ARTICLES

• Drones: Targets, Civilians and Operators (Andrew G. Jones)

• The Evolution and the Role of Individual Complaint Mechanisms in International Human Rights Law and the Status of Pakistan (Syed Muhammad Farrukh Bukhari)

• The Role of Qisas and Diyaat in Facilitating Honor Killings (Shehreyar Khan)

• Counter-Terrorism and Human Rights: A Review of the ATC Trial Procedure in Pakistan (Zainab Mustafa)

• Deprivation of Liberty During Investigation, Preventive Detention and Internment (Minahil Khan)

• Negotiations Between India and Pakistan over the Kashmir Issue (Mehak Mubin)

• The WTO and its Failure to Create a Level Playing Field for Developed and Developing Nations (Zarmala Tashfeen)

STUDENT NOTES

• Restitution of Conjugal Rights under Islam (Maha Ali)

• An Analysis of the Acceptable Standards for Living Conditions, Solitary Confinement and Unlawful Detention (Ahmed Farooq and Haniya Hasan)
RSIL Law Review

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Submissions: The Editors of the RSIL Law Review invite the submission of articles. Articles will be accepted with the understanding that the content is unpublished previously. The RSIL Law Review seeks to publish work that displays excellence in both written English and legal academic analysis. The submission of articles that use creativity, a trans-disciplinary approach or address comparative law issues as they relate to international law and domestic issues of international relevance is also encouraged. RSIL accepts student notes (up to 2500 words) and full-length articles (4000 – 9000 words). All those interested, should submit an abstract/articles for review through the submission form available on our website journal.rsilpak.org.

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# TABLE OF CONTENTS

**EDITOR’S NOTE**

_Hafsa Durrani_................................................................................................................6

**ARTICLES:**

**Drones: Targets, Civilians and Operators**

_Areward G. Jones_........................................................................................................8

**The Evolution and the Role of Individual Complaint Mechanisms in International Human Rights Law and the Status of Pakistan**

_Syed Muhammad Farrukh Bukhari_........................................................................22

**The Role of Qisas and Diyaat in Facilitating Honor Killings**

_Shehreyar Khan_........................................................................................................38

**Counter-Terrorism and Human Rights: A Review of the ATC Trial Procedure in Pakistan**

_Zainab Mustafa_...........................................................................................................57

**Deprivation of Liberty during Investigation, Preventive Detention and Internment**

_Minahil Khan_.............................................................................................................72

**Negotiations between India and Pakistan over the Kashmir Issue**

_Mehak Mubin_.............................................................................................................95
THE WTO AND ITS FAILURE TO CREATE A LEVEL PLAYING FIELD BETWEEN DEVELOPED AND DEVELOPING NATIONS

Zarmala Tashfeen

STUDENT NOTES:

RESTITUTION OF CONJUGAL RIGHTS UNDER ISLAM

Maha Ali

AN ANALYSIS OF THE ACCEPTABLE STANDARDS FOR LIVING CONDITIONS, SOLITARY CONFINEMENT AND UNLAWFUL DETENTION

Ahmed Farooq and Haniya Hasan
Editor’s Note

The RSIL Law Review is proud to present its second publication. This issue contains seven articles and two student notes. All nine pieces are a display of the diverse and creative scholarship flourishing in today’s Pakistani legal fraternity.

Andrew G. Jones, a PhD candidate of the Chine University of Political Science and Law, discusses in his article the legality of armed drones as being used for both military and civilian operations. The article focuses on the individual human elements of drones as well as the legal consequences individuals face because of the use of this new technology.

Syed Muhammad Farrukh Bukhari, a PhD scholar at the Istanbul University, writes in great detail about the development and incorporation of the Individual Complaint Mechanism (ICM) as a tool to realize the rights granted under several human rights conventions. He discusses the procedure of the ICM as well as its significance within the United Nations Human Rights Enforcement System.

Shehreyar Khan, a graduate of the University of London External LL.B program, provides a critical analysis of the qisas and diya laws in light of Pakistan’s obligations under international human rights law.

Zainab Mustafa, a Research Fellow at the Conflict Law Center of RSIL, in her article maps out the investigation and trial procedure of offences under Pakistan’s Anti-Terrorism Act 1997. She provides an in-depth review of the entire process while highlighting the defects prevalent in the system at each step of the way.

Minahil Khan, fellow Research Associate at the Conflict Law Center of RSIL, explores and analyzes the different domestic legal frameworks that are employed to detain individuals in Pakistan. Her article focuses on how the two primary mechanisms of detention- ‘arrest, remand and bail’ and ‘preventive detention’- are often used indiscriminately and arbitrarily, undermining their effectiveness and legitimacy.

Mehak Mubin, a practicing lawyer, reviews all the negotiations and agreements that have been held between India and Pakistan regarding the Kashmir issue. She explains the various strategies adopted and analyzes their varying levels of success.

Zarmala Tashfeen, a Law Clerk at the Supreme Court of Pakistan, discusses in her article how the World Trade Organization (WTO) has at times failed to provide a level playing field between developed and developing nations, by enacting rules that seem to have benefitted the richer countries more than the poorer countries.

This Issue includes two student notes, the first note by Maha Ali, discusses the origin and evolution of the legal remedy known as the restitution of conjugal rights, in matrimonial
issues. The second note, co-authored by Ahmed Farooq and Haniya Hasan, analyzes the acceptable standards for prisons and detention institutions prescribed under various laws of Pakistan and to what extent they are being implemented.

I am grateful to the entire Board of Editors for their hard work in reviewing and editing the articles. Also I am immensely grateful to Mr. Ahmer Bilal Soofi and Mr. Jamal Aziz, for their constant support and guidance throughout the process.

Hafsa Durrani
Managing Editor
Feb 2018

*RSIL Law Review*
Drones: Targets, Civilians and Operators

Andrew G. Jones*

INTRODUCTION

The use of armed unmanned aerial vehicles (drones) has been the subject of much discussion since the beginning of the new millennium. Drones have given military forces a new tool to carry out attacks previously beyond their capabilities. Further, these technologies have enabled them to do so without the traditional risk to soldiers and other personnel. Commentary around the use of drones has raised a number of issues and avenues of discussion on their use, many focusing on the where, when and how they are used, and the extent to which they comply with international law. This paper does not consider such issues, but instead looks at the people involved; the individuals on either side of the camera of a drone.

For the purposes of this study, the focus will be on the use of drones by US forces in its so-called ‘war on terror’ after the 9/11 attacks. Drones have been used as a method of carrying out lethal operations in a number of states in which the US has targeted people they consider members of terrorist organizations with whom they claim to be engaged in this armed conflict.1 Consideration will not only be given to those being targeted and killed but also those who endure life under the constant presence of drones and those on the other side of the controls.

Firstly, those being targeted will be considered, what the targeting procedures which single them out are, their status under international law and what, if any, benefit is gained through targeting them. Secondly, consideration will be given to the civilians who are injured and killed during drone strikes and the scale of collateral damage that is caused, as well as the effects living under the threat of drone attacks has on the rights of those not being directly targeted. Finally, those who control drones, both military and civilian operators, will be reviewed, and what repercussions their involvement in strikes has under international law.2 This will include an insight into the issues that have arisen around the use of drones in deadly operations which, it is suggested, has made it easier to order the use of lethal force3 and has de-humanized conflict through the separation of those carrying out strikes and those being targeted. The purpose of these topics will be to develop an idea of the effect and legality of drones from the perspective of individual people who find themselves under their influence, whether voluntarily or not.

* Andrew G. Jones holds a master’s degree in international law from Bangor University, UK and is currently a PhD candidate of China University of Political Science and Law.


1. **The Targets**

The first section of this brief study deals with those who are targeted by drones. There are a number of issues which arise when considering these individuals; the status of those being targeted under international law, whether they could be considered legitimate targets in the circumstances strikes occur or whether they should be protected against attack. Further there is the issue of whether the strikes are having any real effect on the organisations they seek to disrupt, or whether they are, as some have insisted, counterproductive in their fight against terrorism.\(^4\)

1.1. **Legitimate Targets**

Beginning with an evaluation of those being targeted, we must look at who can be legitimately targeted by those employing lethal force. The US considers itself to be engaged in an armed conflict against al-Qaeda and associated forces as a measure of self-defence against the threat these actors pose to the US and its citizens. This basis has been used as a further justification for the targeting of specific individuals, even when they are located outside of the zone of active hostilities.\(^5\) According to a US Department of Justice White Paper, the US can legitimately target individuals in the situations considered in this study.\(^6\) The White Paper points out that where the US is engaged in an armed conflict in self-defence after 9/11, such as the conflict in Afghanistan, the use of force against enemy personnel is justified.\(^7\) While this is an acceptable stance in that where an armed conflict exists lethal force against enemy combatants is legitimate, the White Paper also asserts that outside the zone of active hostilities “the United States retains its authority to use force against al-Qa’ida and associated forces… when it targets a senior operational leader of the enemy forces who is actively engaged in planning operations to kill Americans.”\(^8\) The consequence of this being that the US would be justified in targeting any individual anywhere, under the umbrella of its non-international armed conflict with al-Qaeda and associated forces, provided those targeted are senior operational leaders actively planning operations to kill US citizens.

In order for the US to legitimately target suspected terrorist leaders during an armed conflict, it must be shown that they can be considered enemy combatants\(^9\) or civilians directly participating in hostilities.\(^10\) In other words, operators must ensure that targets are members of an organized armed group, have a continuous combat function or are directly participating in the armed conflict.\(^11\) In the case of carrying out targeted killings

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4 Peter Bergen & Katherine Tiedemann, ‘The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan 2004-2010’ (New America Foundation, 24 February 2010); “U.S. drone strikes don’t seem to have had any great effect on the Taliban’s ability to mount operations in Pakistan or Afghanistan or to deter potential Western recruits, and they no longer have the element of surprise.”


