by more and more states. China and Russia also jointly issued a statement at the UN Human Rights Council session held from June 18-July 16 2012, condemning the drone attacks.

Emmerson stated that the US should establish an investigative body and in case it failed to do so, the UN would set up the body itself. He also said that US statistics regarding the accuracy of drone strikes were not accurate. Given the balance of power between Pakistan and US, not to mention the rest of the world, it is difficult to initiate action against the US.

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[65] Christof Heyns, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum' (30 March 2012) < http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-22-Add3_en.pdf> accessed 4 August 2014.

[66] Owen Boycott, 'Drones Strikes Threaten 50 Years of International Law, Says UN Rapporteur' *The Guardian* (21 June 2012) <http://www.guardian.co.uk/world/2012/jun/21/drone-strikes-international-law-un> accessed 4 August 2014.

[67] Jane Mayer, 'The Predator War. What Are the Risks of the CIA's Covert Drone Program?' *The New Yorker* (26 October 2009) <http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer> accessed 4 August 2014.

In the follow up of his meeting of the Human Rights Council in Geneva in June 2012, mentioned earlier, Ben Emmerson set up an investigative body on the 24th of January 2013 and its details were given at a press conference in London.[68] In the press release issued on the 24th of January 2013, the Rapporteur stated that the aim of the inquiry was to gauge the actual amount of harm suffered including disproportionate civilian casualties. With this aim in mind, a number of case studies would be examined from various countries where drone attacks were taking place including Pakistan. It would then be decided whether the allegations of unlawful killings were such that amounted to breaches of international law obligations, both under international human rights law and international humanitarian law. [69]

The enquiry was welcomed overall by many from the international human rights community and national security experts including Hina Shamsi, director of the ACLU's National Security Project, Joshua Foust, a fellow at the American Security Project and Gregory Johnsen, a Princeton PhD candidate and author of the new book, The Last Refuge: Yemen, Al-Qaeda and America's War in Arabia. Foust however, cautioned that success is dependent on the cooperation of the relevant nations and that the UN is helpless otherwise.[70]

This enquiry is now complete and in his report[71] Emmerson concluded that countries that carry out drone strikes had a 'legal obligation to disclose the results' of each strike.[72] He emphasised on the fact that this was not a political obligation;

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[68] 'Statement by Ben Emmerson, UN Special Rapporteur on Counterterrorism and Human Rights Concerning the Launch of an Inquiry into the Civilian Impact, and Human Rights Implications of the Use Drones and Other Forms of Targeted Killings for the Purpose of Counter-terrorism and Counter-insurgency' *News Release* (24 January 2013) <http://www.foreignpolicy.com/files/fp_uploaded_documents/130124_SRCTBenEmmersonQCStatement.pdf> accessed 4 August 2014.

[69] Ibid.

[70] Ryan Devereux, 'UN Inquiry Into US Drone Strikes Prompts Cautious Optimism' *The Guardian* (24 January 2013) <http://www.guardian.co.uk/world/2013/jan/24/un-announces-drone-inquiry-human-rights> accessed 4 August 2014;Christof Heyns, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum' (30 March 2012) < http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-22-Add3_en.pdf> accessed 4 August 2014.

[71] Ben Emmerson, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (28 February 2014) <http://justsecurity.org/wp-content/uploads/2014/02/Special-Rapporteur-Rapporteur-Emmerson-Drones-2014.pdf> accessed 4 August 2014.

[72] Patrick Galey 'Us Should Gather Accurate Drone Civilian Casualty Data, Says Military Analyst' (10 April 2014) <http://www.thebureauinvestigates.com/2014/04/10/us-military-analyst-calls-for-better-drone-civilian-casualty-data/> accessed 4 August 2014.

rather there was a continual "legal" obligation to disclose the results of fact finding inquiries.[73] The report also recommended that a panel of experts should be set up by the Human Rights Council[74] of the UN solely for the discussion and reporting on the legal issues raised by the use of drones pertaining to targeted killings[75]. In addition, the report discusses 30 strikes which include strikes by the US on Pakistani territory, and asks the concerned states to provide a public explanation since there is civilian damage in each. In any strike where there has been civilian harm, or there appears to have been civilian harm, which was not foreseen at the time of the planning of the attack, then the state responsible for the attack is under an obligation to investigate impartially and submit a public explanation of the same. The obligation to do so would come into play whenever there is an indication from a reliable source that such unforeseeable civilian casualties have taken place.[76] This shall most likely constitute the basis for a draft resolution in the near future.[77]

C. PAKISTAN

The Pakistani reaction has been overwhelmingly hostile and they perceive the drones as inhuman killing machines which go against the cultural codes of honourable warfare. The secrecy of the entire process leads to mistrust in especially the rural population and increases condemnation of the drone strikes. Anti US sentiment and anger towards the US is increasing in Pakistan with each attack. Such sentiment has been expressed by the public through various means. Militant extremists have carried out and threatened to carry out serious acts of terrorism in protest.[78]

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[73] Jack Serle, 'Countries Must Investigate Civilian Drone Death Claims, Says UN Investigator Ben Emmerson' (12 March 2014) <http://www.thebureauinvestigates.com/2014/03/12/countries-must-investigate-civilian-drone-death-claims-says-un-investigator-ben-emmerson/> accessed 4 August 2014.

[74] Sarah Knuckney, 'Key Findings in UN Special Rapporteur Report on Drones' (4 March 2014) <http://justsecurity.org/7819/key-findings-special-rapporteur-report-drones/> accessed 4 August 2014.

[75] Conor Friedersdorf, 'UN Drone Investigator: US Must Explain Civilian Deaths' (11 March 2014) <http://www.theatlantic.com/politics/archive/2014/03/un-drone-investigator-us-must-explain-civilian-deaths/284337/> accessed 4 August 2014.

[76] Ewen MacAskill and Owen Bowcott, 'UN Report Calls For Independent Investigations of Drone Attacks' (10 March 2014) <http://www.theguardian.com/world/2014/mar/10/un-report-independent-investigations-drone-attacks> accessed 4 August 2014.

[77] Ibid.

[78] Sikander Ahmed Shah, (2010) *'War on Terrorism: Self Defense, Operation Enduring Freedom and the Legality of US Drone Attacks in Pakistan'* 9 Washington University Global Studies Review 77.

Former PM of Pakistan, Yousaf Raza Gillani, officially condemned the drone attacks and said that they amounted to the violation of the territorial integrity of Pakistan. He also demanded the US to put an immediate end to it.[79]

Political leader Imran Khan said, "Of drones I think two words – it's immoral and it's insane. Immoral because you cannot justify eliminating suspects and insane because it's counterproductive. All it does is it turns more people against the US, hatred grows and the beneficiaries of this insanity are the militants." [80] According to Khan, these drone attacks are equivalent to a war crime and the CIA does not even provide the names of the people who have been killed. "It is too criminal to justify these acts, which are a violation of all humanitarian laws. You can't eliminate suspects, their families, their children and anyone else who is killed and pass it off as collateral damage. All it does is aid the militancy".[81]

Apparently, the Pakistani government has complied with most requests by the CIA related to the drone strikes but has repeatedly voiced concerns requesting for a procedure which is transparent and does not lack accountability. The CIA has reasserted that secrecy is a necessary requirement.[82] It has been alleged that the Pakistani government is secretly partially involved in the drone strikes but publicly condemns them.[83] This leads to resentment amongst the Pakistani populace. These allegations have been vehemently denied by the former PM[84] and the current government.[85]

In 2008, there was a leaked diplomatic cable indicating that Gilani had privately agreed to the strikes even though Gilani refuted the statment that and alleged that it lacked authenticity. Anonymous Pakistani security officials alleged that this story

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[79] Ibid.

[80] Asif Mehmood, *Drone Strikes Immoral, Illegal, says Imran* Daily Times (July 22, 2012) <http://droneswatch.org/2012/07/22/drone-strikes-immoral-illegal-says-imran/#more-637> accessed 4 August 2014.

[81] Ibid.

[82] Sikander Ahmed Shah, (2010) *'War on Terrorism: Self Defense, Operation Enduring Freedom and the Legality of US Drone Attacks in Pakistan'* 9 Washington University Global Studies Review 77.

[83] Jon Boone, 'Pakistan is Not Co-operating With US Over Drones, Ministry Insists' *The Guardian* (28 September 2012) <http://www.guardian.co.uk/world/2012/sep/28/pakistan-military-drones-america> accessed 4 August 2014.

[84] Sikander Ahmed Shah, (2010) *'War on Terrorism: Self Defense, Operation Enduring Freedom and the Legality of US Drone Attacks in Pakistan'* 9 Washington University Global Studies Review 77.

[85] Ayaz Gul, "Pakistani PM Urges US to Stop Drone Strikes" (22 October 2013) Voice of America < http://www.voanews.com/content/us-accused-of-unlawful-killings-pakistan-drone-strikes/1774276.html> accessed 4 August 2014.

was fabricated to spread responsibility since Washington was being pressured by human rights groups to put an end to the attacks.[86]

However, the drones are of central importance in Pakistani politics and eventually the sentiments of the Pakistani populace are expected to be accurately reflected by the Pakistani government as well.[87] The foreign ministry of Pakistan condemns[88] these attacks as being violations of the sovereignty of Pakistan. However, these condemnatory messages have become a matter of routine. It is increasingly felt that there is covert Pakistani involvement too.[89] However, the issue does not hinge on that, the issue is that realistically, the government of Pakistan is not in a position to say no to the US in any case given the balance of power.

VII CONCLUSION

Sikander Ahmed Shah very aptly summarized the situation.[90] In his view, drone attacks lack proportionality and it is inappropriate to link the injustice, which was suffered by the US from 9/11, to these attacks. The drone attacks have been going

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[86] AFP 'Gilani, Officials Deny US Drones Collusion' Dawn News (24 October 2013) <http://www.dawn.com/news/1051554> accessed 4 August 2014; Rob Crilly, 'WikiLeaks: Pakistan Privately Approved Drone Strikes' The Telegraph (01 December 2010) <http://www.telegraph.co.uk/news/worldnews/wikileaks/8172922/Wikileaks-Pakistan-privately-approved-drone-strikes.html> accessed 4 August 2014; Declan Walsh 'WikiLeaks Cables: US Special Forces Working Inside Pakistan' (30 November 2010) <http://www.theguardian.com/world/2010/nov/30/wikileaks-cables-us-forces-embedded-pakistan> accessed 4 August 2014.

[87] Aliya Robin Deri, (2012) ''*Costless' War: American and Pakistani Reactions to the US Drone War*' 5 Intersect 1

[88] Latest Press Releases/Speeches, Ministry of Foreign Affairs, Government of Pakistan (12 June 2014) <http://www.mofa.gov.pk/pr-details.php?prID=2034> accessed 4 August 2014; Latest Press Releases/Speeches, Ministry of Foreign Affairs, Government of Pakistan (18 June 2014); <http://www.mofa.gov.pk/pr-details.php?prID=2046> accessed 4 August 2014; Latest Press Releases/Speeches, Ministry of Foreign Affairs, Government of Pakistan (01 November 2013) <http://www.mofa.gov.pk/pr-details.php?prID=1517> accessed 4 August 2014; Latest Press Releases/Speeches, Ministry of Foreign Affairs, Government of Pakistan (21 November 2013) <http://www.mofa.gov.pk/pr-details.php?prID=1565> accessed 4 August 2014; Latest Press Releases/Speeches, Ministry of Foreign Affairs, Government of Pakistan (22 November 2013) <http://www.mofa.gov.pk/pr-details.php?prID=1570> accessed 4 August 2014; Latest Press Releases/Speeches, Ministry of Foreign Affairs, Government of Pakistan (26 December 2013) <http://www.mofa.gov.pk/pr-details.php?prID=1631> accessed 4 August 2014.

[89] Alice K Ross, *The Drone Strikes Resume in Pakistan After Five-Month Pause* The Bureau of Investigative Journalism (12 June 2014) <http://www.thebureauinvestigates.com/2014/06/12/drone-strikes-resume-in-pakistan-after-five-month-pause/> accessed 4 August 2014; Drones Team, 'Obama 2014 Pakistan Drone Strikes' (11 June 2014) <http://www.thebureauinvestigates.com/2014/06/11/obama-2014-pakistan-drone-strikes/> accessed 4 August 2014.

[90] Sikander Ahmed Shah, (2010) *'War on Terrorism: Self Defense, Operation Enduring Freedom and the Legality of US Drone Attacks in Pakistan'* 9 Washington University Global Studies Review 77.

on for a decade now in response to that event and the people being targeted are not given a fair trial to determine their culpability to it. In any case, Pakistan itself did not attack the US therefore there does not seem to be any legal justification for the harm suffered by the civilians of Pakistan. It has been proven time and again that the US has the ability of coercing the Pakistani Government and more importantly, its armed forces[91], to take stronger action against militarism. The Pakistani government is immensely dependent on the US for economic and military aid for survival[92]. The US has a lot of influence in diplomatic matters as well as far as Pakistan is concerned and if it wants Pakistan to tackle the militants more aggressively then it could use the mechanism of the SC by the promulgation of a binding Security Council resolution to that effect compelling Pakistan take action under Chapter VII.[93]

Pakistani Lawyer Ahmer Bilal Soofi suggested that the victims of these drone strikes should be able to seek compensation from the US government. While speaking to Owen Bennett Jones of the Investigative Bureau in Islamabad, he also agreed that these strikes were a violation of the sovereignty of Pakistan and infringed not only the Constitution of Pakistan but also the UN Charter itself.[94]

Recently, Pakistan has in fact launched independent aggressive action against the militants. Triggered by the events of the 9th of June 2014[95], where the Karachi airport was attacked by the Taliban, the Pakistan government finally launched an operation against the Taliban in North Waziristan referred to as operation Zarb-e-Azb since 15th June 2014.[96] The situation in North Waziristan is very critical since this operation is the largest operation launched by the military against the tribal

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[91] Ibid.

[92] Manzur Ejaz, '*Washington Diary: Conditional Aid'*, DAILY TIMES, (14 January 2009) < http://archives.dailytimes.com.pk/editorial/14-Jan-2009/washington-diary-conditional-aid-dr-manzur-ejaz> accessed 4 August 2014; Anwar Iqbal, '*New Conditions Incorporated into Pakistan Aid Bill'*, DAWN NEWS (10 April 2009) < http://www.dawn.com/news/456275/new-conditions-incorporated-into-pakistan-aid-bill > accessed 4 August 2014.

[93] Sikander Ahmed Shah, (2010) *'War on Terrorism: Self Defense, Operation Enduring Freedom and the Legality of US Drone Attacks in Pakistan'* 9 Washington University Global Studies Review 77.

[94] Bureau Reporter 'Drone Strikes Are Illegal According to a Prominent Pakistani Lawyer' The Bureau of Investigative Journalism (16 January 2014) <http://www.thebureauinvestigates.com/2014/01/16/drone-strikes-are-illegal-according-to-a-prominent-pakistani-lawyer/> accessed 4 August 2014.

[95] 'TTP Claims Attack on Karachi Airport' Dawn.com (09 June 2014) <http://www.dawn.com/news/1111397> accessed 4 August 2014.

[96] Press Release, Inter Services Public Relations (15 June 2014) <https://www.ispr.gov.pk/front/main.asp?o=t-press_release&id=2574#pr_link2574> accessed 4 August 2014.

areas as per retired Lt Gen Abdul Qadir Baloch, the federal minister for states and frontier region[97].

The single most important actor is the US and unless the international community puts intense pressure on the US, there is little chance of the drone attacks ending. Even with international pressure, there is a slim chance since it is no secret that the US is a very strong power and wields a lot of influence. In order to compel the US to yield, substantial unity is required on the part of the international community to take a stand against the drone strikes. These inquiries and reports are futile if the international community is going to just sit and watch.

It is a matter of great tragedy that the first apparently concrete step to the addressing of the issue of the drone strikes, that is the Emmerson Inquiry, was initiated in January 2013- a good nine years of drone strikes had already passed by that time. This goes to show the weakness of the international regime. The international regime is dependent on the nation states to operate. Given that reality, it is a shame that these states are content in their own shell and refuse to take a united stand against the violations of international law by the US. The US itself feels no obligation to put an end to these drone strikes since the backlash of the drone strikes is suffered by Pakistan itself not by the US.

The US needs to respect Pakistan's sovereign status and realise that it is attacking its sovereignty. Consequently, the US should refrain from conducting the drone strikes. It is not that Pakistan is unable to take any step against the rogue elements in the country. Currently, since matters came to a head, Pakistan launched operation Zarb-e Azb, as mentioned above, to wipe out militants. That is an example of a situation where Pakistan is taking action against the militants head on. Even if the US was not able to see it earlier, it should at least now appreciate that Pakistan is able to take action on its own and the US should consequently back off. By continuing the drone strikes, the US is adding to the militancy threat even further, especially in Pakistan.

The biggest drawback is that the backlash of these drone strikes is suffered by Pakistan itself as opposed to the US. The militants retaliate to the drone strike attacks by bombing in different areas of Pakistan. Even though the drone strikes are conducted by the US, the damage is suffered by Pakistan. In any situation, Pakistan is at the losing end. The US is merely making matters more difficult. It is

[97] Khawar Ghumman, 'Success of Operation Linked to IDPs' Help' Dawn News (23 July 2014) < http://epaper.dawn.com/?page=23_07_2014_001 > accessed 4 August 2014.

time the US let Pakistan be the independent nation that it is and allow Pakistan to work on the internal situation and conflicts without having to deal with any additional external difficulties, in particular those posed by the drone strikes.