6 ibid, 7-26

7 ibid, 9-10

8 ibid, 10

9 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [1977] 1125 UNTS 3 (API), art 43(2)

10 ibid, art 51(3)

against a member of al-Qaeda, there are a number of difficulties in fitting individual members with these requirements. Firstly, members of al-Qaeda are not members of State armed forces meaning that they are not combatants since, by its nature as a transnational terrorist network, al-Qaeda does not have an organized command structure. Indeed it has been pointed out that “al-Qaeda and other alleged “associated” groups are often only loosely linked, if at all. Sometimes they appear to be not even groups, but a few individuals who take “inspiration” from al-Qaeda.” To hold then that members of such groups are part of an organized armed group can be very problematic given the nature of terrorist organizations. In addition to this, the requirement of the individual target being one that has a continuous combat function or someone directly participating in the conflict presents its own obstacles.

In the case of terrorist actors, the difficulty in labelling them as having such status was examined by the Israeli High Court in 2006. The Court stated that “a civilian who joins a terrorist organization that becomes his home, and…carries out a series of hostilities, with short interruptions between them for resting, loses his immunity against being attacked for such time as he is carrying out the series of operations.” The court went on to point out, however, that care must be taken around the term ‘for such time’, highlighting that:

“[o]n the one hand, a civilian who takes a direct part in hostilities on a single occasion or sporadically, but has severed his connection with them (whether entirely or for a lengthy period), should not be attacked. On the other hand, we must avoid a phenomenon of the revolving door, whereby every terrorist may invoke sanctuary or claim refuge while he is resting and making preparations, so that he has protection from being attacked.”

This judgment makes clear the principle that a member of a terrorist group can only be targeted where they are a continuous member of the organization, and further that each case must be considered on its merits with the targeting belligerent possessing clear evidence as to the status of the individual. Therefore, when legitimizing a targeted killing, unless it can be shown that the target is still a member of an armed group, past participation in completed terrorist attacks cannot be used to show a combat function.

1.2. Required Precautions

Even where the US can justify its use of force against a target, international law places a number of requirements regarding precautions that must be taken. The principles of necessity and proportionality are key considerations in any attack, and are widely

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15 The Public Committee Against Torture et al. v. The Government of Israel [2006] Israel High Court of Justice HCJ 769/02
16 ibid, [39]
17 ibid, [40]
18 ibid
19 Breau & Aronsson (n 12) 285
discussed. In addition, it must also be ensured that each strike distinguishes between legitimate military targets and civilians.\textsuperscript{20} While the preceding paragraphs have dealt with how to establish whether a member of a terrorist group can be considered a target, a further problem is that many conceal themselves amongst the civilian population to shield themselves from attack.\textsuperscript{21} Although using civilian populations to shield oneself is a breach of international law,\textsuperscript{22} States are not released from their burden to ensure that civilian casualties are minimised so as to be proportional to the elimination of the target.\textsuperscript{23} Therefore, when authorising a strike, all available information must be considered so as to establish the true situation on the ground. It is here, perhaps, that drones do provide some true advantages over many other methods of attack. Advanced sensors, coupled with the ability to observe for extended periods of time, allow for a comprehensive assessment of the target before a strike is carried out.\textsuperscript{24} However, a view from a camera can only provide so much; drone operators also have to rely on intelligence collected on the ground to establish who they are targeting. As Alston puts it, “[t]he precision, accuracy and legality of a drone strike depend on the human intelligence upon which the targeting decision is based.”\textsuperscript{25} Unfortunately there have been a number of instances in which the capabilities and intelligence available to drone operators has failed to distinguish between civilians and combatants.\textsuperscript{26} While drones can provide some advantages and safeguards to distinguishing between military and civilian persons, they are not beyond reproach in that ability.

1.3. Effectiveness of the Campaign

Finally, we turn to whether, even when a target is legitimate, targeted strikes are having the desired effect of disrupting and eliminating the threat posed by terrorist organisations. As previously mentioned the purpose of US strikes has been to eliminate high level operational leaders of al-Qaeda or associated forces so as to remove the threat they represent. While this goal is understandable in terms of military strategy, it has been noted that even a high-level leader is killed; the effect on the organisation or workings of the terrorist group is not overly dramatic since there are always others to replace them.\textsuperscript{27} This begs the question, how can strikes be deemed militarily necessary where they do little more than change the name on a US target list? In addition to this, commentators have further pointed out that drone strikes have been counterproductive since they result in increased negative views of the US within the areas they are employed, and have resulted in increased recruitment into terrorist organisations and violence.\textsuperscript{28}

\begin{thebibliography}{99}
\bibitem{API} API, Art 57(2)(i)
\bibitem{21} 22 API, Art 51(7)
\bibitem{22} 23 ibid, Art 51(8)
\bibitem{24} 25 Alston Report (n 15) [81]
\bibitem{25} 26 Mayer (n 3); An example of 3 men killed by a drone in Afghanistan, one of whom was thought to be Osama Bin Laden. After the strike it was discovered that they were in fact innocent villagers gathering scrap metal
\bibitem{27} 28 Peter Bergen & Katherine Tiedemann, ‘Washington’s Phantom War: The Effects of the U.S. Drone Program in Pakistan’ [2011] 90 Foreign Aff. 12, 14
\end{thebibliography}
frequency of drone strikes in some areas may have even resulted in militants leaving those areas to safer regions, which has in turn further disrupted already unstable areas. These criticisms of the US drone program, while not entirely issues of law, point to the fact that the justifications used are not as reliable as some would like. Drones do have some advantages as a tool of war, but in the realm of counterinsurgency they may be more problematic than helpful.

2. CIVILIANS

The targeting of suspected terrorists, legal or not, is only one controversial factor in this area. Possibly one of the main criticisms of the US drone program has been that drone strikes have caused disproportional and unacceptable levels of collateral damage. This problem has been observed by numerous commentators relying on a number of sources to gain data. While these sources tend to disagree on the exact number of civilian casualties, none, or at least very few, attempt to claim that drone strikes are not causing collateral damage, and most clearly show that strikes are killing many more than simply the senior ranks of terrorist organisations. Even if the use of drones in targeted killing operations in general were deemed to be lawful, their use would still have to comply with a number of basic principles of international law; they would have to be necessary, proportional and would have to distinguish between those being targeted and innocent bystanders who should be protected from harm. As well as harm caused to civilians who are caught in drone strikes, there are also impacts for all those living within the affected areas. With drones constantly present and strikes occurring without warning, reports have shown that civilian populations are being deprived of various human rights as a direct result of the US drone program. As will be shown, drones cause damage to more than just those hit by their weapons.

2.1. Casualty Rates

One of the main difficulties in exploring this area of the discussion is the nature of the US drone program as a ‘covert operation’ which has left the world largely in the dark over the true impact of strikes. The lack of transparency the US has demonstrated over its drone strikes has been described as the foremost challenge in assessing their legality.

29 Bergen & Tiedemann (n 5) 5
30 ‘Drone Warfare’ (The Bureau of Investigative Journalism) <https://www.thebureauinvestigates.com/projects/drone-war> accessed 15 December 2017; At the time of writing records 7,207-10,511 killed in total of which 737-1,551 were civilians and 242-330 children
32 Scott Shane, ‘C.I.A. is Disputed on Civilian Toll in Drone Strikes’ (The New York Times, 11 August 2011) <http://nytimes.com/2011/08/12/world/asia/12drones.html?pagewanted=all&_r=0> accessed 10 May 2017; Official US figures have claimed that strikes have caused no collateral damage, e.g. “since May 2010, C.I.A. officers believe, the drones have killed more than 600 militants- including at least 20 in a strike reported Wednesday- and not a single noncombatant.”
33 Bergen & Tiedemann (n 29) 12; “On average, only one out of every seven U.S. drone attacks in Pakistan kills a militant leader. The majority of those killed in such strikes are...low-level fighters, together with a small number of civilians”
34 Cavallaro, Sonnenberg & Knuckey (n 32) vii
35 Moyer (n 3); “The program is classified as covert, and the intelligence agency declines to provide any information to the public about where it operates, how it selects targets, who is in charge, or how many people have been killed.”
36 Cavallaro, Sonnenberg & Knuckey (n 32) 4
Further to this, attempts to accurately document such damage is further frustrated by the efforts of governments, as it is in Pakistan, to prevent independent observers from entering certain regions. Despite these obstacles, as well as a number of others, there are sources and reports which demonstrate the scale of the problem as well as some well documented examples of strikes which provide illustrations of the controversies surrounding drones.

To begin this discussion, a look at the differing death toll figures is helpful to gauge the true extent of the problem. As pointed out above, the numbers tend to vary, in some cases significantly, depending on the source being used. An extreme example to illustrate this point is the fact that the US government insists that civilian casualties from drone strikes are only in double figures whereas independent investigations by organisations, such as the Bureau of Investigative Journalism based in City University, London, have placed the death toll among the civilian population at a much higher level. Their report in 2011 stated that “[s]ome 175 children are among at least 2,347 people reported killed in US attacks since 2004. There are credible reports of at least 392 civilians among the dead.” This example shows that while the official reports paint a picture of very low levels of civilian deaths, the truth may be very different. Another report published by the New America Foundation placed civilian casualties at an average of 32% from 2004-2010. Granted this means that two thirds of those killed are militants, but this number is still high, especially considering the argument that drones are such precise tools and reduce collateral damage compared to alternative methods of attack. The fact that drones are causing less civilian casualties than may occur in an air strike from a fighter jet does not justify them. The law in this area is that of proportionality in attack. API states that “[a]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated” is considered indiscriminate. This does not require there to be no civilian casualties, but ensures that any collateral damage is not disproportionate to the military advantage sought. In an operation where “there must be near-certainty that no civilians will be killed or injured”, a 32% civilian fatality rate is rather high, especially given that accompanying this figure is the fact that most of the other 68% are not the senior leaders the US cites as its actual targets, but instead low-level fighters.