Students

MARITAL RAPE: A SOUTH EAST ASIAN PERSPECTIVE

Noor Ejaz Chaudhry[1]

A. INTRODUCTION

More than a thousand women in South East Asia alone suffer from marital rape; yet, their cries are hushed simply because the "private matters" of a family is outside the jurisdiction of traditional courts. It is exactly this lack of interference in the private sphere by the courts that instigates a chain of physical, psychological and verbal abuse within the family home, that women have no way of avenging. Every society condemns the act of rape and the violation of individual integrity. However, the question still remains why is this act suddenly justifiable under the contract of marriage? This paper will discuss four aspects. We will firstly discuss what marital rape is and how it is different from the basic definition of statutory rape. Secondly, we will discuss the recognition of such an offense around the world. Thirdly, we will consider whether or not the same recognition exists in South East Asia and whether there are any plausible solutions. Lastly, we will discuss whether or not the law in Pakistan criminalizes such behavior.

B. DEFINITION OF MARITAL RAPE

Although the legal definition may differ from state to state, a general consensus has been reached over what essentially constitutes rape. Therefore, rape "*… forced, manipulated, or coerced sexual contact by a stranger, friend or acquaintance. It is an act of aggression and power combined with some form of sex. A person is forced into sexual contact through verbal coercion, threats, physical restraint, and/or physical violence. Consent is not given*" [2]. However, the definition of marital rape is somewhat different. It is considered to be any "*…unwanted sexual acts by a spouse or ex-spouse that is committed without the other person's consent. Such illegal sexual activity is done using force, threat of force, intimidation, or when a person is unable to consent."*[3] The constituent elements of both these crimes are quite similar. However, upon closer inspection,

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[1] The author is currently a second year student pursuing her law degree from the University of London External Programme.

[2] A Definition of Rape, Sexual Assault and Related Terms, http://www.clarku.edu/offices/dos/survivorguide/definition.cfm

[3] Marital Rape Law and Legal Definition, http://definitions.uslegal.com/m/marital-rape/

one can see that while rape considers the commission of non-consensual sexual activity at large; marital rape more specifically targets spouses and the acts of sexual violence committed by them. The reasons for the creation of such an offense permeate from the very roots of patriarchy. Historically, social norms have not allowed women to raise concerns regarding what goes on within the bounds of a man and wife's private life. This resulted in a fierce backlash in women's rights whereby, a woman could be protected under law from rapists outside her home; yet there was no law to protect her from rapists that resided within it. It was this sort of needed protection that called for the recognition of marital rape by European and American courts in the late nineties.

C. EUROPEAN AND WESTERN RESPONSES TO MARITAL RAPE

The timeline for jurisprudence over marital rape is much more recent. The earliest of criminalization can be traced back to Poland in 1932 and has continued to as late as Jamaica in 2009. From the common law doctrine of the "marital rape exemption" which "*…precluded the prosecution of a husband raping his wife. This unqualified immunity was based on the notion that, by the very act of marriage, a woman irrevocably consented to intercourse with her husband*"[4] the law subsequently recognized the need for deviation from such an exemption so as to prevent atrocities against women within their homes. The 84th Session of the Michigan Legislature abolished the marital rape exemption by 1988[5]. However, no proper legislation or case law was established to give proper considerations to the problem. There was no law that had criminalized marital rape entirely. However, by the 1992, even the United Kingdom in the progressive case of R v. R[6] recognized the existence of marital rape and thereby, established the need to criminalize the offence. Continued feminist efforts, required the criminalization to be taken more seriously and therefore, as societies evolved, so did the law. The California Penal Code S.262[7] is the perfect example of spousal rape being given a statutory footing. Yet, jurisprudential problems regarding the matter still remain. Such an act has been criminalized, but societies have not been willing to accept the commission of such a crime. Nevertheless, we can see that states have indeed

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4 72 N.C.L. Rev 261 (1993-1994) Old Wine in New Bottles: The Marital Rape Allowance; Sitton, Jaye

5 35 Wayne L. Rev. 1219 (1988-1989), Abolishing the Marital Rape Exemption: The First Step in Protecting Married Women from Spousal Rape; Lincoln, Judith A.

6 R v R (1991) http://www.e-lawresources.co.uk/R-v-R-%5B1991%5D.php

7 Marital Rape Law and Definition, http://definitions.uslegal.com/m/marital-rape/

taken relevant action to ensure that such an act is criminalized on its objective grossness and societal norms are not in fact taken into account. It then also becomes an imperative for South East Asia to follow suit and consider marital rape as an offence that must be immediately be criminalized.

D. SOUTH EAST ASIAN LAWS AND MARITAL RAPE

Even though marital rape had been recognized in certain parts of Europe and the West; it was primarily because of evolving societies, women rights' movements and the need for equality within human rights. More importantly, it was the secular legal approach that was taken by these courts that helped them understand the implications associated with marital rape on a more objective scale. The same, however, cannot be said about South East Asian cultures. Even if we concede that countries like India have adopted a secular approach; we have seen that Indian society has not evolved to the extent of accepting such "untraditional" laws. Moreover, the legal systems in Pakistan and Bangladesh are currently much stunted in their approach towards objective rights and liberties, much due to their developing legal systems. However, it is high time that these countries begin to consider the concept of marital rape as truly heinous. It could be argued that the overarching consensus between traditions and the law can be brought about by international charters such as the non binding UN Declaration on the Elimination of Violence against Women. Article 2[8]of the Declaration concerns itself with violence against Women; this was an element which CEDAW did not concern itself with explicitly. The Article further considered "*physical, sexual, and psychological violence in the family, (i.e., domestic violence, marital rape, forced begging by parents), battery, sexual abuse of children (such as sexual intercourse with a female minor, involvement in prostitution, child pornography, statutory rape, rape by male members of the family), dowry-related violence (i.e. early and forced marriages, bride kidnapping), harmful traditional practices like female genital mutilation, rape (this is a non-spousal, committed by a stranger) are violence related to exploitation*"[9]. We can clearly see that this Article interfered far more into the private sphere of the traditional family home than the Convention on All Forms of Discrimination Against Women and purported that marital rape be

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[8] Declaration on the Elimination of All Forms of Violence Against Women, http://www.un.org/documents/ga/res/48/a48r104.htm

[9] Anahtar Kelimeler, The Distinctive Features of Sexual Related Offences: Statutory Rape vs. Marital Rape

recognized as a separate offence. However, South East Asian countries and their respective legal systems still need to overlook societal beliefs when considering whether marital rape can be considered an offence at all. To date, this relativist approach continues to plague the approach of uniformity within human rights and thus, breaks down the purpose of international law in South East Asia. Even though India has created the Protection of Women from Domestic Violence Act of 2005[10], we can see that it still does not cover sexual abuse within the home and therefore, continues to leave women vulnerable. Moreover, the Parliament's decision to back up the government in a press release dated 1st March 2013[11] shows that there is a dire need for society to accept certain laws in order for secularism to hold any waters. The report further stated, during its Criminal law (Amendment) Bill 2012 that criminalizing such an offence would break down family values and marriage presumed the concept of consent. Therefore, the crime is only extended to where a couple is separated[12]; an act which overlaps with the definition of statutory rape. Therein, one can see that until traditions upholding patriarchy are not eliminated from the grassroots; there is nothing international or domestic law can do to protect women.

E. PAKISTANI MARITAL RAPE LAWS

We must now turn towards understanding whether or not marital rape can be recognized as an offence in Pakistan. We can see that the wording of **S. 375 of the Pakistan Penal Code**[13] has broadened the ambit of rape so as to amalgamate the concept of marital rape into the definition too. The wording is as follows:

"*A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions,*

(i) against her will.

(ii) without her consent

(iii) with her consent, when the consent has been obtained by putting her in fear of

[10] India's Landmark Domestic Abuse Law Takes Effect, ohttp://www.sarid.net/governance/102606-india.html
[11] Bhattacharjee, Anwesha, "The Non-Criminalization of Marital Rape"
[12] India Law Journal, http://www.indialawjournal.com/volume2/issue_2/article_by_priyanka.html
[13] Pakistan Penal Code (Act XLV of 1860)

death or of hurt,

(iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or

(v) With or without her consent when she is under sixteen years of age."

We can therefore see that the consideration of "a man" can be construed as "any man" including a spouse by courts, therefore giving rise to a new form of interpretation of Pakistani rape laws. Sections 375 (i)(ii)(iii)(iv) and (v) regard themselves with the common factors in both statutory rape and marital rape. Therefore, it is evident that the law permits courts criminalize marital rape under this broad definition. However, much due to the overriding Islamic principles that govern Pakistani Law, we must see what Islamic legislation has to say about marital rape. Under the Zina Ordinance[14] created by the Zia Regime, Zina is defined as:

"A man and a woman are said to commit 'Zina' if they wilfully have sexual intercourse without being married to each other"

Moreover, the act of Zina-bil-Jabrif is defined in the Zina Ordinance as:

"(1) A person is said to commit zina-bil-jabrif he or she has sexual inter-course with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely:-

(a) against the will of the victim;

(b) without the consent of the victim;

(c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt; or

(d) with the consent of the victim , when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to who the victim is or believes herself or himself to be validly married.

Explanation: Penetration is sufficient to constitute the sexual inter-course

[14] The Offence of Zina (Enforcement of Hudood) Ordinance, 1979

necessary to the offence of zina-bil-jabr."

Once read together, we can see that the offences of Zina and Zina Bil Jabr[15] exclude marital rape entirely from the equation. Rather, only a man who does not have marital relations with a woman under the definition of Zina will be liable for Zina bil Jabr. Therefore, one can see that the only leverage that Pakistani lawmakers have under Islamic Law is to consider marital rape an offence only when committed by an ex-spouse. This stance inclines itself more so towards the concept of statutory rape as opposed to marital rape that is persistent within thousands of Pakistani homes. It is therefore imperative to ensure that women and their conjugal rights are safeguarded from traditional gender roles. One can argue that Pakistan can enable legislation to enact the Declaration on Elimination of Violence Against Women. However, the declaration requires all forms of violence that derive themselves from customary or religious practices to be abolished[16]. Therefore, it is essential for Pakistan to enforce and accept a secular approach. Hence, one can understand that the social acceptability of marital rape as an offence is directly proportional to pace of societal evolution.

F. AN UNCLEAR SOLUTION

We can essentially understand that above mentioned countries and their timelines concerning marital rape are attached to the level of societal evolution they have achieved. Not only is the subject of human rights a new consideration in Pakistan; rather understanding women rights specifically at this point, is rather impossible at a grassroots level. The concentrated patriarchal norms in Pakistani society have significantly increased the number of rape apologists and decreased the number of people who consider rape to be a heinous criminal offence. Moreover, traditions and customs provoke the belief that a woman is a man's property; henceforth, the right to her own body is transferred to the husband along with their marriage contract. Therefore, marital rape is not even considered a problem in a country such as Pakistan at this point in time. Hence, we can conclude that, before laws are created to criminalize certain offences; the social acceptability of such crimes must decrease first; for if it doesn't, women will continue to be abused within their

[15] Note no. 7, The Offence of Zina (Enforcement of Hudood) Ordinance, 1979

[16] Freeburg, Emily, UN Pact Sinks on Issue of Violence Against Women, http://womensenews.org/story/international-policyunited-nations/030424/un-pact-sinks-issue-violence-against-women#.U54L1JSSy8o

private lives, irrespective of the socio-economic rights the state grants them publicly.

JUVENILE DEATH PENALTY
A VIOLATION OF HUMAN RIGHTS IN PAKISTAN

Sevim Saadat[1]

INTRODUCTION

In today's world there exist countless 'rights' that need to be enforced as they are considered 'fundamental' to the human race for one reason or the other. The prohibition on death penalty for child offenders is arguably one of these fundamental rights. The question that arises is, what is a fundamental right and how do we classify something as fundamental. Looking at this right from the eye of 'the average man' we see that the sensitivity of the child being the offender could be a suitable reason for why this right can be termed as 'fundamental.' Taking a more professional approach, we can see that juvenile death sentence can be found within both customary international laws as well as explicitly in conventions and treaties such as the International Covenant on Civil and Political Rights (ICCPR). This would suggest that the position of this right to prohibit juvenile death penalty does have a stand in the face of international law. Furthermore, it is suggested that over the years the prohibition of the juvenile death penalty has become "so universally practiced and accepted, it has reached the level of a jus cogens norm." [2] Therefore, this right may indeed be what we call a 'fundamental right.'

In order to understand the idea behind the prohibition of juvenile death penalty we will first look into what is juvenile death penalty, then we will focus on the existence of the death penalty within Pakistan. Finally we will assess how far we need to amend the situation in Pakistan to ensure that this "average Joe's" 'fundamental right' is protected. Thus we must first look into the issue of juvenile death penalty and its existence within Pakistan, then we will form a constructive argument highlighting areas where action is needed and whether changes have been made over the last few years.

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[1] *The author is a second year student pursuing her Law degree from the University of London External Programmes.*

[2] *Agenda Item 13: THE DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF RELEASE FOR YOUTH OFFENDERS WHO WERE UNDER THE AGE OF 18 AT THE TIME OF THE OFFENSE., Commission on Human Rights 61st Session*

WHERE DOES THE NEED TO PROHIBIT JUVENILE DEATH PENALTY ARISE FROM?

International law treats the right of children with due importance. There are special provisions within several instruments to suggest and promote this idea. The ICCPR Article 6 deals with the inherent right to life for every human being. [3] Further 6 (5) within the Covenant explicitly states that the "sentence of death shall not be imposed for crimes committed by persons below eighteen years of age…"[4]. Though there are similar provisions under other instruments such as the Children Rights Convention (CRC), our focus will lie primarily on the rights laid down in ICCPR. As of April 2008, Pakistan is a signatory of the ICCPR and further ratified it in June 2010, thus becoming bound to the obligations set within it. Thus it is clear that Pakistan should recognize this right to prohibit juvenile death penalty as set out in the Covenant and in turn implement the obligation imposed on it by recognizing such a right.

JUVENILE DEATH PENALTY IN THE INTERNATIONAL ARENA

Before we look at the situation in Pakistan, we will assess the position and importance of this right within the international arena. As mentioned earlier this issue has been addressed within several treaties, resolutions and instruments. The Commission on Human rights and General Assembly have adopted resolutions calling for the prohibition of such practice. Furthermore, the CRC is a substantial example of this campaign against juvenile death penalty. It presents an almost universal ratification of states to such a prohibition, suggesting that at large the international community supports such a ban. This shows that within the international sphere the prohibition of juvenile death penalty is such that it can be considered general international law accepted by a large majority of states. Furthermore, this almost universal acceptance would elevate the status of such a right to one that is immune from derogation. Thus on the basis of international law to be classified as a jus cogens norm it must fulfill the requirement of being of

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[3] *United Nations Human Rights Office of the High Commissioner for Human Rights,1976. International Covenant on Civil and Political Rights, Article 6 (http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx)*

[4] *United Nations Human Rights Office of the High Commissioner for Human Rights, 1976. International Covenant on Civil and Political Rights, Article 6 (http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx)*

fundamental value within the international community, is a non-derogable right and is accepted by a majority of states.

Following the check-list provided above, the prohibition on juvenile death penalty is accepted by a majority of states with 85 having already abolished juvenile death penalty. Thus clearly that requirement is being met and had it not been of fundamental value the international community would not be so readily accepting it. This leaves us only with the requirement of being a non-derogable right, which if fulfilled would classify prohibition of juvenile death penalty as a jus cogens norm.

Looking at Article 4 of the ICCPR, it is clear that no derogation from Article 6 can be made. Thereby, the right to prohibit juvenile death penalty classified under Article 6(5) must not be derogated from by those states that have ratified the Covenant. Though such articles are clearly non-derogable, there have been attempts to place reservations in respect to such rights regardless of the clear obligation to comply by them. [5] This leaves uncertainty as to whether we can classify the right as having reached the status of a jus cogens norm but on a balance of probabilities the right in question has come as close as possible to taking the shape of a jus cogens norm.

A QUESTION OF 'THE LEGAL AGE?

Traditionally, the position of juvenile death penalty in Pakistan was not restrictive at all; a blend of Shariah and Federal law allowed for the existence of capital punishment for several offences. Under the Shariah the most notable offences are those described as Hadd offences which deal with Zina (unlawful sex) and Harrabah placing punishments such as 'stoning to death.'[6] Such offences become an issue due to the fact that the 'legal age' under international law (18 years of age) differs from that prescribed by the Shariah (generally the age of puberty.) Thus, the issue becomes the distinction of legal age within Pakistan.

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[5] *De La Vega, C. 2014. THE DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF RELEASE FOR YOUTH OFFENDERS WHO WERE UNDER THE AGE OF 18 AT THE TIME OF THE OFFENSE.. AGENDA ITEM 13: [report] Berkley: Angela Fitzsimons, pg. 2-3*

[6] *Children Rights International Network, Inhuman sentencing of children in Pakistan. [report] (Legality of Inhuman sentencing).2011*

Looking at the Code of Criminal Procedure 1989 (CrCP) section 29(B) describes "juvenile as a person under the age of 15"[7], similarly Punjab Youthful Offender Ordinance 1983 (PYOO) also stated that a "child is a person not attained the age of 15" (section 2(1)(a)).[8] Moreover, some laws do not specify a minimum age and thus children of any age are open to being sentenced. [9] Thus, the lack of uniformity between domestic laws as to the age of a juvenile allows a child who is 15 (and a juvenile under international law) to be liable for death penalty as his age in domestic law has reached 'the age of majority'. Clearly, this stands in violation of international human rights under Article 6(5) of the ICCPR whereby, imposition of a death sentence is restricted from those below eighteen.