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37 ibid, 26
38 ibid, 4-5
39 Shane (n 33); “American officials… say it has killed more than 2,000 militants and about 50 noncombatants since 2001”
41 Bergen & Tiedemann (n 5) 3
42 Barack Obama, Remarks of President Barack Obama’, (National Defense University, 23 May 2013); “Conventional airpower or missiles are far less precise than drones, and likely to cause more civilian casualties and local outrage”
43 API, Art. 51(5)(b)
44 Obama (n 43)
45 Bergen & Tiedemann (n29) 12
2.2. Targeting Baitullah Mehsud

One widely reported strike demonstrates, in the opinion of the author, a clear example of the disproportionate nature of drone strikes. In August 2009, a strike in South Waziristan, Pakistan, killed Baitullah Mehsud while he was sheltering in a remote farmhouse.\(^{46}\) Mehsud was the leader of the Pakistani Taliban, in command of up to 20,000 militants, and at the time, one of the most wanted militants in the country.\(^{47}\) Undoubtedly, Mehsud qualified as a senior leader of the Taliban. Therefore, targeting him, if the justifications the US provides for its drone campaign are to be accepted, was a legitimate action. However, the actual circumstances of the strike alter the perception of the operation.

Firstly, it is worth noting that before he was killed there were 15 strikes targeted at Mehsud over a period of 14 months, killing between 217 and 321 people.\(^{48}\) Regardless of the desirability of his removal, these are staggering statistics for the killing of one man. On the 16\(^{th}\) occasion, Mehsud was in his father-in-law’s house with one of his wives.\(^{49}\) It is reported that he was located on the roof of the property while receiving treatment via an intravenous drip from his uncle, a medic.\(^{50}\) Further to Mehsud and his uncle, his wife, her parents, seven body guards and a Lieutenant were present at the time of the strike.\(^{51}\) While targeting Mehsud himself may not seem problematic; it has been suggested that he should in fact have been considered hors de combat, and therefore not targetable, since he was receiving medical treatment at the time.\(^{52}\) For its part, this may be a legitimate point; it is prohibited to attack a person who is defenceless due to wounds or sickness.\(^{53}\) However, this argument is not entirely convincing given that the final requirement to be considered hors de combat is that the individual abstains from any hostile act.\(^{54}\) As Dr Robert Barnidge of Reading University has pointed out, given Mehsud’s experience and capabilities, he “would not have left himself exposed and defenceless in a region known for American drone strikes”.\(^{55}\) Further to this, the presence of the lieutenant and bodyguards suggests he was conducting military matters when the attack occurred, and thus not abstaining from hostile acts.\(^{56}\) While this view does represent a realistic appraisal of the situation, the fact that Mehsud was a legitimate target does not mean that the strike could go ahead regardless of other factors.

The fact is that the strike killed eleven other people, three of whom could easily be considered civilians. Dr Barnidge argues that the bodyguards and lieutenant were

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\(^{48}\) Mayer (n 3)

\(^{49}\) O’Connell (n 28) 11

\(^{50}\) ibid

\(^{51}\) Mayer (n 3)

\(^{52}\) O’Connell (n 28) 25


\(^{54}\) ibid, Rule 47


\(^{56}\) ibid
legitimate military targets, and even if it was deemed that Mehsud was not, a strike would have been proportionate had it only been targeted at them. On the flip side of this, Prof. Mary O’Connell argues that those individuals were not at the time directly participating in hostilities and so could not be targeted. Regardless of this particular argument, the fact remains that the US insists its strikes are only carried out against senior operational leaders and when there is near certainty that no civilian casualties will occur. On this basis, Mehsud was the only legitimate target, and the attack was carried out with full knowledge that civilians were present and would be killed, therefore making the strike a clear example of disproportional use of force.

2.3. Denial of Human Rights

As well as creating disproportionate levels of collateral damage, the US drone program has created a situation that is affecting the enjoyment of human rights for those on the ground. While further analysis of these aspects of the drone operations is beyond the scope of this research, it is useful for an overview of all the legal ramifications to at least highlight the effects on the ground.

Interviews with civilians paint a picture of a situation in which they are unable to continue with various aspects of their life, and are deprived of a number of rights. The study speaks of financial and economic hardships from the destruction of their homes, the loss of wage earners and medical costs they incurred when families are injured. As a result, children have been pulled out of education to compensate for lost income or to care for injured relatives, further damaging the already low literacy rates of the region. Encapsulated in the ICESCR, the right to education is not only about learning but is important for developing personality, a sense of dignity, respect for human rights and enables participation in society, strengthening tolerance and friendship. In areas where violence and intolerance have caused many of the problems people now face, these factors are more important than ever. In addition to lost educational opportunities, fear and stress, as well as mental health problems, have resulted from the constant presence of drones and drone strikes. This is taking away the right to enjoy the best attainable standard of health, both physical and mental. Further, the impact drones have had on people is far reaching, from causing widespread fear in the population, preventing religious activity such as attendance at funerals, to creating a situation in which they are unable to continue with economic, social and cultural activities. Drone campaigns like the US’s in Pakistan are damaging States and their populations through more than just

57 ibid
58 O’Connell (n 28) p25
59 Obama (n 43)
60 See generally Cavallaro, Sonnenberg & Knuckey (n 32)
61 ibid 77
62 ibid 89
63 ibid 88
65 ibid, Art 13(1)
66 Cavallaro, Sonnenberg & Knuckey (n 32), 82-83
67 ICESCR, Art 12(1)
68 Cavallaro, Sonnenberg & Knuckey (n 32), 92-95
69 ibid 95-99
killing, it is creating a situation in which innocent civilians are unable to live for fear of death.

Such impacts do not necessarily influence the legality of these campaigns, it is nonetheless important to note these effects. Where a situation qualifies as an armed conflict, with humanitarian law taking precedence, the constant threat of drones may not be particularly, nor legally, different to the threat presented by other, more conventional means of attack. However, where situations do not easily fit under the accepted definitions of armed conflict, with human rights law generally applicable, the continuous presence of a deadly threat which prevents individuals from enjoying their rights, even where no attack actually occurs, could amount to a breach of international law on the part of the operating State.

3. OPERATORS

The final area of this brief study concentrates on those who operate drones and carry out strikes. Again there are a number of issues surrounding these actors which are important for the legitimacy of the drone program; firstly, it is commonly known that the US has operated two drone campaigns, one military and one controlled by civilian personnel in the CIA. While the military operation is not overly problematic; within an armed conflict they are entitled to target enemy combatants with lethal force, the CIA operations are not so easily justified. The use of lethal force by civilians in both armed conflict and peace time is generally limited making the CIA program controversial. In addition to this, commentators have suggested that the use of drones to carry out lethal strikes has made the decision to kill much easier since a State’s own personnel are not in danger and those carrying out the attacks are detached from them, creating a ‘video game’ mentality in drone operators.

3.1. Civilian Participation in Hostilities

Turning first to the issue of civilian operators, as mentioned, use of lethal force by civilians is generally restricted regardless of the situation (whether peace or war) meaning that there has been some controversy surrounding the use of civilian operatives to carry out drone strikes. In an armed conflict, the only actors permitted to use lethal force are those considered combatants, a status only afforded to those considered to be a member of a states armed forces, militias or volunteer corps. Those not falling into this category are considered to be civilians and given a general protection from deliberate attack during armed conflict. This protection, however, exists provided that civilians do not directly participate in hostilities. In the case of civilian operatives in the CIA, they

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70 Mayer (n 3)
71 Only self-defence to prevent death or serious injury, and never as the purpose of the mission.
72 O’Connell (n 4) 134; “no boots on the ground, has been a significant political factor in the use of drones in Pakistan”
73 ibid 138
76 API, Art 48, 51(1); Rome Statute of the International Criminal Court (adopted 17 July 1988, entered into force 1 July 2002) A/CONF.183/9, Art 8(b)(i)
77 API, ibid, Art 51(3)
cannot be considered to fall under the category of combatants since “while they do report to a responsible chain of command (albeit not always a military chain of command), as a group they do not wear uniforms or otherwise distinguish themselves, nor do they carry their arms openly.”

Neither, though, can they still be protected as civilians since they are engaging in hostilities through drones. This does not mean that their involvement is not legal, indeed as it was pointed out by Alston, “[u]nder IHL, civilians, including intelligence agents, are not prohibited from participating in hostilities.” Instead their involvement in these operations simply means they can be legitimately targeted and killed. Thus, not only the personnel but also physical assets of the agency can be the target of attack, where they provide by their nature, location, purpose or use an effective contribution to military operations. The result of this in itself does not create a great number of problems; where CIA agents are carrying out lethal strikes, so too can such a strike be legitimately carried out against them. A further result of their involvement is that they are not protected by the immunity which combatants enjoy; that is protection from prosecution for their actions during the conflict. The result being that CIA personnel are liable for prosecution under the law of “any country in which they conduct targeted drone killings, and could also be prosecuted for violations of applicable US law.” In other words, they can be tried and punished for their actions and the harm they cause to the extent that the national law they find themselves in allows. Realistically, neither of these issues are likely to cause much lost sleep in the US, but as a matter of law it is important to note the fact that CIA drone operators are not acting above the law; they are in a position where they could be targeted, or prosecuted, no matter how unlikely that eventuality.

3.2. Lethal Force Outside Armed Conflict

Unlike in war, during peacetime, the use of force is severely limited. Outside armed conflict, international humanitarian law cannot apply to the use of force; it is therefore human rights law that must be adhered to. The right to life is one of the most fundamental human rights and the foundation of all other rights. Article 6 of the ICCPR, states that every person has the inherent right to life of which they shall not be arbitrarily deprived. This does not mean lethal force is automatically illegal, and in tackling terrorism the regulations on law enforcement are to be applied to determine legality. Under the international rules governing the use of force for law enforcement purposes, lethal force can be legitimately applied where a suspect poses an immediate and lethal threat, with arms being allowed where there is a belief that the target will cause

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79 Alston Report (n 15) [71]
80 ibid, [71]
81 Barnidge (n 56) 445
82 API, Art 52(2)
83 Alston Report (n 15) [71]
86 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)
serious physical harm.\textsuperscript{88} Clearly, this does not rule out the use of firearms against terrorist actors, so long as they present an immediate threat. However, the use of force is further restricted in that the force used must be proportional to the seriousness of the offence with minimal damage and injury caused.\textsuperscript{89} Therefore, the CIA, as with any other section of a law enforcement or civilian organisation, is not justified in using lethal force unless it is absolutely necessary to save lives, and the force used is proportional to the threat. It is hard to satisfy these requirements in areas far from US soil where it cannot be said that targets pose an immediate and serious threat to the lives of US citizens. The difficulty is having them answer for what may be a significant number of illegal killings. While the drones may be thousands of miles from the US, the personnel are safely within US territory.\textsuperscript{90} It is therefore not easy to see how action could be taken. That said, Alston did highlight that where the US is using intelligence personnel to carry out strikes, avoiding the jurisdiction of either humanitarian or human rights law, state responsibility could be incurred where it is found to be in violation of either which could present a solution to any impunity.\textsuperscript{91}

3.3. Separation from Conflict

Finally we turn to the argument raised by some that the capabilities of drones in removing risks to friendly forces, and detaching operators from their targets has resulted in the decision to use lethal force being made easier, creating a so-called “Playstation” mentality to killing.\textsuperscript{92} O’Connell supports this view, pointing out first that the distances at which the killings take place have lowered the inhibition to kill, and secondly that the capabilities of drones, allowing them to reach areas unlikely to be targeted previously have lowered the political barriers limiting the use of force.\textsuperscript{93} Mayer drew attention to similar points of view in her report on drones, highlighting warnings from other authors who warn of the seduction of a ‘costless’ war, the dangers of a ‘virtueless war’ created by the removal of danger and sacrifice that combatants face, and the undermining of political checks on war caused by isolating the public from warfare.\textsuperscript{94} These commentators make clear cases for the drone program lowering both the psychological barriers to killing, and the political obstacles to the use of force.

The first aspect to consider here is the idea that the distance between controller and victim makes the decision to kill easier for the controller, and for commanders who make their decisions in the knowledge that there is no risk to the lives of their forces.\textsuperscript{95} The argument is pinned on the psychological factors that affect killing, suggesting that since the operator doesn’t see their targets and are not themselves physically in the location they carry out attacks, they are not deterred from unleashing deadly attacks.\textsuperscript{96} This seems like a fair argument; a lack of risk to friendly forces may make that decision easier, but is

\begin{thebibliography}{99}
\bibitem{Breau & Aronsson} Breau & Aronsson \textit{(n 12) 271}
\bibitem{Basic Principles} Basic Principles on the Use of Force and Firearms, Principle 5 (a)&(b)
\bibitem{Vogel} Vogel \textit{(n 79) 133}
\bibitem{Alston Report} Alston Report \textit{(n 15) [73]}
\bibitem{ibid} ibid \textit{[84]}
\bibitem{O’Connell} O’Connell \textit{(n 4) 118}
\bibitem{Mayer} Mayer \textit{(n 3)}
\bibitem{O’Connell} O’Connell \textit{(n 4) 136}
\bibitem{O’Connell} O’Connell \textit{(n 28) 9}
\end{thebibliography}
it factually accurate that the separation does reduce this inhibition? A counter point here is that the use of a drone, whose operator is far from the location of the strike, is not really any different to many other forms of long distance attack; whether a ship firing a rocket at an onshore target many miles away, a plane dropping a bomb from thousands of feet in the air, or an intercontinental missile being fired from one country to another. There are numerous forms of attack which do not require the person who pulls the trigger to be within arm’s reach of their target. Drones are not new in this respect and it seems odd that these other methods can be easily accepted where a drone cannot. Further to this, there may also be evidence that the separation factor does not remove the effects that killing has on the operators of drones. Indeed, it has been noted that “some Predator pilots suffer from combat stress that equals, or exceeds, that of pilots in the battlefield.” This suggests that rather than removing the inhibition to kill, the use of drones does in fact have quite serious psychological effects on operators.

Moving to the political hurdles overcome by drones, the basic line is that since there are no boots on the ground in the regions where attacks are being carried out, and thus no danger to personnel, the government’s decision to employ lethal force is an easier one. Again this argument is logical; one of the key considerations for a military operation is the risk to one’s own forces against the benefit to be gained from the operation. Much more than the first, this point holds up to scrutiny. Even proponents of the drone program admit that the nature of drone warfare lowers the reluctance to resort to force, and point out the likelihood that with further development of the technology, more efficient and accurate killing, as well as lowered costs and increased availability of drones will further reduce this reluctance. Despite this, provided the decision to use force complies with the requirements of international law, whether it is an easier decision or not is irrelevant to issues of legality.

Further to this, the ease factor can have positive results. In humanitarian missions like that in Libya in 2011 where the US did not want to put boots on the ground, it was still able to make a significant contribution to the military effort through a combination of manned and unmanned aerial vehicles. The result of this was that the US population was assured the country was not engaging in another armed conflict, while the State was able to assist its allies. The fact is that drones may well make the decision to use force easier, but this in itself is not necessarily a negative issue, especially when the use of force is for humanitarian purposes, and provided the state employing force adheres to jus ad bellum principles, the use of force will not be unlawful, easier or not.

97 Vogel (n 79) 133
98 Mayer (n 3)
99 O’Connell (n 4) 134
101 ibid 392
102 O’Connell (n 4) 134
103 ibid
4. **Involvement of Other Authorities**

This final brief section will consider the involvement of agencies outside the US and what the potential effect their involvement has on their standing under international law. This is an issue which was raised in the courts of the United Kingdom by the son of a Pakistani Tribal Leader who was killed in a strike in 2011. The case was concerned with the sharing of information between British and US intelligence services used to locate and direct strikes against targets in Pakistan and whether these actions could expose the British services to charges of complicity in murder, and possibly even war crimes. The case echoed a number of points highlighted in this study, such as that since CIA operators and GCHQ employees are civilians, they cannot benefit from combatant immunity and so may be liable under criminal law. It was also argued that even where they may be granted immunity, there is in fact no armed conflict in Pakistan, and therefore no protection. While the case did not claim that employees of GCHQ were attacking targets in Pakistan, they sought a judgement that they were “liable under domestic criminal law as secondary parties to murder and that any policy which involves passing locational intelligence to the CIA for use in drone strikes in Pakistan is unlawful.” What was sought was a full judicial review as to the legality of the involvement of British intelligence services in the US drone campaign. Unfortunately the case was ultimately rejected by the Court of Appeal, with the then Foreign Secretary William Hague refusing to confirm or deny the UK’s involvement in the program and pointing out that the court would need to consider a number of issues including whether there is an armed conflict in Pakistan, and whether the strikes are legitimate under self-defence. Finally they insisted that the case would have an impact on relations between the UK, US and Pakistan. While this case ended disappointingly, it does bring to light that the issues drones present do not only relate to whether they are legitimately targeting individuals and whether the force they use is legitimate, but also whether there may be wider reaching liability which applies to those who provide assistance for operations should they be deemed unlawful, which could have repercussions in many states.

**Conclusion**

As this paper has attempted to show, the use of drone technologies to carry out lethal attacks does not only raise geographic and situational issues, but there are also a number of factors in terms of the individuals involved which are problematic. Those who are being targeted are terrorist actors and not combatants; they are therefore not legitimate targets unless they are performing a continuous combat function, which such suspects are


106 Hague in Court Over Drones Policy (n 105)

107 ibid

108 ibid

109 Cobain (n 105)


111 Ibid
often unlikely to be doing. Additionally, the groups which the US considers enemies often only have tenuous links to those against whom force may be justified, making their targeting illicit. Even where the drone strikes have killed their intended targets, and even if the targets are legitimate, the drone campaigns are not having the desired effect that States like the US are seeking. With the deaths of more and more civilians comes further recruitment to the groups being targeted, absorbing any losses suffered; a point well illustrated in the Mehsud example where his leadership position was quickly filled with two other militant leaders.

Drones have also been heavily criticised, justifiably so, for causing significant levels of collateral damage. While there is some difficulty in analysing these factors due to the secrecy of drone strikes, the reliable figures which are available paint a picture of heavy civilian casualties. Again, the Mehsud strike demonstrates that even in strikes on legitimate targets, the amount of force used can cause collateral damage far in excess of the benefit sought. The presence of drones in the skies above countries like Pakistan has also resulted in the deprivation of rights for the civilian population, economic hardships through the cost of damage and medical bills, loss of educational opportunities, as well as stress and anxiety issues caused by the fear of the vehicles above.

Finally, the involvement of civilian operatives in lethal drone operations has its own consequences. While not necessarily affecting the legality of drone strikes, the fact remains if there was an armed conflict, then targeting of the civilian operators would be justified since they would be taking an active part in hostilities. Additionally, since they are not entitled, as civilians, to participate in conflict, such civilians would not be protected from prosecution as combatants and could be liable for the deaths they cause, both domestically in US and in the states within which the strikes occur. There is also some warranted concern that drones are lowering the hurdles to utilising force. While the idea of them lowering the inhibitions to kill of operators and commanders may not be any more problematic than other forms of long range attack acceptable under international law, there is certainly a case that politically, drones have made the decision easier. Without boots on the ground, states can apply the destructive force of drones without endangering their own personnel and without losing public support. However, where the use of force is legal, this does not have much legal significance, it simply presents a risk of increased willingness to resort to force.
The Evolution and the Role of Individual Complaint Mechanisms in International Human Rights Law and the Status of Pakistan

Syed Muhammad Farrukh Bukhari*

INTRODUCTION

International Human Rights Law has significantly developed after the creation of the United Nations. United Nations not only developed several human rights conventions and covenants but also provided for the “means and tools” to realize those rights. Amongst them, one of the most important procedures is Individual Complaint Mechanism (ICM). This procedure gives individuals the right to file petitions before United Nation (UN) treaty bodies if their treaty rights are violated. This article sheds light on the development and incorporation of ICM in International Human Rights Law as well as its significance in United Nations Human Rights Enforcement System. Furthermore, the status of Pakistan with respect to Individual Complaint related treaties is also discussed.

1. THE EVOLUTION OF HUMAN RIGHTS

It took International Human Rights Law (IHRL) too long to take the shape as we see it today. After the creation of the United Nations Organization, this branch of International Law has been rapidly developing and playing a significant role in the protection of the rights of individuals as opposed to the primitive concept of International Law which considered only the states to be the subject of rights and duties.