This obviously creates a break between who can be called a juvenile under domestic law in contrast to one under international law. It would be quite simplistic to say "alter the age limit to match that of international standards." However, this would require a great deal of work to make sure all other local legislation complies by this new standard. Furthermore, it can be argued that such a change would be unascertainable as it would go against the legal framework of Pakistan which is built upon rules that have their own mechanisms. Thus by altering the age limit in such offences, there would be a greater chance of disapproval within the community as international obligations would be overriding domestic law that has been adopted from religion and precedent over the years. Hence, we must look for alternatives to help mend this situation without interfering with the sovereignty of domestic law.

ONE STEP FORWARD FOR PAKISTAN: THE JUVENILE JUSTICE SYSTEM ORDINANCE 2000

There are seemingly two spheres of knowledge, one where it is assumed that individuals under the age of 18 cannot legally be executed under the law of Pakistan and the second, that though there are claims to prohibit juvenile death penalty; it has not come to an end. It seems that the former is merely a hope and

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[7] *Khan, Ashraf Ali, Analysis of Juvenile Justice System Ordinance 2000 – Decisions of Pakistani Courts, 2013. (http://ssrn.com/abstrac=2256330)*

[8] Khan, Ashraf Ali, *Analysis of Juvenile Justice System Ordinance 2000 – Decisions of Pakistani Courts*, 2013. (http://ssrn.com/abstrac=2256330)

[9] Children Rights International Network, *Inhuman sentencing of children in Pakistan.* [report] (Legality of Inhuman sentencing).2011 *Juvenile should to be defined as is in International law "any person below the age of 18."

the latter is the reality that has been achieved through numerous forums including the coming into force of the Juvenile Justice System Ordinance 2000.

The introduction of the JJSO provided a surface level of protection to juvenile offenders. Under the provisions of the JJSO a juvenile below the age of 18 at the time of the offense cannot legally be sentenced to death.[10] The creation of such a right is definitely a step forward for Pakistan but the implementation of it in practical situations is what we are concerned with. Being the primary tool of juvenile justice in Pakistan the JJSO still remains only partially implemented as not all provinces have accepted it as of yet. Areas such as the Federally Administered Tribal Areas, northern areas of Pakistan and the Provincially Administered Tribal Areas (PATA) did not accept the terms set by the JJSO.[11] It is often argued whether such exclusion is constitutional, as juvenile offenders continue to be sentenced to death in many areas of Pakistan[12]. Angela Fitzsimons in her report titled, *"The Death Penalty and Life imprisonment without the possibility of release for youth offenders who were under the age of 18 at the time of the offense"* suggests like many others that since the inception of the JJSO it has "…never been uniformly implemented in Pakistan"[13] and thus displays the inapplicability of this prohibition within Pakistan. However, the picture cannot be all bad as there have been small advances in prohibiting juvenile death penalty as suggested by the extension of the law to the PATA in 2004.[14]

Moving on Section 12 of the JJSO reads, "notwithstanding anything to the contrary contained in any law for the time being in force no child shall be (a) awarded punishment of death…"[15] This prohibition applies to rid the juvenile system of capital punishment and thus appears to be in perfect conformity with international

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[10] *Death Penalty Worldwide – Pakistan, 2011*

[11] *De La Vega, C. 2014. THE DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF RELEASE FOR YOUTH OFFENDERS WHO WERE UNDER THE AGE OF 18 AT THE TIME OF THE OFFENSE.. AGENDA ITEM 13: [report] Berkley: Angela Fitzsimons, pg. 7*

[12] *Death Penalty Worldwide – Pakistan (Categories of offenders Excluded from death penalty). 2011.*

[13] *De La Vega, C. 2014. THE DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF RELEASE FOR YOUTH OFFENDERS WHO WERE UNDER THE AGE OF 18 AT THE TIME OF THE OFFENSE.. AGENDA ITEM 13: [report] Berkley: Angela Fitzsimons, pg. 7*

[14] *De La Vega, C. 2014. THE DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF RELEASE FOR YOUTH OFFENDERS WHO WERE UNDER THE AGE OF 18 AT THE TIME OF THE OFFENSE.. AGENDA ITEM 13: [report] Berkley: Angela Fitzsimons, pg. 7*

[15] *Children Rights International Network, Inhuman sentencing of children in Pakistan. [report] (Legality of Inhuman sentencing).2011*

law. On the other hand, several restrictions apply to this right of prohibition stated above.

Firstly, Section 14 states that the provisions of the JJSO are "in addition to and not in derogation of, any other law for the time in force"[16] and thus under other local legislation juvenile's will be subject to capital punishment. For example, offenders falling under specific acts such as the 'Anti-terrorism Act' or 'The Control of Narcotic Substances Act' would not fall within the protection of the JJSO and thus could be sentenced to death regardless of their age.[17] By way of example the case of Shafqat Hussain,[18] a juvenile tried for terrorist activities faces death sentence regardless of the JJSO. The case of Shafqat Hussein as reported in the news is not a unique case, there exist many like it that involve the conviction of juveniles for crimes that fall under terrorism/acts of terror.[19] This would suggest that to a large extent juveniles will still be sentenced to death lawfully regardless of the formation of the JJSO.[20] Over here we stop to look at the Constitution of Pakistan, though it prohibits deprivation of life it simultaneously adds, where in accordance with law it may be permissible.[21] The discussion above illustrates that even with the introduction of the JJSO, where juvenile offenders are tried under other local legislation capital punishment will be permitted and thus will continue violating international human rights.[22]

To further exemplify the lack of implementation of the JJSO, over 40 children were reported to be on death row during June 2006.[23] The Mutaber Khan case is a clear depiction of the loopholes that still exist. Mutaber Khan, a juvenile offender, was executed in 2006 despite the prohibition on juvenile death penalty in JJSO. The reasoning for such execution lay on the fact that the poor birth record systems in Pakistan register about one third of the births and thus it remains difficult to

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[16] *Children Rights International Network, Inhuman sentencing of children in Pakistan. [report] (Legality of Inhuman sentencing). 2011*

[17] *Children Rights International Network, Inhuman sentencing of children in Pakistan. [report] (Legality of Inhuman sentencing).2011*

[18] *Charlie, Behind The Fig-leaf: Shafqat Hussain And The True Face Of Pakistan's Death Penalty, 17th June 2014 (http://www.tutorhunt.com/resource/10703/)*

[19] *Catherine Higham, Dawn News, Juveniles on death row, 22nd August 2013 (http://www.dawn.com/news/1037526)*

[20] *Death Penalty Worldwide – Pakistan. 2011*

[21] *Death Penalty Worldwide – Pakistan (Does the country's constitution make reference to death penalty?). 2011*

[22] *Death Penalty Worldwide – Pakistan (Does the country's constitution make reference to death penalty?). 2011*

[23] *HRCP, Slow march to gallows, death penalty in Pakistan, Jan 2007 pg. 42-43 (http://hrcp-web.org/hrcpweb/wp-content/pdf/ff/24.pdf)*

ascertain whether an offender is below the age of 18 or not in many cases. [24] Moreover in 2010, the Supreme Court approved the death sentence of a juvenile in a case of murder committed at the age of 17, on the basis that the issue pertaining to his age had not been raised at the time of the original trial.[25] In addition, a surprising remark was made during this case as the Supreme Court said "the tender age itself would not mean that an accused should not be awarded the death penalty."[26] In many ways the remark shows the lack of acceptance of the right under Article 6(5) ICCPR in domestic courts. It shows that the age of the offender would not have been a decisive factor of whether capital punishment should be permissible or not. Thus, on the basis of lack of evidence of birth registration forms and other documents that could provide the age of the offender the courts risk treating juveniles as adults in capital cases.[27]

Furthermore, the JJSO has not been openly accepted within Pakistan, the strongest example being the 2004 decision of the Lahore High Court to revoke the JJSO with effect for the whole country.[28] The decision was based on the accumulation of certain points, none of which should be seen as justification for the violation of a fundamental right nor could such grounds bring about more good than the existence of the JJSO had earlier brought out. The revocation of the JJSO was argued on the basis that capital punishment was necessary to deter crime within Pakistan. The idea was that capital punishment created greater deterrence than other types of punishment. On the basis of such logic, the court felt that the JJSO gave incentive to adults to use children to carry out serious crimes as juveniles "will get away with lesser sentence."[29] Though a well versed argument, scientific studies repeatedly show that there is no evidence to support the ideology that the existence of capital punishment provides greater deterrence within a state.

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[24] *HRW, The Last Holdouts, 2008 pg. 13-14 (http://www.hrw.org/sites/default/files/reports/crd0908webwcover_0.pdf)*

[25] *Children Rights International Network, Inhuman sentencing of children in Pakistan. [report] (Inhumane sentencing in practice). 2011*

[26] *Children Rights International Network, Inhuman sentencing of children in Pakistan. [report] (Inhumane sentencing in practice). 2011*

[27] *Human Rights Watch, The Last Holdouts: Ending the Juvenile Death Penalty in Iran, Saudi Arabia, Sudan, Pakistan, and Yemen. September 2008. (http://www.hrw.org/reports/2008/crd0908/1.htm)*

[28] *Children Rights International Network, Inhuman sentencing of children in Pakistan. [report]. 2011*

[29] *Amnesty Internatinoal, Documento-Pakistan, Comentarios De Amnista Internacional sobre la resolucian del tribunal superior de Lahore de diciembre de 2004 por la que se revoca la ordenanza del sistema de justicia de menores, pg 13. 2005*

Secondly, it was suggested that the abolition of the death penalty was in fact a 'phase' and would soon die out. This would be the weakest argument considering only evidence to the contrary exists, as over 85 countries have abolished the death penalty for all crimes.[30] Another argument was that prohibition of juvenile death penalty was encouraging offenders and their families to do even more wrong, through forgery of birth certificates and other documents to escape capital punishment.[31] Furthermore, it seems rather alarming, that the Lahore High Court thought fit to do away with the JJSO as it was creating unrest, but unleashed a greater evil, namely; juvenile death penalty. However, following the 2004 move by the High Court, the Supreme Court reviewed the matter and made an order to restore the JJSO temporarily. This said the temporary reinstating of the JJSO has faced problems as courts refuse to reevaluate decisions made and still show an attitude of hostility to the idea of prohibiting juvenile death penalty.[32] Thus, though the Supreme Court has suspended the High Court decision, there seems to be no final decision up till 2010 for the permanent reinstating of the JJSO. [3334]

Clearly, Pakistan has taken some steps to comply with the prohibition of juvenile death penalty set by international treaties. The JJSO, as discussed above is the most notable form of Pakistan's attempt to keep in line with international obligations. It is clear that the JJSO remains largely unaccepted and barely implemented within Pakistan. Some recommendations on how to deal with the shortcomings of the JJSO have been mentioned above.

We must keep in mind that the creation of the JJSO definitely helps limit the unfair treatment, but since it does not repeal other laws it cannot be seen as an absolute protection for juveniles. [35] Moreover several reported cases as discussed above

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[30] *Amnesty Internatinoal, Documento-Pakistan, Comentarios De Amnista Internacional sobre la resolucian del tribunal superior de Lahore de diciembre de 2004 por la que se revoca la ordenanza del sistema de justicia de menores, pg 13. 2005*

[31] *De La Vega, C. 2014. THE DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF RELEASE FOR YOUTH OFFENDERS WHO WERE UNDER THE AGE OF 18 AT THE TIME OF THE OFFENSE.. AGENDA ITEM 13: [report] Berkley: Angela Fitzsimons, pg. 6*

[32] *Daily Times, Minorities and women continue to suffer, 2006, (http://archives.dailytimes.com.pk/national/24-May-2006/minorities-and-women-continue-to-suffer-ai)*

[33] *Syed Mohammad Ali, Lacunas in our juvenile justice system, 2012 (http://tribune.com.pk/story/474163/lacunas-in-our-juvenile-justice-system/)*

[34] *HRCP, Slow march to gallows, death penalty in Pakistan. Jan 2007 pg. 42-43 (http://hrcp-web.org/hrcpweb/wp-content/pdf/ff/24.pdf)*

[35] *Children Rights International Network, Inhuman sentencing of children in Pakistan. [report] (Legality of Inhuman sentencing).2011 pg. 10-18*

show that within the legal framework of Pakistan the law is such that some federal laws will override provincial laws and thus can cause non-compliance.[36] Moreover, the legal system within Pakistan is based in part on common law and thus it is very typical to not directly incorporate international treaties. The need for separate legislation, such as JJSO is essential to implement the international obligations within domestic law as there is no automatic incorporation in such legal frameworks. [37]

BREAKING THROUGH THE CONFLICT

In order to align the position of juvenile death penalty within domestic law in Pakistan with that of international law we must first look at why a difference exists and then into whether any solution can be found. As discussed earlier in this paper, Pakistan has ratified the ICCPR and thus is a signatory however it has not signed the Second Optional Protocol of the ICCPR which deals with abolition of death penalty and on this basis remains free of any violation of international law. Nevertheless, Pakistan is a party to the Covenant and cannot simply excuse itself from its treaty obligations as it is still bound by the prohibition; especially where we consider the right in question to have the elevated status of a jus cogens norm as discussed above.[38]

Under international law, primarily Article 4 ICCPR clearly states that the right under Article 6 cannot be derogated from. This said many countries have placed reservations in reference to specific articles of the covenant, amongst these reservations Pakistan has affirmed its stand that Article 6 will be applied "to the extent that they are not repugnant to the provisions of the Constitution of Pakistan and Sharia laws."[39] This creates a loophole as this non-derogable right under Article 6 is only to be followed so long as it is in line with domestic law in

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[36] *De La Vegsa, C. 2014. THE DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF RELEASE FOR YOUTH OFFENDERS WHO WERE UNDER THE AGE OF 18 AT THE TIME OF THE OFFENSE.. AGENDA ITEM 13: [report] Berkley: Angela Fitzsimons*

[37] *Children Rights International Network, Inhuman sentencing of children in Pakistan. [report] (Legality of Inhuman sentencing).2011 pg. 10-12*

[38] *De La Vega, C. 2014. THE DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF RELEASE FOR YOUTH OFFENDERS WHO WERE UNDER THE AGE OF 18 AT THE TIME OF THE OFFENSE.. AGENDA ITEM 13: [report] Berkley: Angela Fitzsimons, pg. 2-7*

[39] *Children Rights International Network, Inhuman sentencing of children in Pakistan. [report] (Legality of Inhuman sentencing).2011 pg. 8-9*

Pakistan and thus capital punishment for juveniles does not come to a complete halt.

The restriction of such international law rights is placed upon the 'need' to comply with the Shariah. The question for the current legal system in Pakistan is how to overcome this conflict; many suggest that on a proper application of the Shariah juvenile death penalty would not be a problem at all. To illustrate this 'proper application' it can be suggested that the courts should adopt the requirements laid down within the Shariah for constituting an offence in as stringent a manner as they adopt the punishments prescribed within the Shariah. For example, Shariah is applied domestically to the extent that an offence like Zina[40] is punishable by death regardless of the offender being 18 so long as he/she is over the age of puberty.[41] At the outset this seems blatantly against the right under Article 6(5) ICCPR, however if we are to apply the Shariah in its entirety then certain guidelines will need to be followed to sentence anyone for such an offence.

For sake of clarity, to constitute the offence of Zina oral witnesses must be of exceptional moral standing who were present at the commission of the offence. This requirement is barely followed in today's world and is not taken into consideration within the current legal system in Pakistan. Thus if we are to apply the stringent requirements mentioned above it would be highly unlikely that such evidence will be available and thus only rarely, if ever, will capital punishment be exercised in such cases.[42] Though this may not be a perfect solution to our problem of prohibiting juvenile death penalty it will align the law in Pakistan with international law and thus provide a stepping stone towards a positive change.[43]

CONCLUSION

It would be best to place emphasis on the fact that firstly the legal age within Pakistan is 18 and all those below it cannot be held on death row. Secondly, new local legislation should be introduced as revamping the JJSO seems too conflicting and would not be too effective. Therefore, new legislation will do well to govern the rights of juvenile offenders and permanently ban capital punishment within

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[40] *A Hadd Offence is one that cannot be punished at the discretion of a judge but rather is prescribed a punishment in the Quran.*

[41] *Ibrahim B. Syed, Zina and Raj, Islamic Research Foundation International, Louisville. (http://www.irfi.org/articles/articles_51_100/zina_and_rajm.htm)*

[42] *Hudud, a misunderstood Islamic Law*, 2012 (http://www.malaysiakini.com/letters/210083)

[43] Zina Laws in Pakistan '*Mechanics of Zina Laws.' (http://zinalaws.tripod.com/ZinaLaws/id11.html)*

domestic law. Such legislation should be carefully drafted and must override any other acts that allow juvenile death penalty until the system is completely rid of such provisions. These recommendations much be taken into consideration as they will allow compliance to international human rights and thus reduce the loopholes within the existing legal frame work of Pakistan.

INTERNALLY DISPLACED PERSONS: CITIZENS' RIGHTS IN A WORLD AT THE MERCY OF CLIMATE CHANGE

Sana Farrukh Shaikh[1]

This paper examines the current state of human rights legislation in Pakistan with reference to the effects of climate change. It assumes that the link between climate change and extreme fluctuations in weather pattern as well as earth degradation are scientifically well established. It argues for a rights-based response to the effects of climate change in Pakistan. The conclusion is based on the research of international think tanks and inter-governmental organisations that encourage constitutional rights to be interpreted in a manner as to include the prevention of devastation from such disasters, the largest consequence of which is mass internal displacement.

1. INTRODUCTION

Millions of people have been affected by the floods resulting from monsoon rains. This has been a consistent pattern for many years, and damage caused by them has dramatically increased in the last decade or so. The 2014 floods have swept through Pakistan and devastated 1.8 million Pakistani citizens as of 12th September[2]. These natural calamities have displaced millions from their homes. They are commonly referred to as Internally Displaced Persons (IDPs). There is no specific local legislation dealing with IDPs from natural disasters. Similarly Pakistan is not signatory to the *1951 Convention Relating To The Status of Refugees* and its additional protocols. They constitute an ill-identified subset of victims under the umbrella of IDPs. In order to understand the need for legislation in this area for these vulnerable people – the number of which will only grow

[1] The author is a second year student pursuing her Law degree from the University of London External Programmes.

[2] BBC "Alert in Multan as Pakistan flood river peaks.

larger and penetrate all class boundaries when the effects of climate change become more palpable than they already are – we must define and segregate the very large number of IDPs in Pakistan today.

The Internal Displacement Monitoring Centre[3] under the Norwegian Refugee Council[4] structures its country profiles according to the UN Guiding Principles on Internal Displacement, the set of international standards concerning IDPs. As their title suggests, these principles do not provide legal definitions. Rather they only attempt to describe the situation many, if yet not all nations, are facing today in the hopes that governments will do what is necessary to provide for their citizens in dire circumstances.

The above referred principles define internally displaced persons are "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border[5]."

1.1 STATISTICAL ANALYSIS – ESTABLISHING THAT THERE IS A PROBLEM:

The IDMC's report[6] on Pakistan estimates that the vast majority of IDPs have been displaced because of environmental disasters, or rather the inadequate mechanisms that deal with such disasters. The total number of IDPs in Pakistan fluctuates often with the displacement and eventual return or resettlement of individuals. According to the IDMC, an estimated five million individuals in the northwest have been displaced by conflict, sectarian violence and human rights abuses since

[3] Established in 1998 at the request of the Interagency Standing Committee on humanitarian assistance, the unique service the IDMC provides has been recognized their work been and reiterated in annual UN General Assembly resolutions.

[4] The NRC was established in 1946 under the name Aid to Europe, to assist refugees in Europe after the Second World War. Today NRC is organised as an independent, private foundation which works with the UN and humanitarian agencies worldwide. It has over 4000 employees operating in over 20 countries.

[5] UN Guiding Principles on Internal Displacement, Introduction, para. 2.

[6] IDMC Overview Pakistan 12 June 2013 NORTH-WEST PAKISTAN Massive new displacement and falling returns require rights-based response.

2004. With the army operation (Zarb-e-Azb) now being conducted in North Waziristan, over half a million further refugees have been created[7].

These numbers must be kept in mind and compared to the 15 million individuals that were displaced across the country over just three years of monsoon flooding between 2010 and 2012[8].

This figure does not account for those individuals who were made to leave their homes due to droughts or earthquakes, both of which are unfortunately frequent occurrences in the country. For example, the earthquake which struck Kashmir and parts of Northern Pakistan in 2005 displaced 3.5 million individuals[9]. Thus we can conclude that the number of Pakistani nationals who have at some point held IDP status in the last decade exceeds 24 million - with only a small fraction of those displacements being the result of violence.

Comparatively smaller numbers of IDPs are wrought into existence in different areas of Pakistan regularly.

Drought in Sindh has made some areas uninhabitable. Most recently, a report by ActionAid[10] showed that in District Tharparkar, 6,227 people were displaced (out of a total of 31,133 affected by drought[11]). The report also acknowledges the recurring nature of this environmental phenomenon: "Drought-like situation was declared by Govt. in Tharparkar in 1968, 1978, 1985, 1986, 1987, 1995, 1996, 1999, 2001, 2004, 2005 & 2008 which shows that the inhabitants have been facing the calamity time and again for a long time." It has also predicted severe drought in the future.

Furthermore, in Karachi, rising sea levels have resulted in 100,000 individuals abandoning villages where their ancestors lived for centuries. Water begins to encroach into homes and causes sanitation problems. Additionally, more than one

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[7] Pak Tribune 7th July 2014 - "A total of 572,529 people, belonging to 44,633 families have been registered as internally displaced persons (IDPs) in the aftermath of operation Zarb-e-Azb, which started on June 15."

[8] IDMC Overview Pakistan 12 June 2013 NORTH-WEST PAKISTAN Massive new displacement and falling returns require rights-based response, para. 2.

[9] "Construction of Earthquake Resistant Buildings and Infrastructure Implementing Seismic Design and Building Code in Northern Pakistan 2005 Earthquake Affected Area"

[10] Founded in 1972, ActionAid is an international non-governmental organization the primary aim of which is to fight poverty and injustice globally.

[11] Needs Assessment Umerkot and Tharparkar "ACTIONAID – NEEDS ASSESSMENT DROUGHT IN SINDH" Published 12th March, 2014.

million hectares have been rendered barren due to salinity from salt-water intrusion[12].

1.2. ARE ALL NATURAL DISASTERS UNCONTROLLABLE? IF NOT, WHO IS RESPONSIBLE FOR MANAGING THEM?

Some natural disasters may be not be classified as an uncontrollable phenomenon. For example, landslides and floods can both be managed in the long term using basic planting techniques. Similarly some environmental "disasters" are a recurring problem. If flooding is expected every year and despite this the precautions advocated are not heeded, the devastation cannot be termed as uncontrollable. It is true that the scope of the damage has been enormous and there has been devastating loss of life and livelihood. Ultimately however, it is the responsibility of the state to offer a rights-based response to that problem. Instead states (including Pakistan) have allowed themselves to hang on to the archaic idea that these disasters are freak events unrelated to one another, that perhaps they cannot already estimate the damage expected, that their educated guesses are not a viable basis for reform because they are at the mercy of events they cannot predict. These notions justify the existence of an ad-hoc response to a problem the solution to which would be exponentially more effective had it been established as a rights-based system, with those rights existing in legislation.

2. WHAT IS THE GOVERNMENT'S CURRENT RESPONSE PLAN FOR REFUGEES?

In response to IDP influxes, the government and other arms of the State (such as army) work to mitigate the damage and provide safe passage and residence to the afflicted.

The role of the government:

1. The government deals with registering the refugees, as documentation is essential in order to organise provision of aid and to keep record of the movement of individuals. The motivations for this are also related to national security – in regions afflicted by terrorist activity, any movement of peoples to other regions of the country, especially as a result of a

[12]Al Jazeera: Asia http://www.aljazeera.com/video/asia/2014/06/rising-sea-levels-force-pakistanis-from-homes-201462883522471298.html

military operation, must be strictly monitored to ensure that terrorists do not take advantage of safe passage in emergency situations.

2. The government allocates funds from the national treasury to ensure the health and safety of IDPs.
3. The provincial government either accepts IDPs that wish to enter the state or closes its borders to them.

The role of the army:[13]

1. The army has been setting up routes for safe passage of IDPs from uninhabitable areas to safer ones. This involves checking each refugee and appropriately assigning those with security clearance a document proving that they have been cleared to travel and enter other cities. This documentation is given less importance when the migration is unrelated to terrorist activity or army operations to curb terrorist activity.
2. The armed forces set up camps for refugees to live in. These are meant to include basic sanitation and medical facilities.
3. Along with health care for humans, animal vaccination also takes place to protect the livelihood of livestock farmers.

3. WHAT CONSTITUTIONAL RIGHTS HAVE BEEN AWARDED TO PAKISTANI CITIZENS THAT FORM THE BASIS FOR A RIGHTS-BASED SYSTEM?

With regard to environmental issues, constitutional rights have not traditionally been interpreted in a manner to include a marginalised section of society - the least affluent citizens who are living near or below the poverty line – their state exacerbated because they bear the brunt of natural disasters.

The term ‘natural disaster’ is too reductive. It does not encapsulate the many intricately linked problems faced before and after these disasters, with the problems often feeding off one another.

Thus if governing bodies are able to reduce the occurrence of, and mitigate the damage caused by such events, then voters are likely to choose such social service

[13] For reference, see www.ispr.gov.pk, “Pakistan Army’s Flood Relief Efforts”.

as an important criterion when electing a party to come to power. Under the social contract, the government is directly responsible for this work.

The Constitution of Pakistan 1973[14] contains fundamental human rights that can be interpreted in a manner to preclude environmental problems. These include:

a. **Right to life** under *Art. 9 – Security of Person – "No person shall be deprived of life or liberty saves in accordance with law."*

b. **Right to water** under *Art. 9, Security of Person,*

   Art. 14 - Inviolability of dignity of man, etc.– "(1) The dignity of man and, subject to law, the privacy of home, shall be inviolable."

   and Art. 155 – "Complaints to interference with water supply"

c. **Right to food, health and housing** under *Art 38 – "The State shall provide basic necessities of life, such as food, clothing, housing, education and medical relief."*

d. If any section of society is deprived of any amenity the supply of which the government is to ensure, it falls under *Art. 25 – Equality of Citizens. –*

   "(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."

3.1. WHERE ELSE HAVE BASIC HUMAN RIGHTS BEEN INTERPRETED AS SUCH?

Other jurisdictions have been exploring a rights-based approach to the effects of climate change and environmental degradation. For reference, we can take the Centre for Policy Development's[15] article[16] which explains the link between human

[14] The Constitution of Pakistan 1973, Articles 9, 14, 25, 38, 155.

[15] Established in 2007, Centre for Policy Development (CPD) is an independent, nonpartisan Australian think tank.

[16] "Climate Change and Human Rights" – John Von Doussa, published 13th June, 2008.

rights and climate change (and its associated problems), and has collected the Australian jurisdiction's assessment of this approach to policy making.

The Centre for International Environmental Law's[17] publication "Climate Change and Human Rights: A Primer" includes UN resolutions from as early as 2008 that indicate the importance of a rights-based approach.

Resolution 7/23 on human rights and climate change described the threat of climate change as 'immediate' and 'far reaching' and requested the OHCHR[18] 'to conduct a detailed analytical study of the effects of climate change on human rights.

In the aforementioned papers the basic problems of climate change are discussed, as are the international obligations that take these basic human rights further into the realm of environmental law.

Moreover, Pakistan has ratified the International Covenant on Civil and Political Rights (ICCPR), many provisions of which are also read as connecting human rights and environmental rights[19]. Thus an effort must be made to legislate and adjudicate with these rights, Pakistan's international obligations and its international reputation in mind.

3.2. CAN PAKISTAN'S JUDICIARY ADOPT INTERNATIONAL PRINCIPLES AND HAS IT DONE SO IN RECENT TIMES?

The Supreme Court of Pakistan has in recent times applied principles of UN treaties while adjudicating upon important human rights issues in the country, for example in relation to enforced disappearances/missing persons cases.

Thus one avenue that Pakistan has is to adopt the directives of relevant UN resolutions and become a frontrunner in the development of environmental law in Pakistan, which will go hand in hand with the prevention of human rights abuses at the hands of the state.

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[17] CIEL is a "Nonprofit organization that provides environmental legal services in international and comparative environmental law."

[18] United Nations Human Rights Office of the High Commissioner for Human Rights

[19] "Human Rights and Environmental Rights – Making the Connection" - Cecilia Riebl, published 30th August, 2012.

In the report of the Judicial Flood Tribunal Inquiry, 2010[20], the blame for the devastation caused by the floods was placed directly on the government, specifically the Punjab Irrigation department. The Minister for Irrigation Mr. Rab Nawaz and his chief engineers Rao Arshad and Abdul Qadir were pointed out in the report, but no action was taken against them. The government is now being questioned by the opposition about the action taken over the 2010 report, or rather lack thereof.

Though the government was found guilty of criminal negligence, no cases were filed against those explicitly pointed out as the culprits. This showed failure on the part of the government to uphold the rights of the citizens. Further infringing citizens' rights and showing refusal to remedy the human rights abuses they were already guilty of, the technical faults found by the commission were not remedied, and the proposals of some basic laws that could in turn save millions of people were ignored, such as a prohibition on building too close to rivers.[21]

4. WHAT STEPS SHOULD THE GOVERNMENT TAKE?

The government needs to recognise that these problems must be dealt with in three distinct phases. These are a) preventative measures/long term sustainable development goals, b) precautionary measures and c) damage control operations. The first of these will be the most difficult to direct funding to because of lack of immediacy in a country with so many political and security issues.

a) Preventative measures must include a weaning off of natural resources for the state of Pakistan. For a country with a massive sun-belt and opportunities for wind-generated power, reducing reliance on fossil fuels would at the very least improve air quality and minimise the consumption of hydrocarbons. Reliance on alternative energy will reduce the emissions that cause climate change. Even though Pakistan has a world share of 0.5% of global greenhouse gas production, switching to renewable energy will result in savings in the long run which can be redirected to implementing laws that fight environmental human rights abuses. As climate change is at the root of the increased frequency of the natural calamities that cause mass internal displacement, Pakistan needs to participate fully in a net reduction in global emissions, as well as establish itself as a country aware

[20] The report of a judicial commission held under Justice Syed Mansoor Ali Shah.
[21] Report of the Judicial Flood Inquiry Tribunal, 2010.

of its ecological impact that in turn only torments its own citizens. In this case we are dealing with a massive change in national policy in many different areas over decades.

These include investment in safe public transport which runs on clean energy (which should reduce cost) and sustainable agricultural practices.

Changes in the education sector should include providing students with the opportunity to become professionals in environmental studies, environmental engineering or consultation which includes urban planning, impact assessment and feasibility studies.

A market must also be created for this kind of expertise. This can be achieved through strictly implementing corporate social responsibility policies in all companies. In this way, they can become compliant with what should be Pakistan's eventual goal, to become a green city not contributing to climate change, and not responsible for the frequent natural disasters that will keep coming unless every state aspires to go green.

b) Precautionary measures include (i) Increased precision and efficiency of urban planning, (ii) introduction of new specialised legislation and (iii) regulation and implementation of (i) and (ii).

Pakistan already has the Pakistan Environment Protection Act 1997 (PEPA). However, legislation is needed in each province for safer building practices and regulation of economic activity. This needs to include better irrigation in cities, bans on building too close to rivers, strict limits on logging, mandated reforestation in hilly areas or areas prone to floods/landslides and an aim to raise the percentage of forest-covered land in Pakistan (to create carbon sinks, which further achieves the objectives of long-term sustainable development).

With specific reference to the introduction of specialised legislation, Pakistan needs to build on the principles developed in Shehla Zia v. Wapda[22]. Here the judiciary did accept that deforestation, electro-magnetic fields and environmental pollution constitute human rights abuses. These principles have been discussed considerably within this judgement, taking care to balance national economic objectives with the welfare of the people, with the latter being adequately catered to.

[22] PLD 1994 Supreme Court 693

c) For obvious reasons, damage control is currently the area receiving most attention from the government. Pakistan does important work in this regard under the National Disaster Management Authority (NDMA[23]). Moreover, government agencies work with many international organisations and especially the UNHRC in provision of temporary shelter for the internally displaced. However, a legislative footing for emergency protocol would improve conditions immensely.

A very important preliminary issue where there is need for consensus and clarity within the federal and provincial governments is when and in what circumstances their borders will be open for IDPs from other provinces. There must be a national policy on this and cooperation from the provinces. Only after this is sorted can plans to improve the state of IDP camps be truly successful due to a better distribution of individuals, especially to provinces that are prepared for them.

Once the first hurdle is passed, perhaps the most important issue with reference to the kind of lives IDP's lead is education for children, who constitute much of the population at these camps. Article 25-A of the Constitution of Pakistan[24] is the right to education, and non-compliance with this is another manner in which IDPs are treated as second-class citizens. If they were not already lost in the cycle of poverty, they will be if future breadwinners are not being educated.

Detailed protocol must be developed. Even going as far as creating a definitive list of rights of the IDP might become necessary to ensure that non-compliance by the government results in action against relevant agencies. An avenue for legal representation for the IDP's must be opened.

Besides enacting legislation, the Pakistani government, especially with reference to floods, must come to an agreement with the Indian government to minimise the devastation. The rivers that flow through Pakistan originate from Indian-held Kashmir. Currently the Indian Central Water Commission (CWC) does not operate in Indian-held Kashmir.[25] Thus without any legislation mandating the CWC to monitor water levels

[23] Assisted by the UN.
[24] The Constitution of Pakistan 1973 Art. 25-A.
[25] See Sharafs.wordpress.com "The Avoidable 2014 Floods in Kashmir and Pakistan, published September 16th, 2012.

and issue flood warnings from the area, the scale of this problem cannot be minimised.

5. CONCLUSION:

The environmental phenomena behind the increased frequency and strength of natural disasters and increasingly erratic weather patterns need to be brought into the narrative of national policy development. Encouraging innovation in the field of environmental studies as well as encouraging other disciplines to include environmental ethics into their programmes can result in a major shift in the rhetoric on climate change in Pakistan.

Because of lack of awareness and specialised education the link between climate change and the very real, very visible human rights issues it results in is missing in the thought process of today and tomorrow's employees, business owners and government officials.

Once this is remedied through the steps highlighted in Section 4, over time Pakistan will achieve sustainable growth. The right legislation must be enacted to counter each stage of the problem. To prevent disasters, we must deal with displacement, and bring human rights protection to a level where IDPs can eventually relocate or return to their homes and live respectable lives. If these objectives are achieved, Pakistani citizens will no longer face the threat they currently face, which is to risk becoming second-class citizens if they are unlucky enough to bear the brunt of a natural calamity.