At present, IHRL has expanded to such an extent that it has found its way even into the internal affairs of the states in a way that it requires the states of the world to observe its principles as “standards” to human respect and dignity. Indeed, adherence to IHRL has now become the symbol of being more civilized and cultured among the nations of the world.¹

1.1. Effects of The First World War And The Rise of Individuals as Subjects of International Law

The development of modern human rights law and its enforcement mechanisms find their roots in the post-World War II era, but prior to that various efforts had been made by different states and organizations in that direction. Particularly the League of Nations (LON) which was made in response to the massive devastations and destructions of First World War in order to work with the aim that no such horrific incident could ever take place again.²

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The League of Nations was the first inter-governmental organization which provided the basis for human rights protection at an international level to individuals. It strived hard against child labor, abolition of slavery and the protection of the rights of minorities. This was a unique step, first of its nature, where the sovereign states were required to respect their international obligations in respect of minorities, slaves, children and different segments of vulnerable individuals.

Several General and Special treaties were concluded and at occasions unilateral declarations were made for the protection of minorities for instance in Convention relating to Upper Silesia and in the Convention regarding the territory of Memel, different countries including Albania, Estonia, Finland accepted their responsibility to protect rights of minorities.

Later on the League declared itself to be the guarantor of all the promises made in the treaties concluded under its auspices. A “guarantee clause” was inserted in almost all such treaties giving reference to the League of Nations as guarantor of the rights mentioned thereunder.

The text of the guarantee clauses in several such treaties was in the following words “…agrees that the stipulations in the foregoing Articles, so far as they affect persons belonging to racial, linguistic or religious minorities, constitute obligations of international concern and shall be placed under the guarantee of the League of Nations.”

Consequently different tribunals were established to make sure the compliance of the relevant treaties concluded under the auspices of the League. In Steiner and Gross v. The Polish State before the Upper Silesian Arbitral Tribunal, 1928, the tribunal held that individuals have the right to bring their complaints against their own states before the tribunals for the purposes of adjudication.

This was definitely a major breakthrough in the development of International Human Rights Law because an international organization had assumed the role for the supervision of human rights which was until then considered to be the sole function of sovereign states. Moreover a precedent, first of its kind, was set at international level that governments were made bound to deal with minorities in accordance with certain principles. The protected rights included right to freedom of religion, use of language, maintenance of religious and educational establishments; “a complaint procedure was also instituted, enabling individuals to invoke personal rights in any international forum against the state of which they were

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4 Adopted on May 15, 1922
5 Adopted on May 8, 1924
7 Text of the relevant treaties which bound the respective states in the same manner can be found at “Publications of the League of Nations, C.L. 110. 1927. I Annex”
8 Steiner and Gross v Polish State [1928] 4 Annu Dig Public Intl L 291 (Upper Silesian Arbitral Tribunal).
9 Roland Portmann, Legal Personality in International Law (Cambridge University Press 2010) 73.
nationals.”

11 Unfortunately, the League of Nations could not succeed substantially in its aims and Second World War broke out, causing massive violations of human rights across the globe.

1.2. Effects of the Second World War on the Development of Human Rights/ Acceptance of “Individuals” as Subjects at International Level

Following the atrocities of World War II, the world has witnessed unparalleled development in International Human Rights Law. New legal regimes have emerged that have the protection of individuals’ principle at their core and aim to limit the traditionally exclusive jurisdiction of states over their citizens.12 Personal rights did not remain under the sole and exclusive jurisdiction of the states under legal theory and practice. These rights had been recognized and were subject to various actions internationally.13 These developments happened at the same time at international, regional as well as national level.14 Specifically two events completely changed the status of individuals at international level: firstly, the creation of war tribunals to try war criminals at Nuremburg and Tokyo and secondly, devising mechanisms for the protection and safeguarding of humanity in hopes of preventing the recurrence of such atrocities. The tribunals indicated that international law does not only deal with matters between states but also imposes obligations on states with respect to individuals.15

1.3. The Doctrine of State Sovereignty

The major obstacle to the development of international law of human rights and specifically its implementation and enforcement was the doctrine of “state sovereignty” as recognized by customary international law. Consequently the states had full and exclusive authority over their subjects. Moreover, it was also not possible for any other state to intervene in the domestic affairs of another state therefore every state was free to deal with its nationals as it liked. There were no restrictions whatsoever on the authority of states over its nationals. In the context of this doctrine it was almost inconceivable that international law could vest an individual with any rights exercisable against his own state.16

Therefore, to make states respect and abide by their international obligations it was necessary to establish a set of superior standards to which all national laws must conform.17 That is why it may be said that IHRL in its modern shape is purposely designed to limit the state sovereignty as it interferes with states domestic activities.18

15 Enabulele A and Bazuaye B, Teachings on Basic Topics in Public International Law (AMBK Press 2014) 196.
16 Nihal Jayawickrama, op. cit. p. 17.
1.4. Erosion of the Doctrine of State Sovereignty and Incorporation of Human Rights Norms

The doctrine of state sovereignty, in so far as it is related to the treatment of citizens by their own states, started losing its intensity and strictness due to the incorporation of certain human rights norms in international law which began in the early nineteenth century.\(^\text{19}\) The Treaty of Paris, 1814 between the British and French Governments for suppressing the trafficking of slaves; establishment of International Committee of the Red Cross (ICRC) in 1859 for the purposes of taking care of wounded and sick in armed conflicts, consequently the framing up of Hague & Geneva Conventions restricting and limiting the use of force during armed conflicts, are all reflective of the efforts not only from countries but also from individuals to mobilize the conscience of world community to take steps for the protection of human rights in times of peace as well as in times of war. International Law therefore also began to express its concern at a government’s treatment of its own citizens.

As aforementioned, contrary to its earlier notions of human rights being an internal matter of states, therefore falling under their exclusive domain is no longer accepted by the contemporary legal scholarship. Although International law still respects sovereignty but it is the people’s sovereignty rather than the sovereign’s sovereignty and the object of protection is to strengthen the continuing capacity of a population to freely express and affect choices about the identities and policies of its governors.\(^\text{20}\) In the words of Farrokh Jhabvala,\(^\text{21}\) the term “human rights” basically describes and relates to the relationship between a State or its government and its own people, a relationship that is second to none in being ‘domestic’.\(^\text{22}\) Subsequently, when United Nations was created, it worked exhaustively to frame a set of Conventions/Covenants to engage states progressively to work for better human rights conditions through co-operation.

1.5. Enforcement and International Legal Regime

Enforcement of International Human Rights Law under the United Nations has two aspects and dimensions i.e. enforcement through its Charter based mechanisms and enforcement through its Treaty based mechanisms whereas different regions of the world have also developed their own system of protection and enforcement of human rights such as European and Inter-American Human Rights Systems.

1.5.1. Creation of the United Nations

The United Nations officially came into existence in October 1945.\(^\text{23}\) While the Charter of the United Nations contained few references regarding the respect and promotion of human rights, it lacked any substantive mechanism for the enforcement of the same. There are as

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\(^{19}\) Ibid, 18.


\(^{21}\) Professor of International Relations, Florida International University, Miami, United States.


many as seven different places referring to human rights in the Charter but none of them is specific upon the implementation or enforcement of human rights. These are as follows:

Firstly, the Preamble describes the purposes of U.N. in the words “we the peoples of the United Nations reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.”

Secondly it provides that it is one of the purposes of the U.N. “to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.

Thirdly mentioning the responsibility of the General Assembly to initiate studies and make recommendations for the purpose of “promoting international co-operation in the economic, social, cultural, education and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”

Fourthly, “with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples” Article 55 charters the U.N. to promote “universal respect for, and observation of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”

Furthermore, Article 56 further strengthens the above mentioned provision under which “all members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55.”

Article 62 empowers the Economic and Social Council (ECOSOC) of the United Nations to make recommendations for the purpose of promoting respect for, human rights and fundamental freedoms for all with respect to economic, social, cultural, educational, health and related matters. Article 68 empowers the ECOSOC to setup commissions for the sake of promotion of human rights in economic and social fields.

These provisions were of paramount importance but the controversy was that whether these provisions created binding obligations on the member states to give their subjects access to the UN mechanisms in case of violation of these provisions. It appears that the Charter’s clauses only contain nominal injunctions to co-operate and do not impose any solid obligations which could make states answerable before it. Furthermore, the Charter merely points out that human rights are to be respected and protected but it is silent as to which human rights these provisions refer to. This paved the way for the adoption of the Universal Declaration of Human Rights, 1948. But as apparent from the title, it was a “declaration”, hence it only had an aspirational value. Therefore, UN later on adopted International Covenant on Civil and Political Rights, 1966 (ICCPR) and International Covenant on

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24 Charter of the United Nations, 1945, The Preamble
26 ibid Article 13(1) (b)
27 ibid Article 55 (c)
28 ibid Article 56
29 ibid Article 62
30 ibid Article 68
Economic, Social and Cultural Rights, 1966 (ICESCR) so as to make morally motivated provisions of Universal Declaration legally binding by incorporating them into ICCPR and ICESCR. These covenants made states parties to them answerable at least before the respective Committees established under the same.

1.5.2. Codification of the Newly Recognized Enforceable Human Rights

The next phase in the development of the modern human rights conventions was to make them enforceable. This happened both at regional and international levels. At a regional level provisions for the systematic review and development of progressive improvement in human rights compliance were made part of the main Charters or Conventions whereas at International level additional Protocols were documented and adopted covering implementation and compliance aspects. Brief mention of the system of the United Nations responsible and dedicated for the enforcement purposes together with the place ICM has in this system will be discussed below.

1.5.3. United Nations Enforcement System and Individual Complaint Mechanism

United Nations has two types of enforcement systems/ mechanisms:

a) Enforcement through Charter based institutions/ organs.
b) Enforcement through Treaty based institutions.

a. Charter Based Enforcement

This type of enforcement is carried on through the organs or institutions which are the creation of the UN Charter itself, for instance United Nations General Assembly (UNGA), United Nations Economic and Social Council (ECOSOC) and Human Rights Council. Charter based organs deal mainly with the states instead of individuals. Their decisions are taken through majority voting and they rely heavily on NGO inputs.

It will be a matter of interest to mention here that Human Rights Council has devised a complaint procedure of its own. It adopted a very important Resolution No. 5/1 on June 18, 2007. This resolution contains a procedure which gives rights to individual victims, groups or non-governmental organizations to submit communications to Human Rights Council against gross violations of human rights and fundamental freedoms. It does not matter where the victim is or who violated his rights. Even if somebody has reliable or direct knowledge of the violations, he may complain.