The government must recognise its duty to uphold the constitution especially in dire situations. These fundamental rights cannot be ignored or suspended in times of chaos. If the government is unable to deal with that chaos, it loses its legitimacy. Furthermore, the IDPs must be aware that they do not lose their rights once IDP status is given to them. They must have legal avenues and must be able to challenge the government departments that fail them. The judiciary has taken steps in the right direction but reform and redrafting can go much further. The organs of this state need not wait for another wave of floods and landslides to determine whether concrete change is necessary.

TOWARDS THE EFFECTIVE REALIZATION OF THE RIGHT TO EDUCATION IN PAKISTAN

Zainab Fakhar[1]

INTRODUCTION

Education has been formally recognized as a human right since the adoption of the Universal Declaration of Human Rights in 1948.[2] This has since been affirmed in numerous global human rights treaties, including the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention against Discrimination in Education (1960), the International Covenant on Economic, Social and Cultural Rights (1966) and the Convention on the Elimination of All Forms of Discrimination against Women (1981).[3] These treaties establish a legal obligation for all signatory states to provide free primary education for all children; an obligation to develop secondary education and easy access to higher education.

Furthermore, they affirm that the aim of education is to promote personal development, strengthen respect for human rights and freedoms, enable individuals to participate effectively in a free society, and promote understanding, friendship and tolerance. The right to education has long been recognized as encompassing not only access to education, but also the obligation to eliminate discrimination at all levels of the educational system, to set minimum standards and to improve quality. In addition, education is necessary for the fulfillment of any other civil, political, economic or social right.

The United Nations Convention on the Rights of Child (CRC) further strengthens these treaties and broadens the ambit of the right to education. The overriding objectives of this treaty are to recognize children as important agents of the society and that education curriculum must be designed in a manner which promote and respect their rights and needs.

Widely held view of the experts is that right to education qualifies as customary international law hence giving this right further significance. Stephen Knight compels the conclusion that the right to education qualifies as customary

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[1] The author is a second year student pursuing her law degree from the University of London External Programme.
[2] Universal Declaration of Human Rights.
[3] UN report.

international law[4]. Most of these experts argue that the provisions of both ICCPR and ICESCR are binding on signatory states. Although the concept of progressive realization is present, nevertheless the states are expected to work towards the implementation of these laws hence making them customary international law.

Education is one of the most important investments a country can make in its people and its future and is critical to reducing poverty and inequality. The right to education is a fundamental right of every citizen and is usually protected through domestic legislative instruments making it a duty of the state to provide education to all of its citizens. This problem is much more widespread in third world countries. Developed nations overcame this problem long ago while the developing countries are still struggling to enforce these basic human rights.

Similarly, one of the significant issues in Pakistan is the presence of the egregious practice of forced labor and particularly child labor, thus curtailing the right to education.

PAKISTAN'S LEGAL FRAMEWORK:

The Constitution of Pakistan safeguards this very right under Article 25A. It states, "*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.*"[5] It is the duty of the state to implement laws in conformity with its constitutional compulsions. The problem arises primarily in the enforcement of these laws. Law making is not the problem; law enforcement is the real challenge which states face. Developed countries have found a way of a better law enforcement mechanisms and striking the right balance in every sphere when it comes to governing. According to Article 25A, anyone who is deprived of this right can get it enforced through courts. However, no such claim has been made in the courts as yet.

Moreover, the Pakistani constitution further states in Article 11(3): *No child below the age of fourteen years shall be engaged in any factory or mine or any other hazardous employment*.[6] This section expressly talks about factories and mines, but fails to explain the word hazardous. Can children working in homes and small shops be brought within the ambit of this section? It is arguable that the word 'hazardous' can be interpreted purposively. The meaning of this word can be

[4] KNIGHT,1995,p.185.
[5] PAK CONST. art. 25A
[6] PAK CONST. art. 11(3)

widened in order to achieve the goal of limiting child labor. The law remains ambiguous as to the working conditions of the work places. Eventually, it is the discretion of the courts as to how they interpret this particular legislation.

However, the Hazardous Occupation Rules 1963 section 5 state;

No woman, adolescent or child shall be employed in any factory in any of the operations specified in the Schedule.

i. *Work at furnace where reduction or treatment of zinc or lead ores is carried on;*

ii. *the manipulation, treatment, or reduction of ashes containing lead, the de-silversing of lead or the refining of dross cantaining lead ;*

iii. *The manufacture of alloys containing more than ten per cent of lead;*

iv. *the manufacture of any oxide, carbonate, sulphate, chromate, acetate, nitrate, or silicate of lead ;*

v. *handling or mixing of lead tetra ethyl;*

vi. *Mixing or pasting in connection with the manufacture or repair of electric accumulators;*

vii. *the manufacture, assembly and repair of lead storage batteries ;*

viii. *The cleaning of work-rooms where any of the processes aforesaid are carried on; and*

ix. *Every other manufacturing operation involving the use of -my lead compound or the cleaning of work-rooms where any such operation is carried on*[7].

This particular legislation clearly lists down certain occupations which are considered to be hazardous by the parliament. They fail to describe as to why these occupations are considered to be hazardous. The real problem will arise when a claim is brought for an occupation which is not in the legislation mentioned above and harms the physical or mental state of a child or woman.

Furthermore, the Employment of Child Act 1991 asserts:

Section 3

[7] Hazardous Occupation Rules § 5. (1963)

No child shall be employed or permitted to work in any of the occupations set forth in Part I of the Schedule or in any workshop wherein any of the processes set forth in Part II of that Schedule is carried on:

Provided that nothing in this section shall apply to any establishments wherein such process is carried on by the occupier with the help of his family or to any school established, assisted or recognized by Government

Moreover, the Factories Act 1934 mentions the definition of a 'child' in its preamble. Section 2(c) states: "child" means "*a person who has not completed his fifteenth year.*" Section 28 states the power to exclude children and states, "sub-section (1*) The Provincial Government may make rules prohibiting the admission to any specified class of factories, or to specified parts thereof, of children who cannot be lawfully employed therein.*"

The discretion lies in the hands of the provincial government to decide on the matters related to child laborers in factories.

More importantly, the relevant provision for the purposes of this note is Chapter 5 which covers all the provisions for children and adolescents. Section 54 states:

"(1) No child shall be allowed to work in a factory for more than five hours in any day.

(2) The hours of work of a child shall be so arranged that they shall not spread over more than seven-and-a-half hours in any day.

(3) No child shall be allowed to work in a factory except between 6 a.m. and 7 p.m.:
Provided that the Provincial Government may, by notification in the official Gazette, in respect of any class or classes of factories and for the whole year or any part of it, vary these limits to any span of thirteen hours between 5 a.m. and 7-30 p.m.

(4) The provisions of section 35 shall apply also to child workers, but no exemption from the provisions of that section may be granted in respect of any child.
(5) No child shall be allowed to work in any factory on any day on which he has already been working in another factory."[8]

[8] Factories Act. Chapter V § 54. (1934)

COMPARATIVE LEGAL ANALYSIS

In comparison to Pakistan, the Sri Lankan constitution safeguards this right even more expansively. Article 27(h) states *the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels.*[9] By this section, it is evident that the Sri Lankan government constitutionally, is more committed towards the complete eradication of illiteracy rather than the mere assurance that this right might be protected.

Furthermore, the constitution of Afghanistan protects this right under Article 17 and 43. Article 17 states the duty of the state to adopt all necessary measures at all levels to provide education. Article 43 further states, "*Education is the right of all citizens of Afghanistan, which shall be offered up to the B.A. level in the state educational institutes free of charge by the state."*[10] Hence making it the duty of the state to provide free education up till the under-graduate level

The Indian constitution similarly to Pakistan's states in Article 21A that the "state shall provide free and compulsory education to all children between the ages of six to fourteen as determined by law, making it the states duty to provide education at the primary level."[11]

Although these constitutions have provisions about education on all different, levels and they recognize this basic right, however (except Sri Lanka) these countries have a huge issue implementing these laws. Due to several different reasons, these states have not been able to combat the war against poverty, forced and child labor due to which this right is being constantly infringed. The question which is raised is whether these countries can improve on policy making consequently resulting in better law enforcement.

The Indian Factories Act 1987 explains what qualifies as a 'child'. It also expressly defines what hazardous means. Chapter 1 section 2 contains all the definitions for the purposes of the Act. *(c) "child" means a person who has not completed his fifteenth year of age.[12] (cb) "hazardous process" means any process or activity in relation to an industry specified in the 'First Schedule where, unless special care is taken, raw materials used therein or the intermediate or finished products, bye-products, wastes or effluents thereof would-*

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[9] SRI LANKA. CONST. art.27
[10] Afghanistan Const. Art.43
[11] India. Const. Art
[12] Factories Act. Chap 1-2. (1987)

(i) cause material impairment to the health of the persons engaged in or connected therewith, or

(ii) result in the pollution of the general environment.

The legislation has clearly described these terms in order to eliminate any threat of ambiguity and thus keeping the authority of teleological interpretation away from the courts.

In addition, chapter V II- Employment of Young Persons, Section 67 mentions the prohibition of young persons under the age of fourteen.[13] Furthermore, Section 71 which is on the working hours of young person says; *" No child shall be employed or permitted to work in any factory-*

(a) For more than four and a half hours in any day;

(b) During the night."

Where the law in India allows children to be economically active, it has made sure that there are no gaps in drafting these laws. The term child has been expressly stated and the law of free education complies with the same age as well thus showing the conformity of the law. The time period for child employees is no more than four and an half hours in a day. This gives plenty of room for these children to go to school and also work side by side.

On the other hand, developed countries have similar laws but more effective and robust law enforcement schemes. United Kingdom (UK) being one of the very few countries with un-codified constitution, guaranteed the right to education in the Human Rights Act (HRA) 1998 which is a substitute of Bill of Rights for the UK constitution. Article 2 of the HRA states, *"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions"*[14].

In addition to HRA, UK (and the other European countries) which are a part of the European Union need to abide with the laws of the EU. Under the principle of supremacy, national courts are required to enforce the treaties that their member states have ratified, and thus the laws enacted under them, even if doing so requires them to ignore conflicting national law, and (within limits) even constitutional

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[13] Employment of Young Persons. Chap V. § 67.
[14] HUMAN RIGHTS ACT. Art 2. (1998)

provisions. The European Convention on Human Rights (ECHR) further strengthens the enforcement of the fundamental rights. ECHR's Protocol 1 Article 2 mentions the right to education.[15] Hence, all EU member states have an additional obligation to comply with the EU laws.

The European Social Charter compliments the European Convention on Human Rights in the field of economic and social rights. The Charter is a major European treaty on social rights which secures inter alia the right to education from primary to higher education and the right to vocational training through a range of provisions, i.e. Articles 9 (right to vocational guidance)[16], 10 (right to vocational training)[17], 15§1 (right to vocational training for persons with disabilities)[18] and 17§1 (right of children to assistance, education, and training[19]). It guarantees an accessible and effective primary and secondary education and vocational training system, as well as equal access to higher education.

The Children and Young Persons Act 1933 Part II Section 18 mentions the laws of employment. It states; *"Subject to the provisions of this section and of any by-laws made there under no child shall be employed—*

(a) so long as he is under the age of twelve years; or

(b) before the close of school hours on any day on which he is required to attend school; or

(c) before six o'clock in the morning or after eight o'clock in the evening on any day; or

(d) for more than two hours on any day on which he is required to attend school; or

(e) for more than two hours on any Sunday; or

(f) to lift, carry or move anything so heavy as to be likely to cause injury to him."

The UK laws specifically mentions the school timings not to clash with working hours. The legislation clearly has gone an extra mile to protect the right to education for children.

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[15] European Convention on Human Rights art.2, protocol 1.
[16] European Social Charter art 9.
[17] *Id.* art 10
[18] See *id.* 15 §1.
[19] See *id.* 17 § 1

INTERNATIONAL OBLIGATIONS

Apart from the domestic laws mentioned above, Pakistan being a signatory of several treaties is bound by international laws. Pakistan ratified the International Covenant on Economic, Social, and Cultural Rights (ICESCR) in April 2008. Along with ICESCR Pakistan also signed International Covenant on Civil and Political Rights (ICCPR). "Becoming a state party to UN human rights conventions is a key step to ensuring human rights are respected, protected and realized for all in Pakistan in line with international standards," according to Amnesty International.[20] ICESCR commits its parties to work toward the granting of economic, social, and cultural rights (ESCR) to individuals, including labor rights and the right to health, the right to education, and the right to an adequate standard of living.

Article 13(2) of the ICESCR states as follows:

The State Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b)Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.[21]

[20] Amnesty International annual report 2012.
[21] International Convention on Economic, Social and Civil Rights. art 13(2)

According to this Article, it is mandated that the signatory states must make primary education available to the public free of cost and should also make compulsory. Higher education must be made easily accessible but are not bound by it to be free or compulsory. Looking at this Act closely, it makes education compulsory at the primary level thus impliedly banishing the practice of child labor. Signatory states according to international law obligations are supposed to do nothing less than what is required of them from these treaties. States are appreciated when they rise above the level that the treaty requires from them.

The Committee on the rights of child (CRC) Article 3(1) states "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration*".[22]

Pakistan being a signatory of this treaty is under an obligation under international law to abide by them. Within a span of two, three years it is apparent that the protection of child rights has not been of priority for the Pakistani government.

Despite the assurances and promises, the cases for child rights violation remained unchanged.[23] Recommendations made to Pakistan by the Human Rights Council and Committee on the Rights of Child's Rights at the UN Universal Periodic Review (2008-2012) for the country, indicated that Pakistan had seriously lagged in its commitments to child rights as more than half of the recommendations pertained to child rights. However, the constitution of a Parliamentary Forum on Child Rights (PFCR) by the National Assembly with the primary purpose of ensuring protection of child rights in the country, adoption of the Right to Free and Compulsory Education Act 2012 at the federal level was a step forward in securing the rights of child.

UNESCO released its Education for All Global Monitoring (EFAGM) report in October 2012 that presented an extremely dismal statistical account of the state of education in Pakistan. According to the report, Pakistan's Education Development Index (EDI) is 113, which is much worse than regional countries such as India (102) and Bhutan (98). The state of education in Pakistan in 2014 is yet another example of the persistent government failure to provide basic rights to children. The literacy rate and the quality of education were both far from satisfactory and any prospects for improvement were hamstrung by rising security concerns in the

[22] Committee on the Rights of Child art. 3(1)
[23] Human Rights Commission Pakistan report 2012.

country.[24] According to the UN education department, UNESCO's latest report show the illiteracy percentage was 79 percent in Pakistan in 2012 and the number of Pakistan was 180 in the list of 221countries in the world[25].

Despite international pressure, Pakistan failed to conduct a survey on child labor. The last survey which was successfully conducted was in the year 1996. US Labor Department's 2011 findings on the Worst Forms of Child Labor, released in September 2012, and showed Pakistan as one of the 27 countries (out of a total of 144 countries assessed) that made no advancement in efforts to remove the worst forms of child labor.

International labour standards are legal instruments drawn up by the ILO's constituents (governments, employers and workers) and setting out basic principles and rights at work. They are either conventions, which are legally binding international treaties that may be ratified by member states, or recommendations, which serve as non-binding guidelines. In many cases, a convention lays down the basic principles to be implemented by ratifying countries, while a related recommendation supplements the convention by providing more detailed guidelines on how it could be applied.

The International Labour Organization (ILO) also imposes legal implications on signatory states. ILO is devoted to protecting labour and human rights around the globe with its law being binding on states which are a part of this organization. The ILO's Governing Body has identified eight conventions as "fundamental", covering subjects that are considered as fundamental principles and rights at work. The most relevant is the Minimum Age Convention (No.138). The preamble talks about the gradual abolition of child labour.

Article 1 says ; "*Each Member for which this Convention is in force undertakes to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons.*[26]*"* similarly, Article 2(3) states, "*The minimum age specified in pursuance of paragraph 1 of this Article shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years.*"[27] Pakistan

[24] Human Rights Commission Pakistan report 2012
[25] UNESCO report
[26] Minimum Age Convention (no. 138) art.1.
[27] *Id.* art 2(3).

being a dualist nation and a signatory of International Labour Organization is supposed to comply with these obligations. Whereas, the Pakistani constitution Article 25(A) makes education compulsory for all children between the ages of five and sixteen. Likewise, Article 11 says that no child under the age of fourteen shall be engaged in any hazardous employment. Clearly, the laws are there however, the gaps have not been filled. Where ILO requires the minimum age to be fifteen the Pakistani constitution itself states the age of sixteen but on the other hand contains an article for child workers and specifies the age of fourteen. This problem is to be dealt by the legislature. It needs to take into account the international obligations which are levied on Pakistan and while passing a domestic legislation for applying any international laws it must scrutinize the existing domestic laws and whether they need to be altered in order to comply with all international obligations.

The Worst Form of Child Labour Convention further strengthens the idea of eliminating child labour for the development of children in order to provide them with their basic right to education. Article 1 states: "*Each Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.*"[28] Thus, giving rise to the duty of the states to act in accordance with the international obligations.

While these international provisions talk about the right to education and the elimination of child labour, they also explain how certain occupations are 'hazardous' and that economically active children are prohibited from being employed for them.

United Nations Convention on the Rights of the Child Article 32 state:

States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

4. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, states parties shall in particular:

[28] The Worst Form of Child Labour Convention art 1.

(b) Provide for appropriate regulation of the hours and conditions of employment;[29]

This provision expressly terms as to what amounts to be hazardous employment.