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32 Human Rights Council (2006) is an inter-governmental body of 47 different countries which holds its session once a year to discuss the human rights situation in the world and also makes recommendations on them. Works under United Nations.
b. Treaty Based Enforcement

There are nine core Human Rights Treaties adopted by the United Nations General Assembly on various themes of human rights. They offer different procedures for human rights enforcement. The mechanisms operate through respective Human Rights Committees established by their treaties. The committees happen to be quasi-judicial forums and are responsible for the monitoring and compliance of the treaty provisions consisting of specific human rights by the states parties.

Normally three treaty based enforcement options are available:

i. Individual Communications;
ii. State to State Complaints; and
iii. Inquiries

Committees receive petitions from the individuals if their states have acknowledged their jurisdiction in this regard. For instance UN has adopted an International Covenant on Civil and Political Rights on December 16, 1966 which entered into force on March 23, 1976. First Optional Protocol (O-P) to ICCPR has established a procedure whereby an individual whose state has signed and ratified the Covenant and the Protocol may bring a petition before the HRC created by the treaty itself against his/her state in case his state has violated any of the rights provided in the Covenant.

Besides ICM, states may also file petitions before the HRC and accuse other states of such violations. In this situation both the states should be party to the Covenant/O-P and must not have reserved the relevant provisions enabling them to file petition against one another.

Inquiries are another important tool for checking up states compliance with treaty provisions. The Human Rights Committees may, if it finds any serious violations of the rights by any state party to the conventions, start an inquiry in this regard.

Then there is another obligation upon the states (as the treaty requires) to submit annual or periodic reports to the respective human rights committees. Article 40, ICCPR requires member states to submit their reports on the measures they have taken to give effect to the rights available in the treaty.

All these procedures aim to help getting human rights enforced through state compliance but usually it is noticed that member states do not join either Optional Protocols or reserve the relevant treaty provision which enables or recognizes individual’s right to approach HRC for justice. Rather states feel more comfortable with reporting system as an alternative. This syndrome is all with Third World Countries, whereas if we look at European Human Rights

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35 Optional Protocol-I to International Covenant on Civil and Political Rights, 1966, Article 1
36 Article 21 of UNCAT, Article 32 of CED, Article 74 of CMW, and Article 10 of OP to ICESCR and Article 12 of OP to CRC (not yet enforced) sets a procedure where one state may file a petition against another state if the other state is not fulfilling the obligations under any of these treaties before the respective Committee.
37 Article 20 of UNCAT, Article 8 of OP to CEDAW, Article 6 of OP to CPRD, Article 33 of CED, Article 11 of ICESCR, and Article 13 of OP to CRC (not yet effective) give respective Human Rights Committees to inquire gross violations of human rights on their own initiative.
38 International Covenant on Civil and Political Rights, 1966, Article 45.
39 ibid Article 40.
system, it has a very powerful, vibrant and active individual complaint procedure, through which thousands and thousands of people from Europe file petitions to secure their rights.

1.6. Evolution of Individual Complaint Mechanism (ICM) at International Level

At the international level the human rights regime has developed under the auspices of the United Nations. As mentioned the protection of human rights was one of the principle purposes of the United Nations. Prior to the creation of the United Nations in 1945, apart from a few infrequent cases, individuals were not the subjects of rights and duties under international law. Universal Declaration of Human Rights, 1948 (UDHR) was the first step taken by the United Nations for the recognition and protection of human rights which came into force in 1948 through a General Assembly resolution. It recognizes both civil and political rights, economic, social and cultural rights. As (UDHR) was an aspirational document having no binding force, the UN adopted two separate covenants in 1966, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Together with the UDHR they are called as the International Bill of Human Rights.

An Optional Protocol to the ICCPR was also adopted. It established an opportunity for individuals from states that have ratified the Optional Protocol 1-ICCPR to complain to a committee (Human Rights Committee or HRC) within the UN, in case their rights have been violated, against their own states.

It is worth mentioning here that ICCPR was not the first covenant which established ICM. The first Convention which established ICM was International Convention on the Elimination of All forms of Racial Discrimination, 1965. Another thing to note here is that in CERD, the right to complain was provided with in the principal treaty unlike ICCPR where it is provided under its OP-1.

Now coming back to ICCPR, the purpose of making Optional Protocol-1 to ICCPR is very much clearly found from the preamble of it which states that:

In order further to achieve the purposes of the International Covenant on Civil and Political Rights and the implementation of its provisions it would be appropriate to enable the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.

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42 Charter of the United Nations, 1945, Article 1(3).
44 UN General Assembly resolution 217A (III) of the 10th of December, 1948.
45 UN General Assembly resolution 2200A (XXI) of the 16th December, 1966.
This method of implementation is available only to the individuals who are subject to the jurisdiction of the States Parties who have ratified the Protocol. The right to communicate with the committee is conferred upon the individuals claiming to be the victims of a violation, irrespective of their nationality or lack of it. By Optional Protocol-1 to ICCPR, United Nations has made individuals subjects of international law having rights enforceable against states.

Like ICCPR we have eight other Core Human Rights treaties developed by the UNGA addressing the need of the time and specific themes. The idea behind the whole saga was to make it crystal clear that human beings have different types of rights which should be respected and protected by everyone. Therefore, we see that after ICCPR various other treaties were adopted by the UNGA, addressing different themes, establishing separate committees under each of the treaties for better realization and observance of those rights by the state parties by incorporating ICM mechanisms in almost all of the treaties, either in the main text of the treaty or its Optional Protocol.

Following is a table highlighting nine core Human Rights Treaties adopted by the United Nations General Assembly and showing their dates of adoption, entry into force, and most importantly whether or not ICM is available, and the relevant provisions.

The table has been prepared chronologically hence the first Convention as per the date of adoption is displayed on the top followed by the others which were adopted later on in sequence. The table shows us how international human rights law has developed over decades, and how every treaty acknowledged the importance and relativity of Individual Complaint by incorporating it in the treaties as a tool to achieve those rights.

<table>
<thead>
<tr>
<th>Serial No</th>
<th>Name of the Treaty</th>
<th>Date of adoption</th>
<th>Entry into Force</th>
<th>ICM Availability</th>
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<td>September 2, 1990</td>
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The right to approach the appropriate Human Rights Committee is not that easy. It requires a lot of formalities to be fulfilled. These are more or less same under almost all the core Human Rights Conventions. A person who wants to avail the right of Individual Petition must satisfy the relevant treaty body i.e. the Committee that the applicant for instance has undergone and fulfilled all the requirements before approaching the Committee and could not have acquired justice through the national justice system.

Following is a brief sketch of these requirements.

- The complaint must be about the actual violation of the treaties rights of an identified person.\(^{50}\)
- Before communicating with the Committee, the individual concerned must first exhaust all domestic remedies.\(^{51}\)
- It must be submitted within one year after exhaustion of domestic remedies.\(^{52}\)
- An anonymous communication or one which the committee considers to be an abuse of the right of petition or incompatible with the treaty provisions is inadmissible.\(^{53}\)
- Moreover, no communication shall be considered by the Committee\(^{54}\) unless it has ascertained that the matter is not being investigated under another international investigatory or settlement procedure.\(^{55}\)

1.6.2 Procedure after Admissibility

The Committee is then required to bring any communication submitted to it to the attention of the State Party concerned which on its part, undertakes to provide the committee with a written explanation of the matter and the remedy, if any, that it might have taken. Meeting in a closed session, the committee will consider individual communication in the light of all written information made available to it by the individual and by the State Party concerned.

\(^{50}\) OP-1 to ICCPR, Article 1; UNCAT, Article 22; OP to ICESCR, Article 2.
\(^{51}\) ICCPR, Article 5(b); OP to ICESCR, Article 3(1).
\(^{52}\) OP to ICESCR, Article 3(a).
\(^{53}\) ibid Article 3 (g).
\(^{54}\) OP to ICCPR, Article 5(2); OP to ICESCR Article 3(2)(c).
1.6.3. What Happens When Committee Decides a Case?

When the committee decides a case it is then transmitted to the aggrieved party concerned and the state simultaneously. A separate note is appended with the decision in case of difference of opinion between the judges. The decisions of the committee although form authoritative interpretation, they are not binding on the states parties. Usually these contain recommendations addressed to the state for taking steps to remedy the situation. The decision of the Committee is also sent to the Office of High Commissioner for Human Rights and published on its website. There is no right to appeal against the decision of the committee.\(^{56}\)

Normally all the treaty bodies have established various procedures usually called as “follow-up” procedures to monitor whether the state party has taken steps for the implementation of its decisions or not.\(^{57}\) Presently there are nine United Nations Human Rights treaties that have a complaint mechanism (only five active)\(^{58}\) in international law and a number of others that have human rights elements and they are part of human rights system but do not have active mechanisms of implementation or enforcement that an individual can utilize. Basically international human rights law is based on consent given by states. States are only bound if they agree to be bound. The status/position of an individual in international law is very narrow and limited.

When the United Nations General Assembly was working on the draft of International Bill of Rights which includes both ICCPR and ICESCR, it faced the problem as to how to give the provisions of these instruments a legally binding character so it introduced different procedures to address the issue. Some of them were mandatory like state reporting, and some were Optional like Individual Complaint. To give individuals access to a Committee under ICCPR, United Nations General Assembly adopted a separate “Optional Protocol”.

A protocol in international law is a part of main treaty and addresses specific issues like an enforcement mechanism of the main treaty. However, it is common that states are parties to the treaties but not to their optional protocols.\(^{59}\) Normally states ratify the treaty to save their faces at an international level but when it comes to implementation of these rights they avoid ratifying the protocols. Similarly, in situations where ICM like procedures are in-built in the principal treaty itself, states declare reservations against them, thereby thwarting the actual means for the full realization of the rights mentioned in the treaties.

1.7. Significance of Individual Complaint Procedure

Human rights remain unfulfilled promises for a large number of people throughout the world, despite their recognition in national constitutions and in international treaties because


\(^{57}\) ibid


\(^{59}\) For instance, Pakistan has signed ICCPR on April 17, 2008 and ratified the same on June 23, 2010 with a lot of reservations but is not party to Protocol-1 of ICCPR which gives individuals access to Human Rights Committee established under ICCPR.
of the lack of access to enforcement mechanisms. The right of individuals to complain about alleged violations of their human rights to expert bodies established under United Nations human rights instruments is one of the major achievements of UN efforts aimed at the protection and promotion of human rights.

It is through individual complaints that human rights are given concrete meaning. In the adjudication of individual cases, international norms that may otherwise seem general and abstract are put into practical effect. When applied to a person’s real-life situation, the standards contained in international human rights treaties find their most direct application. Without relevant mechanisms and specific means of implementation, human rights theory and norms could remain mere rhetoric on paper. Effective mechanisms and means of implementation lead to the practical realization of human rights in the lives of human beings. It is often argued in that regard that the hurdles to implementation are much higher than those of norms and standard setting under international human rights law.

This is the only procedure available in the UN Human Rights treaty system in which an ordinary person is given the opportunity to bring the state before an international authority (i.e. the Committee) to answer about the wrongs which the state has done. Moreover, this procedure affords to address an individual case of violation by a state party of its human rights obligations under the treaty. This is different from those procedures which are general in nature and are mostly state related and do not address a particular violation of a right against individual like ICM does. In this sense, this procedure works in a similar manner to domestic legal proceedings.

The advantage of making an individual complaint is that a person who believes his or her rights have been violated has an opportunity to receive assistance from an international expert body that supports his or her claim that violation has occurred and help him in getting an adequate remedy from the state. Although the recommendations of the UN human rights treaty bodies are not legally binding, the treaty bodies have been given the authority by states parties to express their expert views as to whether any violation of rights, and the states international obligations to protect those rights, has occurred. The expertise and jurisprudence of the committees has developed over decades of monitoring the implementation of the treaties. The treaty bodies expect state parties to implement their decisions, and call upon states to provide the victim with an appropriate remedy. Notwithstanding that there is no international police force to ensure its implementation, a decision of an international expert body does carry heavy weightage as states become legally

and morally bound to respect the decisions of the respective treaty bodies and implement those once they sign and ratify the relevant treaties or provisions in good faith.\textsuperscript{65}

1.8 Status of Pakistan with Respect To the Signing/ Ratification of ICM related Treaties

Unfortunately, Pakistan has a poor record when it comes to United Nations Human Rights treaties. For instance, ICCPR, the most important among other human rights treaties which contains civil and political rights was adopted by the United Nations on December 16, 1966 and it became effective after 10 years on March 23, 1976. Pakistan signed it on April 17, 2008 after 42 years of its adoption and ratified the same on June 23rd, 2010. Pakistan is also not party to the First Optional Protocol to ICCPR which established an individual complaint procedure that allows individuals to approach the Committee in case the respective country has violated its obligations under the treaty and thereby violated the right of the individual.

Pakistan is under a legal obligation from the date of ratification of ICCPR to take positive meaningful steps in order to make sure that the rights in the covenant are enforceable domestically and also to change its present laws where they go against the same.

Article 2 to ICCPR provides:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all within its territory and subject to its jurisdiction the rights recognized in the present Convention without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each state Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Similarly, Pakistan is also not party to the Optional Protocols to Convention on the Rights of the Child (O-P III),\textsuperscript{66} International Covenant on Economic, Social and Cultural Rights, 1966 and Convention on the Rights of Persons with Disabilities, 2006 all of which are ICM specific i.e. specifically provide individual petition procedure.

The following table shows the status of Pakistan with respect to the nine core human rights treaties as to when Pakistan signed and ratified the treaty and particularly whether Pakistan is party to the OP’s establishing ICM or not, and, in case of ICM being part of the principal treaty whether Pakistan has made reservations or declarations over the relevant provisions or not.

\textsuperscript{65} ibid
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Table 1.2: Status of Pakistan With Respect To Human Rights Treaties Signing/Ratification/ICM Status

Thus far Pakistan has ratified most of the human rights conventions which is commendable but has made lot of reservations in regard to them, particularly those kinds of reservations which directly go against the object and purpose of the respective treaties. Those provisions are specifically affected which allow individuals to have recourse to the relevant treaty committees for redress.

The only Conventions which are signed and ratified by Pakistan which also provide for ICM are the International Convention on the Elimination of All Forms of Racial Discrimination.

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CERD was signed by Pakistan on September 19, 1966, & immediately ratified on September 21, 1966. Article 14 of CERD established ICM which is not reserved. CERD belongs to the third generation category of Human Rights and was adopted by the UNGA on December 21, 1965. This convention aims to prevent and suppress discrimination on the basis of race. It strongly prohibits racial hate speeches and demands a complete ban on racist organizations.

UNCAT was signed on April 17, 2008 & ratified on June 23, 2010. Article 22 of CAT speaks of ICM which is also not reserved. This convention is one of the most important one in the series of other conventions adopted by the United Nations. It addresses a very important issue which is the prohibition of torture and any other kind of cruel, inhuman or degrading treatment to anybody across the globe.

The abovementioned two conventions i.e. CERD & UNCAT are the only UN Human Rights instruments out of nine in which Pakistan has not declared reservations or declarations as to ICM, an approach that Pakistan needs to adopt in respect of other international human rights instruments.

CONCLUSION

Human Rights Law has seen remarkable changes after the creation of the United Nations. UN which was created in the wake of Second World-War has brought to surface a number of Conventions for maintaining peace in the world and particularly for the protection of the rights of ‘individuals’ from their own states. These conventions work as a standard for the states to follow in their national jurisdictions. These instruments are not merely substantive in nature but also provide for a number of procedural options through which the rights provided in the conventions may be realized.

Practices of the states show that they generally become parties to treaties but also reserve many of the provisions thereby blocking the channels and modes through which the rights were expected to be claimed and secured. Individual Complaint/Communication is one of those important procedural tools to “achieve the purposes” of human rights treaties.

The practices of the states to reserve provisions from human rights treaties serve no good purpose and go against the spirit and object of this special branch of International Law. Reserving a substantive provision is allowed but reserving a ‘procedural provision’ to benefit from the rest of the treaty is in no way in accordance with the accepted International Jurisprudence upon Human Rights Treaties. According to the Vienna Convention on the Law of Treaties, 1969, such reservations which are against the ‘object and purposes’ of the treaty have no legal effect.

In present times, Individual Complaint Mechanism is working first, under the UN framework and second, under the Regional Human Rights Regimes such as European Union or African Union. Unlike the UN Human Rights Enforcement System, Regional Human Rights Mechanisms are successfully working across the respective regions because the states cooperate without any prejudice or reservations. Thousands of people register complaints against their own governments for the violations of their rights granted to them by the
regional human rights conventions and not a single government blocks this basic right to petition.

It should be realized by the ‘sovereign developing states’ that ICM is the most harmless and important procedure among those available and does not violate their sovereignties. The Committees mandated to carry out the purposes of the Human Rights Treaties do not put sanctions on the States rather they assist, aid and help ‘individuals’ get their rights back from the very state which violated it by requesting the State itself.

This research was an attempt to bring to light the fact that without relevant mechanisms and specific means of implementation, human rights theory and norms may remain mere rhetoric on paper. The hurdles to implementation are much higher than those of norms and standard setting under International Human Rights Law and it is always effective mechanisms and means of implementation which lead to the practical realization of human rights in the lives of human beings.
The Role of Qisas and Diyaat in Facilitating Honor Killings

Shehreyar Khan*

INTRODUCTION

This article concerns the elements of Pakistani penal law known as qisas and diya. Qisas and diya refer to the right of a murder victim’s family under Sharia law to punish the wrongdoer or to choose not to punish them (in exchange for financial compensation). This article will explore how the law allows defendants to evade punishment for murder, particularly in the context of honor killings, or to escape with disproportionately lenient sentences despite the nature of their crimes. Under qisas and diya laws, homicide is regarded as a private dispute, one that the state is not absolutely required to prosecute. This has resulted in the violation of both domestic law and international human rights obligations, especially where women are concerned.

The critical analysis of qisas and diya will be supplemented by a view of the law in light of the human rights of women as well as Pakistan’s obligations to its citizens. The article will also consider the historical, religious and cultural context of qisas and diya and how the private nature of this law is markedly distinct from a Western legal framework based on the obligation and discretion of the state.

A discussion of the status of honour killing and its relationship to the law is important due to the drastic impact it has on women’s lives and community behaviour. Despite gradual improvements in gender equality, this remains a relevant topic. The year 2016 saw a number of highly publicised honour killings, which prompted a law reform that many have criticised as falling short of its intended purpose of curbing honour killings. Instead, it has served the function of merely appeasing the public. In detailing the reasons for the new law, Senator Farhatullah Babar stated:

Honour killings are common throughout Pakistan, claiming the lives of hundreds of victims every year. According to Aurat Foundation’s statistics 432 women were reportedly killed in the name of honour in 2012, 705 in 2011, 557 in 2010, 604 in 2009 and 475 in 2008. These figures do not include unreported cases or, indeed, the number of men who are often killed alongside women in the name of honour. Addressing the loopholes and lacunae in the existing law is essential in order to prevent these crimes from being repeatedly committed.1

This article will therefore discuss the shortcomings of the legal provisions intended to prevent the exploitation of qisas and diya laws and how these defects render the continued provision of qisas and diya unjustifiable.

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1 Criminal Law (Amendment) (Offences in the name or pretext of Honour) Act 2016
1. **THE LAW OF QISAS AND DIYAT**

This section will examine the law relating to *qisas* and *diya* in Pakistan. The particulars of the law will be illustrated through a discussion of a recent instance of honour killing in the city of Lahore. Furthermore, this section will provide a perspective of *qisas* and *diya* within the historical context of Islamic law, and it will explore the process of Islamisation that overtook Pakistan soon after its inception. In order to assess why the law was promulgated, and why it has persisted, it is important to study the circumstances in which it replaced the remnants of British penal codes from colonial times.