UNCRC General comment No. 3: HIV/AIDS and the Rights of the Child

Paragraph 33

Consistent with the right of children under Articles 32, 34, 35 and 36 of the Convention, and in order to decrease children's vulnerability to HIV/AIDS, States parties are obliged to protect children from all forms of economic and sexual exploitation, including ensuring they do not fall prey to prostitution networks, and that they are protected from performing any work likely to be hazardous or to interfere with their education, health or physical, mental, spiritual, moral or social development. States parties must take bold action to protect children from sexual and economic exploitation, trafficking and sale and consistent with the rights under Article 39, create opportunities for those who have been subjected to such treatment to benefit from the support and caring services of the State and non-governmental entities engaged in these issues[30].

UNCRC General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child

Paragraph 14

The Committee urges states parties to take all necessary measures to abolish all forms of child labour, starting with the worst forms, to continuously review national regulations on 20 minimum ages for employment with a view to making them compatible with international standards, and to regulate the working environment and conditions for adolescents who are working (in accordance with article 32 of the Convention, as well as ILO Conventions Nos. 138 and 182), so as to ensure that they are fully protected and have access to legal redress mechanisms[31].

Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour Article 3 states:

For the purposes of this Convention, the expression "the worst forms of child labour" comprises:

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[29] United Nations Convention on the Rights of the Child art 32.
[30] United Nation Convention on the Rights of Child, General Comments.no.3.
[31] United Nations Convention on the rights of Child, General Comments.no.4.

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for the use in armed conflict;

(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.[32]

International Covenant on Economic, Social and Cultural Rights Article 10(3):

Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination *for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health, dangerous to life, or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law*[33].

RECOMMENDATIONS

In order to deal with the lacunas in the constitution it is necessary that the policy makers alongside the legislature decide what their aim is before a particular legislation is passed. In addition, it might be helpful if they scrutinize how this process is carried out in the developed nations like the United Kingdom and other Scandinavian countries and how they have tackled with these social problems.

Also, when amending previous legislations, it should be made sure that the new is consistent with the already existent laws and that they do not contradict each other. This would also help bridge the gaps which are already present between the federal and the provincial laws.

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[32] Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour art.3.

[33] International Covenant on Economic, Social and Cultural Rights Article 10(3);

In order to deal with this disparity within the Pakistani constitution it is imperative to define in expressed terms what amounts to a 'child'. Once, everyone is clear on the meaning of who would amount to a child, law making and consequently law enforcement will be easier. Child laborers will be defined in definitive terms. In addition, it is vital to focus on policy making before the law is drafted. Otherwise, it causes constitutional and legal chaos. When the articles in the constitution are drafted carefully, incorporation of international laws becomes easier for dualist nations. In order to conform to the international treaties the law needs to be translated into domestic legislation. Where the Factories Act 1934, describes a child as someone below the age of 15, whereas, in the recent Juvenile Justice System Ordinance 2000 a child is defined as a person below the age of 18 at the time of the commission of the offence.[34] The constitution itself at two different places describes a child differently. Hence, there is an urgent need to update the legislation in order to implement other domestic legislation which includes the rights of child. The definition of a 'child' has to include all children up to 18 years in age in consonance with the Juvenile Justice System Ordinance 2000 and the UNCRC as ratified by the government of Pakistan 12th November 1999.

The federal law has managed to classify certain occupations which qualify as being 'hazardous'. However, it fails to define what hazardous in terms of law means. All international treaties and conventions go on to explain what hazardous really means before emphasizing a particular objective. This gap in the law should be bridged for better enforcement of provisions related to labour and consequently child labour.

It is also necessary that the government provides adequate funds towards the development of schools and necessary measures are taken to make sure that children are being sent to school and are being educated in the best manner possible. For this, the Ministry of Education in Pakistan should set a standardized syllabus in all schools, nationwide. The disparity in education systems caused by the international educational system and the domestic educational system should be reduced; hence enforcing Section 25 which mentions the equality of citizens.

In order to obtain effective elimination of child labour, governments should fix and enforce a minimum age or ages at which children can be employed in various fields. Within limits, these ages may vary according to national social and economic circumstances. The general minimum age for admission to employment should not be less than the age of completion of compulsory schooling and never

[34] Juvenile Justice System Ordinance (2000)

be less than 15 years. But developing countries may make certain exceptions to this, and a minimum age of 14 years may be applied where the economy and educational facilities are insufficiently developed. Sometimes, light work may be performed by children two years younger than the general minimum age.

Right to education is inversely proportional to child labor. Elimination of child labor will eventually lead to the greater protection of this constitutional right hence increasing the literacy rate. In any effective strategy to abolish child labour, provision of relevant and accessible basic education is central. Nevertheless, education must be embedded in a whole range of other measures, aiming at combatting the many factors, such as poverty, lack of awareness of children's rights and inadequate systems of social protection that give rise to child labour and allow it to persist.

Child labour can be abolished through legislative measures. However, that is not the proper way to do it. If the legislature passes an Act it recognize, will not it remain unrecognized by law. There are economically active children in the society apart from child labourers. Child labourers are economically active children who do work that prevents them from going to school. Hence, this option can be struck down for eliminating child labour. The legal framework must have clarity on the definition of child labour. It must be inclusive and cover all forms of work children are engaged in. This can be possible only when the parliament itself is clear as to who would amount to a child.

In order to ensure this right and eliminate child labour it is necessary to enforce child labour laws, labour laws, and laws for education. This will further strengthen international standards and there will be no liability on Pakistan as a state for breaching these international obligations which become binding once the treaty is ratified.

CONCLUSION

The concept of education and human rights should be conceptualized for changes to be brought to enforce this constitutional right, and in order to combat the evil practice of child labour. The formulation on national policy on education is vital to establish the system in the country. However, concerted efforts are needed to enforce the policies and laws.

The government of Pakistan and precisely the Education Ministry is responsible for devising a better strategy of implementing these laws and forming a better and more standardized system throughout the country. Education is one of the greatest investments which predict the future of a particular nation. CRC and CEDAW recognize literacy as a right apart from education being an obvious one. Being a signatory state to the international treaties, the government is under an obligation to comply with them.

Elimination of child labour is achievable and possible. To achieve this goal political will is required and can be demonstrated through enactment and enforcement of particular legislations, supported by adequate funds and resources and the strengthening of the accountability framework. Although the government is solely responsible for the elimination of child labour, the civil society should also assist the government in obtaining their objective.

LEGALIZING THE SALE OF HUMAN ORGANS

Hammad Mustafa[1]

Is legalising the sale of human organs the only solution to the human rights dystopia created by the shortage of and black-market for human organs in Pakistan?

Pakistan has historically been at the heart of the international black-market for human organs, creating a human rights dystopia in several parts of the country. This essay will argue that a legal – albeit highly regulated – market for the sale of human organs provides an ethically sound and practically feasible solution to this problem. Respect for the principle of autonomy offers one reason to allow this market to exist, but the strongest arguments in its favour are that it would save human lives and curb the rampant and exploitative black-market, and these will be central to this essay. The position that consent to the sale of human organs can never be 'free from duress' will also be attacked, and lastly it will be suggested that steps falling short of legalisation will be insufficient or counterproductive.

THE LEGAL STATUS QUO IN PAKISTAN

Organ trafficking in Pakistan has been on the rise since the mid-1990s, and the World Health Organisation (WHO) now ranks Pakistan as one of the top five organ trafficking hotspots in the world. In 2007, 2500 kidney transplants were bought in Pakistan, with foreign recipients making up two-thirds of the purchases.[2] The global outcry over 'Transplant Tourism' resulted in the Declaration of Istanbul being created at the Istanbul Summit on Organ Trafficking and Transplant Tourism in 2008. Pakistan expressed support for the declaration, and introduced its provisions into domestic legislation via the Human Organ and Tissue Transplantation Law 2010. Section 3 of the Act limits live organ donation to between genetic or legal relatives, while Section 7 expressly forbids transplants to citizens of a foreign country. The Act aims to dismantle the black-market for human organs using a strict legislative framework and criminal sanctions. This is evident from Section 11, which imposes a penalty of up to 10 years for commercial dealings in human organs. While the debate surrounding human organs in the rest

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[2] Jafar, Tazeen H. "Organ Trafficking: Global Solutions for a Global Problem" (2009) *American Journal of Kidney Diseases* 54 (6): 1145–1157.

of the world is mostly about the most effective way to overcome the shortage of organs, Pakistan is largely preoccupied with overcoming the plague that is the black-market. While this is understandable to a certain extent, this essay will argue that the goal of preventing the loss of human life caused by the shortage of organs is one that must not be lost sight of. Indeed, it should be remembered that the reason why transplantation was initially extended to include non-relatives was the dire need for organs.[3]

ARGUMENTS IN FAVOUR OF LEGALISATION

One reason for legalising the sale of human organs is because it upholds the principle of autonomy. The central idea is that we are the masters of our own lives and our own destiny, and limits should only be imposed on our actions insofar as they infringe upon the autonomy of someone else. A well known version of this idea is John Stuart Mill's the 'Harm Principle', which insists that the state is only allowed to legislate to prevent physical harm to a non-consenting party. Fundamental to the harm principle is the idea that a person's consent provides a good justification for harming her – the job of the state is not to prevent self-harm in a paternalistic manner but to allow citizens to live their lives in the manner they see fit. Under the law, consent provides a justification for harm in a wide variety of contexts, ranging from surgery to boxing, with people who support the legalisation of organ sale often drawing an analogy with the latter. Boxing can cause much more serious long-term health risks to a person than donating an organ, but people are allowed to box for money. Why then, is it argued, that people should not be allowed to sell their organs for money, when the social benefit of having available organs far exceeds the social benefits of boxing? The analogy relies on not just the principle of autonomy, but on the social benefit of having organs available, and indeed it is here that the most powerful argument for legalising the sale of human organs can be found. A shortage of human organs is one of the more major causes of preventable deaths in the world; it is responsible for 17 deaths each day in the US and 3 deaths each day in the UK. The medical facilities available in these countries far exceed those in Pakistan, where most people are unable to afford dialysis for any sustained duration of time. As a result, the situation is more dire, and legalised organ sale presents a more attractive solution. At present, Iran is the only country in the world to have a legal – albeit highly regulated – market for the

[3] Rizvi, A. "Pakistan` Legislative framework on transplantation" *(*2007) *Second global consultation in human transplantation;* Geneva: WHO; 28–30 Mar 2007.

human organs, and this has allowed it to wholly eliminate waiting lists for most organs. Iran has had no waiting list for kidneys since 1999, whereas more than 60,000 patients in the US have died in the same period waiting for a kidney that never arrived.[4]

Another argument in favour of legalisation is that it will destroy one of the most coercive black-markets in the world by bringing organ sale within the ambit of the law. The black-market for organs carries out systematic exploitation of some of the poorest people in the world. Middle-men find poor and often heavily indebted labourers and offer to buy their organs, keeping the bulk of the profit for themselves and giving the donors a mere fraction of it. The donors are not guaranteed any post-operative care, and this results in them often developing complications and infections post-transplantation. The fact that most of these donors work as manual labourers and cannot afford to take much time off only adds to their ailment. It may be argued that The Human Organ and Tissue Transplantation Law 2010 has already addressed the black-market by limiting donations to between relatives. However, experiences from Pakistan as well as other parts of the world suggest that banning the performance of a procedure that people are desperate to have results in the black-market taking over the performance. Perhaps the best analogy that can be drawn is with the ban on abortion in the United States. The website for Planned Parenthood estimates that in the two decades before abortion was legal in the United States, nearly one million women went 'underground' each year for illegal operations, many of them having to resort to desperate measures such as 'coat hanger abortions'. The unsafe conditions did not prove to be a sufficient deterrent, and sadly, an estimated five thousand women died annually due to complications developed during or after abortion[5]. The victims of the black-market for organs are in desperate conditions, and the most likely outcome of the 2010 Act is that these people will accept even worse conditions to sell their organs in. The only way to counter the black-market is to provide an alternative to it. The cost of a kidney in the black-market is around $150,000[6], but the donors only ever see a small percentage of it. Under a legal setup, they will be able to keep all that they get from selling their organs, while also being guaranteed pre and post operative care, and guaranteed time off from

[4] http://www.cato.org/publications/policy-analysis/organ-sales-moral-travails-lessons-living-kidney-vendor-program-iran.

[5] World Health Organization (WHO), "Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality", sixth ed., Geneva: WHO, 2011.

[6] http://isfit.github.io/blog/2013/whats-the-price-kidney/ [30/02/2014 9:46 pm].

work to recover from their surgery. Under such a system, they will have no reason to turn to the black-market.

REFUTING ARGUMENTS AGAINST LEGALISATION

This essay will now move on to address the most powerful argument against legalising the sale of human organs. It has been argued that consent to organ sale cannot be effective, as it is almost always given under conditions of duress and desperation. One camp believes that such consent is *a priori* impossible to give, while another believes that it is *a posteriori* ineffective. It will be argued that both arguments are erroneous, as they both make certain false assumptions. The fundamental assumption both arguments rest on is the idea that selling an organ represents such a grave and permanent harm to oneself that no person in their right mind would do it without the presence of undue influences. The first response to this is a clarification. That a person is willing to sell her organ, does not imply that her sole motivation behind such a sale is monetary. Most surveys suggest that more people would like to donate their organs, and the fact that they don't get around to singing up shows that a lot of these people might just need an 'extra push'. Doctors are paid for their job, but no one doubts that a person may have altruistic motives for becoming a doctor. The argument also vastly exaggerates how dangerous organ transplant is for the donor. In fact, people can live perfectly normal lives following the donation of an organ. Our second Kidney represents a 'safety net', and 75% of one kidney can sustain life very well; liver grows back faster than hair, so donating a piece of your liver does not represent any long-term health risk; and you can live a normal day to day life with only half your lung capacity. In a world where people can cause themselves much greater harm for money, it is problematic that an organ transplant, which can save a person's life, is illegal. In the status quo, people are allowed to risk their bodies in a number of ways, such as being paid to participate in clinical trials or joining the army during a war. Thousands of people die each year from working in coal-mines and other such dangerous jobs; an estimated 4% of coal-mine workers in the United States get pneumoconiosis (black lung) each year. In China, an estimated 20,000 coalminers die each year[7]. In the large majority of cases, the people who are selling their organs have been allowed to inflict much greater harm on their bodies for a much lesser gain. They are often working in farms or brick kilns in inhumane and dangerous conditions with next to no health and safety regulations in place. It is hard to see why these people are

[7] http://content.time.com/time/magazine/article/0,9171,1595235,00.html [30/02/2014 9:11 pm].

allowed to harm their bodies for money in all of these cases, but a person who wishes to save another's life through transplant is denied that option if he wishes to be monetarily compensated for his organ.

THE REGULATORY FRAMEWORK OF A POSSIBLE MARKET FOR HUMAN ORGANS

None of what has been said above is meant to suggest that there should be a *laissez faire* market for organs. There are a number of obvious limitations and regulations that should accompany an organ sale. These include the setting of a minimum price, pre- and post- operative care and psychological assessment for the donor along with strict criminal liability for anyone found guilty of a breach of these regulations. One solution would be to have a monopsony buyer of organs such as the state. John Harris argues that this can ensure a stable and acceptable price for organs is maintained.[8] Even if the state cannot provide organs for everyone in need, charity organisations can step in to fill the gap, as they have done in Iran. Any argument that this is economically unfeasible is also unfounded, as the cost of care for the patients who are unable to obtain organs is often substantially higher than the cost of the organ itself. In the UK, it is estimated that buying a kidney will be cheaper for the NHS than two and a half years of dialysis[9]. While a regulated but legal market for organs is able to uphold the autonomy of people by protecting them from duress, an illegal market is not.

CONCLUSION

It can be seen from the above discussion that a legal market for the sale of human organs is the most ethical and effective way of avoiding a grave and preventable loss of human lives. The decision to sell one's organ can be both autonomous and rational, and allowing people to freely make this decision can curb the rampant and exploitative black-market in Pakistan.

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[8]John Harris, "An Ethically Defensible Market In Organs: A Single Buyer Like The NHS Is An Answer", *British Medical Journal*, Vol. 325, No. 7356 (Jul. 20, 2002), pp. 114-115.

[9]http://www.independent.co.uk/life-style/health-and-families/health-news/sale-of-human-organs-should-be-legalised-say-surgeons-2176110.html [8/20/11 2:01:42 PM].

PROSTITUTION AND HUMAN TRAFFICKING IN PAKISTAN

***Awais Khan*[1]**

"Slavery can only be abolished by raising the character of the people who compose the nation; and that can be done only by showing them a higher one."

-Maria W. Chapman

It is argued that slavery exists in the modern world in the form of human trafficking. Can it be claimed that this form of slavery is being reduced by actions of the state with regards to the international protection of human rights?

It has been 240 years since Great Britain abolished slavery in the United Kingdom.[2] It has been 150 years since slavery was outlawed in the United States of America[3] and the Indian subcontinent has been free from this horror since 1843.[4] Yet even today in the twenty first century there exists a form of slavery older, further reaching, irrepressible and more universal than any of the individual perversions of civil rights found across the world. This is of course, a reference to how prostitution and the human trafficking that ensues with it simultaneously are a modern form of slavery.

This paper on Prostitution and Human Trafficking will focus first on the position of international law on this particular issue, and then an introduction of the Pakistani perspective will follow. This will include the current legal status of prostitution as well as the problems that it is facing. The paper will then focus on future steps that Pakistan should be taking, their potential effectiveness and their accordance with the standard held out in the international legal arena.

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[1] The author is a final year student pursuing his law degree from the University of London external programme.
[2] R v Knowles, ex parte Somersett
[3] The Thirteenth amendment to the United States Constitution
[4] Indian Slavery Act V. of 1843

I. INTERNATIONAL LAW ON PROSTITUTION AND HUMAN TRAFFICKING

In order for human rights infringement(s) to receive attention and possible enforcement it is extremely important that there should be an international standards that may be followed at a domestic level. One of the best standard at the international level, with respect to human rights in general and human trafficking in specific is the standard set in the charter[5]. It is surprising, rather shocking that the International Covenant on Civil and Political Rights makes no mention at all of human trafficking. The only way to cover it using the argument that human trafficking, because it is now widely regarded as a form of modern day slavery[6], falls under the purview of Article 8 of the International Covenant on Civil and Political Rights (ICCPR). The fact, however, that the words 'human trafficking' are nowhere to be found within the Covenant itself is problematic.

As far as specialist treaties are concerned, two important treaties are the European Trafficking convention and the Trafficking protocol (also known as the Protocol to Prevent, Suppress and Punish Trafficking in Persons). The European Trafficking Convention is jurisdictionally inapplicable to the state of Pakistan; it may be regarded as irrelevant for our current purposes. The Trafficking protocol on the other hand is very relevant.

It is important to keep in mind that Pakistan can benefit immensely from a standard of legislative drafting to follow in this area of human rights. This will enable Pakistan to create positive action with regards to human trafficking.[7]

This particular protocol is currently the best guide to human trafficking law currently available for a number of reasons. One of these reasons is that not only does the protocol identify the trafficking of children independently from adult trafficking; it also provides more practical solutions than simply stating that human trafficking is a crime. The protocol recommends steps to prevent and to discourage re-victimisation specifically of women and children.

Additionally, the protocol strongly recommends proportional punishments for perpetrators found guilty of being involved in human trafficking. Amongst these punishments is the recommendation that parental rights of parents, caregivers etc

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[5] *The International Bill of Human Rights*
[6] *United Nations Office on Drugs and Crime; Protocol to Prevent, Suppress and Punish Trafficking in Persons Article 3 paragraph (a)*
[7] *Coalition Against Trafficking in Women, Guide to the new UN Trafficking protocol*

be suspended if they are found to be guilty. These seem like strong steps and this is precisely why this Protocol is so highly regarded with signatures from 117 from states around the world. The strength of the drafting within the Protocol gives a certain degree of importance to the problem of human trafficking that may have been missing in previous years.

II. THE SITUATION IN PAKISTAN

The situation of prostitution and human trafficking in Pakistan is dire. An influential Pakistani Think Tank has provided an illustration of the level of criminal activity that is relevant for analysis. This particular report states statistics which highlight the struggle of the Pakistani state with these crimes. The report states:

1. In the last 10 years two hundred thousand Bangladeshi women have been trafficked to Pakistan, two thousand of which are now in Pakistani jails.
2. "Bangladeshi and Burmese women are kidnapped, married off to agents by naive unsuspecting parents, trafficked under false pretences, or coerced with wonderful stories of a better life..."
3. There has been a significant rise in the trafficking of children between the ages of eight and fifteen.

These are some of the statistics within this report and they paint a harrowing picture where the prostitution which includes underage coerced and nearly unpaid girls is founded upon a system of human trafficking that is as vast as the prostitution is distressing.

Having briefly considered the urgency of the situation it needs to be seen what laws are present that should be preventing a situation such as this from taking place.

The statute in question was introduced by the state of Pakistan in 2002[8]. This act was known as the Prevention and Control of Human Trafficking Ordinance 2002. In the 12 years that this Act has been in force the statistics seem to indicate that the situation has only gotten worse. It might be arguable to say that the act simply sets

[8] *Prevention and Control of Human Trafficking Ordinance 2002; An Ordinance to prevent and control Human Trafficking*

out to criminalise human trafficking instead of a more pragmatic solution to prevent and counteract against the occurrence of this phenomena.

Another issue was that the rules governing this statute[9] did not afford sufficient protection to the victims of Human Trafficking. The extent of protection accorded was that repatriation was provided and expected to take place at the earliest possibility On the other hand however the statute does not guarantee anonymity if the victim so requires, this is peculiar particularly in cases of victims who are minors, the act goes so far as to say that the victims '*must'* be produced before the court for recording purposes.

The constitution of Pakistan[10] makes several guarantees against situations of Human Trafficking particularly in ss.10[11], 10A[12] and 11[13]. These constitutional guarantees are however meaningless without an effective, specialized legislation meant to deal entirely with human trafficking which unlike the 2002 act, has a more pragmatic way of preventing human trafficking within Pakistan.

III. THE FUTURE OF HUMAN TRAFFICKING LEGISLATION IN PAKISTAN

Having considered the current situation of human trafficking law in Pakistan, it is reasonable to say that as the law stands, it could be regarded as unsatisfactory. Fortunately, the ineffectiveness of the current law has been recognised and the state of Pakistan has created a plan[14] to combat the worsening situation of human trafficking in Pakistan.

In order to assess the likelihood that this planned action will be successful in a volatile environment such as Pakistan it is essential to first scrutinise it in light of any flaws or deficiencies that it exhibits.

The so called 'National Action Plan' is aimed at preventing human trafficking through more comprehensive techniques than were previously employed. An area that this plan has failed to target is prostitution. According to a Federal Bureau of

[9] *Prevention and Control of Human Trafficking Rules 2004*
[10] *The Constitution of the Islamic Republic of Pakistan 1974*
[11] *Safeguards as to arrest and detention*
[12] *Right to Fair Trial*
[13] *Slavery, forced labor prohibited*
[14] *Pakistan National Action Plan for combating Human Trafficking*

Investigation (FBI), USA report[15] the majority of prostitutes expressed that prostitution was not their career of choice, wanted to leave or thought that they had no alternative for survival. One of the major reasons behind this is that human trafficking accounts for a large proportion of prostitution. The question then arises as to how this relates to the failure of the national action plan.

The answer lies in that prostitution has such a strong connection with human trafficking, so much so that there is a specific proportion of human trafficking that is accounted for solely by the demand for prostitutes in a country,[16] any action that does not account for this is substantially lacking. This is especially true when it is kept in mind that the National Action Plan has a portion reserved solely for what it calls an "Awareness Program". The argument could, and probably should be made, that any awareness campaign designed to prevent or counter human trafficking is incomplete without creating a dialog with the citizens of the state in a positive effort to limit the demand for prostitution through this awareness.

This problem is further compounded by the fact that prostitution is either treated as an open secret[17] or the victims of human trafficking are treated as the real criminals, which is evident from the fact that 2,000 women who were trafficked for the purposes of sexual entertainment are living in Pakistani jails[18]. This particular injustice is also directly linked to the deficiency in the awareness program that does not cater to how the officials should treat the prostitutes linked with human trafficking as victims and try to rehabilitate them as is recommended by the aforementioned FBI report.

Unfortunately, this is not the only major problem in the National Action Plan and in Pakistan's general stance on human trafficking. The Trafficking Protocol is the leading convention on human trafficking in the world and this may be seen from the fact that 159 states are party to it with 117 of them having also signed it. Pakistan is not one of these countries.[19] Despite the Nation Action Plan, this puts into serious doubt any hope of future amendments to the existing human trafficking law.

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[15] *Prostitution and Human Trafficking: A Paradigm Shift by Steve Marcin*

[16] *The Brown Journal of World Affairs, vol. XIX, issue II, Spring/Summer 2013 by Ambassador Swanee Hunt, chair, Demand Abolition*

[17] *An Open Secret by Masood Nabi Khan, saglobalaffairs.com*

[18] *Human Trafficking and Women's Exploitation in Hypocritically "Islamic" Nations of Pakistan and Dubai: A Savage and Deadly Reality for Men, Women, and Children by Ali Rehan Munir*

[19] *Chapter XVIII: Penal Matters, Trafficking Protocol*

Furthermore, the non participation in this protocol raises issues of a different character. The credibility of any proposed actions that the National Action Plan puts forward must now be scrutinised because of this non participation. So when the Action Plan states that international cooperation will be on the agenda it is difficult to determine the credibility of this claim in light of the fact that the major convention in this regard has not been signed.

It is true however that the National Action Plan does state under the title, 'Campaign Includes' that the Ministry of Foreign Affairs will arrange for the signing of international conventions and protocols but the positive effects of the signing will begin after it has actually been signed and until then the situation of human trafficking will be will be deteriorating, or at best at a standstill.

IV. CONCLUSION

To call human trafficking in Pakistan a problem is an understatement. To say that the current rules governing this area of the law are not effective enough is quite clear from the statistics that researchers have found. The real question however is twofold, **[1]** Can Pakistan reverse the situation of human trafficking? And **[2]** How?

[1] Human trafficking is at a critical point in Pakistan; the amount of people being forced or coerced to join the sex trade is truly astonishing. The difference between the current scenario and a reversal of it cannot be anything less than an overhaul in the thinking process and ultimately in the system of enforcement.

[2] This is a far more difficult and specific question. The first step that the state of Pakistan needs to take is the signing and ratification of the Trafficking Protocol. This is an extremely important step for a number of reasons. Firstly, because it will allow Pakistan greater cooperation with other states to combat human trafficking so as to create a double preventive measure, in the state importing and exporting the trafficking. Secondly, it will give the Pakistani state a model that it can follow whenever it decides to amend or repeal the current outdated legislature on human trafficking.

A positive sign that may be seen in the National Action Plan is the introduction of specialised enforcement authorities for human trafficking cases. An addition to this which should be proposed is the rehabilitation of trafficked prostitutes as well an

attempt to disrupt the trafficking mafia by diminishing the demand for prostitutes by creating greater awareness.

The battle against human trafficking is an uphill one, but it is not one that cannot be fought. Pakistan must show those who compose the nation a higher standard- that this is the only way to abolish this slavery.

DRONES: IMPACT ON HUMAN RIGHTS

Atira Ikram[1]

It is no secret, perhaps even to a child that torture is bad. It is even less of a secret to law enforcers that torture is illegal, but somehow the fact that drone strikes cause inexplicable and inhumane psychological suffering upon its survivors has been completely overlooked by sovereign states and their leaders. The talks are always political, never psychological, because who cares about the "collateral damage" when you can kill dozens of militants with one robotic plane? Do survivors matter? Haven't we done them a favor too? It is these type of deeply disturbing and insensitive remarks that have made drone strikes the norm in military warfare, especially the war on terror, and specifically in Pakistan: where individuals who are fortunate enough not to be incorrectly attributed as terrorists survive, do not often inherit a life worth living. The effects of war have never been pretty, but they have been apparent. However, when the damage is inside and we cannot see it, or substantiate it becomes a whole other problem to fix, and while indifference and silence seem like small prices to pay in such a complicated war, one should consider, what is the price for our silence?

The country which has become both the example and the problem in the War on Terror has been Pakistan, and while there may have been feats in eradicating the Taliban in tribal regions such as Federally Administered Tribal Area (FATA), a closer look will illustrate the defeats are not only worst, rather both unprecedented and undocumented. Those that live in these regions, constantly complain about a buzzing sound heard overhead. This sound triggers massive fear in the children; they run hysterical when they hear the characteristic buzz sound.[2] Imagine the effect this has on the psychology, environment, and living standard for those affected, particularly young children who have already seen such massive warfare and suffered its trauma at such a young age. Unlike deaths and property loss, which may affect one or more families, the fear associated with covert drone strikes affects nearly everyone in a community. The repercussions do not end there, the insufferable trauma of watching individuals die right in front of you, the

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[1] *The author is a final year student pursuing her Law degree from the University of London External Programmes.*

[2] *The Civilian Impact of Drones. (2012). Columbia Law School Human Rights Clinic, 1(1), pp.9-28.*

perpetual fear of when the next drone will strike, is the sound coming from the sky an airplane, or is it a drone strike are all pertinent questions. Is this really the lives we wanted our ally in the war on terror to live? Was our goal to terrorize innocent children and families? To give them a life they would dread living every day? The numbers are easy to calculate when it comes to carnage in war, and easier to repair, whereas the shattered identities become more difficult to rehabilitate. There have also been an increasing number of people living in the tribal areas who are suffering from mental health problems such as depression, anxiety, panic attacks in the aftermath of drone attacks. Mental health professionals are worried that people distressed by drone terror may suffer from long-term ramifications of psychological trauma ranging from post-traumatic stress disorder, emotional breakdowns, and powerlessness.[3] The root of fear lies not only in the consequences of drone attacks, but the inability to locate and predict when the next drone could strike. There is no hint or signal present for innocent bystanders, nor is there any crime committed. It is simply the act of being in the wrong place at the wrong time. How can individuals not suffer from mental malfunctions? They never know whether they are safe or not, whether the buzz is a mosquito or a drone, whether their loved ones are safe or not. When the UDHR was first drafted after WWII, it was to empower individuals to never have to live in the fear and hysteria the Holocaust created. The torture convention (UNCAT) was a further strengthening stone in the same mission, and today in the 22nd century, when the memory of such events has been relegated to textbooks, we are further from the goal than we ever imagined, and the journey to reclaim it has not even begun.

The issue is not of prose alone. There is genuine widespread belief that drone strikes are effective and legal military weapons. They are cost efficient, cause minimal damage, and United States remains committed to the idea that it only strikes and kills real and potential threats to peaceful nations, Pakistan included. Thus, the legal arguments are constructed correctly. However, there is no doubt that words can never do war justice, life is hardly what it seems on paper. In the affected areas doctors have reported a deeply disturbed population. For example, a citizen Mir Ali reports that in addition to the United States bombing his region for nine years, drones fly over his town almost constantly. One psychiatrist reported that many of his patients experience ‘anticipatory anxiety,’ a constant fear that they might come under attack. He also added that patients described emotional breakdowns, running or hiding when drones appear above, fainting, nightmares

[3] *The Civilian Impact of Drones. (2012). Columbia Law School Human Rights Clinic, 1(1), pp.9-30.*

and other intrusive thoughts, hyper startled reactions to loud noises, outbursts of anger or irritability, and insomnia. One victim said: 'we fear that the drones will strike us again… my aged parents are often in a state of fear. We are depressed and anxious.' Those that have lost loved ones are physically and mentally shaken, demanding to be taken to the grave site of their loved ones.[4] An investigator at the UK charity, Reprieve, who met a young man named Tariq Aziz shortly before he was killed in a March 17, 2011 strike, reported: "I asked him, 'Have you seen a drone,' and I expected him to say, 'Yes, I see one a week.' But he said they saw 10 or 15 every day. And he was saying at night time, it was making him crazy, because he couldn't sleep. All he was thinking about at home was whether everyone was okay. I could see it in his face. He looked absolutely terrified".[5] The incidents do not just feel foreign to those living outside of Pakistan's border, but are foreign to many Pakistanis living in urban cities. It is easy to overlook the survivors in war, not examine the quality of life, because it feels that if you survived the war that you cheated death, and as long as you are alive one can come back from anything. However, that is not the case for those living in these regions. For them the torture and the story continues to be one terrible day after the next, hiding under trees, not going to school, not knowing whether to attend the Jirga, whether the individual is an informant or an enemy. In a BBC documentary, an operator of drone bombs was interviewed and said 'Everyone tells you how to do it. No one tells you how to live after.' [6] These were the words of an individual who did not have to live with the consequences of loss of quality of life, rather the person who was asked to do it, imagine the life of those who have to live in constant fear of the next attack. It is not a person, it is not an army, it is not a tangible army, and it is a remote control machine, a toy in simple words here to destroy your inner peace.

While the direct ramifications on the mind of citizens can be related to other war stories, what is most puzzling is the identity crisis the drones have caused within the region. Should I be going to the marketplace, might there be a drone strike leaving nothing but carnage of me either. If I am walking in the market, I have this fear that maybe the person walking next to me is going to be a target of the drone. If I'm shopping, I'm really careful and scared. If I'm standing on the road and there

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[4] Stanford International Human Rights & Conflict Resolution Clinic, (2014). Living Under Drones. New York City: Amnesty International, pp.44-90.

[5] Reprieve.org.uk, (2014). Reprieve. [online] Available at: http://www.reprieve.org.uk/investigations/drones/ [Accessed 18 Apr. 2014].

[6] Drones: What are they and How Do They Work?. (2011). [film] London: BBC.

is a car parked next to me, I never know if that is going to be the target. Maybe they will target the car in front of me or behind me. Even in mosques, if we're praying, we're worried that maybe one person who is standing with us praying is wanted. So, wherever we are, we have this fear of drones. We can't go to the markets. We can't drive cars. When they're hovering over us, we're all scared. One thinks they'll drop it on our house, and another thinks it'll be on our house, so we run out of our houses.[7] Some refuse to leave their houses. Funerals are sparsely attended. Friends no longer visit one another's homes. Yet no one ever feels safe anyway. Some go crazy from the stress. Others just go homeless. The regions the drone strikes take place are known for their extended-extended family nature. Individuals usually live, travel, and work in groups. However, drone strikes have completely altered this bond individuals in the group had to share. Now the idea of travelling in a group is fearsome, because one cannot recognize who would be or would not be a possible target in the missile strikes. While war does inevitably change the lifestyle and workings of any individual or group it effects, it does not so of its allies, and it definitely does not leave individuals torn within itself. The life style these individuals are having to face and live with, of coming home and not having a home, of not being able to partake in religious activities, of not being able to go to the market, these are those types of indiscretions and forms of torture that are used for the most dangerous enemy. Not for citizens that no one is at war with. The high level of civilian trauma has been described by health professionals as surprising. Incidence levels more closely resembled those found in higher intensity conflicts, not of those where war has not been officially waged.[8] The reality is that no one wins in war, but the truth is in this war it seems that our allies are the greatest victims. The conflict in Israel and Palestine has been a constant source of war crimes and consequences for 60 years, the War in Afghanistan too has had its fair share of time, but the case in drone strikes in Waziristan, and other parts of Pakistan should not resemble those areas. There has been a clear declaration of war, though the actions there too are unfortunate, they engage people who are aware of the situation they are living in. Drone strikes in Pakistan have not only left individuals of the land they once loved, but confused about what looms the sky above, and most of all, of the humanity that lives within. There has never been a war, or weapon, that could cause such unfortunate consequences.

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[7] Shaw, I. (2014). The Geopolitics of U.S. Drone Warfare. Predator Empire, 1(1).

[8] Woods, C. (2012). Covert Drone War, Drone strikes in Pakistan. The Bureau of Investigative Journalism, 2(3), pp.44-69.

Undoubtedly, the 'Game of Drones' will continue to take center stage as the war unfolds, but not at the psychological or emotional level it should. Instead, it will be a game of politics, a wager one will use against another, it will be measured in odds, cost/benefit, and the means justify the end. Never against the barometer has which it destroyed peace. This tale is perhaps difficult to comprehend for all those living in urban centers, in safe countries with strong military, far away from the torture of drones, but as Martin Niemoller once warned, *First, they came for the Socialists, and I did not speak out—Because I was not a Socialist. Then they came for the Trade Unionists, and I did not speak out— Because I was not a Trade Unionist. Then they came for the Jews, and I did not speak out— Because I was not a Jew. Then they came for me—and there was no one left to speak.* When the pendulum of history strikes, where will you stand?

DOMESTIC VIOLENCE; A CLASSIC ILLUSTRATION OF THE PUBLIC-PRIVATE DICHOTOMY

Noor Bano[1]

Domestic violence is a plague that has insidiously spread and resulted in the complete and utter oppression of millions of females in Pakistan.

It seems that even the most socially active and vocal voices often ignore this issue since apart from being a taboo subject, its ugliest forms do not touch the wider majority of our elite and intellectual classes. However, the biggest myth that we have been led to believe, until recently, is that domestic violence is born out of poverty and illiteracy and therefore only exists in remote villages amongst uneducated people who don't know any better or are completely unaware of the their legal rights. This myth was shattered when the story of a certain someone surfaced in a newspaper article published in 'The Tribune'– a girl of about twenty years of age, highly educated, quite well-off, belonging to the same social class as many of us, and yet often beaten up by her spouse.

Domestic violence in Pakistan affects not just those living in poverty, as is often portrayed, but also those more privileged – and that too in alarming proportions that cut across all segments of society. Successive governments in Pakistan have made lofty claims to improve the plight of women, but compared to the big promises made in print and electronic media very little is actually done behind the scenes.

CURRENT STATE OF AFFAIRS

According to a study carried out in 2009 by Human Rights Watch, an estimated 70 to 90 percent women have suffered some form of abuse. An estimated 5000 women are killed per year from domestic violence, with thousands of others maimed or disabled. The majority of victims of violence have no legal recourse. Law enforcement authorities do not view domestic violence as a crime and turn a deaf ear to even the most gory and unerring tales. For instance, on 2nd September

[1] The author is a final year student pursuing her law degree from the University of London External Programmes.

1997 at 4 am, a woman named Haleema was sleeping at her home with her 8 year old daughter Kauser, when criminals (her own husband) attacked and burnt Haleema with acid. The police registered an FIR after a great deal of insistence, but to this date the abusers have not been duly punished. Given the lack of women's shelters in the country, victims have limited ability to escape from violent situations. Upto 282 burn cases of women were reported in one province of the country. Out of the reported cases, 65% of victims died of their injuries. A study conducted in Karachi found that a large proportion of women are subjected to physical violence that has serious physical and mental health consequences.[2]

The essential question that then arises is, why despite the existence of domestic legislation and various international conventions such as the CEDAW (Convention on the Elimination of Discrimination against Women) and ICCPR (International Covenant on Civil and Political Rights) do such evils remain?[3] The Domestic Violence Bill of 2012 seeks to prevent violence against women and children with a network of protection committees and protection officers and prompt criminal trials for suspected abusers. The bill defines domestic violence as including, though not being limited to, "all intentional acts of gender-based or other physical or psychological abuse committed by an accused against women, children or other vulnerable persons, with whom the accused person is or has been in a domestic relationship."

The bill requires the court to set a hearing within three days of receiving a complaint and to adjudicate the case within 90 days as per Section 5(4). The law prescribes incremental terms of imprisonment and fines for each breach of a protection order within Section 13 of the Bill. The new domestic violence bill (section 3(2)) coupled with the sexual harassment protections in the Pakistan Penal Code are some of the most impressive and extensive in South Asia and if it displays the will, Pakistan's government can be a regional leader in safeguarding women's rights.

Despite these laws, the ill of domestic violence is still rampant. Clearly it's not only that we fall short of a substantive legislation, but also the ignorance of various other factors that are at the root of this problem. What are these other contributing factors? Research shows that these are factors which are not just glaringly obvious

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[2] Violence against Women in Pakistan: A Framework for Analysis (Journal of Pakistan Medical Association) http://www.jpma.org.pk/full_article_text.php?article_id=1372

[3] http://www2.warwick.ac.uk/study/csde/gsp/eportfolio/directory/pg/asrjac/research/thesis/762650.pdf

but also tend to reveal the naïve understanding that is fostered regarding this issue in Pakistan.[4]

CONTRIBUTING FACTORS FOR THE PREVALENCE OF DOMESTIC ABUSE

It is in fact a set of social and cultural sanctions in Pakistan that lead to domestic violence. A certain mindset is passed down through generations by both the transgressors as well as the victims of this kind of abuse. In Pakistan, it is said that 80% of the women suffer violence of varying degrees in their homes and the matter persists primarily because society condones and defends it, either directly or indirectly. It is a widely accepted form of behavior and a peculiar kind of assertion of masculinity that finds itself entrenched in Pakistani society. Young girls see their mothers going through the same treatment and unknowingly, grow up accepting that to be the norm. There is a silent cry and a wordless longing within many of these women, who wait to creep out of their loneliness and the spheres of their domestic lives. Their voices and eyes depict that they are constantly at war with themselves due to the abuse that they suffer. Examples of such cultural and social barriers that actually such as catalysts for abuse and discrimination include instances of Karo-Kari, honour killings coupled with the concept of blood money spring to mind.[5]

One of the reasons for its persistence is the attitude towards gender violence that categorizes it as a "woman's issue", thereby alleviating men of the responsibility of fixing it, or dealing with it. It gives an excuse to men to tune out the concerns by creating a false perception that it is not their problem; in a way being identical to racial discrimination acts, where races such as the Latino Americans and African Americans were erased as men from the category of the male gender. Through definition, therefore, an exclusion is enabled that makes it okay for men to not treat this as their problem.[6]

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[4] http://edition.cnn.com/2013/06/19/opinion/opinion-domestic-violence-not-private-issue/

[5] Kumaralingam Amirthalingam ,Women's Rights, International Norms, and Domestic Violence: AsianPerspectives http://www.jstor.org/stable/20069801?seq=2&Search=yes&searchText=legal&searchText=violence&searchText=analysis&searchText=domestic&list=hide&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Ddomestic%2Bviolence%2Blegal%2Banalysis%26amp%3Bacc%3Don%26amp%3Bwc%3Don%26amp%3Bfc%3Doff&prevSearch=&resultsServiceName=null

[6] Jackson Katz's ted talk- http://www.ted.com/talks/jackson_katz_violence_against_women_it_s_a_men_s_issue

Why is domestic violence such a big problem? Why do adults sexually abuse women and men, why is it such a common problem not only within our society, but all over the world with new scandals erupting every day? Out of all these questions, the one that is least posed is why do men do this? The way we think and structure our language also conspires to keep our attention off men, particularly with regards to domestic violence issues a point that Catherine Mackinnon also makes in her essay 'Difference and Dominance'.[7] A study carried out by Julia Penelope aptly explained, how the use of linguistics shifts focus off men and allows them to slide off our psychic plane ensuring that the problem of domestic violence is confined to women as opposed to being treated as a gender neutral concern.

Instead of taking part in victim blaming it is vital to investigate the role of institutions that result in the birth of abusive men? The role of religious beliefs, sports culture, pornography culture, race and ethnicity and economics in the escalation of domestic violence is inalienable. It cannot be denied that all these factors mould our ideologies therefore it is essential that we try and decipher how to change these from the grass root level in order to achieve the goal of reducing instances of domestic violence and where they occur to ensure that are brought to the forefront and are not unpunished. [8]

The attitudes of men and the society at large needs to be moulded against the common narrative of 'don't challenge the status quo'. Women ought to be empowered, but alongside them men must also take a stand against domestic violence. The advantage of being a man in Pakistan is that men say things women can't say and are often heard saying things women aren't heard saying. Therefore, this problem of sexism must be appreciated in a way and men must stand up and help women by using their linguistic prowess to approach and speak about taboo subjects publicly. If anything it is a problem that equally impacts both the genders; the effect of these acts on some little boys who grow up seeing what an adult man does to his mother or sister is deep.[9] As a society, we have such predilections for systems, culture and abstract deductions that we are ready to distort the truth intentionally; ready to deny the evidence of our senses only to justify our

[7] Catherine A. Mac Kinnon, Difference and Dominance: On Sex Discrimination,[1984] http://politicalscience.tamu.edu/documents/faculty/MacKinnon-Difference_and_Dominance.pdf

[8] Martin Bagot, 'Domestic violence incidents soar by 38% in five years - to one attack every 37 SECONDS ' http://www.mirror.co.uk/news/uk-news/domestic-violence-figures-incidents-soar-3160438#ixzz2zX8DiLXh

[9] Catherine A. Mac Kinnon, Difference and Dominance: On Sex Discrimination,[1984]

traditions. We have only to look about us and realize that lives of women are being spilt in streams, and in the merriest way, as though they were simply insignificant.

It is the same system that also produces male victims, victims of violence perpetrated by men, even though on a far lower scale as some feminists would argue. The issue of domestic violence must be viewed as the whole spectrum as opposed to in a binary method since both genders form the social school in which peer relations cultivate and socialization takes place and one can't afford to be a bystander in such circumstances. Discrimination exists to such an extent that even though the violence committed is equal in nature to both the male and female victim involved, female victims are more ostracized.[10]

PROPOSALS FOR COUNTERING DOMESTIC VIOLENCE

How do we not remain silent in the face of violence is the consequential query? At a general level we must consider ourselves to be duty bound per se to interrupt that anti-sexist comment like one would with an anti-racist, not because it is illegal, but because it is unacceptable and wrong in the peer culture.

Change can be brought about in two ways; either through social inertia or through progressive legislation. We've seen how the former comes into play; let us now consider the weightage of legislative reforms.

We see that the legal ramifications of domestic violence are not as strong or dire as they should be. One of the primary reasons for this is government inability. Parliaments are leaning towards stances that are shying away from the issue at hand. The election of a much more conservative PML-N government as opposed to last terms more liberal PPP government, means that the voters and as a result the legislature is not giving the adequate priority to issues such as domestic abuse as they believe that their voter base consists of a minority of those affected by this matter. Even in the most evolved democracy such as the US, this issue is being sidelined as a victim of partisan politics between the democrats and the republicans within the senate.[11] How do they then expect a new democracy like Pakistan to give this issue the importance it deserves? In the face of this we need to recognize the need for a progressive legislation and force for one to be formalized. The state needs to take a bold step and legislate laws which are against the social consensus

[10] Michael Freeman, Lloyd's Introduction to Jurisprudence (Chapter on Feminism)

[11] [source : http://www.washingtonpost.com/local/virginia-politics/republicans-cry-foul-over-death-of-domestic-violence-bill/2014/02/19/22179b94-99ae-11e3-b931-0204122c514b_story.html]

and aim of which is to guide the society into the desired direction. This direction is right in the judgment of the state which has been entrusted by the people to make such value judgments on their behalf so in a way it is the state's responsibility to progressively legislate where it think it's necessary and petty politics should be set aside as it is one of the means of ultimately changing social perceptions and eradicating domestic violence.

The cultural interpretation of the institution of marriage too, is to blame for the acceptance of this social evil. It is a general belief that marriage is for life and must be preserved at all costs. Therefore, it becomes culturally unfeasible to escape a marriage and this inflexibility affords obligation to remain tolerant of conflict or assault. Our society views divorce or separation with scorn, especially if it is initiated by a woman; a woman needs to go to court to get a divorce, a man does not. It therefore becomes highly crucial to uphold the family and the marriage and this leaves no option for suffering women. They must stay silent about their ordeals and accept them as a part of life. It must also be heeded that because our so called 'experts on religion' speak with such a predominantly male voice that it just ends up using religion to repress women. Consider the fact that many clerics have advocated that Islam allows you to beat your wife. This, in a fiercely religious state, would have the effect of ratifying domestic violence in the garb of religion. As they absorb the idea into their marriages, they tacitly consent to beatings and violence.[12]

This common perception may be challenged and reconciled with preventative measure by using the concept of 'dhara' which means harm. This is used by Pakistani courts as a ground for dissolution of marriage allowing recourse while remaining within the bounds of Shariah law. Courts have held that dhara includes both physical and psychological harm and so why can't the same principle be extended to domestic violence? Islam has already provided a principle to curb domestic violence then why are we using the pretext of religion to neglect such a big issue.

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[12] Lisa Hajjar, Religion, State Power, and Domestic Violence in Muslim Societies: A Framework for Comparative Analysis http://www.jstor.org/stable/10.2307/4092696?Search=yes&resultItemClick=true&searchText=Religion_State_Power_and_Domestic_Violence&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3DReligion_State_Power_and_Domestic_Violence%26amp%3Bprq%3Dhttp%253A%252F%252Fwww.academia.edu%252F4843302%252FReligion_State_Power_and_Domestic_Violence%26amp%3Bhp%3D25%26amp%3Bacc%3Don%26amp%3Bwc%3Don%26amp%3Bfc%3Doff%26amp%3Bso%3Drel%26amp%3Bracc%3Doff

Acceptance of abuse as part of marriage also stems from lack of knowledge of the rights to which women are entitled. This lack of awareness of an avenue or a mode of protection for them is also why victims of domestic abuse do not report instances that arise.

Misconceived notions regarding the contract of marriage have also assisted in perpetuating the act of domestic violence. Contracting parties feel that acts of violence as long as shrouded by the veil of marriage will remain 'domestic' in nature, one out of which the issue of violence is ignored merely because it takes place in a controlled environment into which the state is not allowed to transgress; allowing the family to operate on a 'don't ask don't tell' policy much like the US army, which makes it very hard for a woman to come out in the open about their sufferings. The socio-economic dependency on the husbands and the illiteracy these women are victims of, makes them much more susceptible to exploitation, of which domestic abuse is a prime example. Furthermore, the idea of bringing shame to the family name and the values attached by the society to a woman whose marriage failed and therefore the threat to her reputation, poses as another nuisance due to which women hesitate from revealing their woes. As a result of the inability to strengthen or in some instances even introduce and in others redefine what constitutes domestic violence, women are attacked 38% more than in 2008, and these are just the reported numbers. Every 37 seconds a domestic violence instance takes place in the UK, only 30% of the reported cases end in an arrest and only 16% end in a charge [13] and this is a country with one of the most advanced legal and law enforcement systems in the world.

Four pronged strategies ought to be adopted to address violence, i.e., (a) legislative action, (b) training and awareness, (c) support service, through crisis intervention and rehabilitation center, crimes against women cells, strict enforcement of poverty alleviation programmes, enhanced opportunities for education of girls, proactive measures by enforcement machinery with participation of NGOs and (d) action at social level such as encouraging NGOs to generate public opinion on law enforcement agencies, self help groups of women, organizing gender awareness week, etc. All women police stations should be set up in cities to facilitate in the reporting of crimes against women. Help line cells in police stations ought to be set up to address calls regarding incidence of violence against women. Voluntary Action Bureaus and Family Counseling Centers should be set up in police stations

[13][source : http://www.mirror.co.uk/news/uk-news/domestic-violence-figures-incidents-soar-3160438]

to provide counseling and rehabilitative services to women and children who are victims of family maladjustment. Special Courts, viz., Family Courts and Fast Track Courts must be set up and some courts must be assigned exclusively to address crimes against women. Gender sensitization of enforcement agencies especially the police and the judiciary should be imparted periodically.

The National Policy for the Empowerment of Women, 2001 commits to address all forms of violence against women, physical and mental, at domestic and societal levels, including those arising from customs, traditions or accepted practices, with a view to eliminating its incidence. It further commits to create and strengthen the existing institutions and mechanisms for prevention of such violence including sexual harassment at the work place, customs like dowry, and rehabilitation of the victims of violence and for effective action against the perpetrators of such violence and special measures to tackle trafficking in women and girls.[14]

Therefore, not only should such administrative and legislative steps be put in force, but the sociological and religious deficiencies must also be catered towards in order to achieve substantial progress in addressing the matter of domestic violence and the violation of fundamental human rights.

We must condemn all forms of human suffering, even if, in a twisted way, it provides men with a confirmation of their masculine identity. We must discontinue fashioning nature to suit our fancy and cultural prejudices. We should instead grow progressively and positively, shunning all cultural and social bigotries that exist in our attitudes towards women. We must stop cradling domestic violence; we must burn it down to its roots and prevent it from wrapping its tight branches around our nation. Let the clarion call be heard.

[14] http://daccess-ddslation o-ny.un.org/doc/UNDOC/GEN/N07/398/67/PDF/N0739867.pdf?OpenElement