1.1. **The Origin of Qisas and Diyat**

The practice of ‘an eye for an eye’ (*lex talionis*) was an essential part of tribal justice in pre-Islamic Arabia. Due to the lack of a centralised authority that could seek justice on behalf of the victims, retribution was the default response to the harm suffered. Not only was the culprit a potential target of this retribution, but so were members of his tribe. As a result, the tribes of the Arabian Peninsula often found themselves occupied in extended blood feuds capable of lasting generations and causing great harm to those involved.\(^2\) *Hamasa*, the “quality of fierce readiness to defend person and 'house' that every real man should have,”\(^3\) was vital to the Arabian man’s identity, and it included the “steadfastness in seeking revenge”\(^4\).

However, the practice of ‘blood revenge’ was costly to the families involved and disruptive to their lives, with arbitration being the final option available after an extended conflict.\(^5\) Arabian tribes therefore developed a method to mitigate the impact of blood feuds and to encourage peace through mechanisms of compensation and institutionalised retaliation for the harm suffered by the victim.\(^6\) This early form of criminal justice had a tremendous impact on reducing the instances of inter-tribal violence.

The advent of Islam saw this practice—amongst many other early Arabian customs—formalised within Islamic jurisprudence as *qisas* and *diya* (or plural *diyat*). This formed one of three categories of crime, the others being *hudoood*, which are offences against God prescribing mandatory punishment, and *ta’zir*, which are offences relating to public order for which punishment lies at the discretion of the judge or ruler.\(^7\)

The Qur’an provides for *qisas* and *diya* in Surah Al-Ma’idah (5:45):


\(^7\)Gottesman (n 6) 444-445
And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. But whoever gives [up his right as] charity, it is an expiation for him. And whoever does not judge by what Allah has revealed – then it is those who are the wrongdoers.

It is clear from this passage that qisas encompasses offences of physical assault and murder, which are subject to retaliation on the choice of the victim or surviving heirs. The word ‘qisas’ means ‘quality’ or ‘equivalence’; therefore, the punishment that would balance the scales for murder could only be death under the traditional practice. Qisas also includes “the right of the victim or his heirs to choose between retribution, pardon, or negotiated settlement” (diya, or as it is more popularly known, blood money). The resolution of tribal violence through pardon or diya was intended to act as an offer of peace, thereby preventing an escalation of the violence into a circle of revenge, and as evidenced by Surah Al-Ma'idah, the practice of diya was in fact encouraged as the most desirable solution in the event of harm.

1.2. The Process of Islamisation

The initial colonization of India saw the majority of the region’s criminal law brought under the authority of British judges, who were aided in their work by Islamic scholars known as mawlawis. The cases of the time were, to a minor extent, determined under the rules shari’ah—whether or not the parties in question were Muslim. However, there was a notable exception: “the right of the victim's next of kin to pardon a murderer, long established in Islamic law, was abolished in 1790...”

Towards the end of the nineteenth century, the Indian Penal Code 1860 and the Criminal Procedure Code 1898 had gradually and completely abolished Islamic criminal law. This set the stage for the provision of shari’ah, or lack thereof, in the post-Independence (1947) criminal law of the Pakistan. Although it is arguable that Muhammad Ali Jinnah subscribed to the tradition of liberal democracy, of which secularism is a fundamental aspect, his pragmatic choice of unifying the movement for an independent nation under the banner of Islam had a lasting impact on the evolution of Pakistani law—especially since he provided little clarification as to what role shari’ah would have following the creation of Pakistan, only that he did not envision an Islamic theocracy.

Perhaps a secular state was never truly possible: after all, there was very little that the ethnically diverse Muslim communities of India had in common with each other besides a shared faith, and just as this faith proved foundational to Pakistan’s independence, so too was it foundational to the country’s subsequent fundamentalist interpretation of the injunctions of Islam. Jinnah’s political expediency and ideological ambiguity came at a

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8 Lippman (n 5) 43
9 Gottesman (n 6) 434
11 Collins (n 10)
12 Collins (n 10) 544
13 Founder of Pakistan (1876-1948)
14 Collins (n 10) 547-549
heavy cost. Indeed, in the decades following his death, the process of Islamisation resulted in the repeal and replacement of a substantial portion of the secular law present since before Pakistan’s independence with provisions that purported to conform to the injunctions of the Qur’an and Sunna.

A significant event during this shift towards shari’ah occurred in 1973 with the promulgation of the current Pakistani Constitution, which included a ‘repugnancy clause’ that allowed the High Court of the time to examine and decide whether a law was repugnant to the injunctions of Islam and whether it should be changed. Furthermore, General Zia-ul-Haq—in his campaign of Islamisation—established the Federal Shariat Court (FSC) and replaced certain sections of the Pakistan Penal Code 1860 with Hudood laws, thereby restoring major elements of Islamic penal law:

Hudood punishments (singular "hadd") - i.e. those prescribed by the Qur'an and Sunnah - were reinstated for four crimes: drinking, theft, zina (any sexual act between persons not married to one another, including adultery, fornication, and rape), and qazf (false imputation of zina).

The enactment of Hudood laws, accompanied by the FSC’s power to void provisions repugnant to Islam, is the defining moment in the Islamisation of Pakistani law. The law could now be moulded freely to fit the dominant Hanafi tradition. Furthermore, the FSC drew a portion of its membership from amongst fundamentalist Muslim clerics who supported Zia’s rhetoric, such as Justice Taqi Usmani. Justice Usmani, for instance, played a major role in restricting the Ahmadiyya community’s right to freedom of religion and having them declared ‘non-Muslims’. Zia-ul-Haq’s changes were not received without opposition, however, and even the FSC attempted to curb the effect of the Hudood laws despite its purpose as an instrument of Islamisation. In the case of Hazoor Bakhsh v Federation of Pakistan, the FSC declared ‘invalid those sections of the Hudood Ordinance that authorized stoning’, which is also known as rajam.

This judgment could have represented the beginning of a balanced agenda for the FSC, as well as a significant victory for a more moderate interpretation of Islamic law, had General Zia not undone it entirely. In response to the decision, he took steps to change both the rules and the membership of the Court, resulting in a second appeal that that took a contradictory stance to the FSC’s previous decision and declared that stoning is consistent with Islamic law.

The entire affair is indicative of the fact that any autonomy possessed by the Court was to be exercised in service of Zia’s mission of Islamisation. In the face of a general lack of secularist opposition, he was bound to succeed. It was in the midst of this tumultuous backdrop that the law relating to unnatural deaths was redefined, drastically altering the landscape of Pakistani criminal law.

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15 ibid 563
16 Constitution of Pakistan 1973, art. 203-D
17 Collins (n 10) 569
18 Ordnance XX 1984
19 Hazoor Baksh v Federation of Pakistan, PLD 1981 FSC 145, [243]
20 Federation of Pakistan v Hazoor Baksh PLD 1983 FSC
1.3. The Qisas and Diyat Ordinance

The law of qisas and diya was first promulgated in the form of an Ordinance, and a particular judgment of the FSC was instrumental in shaping the new law. In its 1989 decision, the Supreme Court Shariat Appellate Bench in the case of Federation of Pakistan v. Gul Hassan Khan found that the sections of the Pakistan Penal Code (P.P.C.) 1860 and the Criminal Procedure Code (Cr.P.C.) 1898, relating to murder and deliberate hurt were repugnant to Islam. This marked the culmination of a number of petitions before the Federal Shariat Court challenging the P.P.C. provisions that had applied since colonial times:

Exercising its unprecedented constitutional powers, the Shariat Bench of the apex court unanimously declared that the relevant provisions of the P.P.C. were null and void for lack of conformity with the injunctions of Islam and ordered the government to replace these with suitable provisions as per the directions of the bench.

The Gul Hassan judgment singled out the lack of provisions for the right of qisas, as well as for diya, and it highlighted the apparent irreconcilability of the fundamental aspects of the common law penal system inherited from the British and that of Islamic criminal law. The Court objected to the government’s power to issue a pardon without consulting the aggrieved party or heirs of the deceased (referred to as wali) and the want of any such provision allowing the victim or her heirs to pardon the offender (referred to as ‘compounding the right of qisas’). Justice Taqi Usmani, a scholar of the Hanafi School, stated in his judgment, ‘In Islam, the individual victim or his heirs retain from the beginning to the end entire control over the matter including the crime and the criminal.’ The inability of the victims to influence the process of justice was therefore seen as decidedly un-Islamic

This decision, carried as it was by the tide of Islamisation, resulted in the promulgation of the Criminal Law (Second Amendment) Ordinance of 1990, which amended the relevant sections of the P.P.C., specifically ss. 299-308. It is worth noting that Justice Pir Karam Shah, who drafted the judgment in Gul Hassan, and Justice Taqi Usmani, who was

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21 A Presidential order that has the same force as an Act of Parliament but is meant to expire after 120 days (Article 89 of The Constitution of Pakistan (1973)). The Qisas and Diyat Ordinance was re-promulgated over twenty times. In 1997, the amendments to the P.P.C. and Cr.P.C. were brought onto a statutory footing under the government of Nawaz Sharif.
24 Under section 203D, Chapter 3A of The Constitution of the Islamic Republic of Pakistan, 1973 (amended in 1980), the FSC may examine and decide whether or not a law is repugnant to the injunctions of Islam.
26 Warraich (n 23) 84
instrumental to Islamisation during the Zia era, were both involved in drafting the Qisas and Diyat Ordinance.\(^{28}\)

The most drastic effect of this change was to render intentional killing under s. 302 (qatl-i-amd) and offences against the body (jurooh-al-amd) as crimes against the victims or their heirs. This can be opposed to a state-centric construction of a crime where an offence is considered to have been committed against the state, thereby making it the government’s duty to pursue prosecution irrespective of the aggrieved party’s wishes.

The current justice system in Pakistan is both secular and religious, with particular areas of the penal code based on Western tradition. For example, in the last decade certain aspects of the Islamic law relating to rape have been replaced by criminal law. This parallel legal system rests at the heart of the issues concerning this article. For instance, while murder remains a cognisable offence under the Cr.P.C, requiring investigation and prosecution by the government,\(^{29}\) in reality it is treated as a matter to be pursued by the victim’s wali in accordance with Islamic law.

As we shall see later, the practical effect of this law has been in many instances to reduce the court’s role to that of a mere spectator, despite it possessing considerable powers to interfere in the process of compromise between the victim’s legal heirs and the culprit.

1.4. Qisas and Diyat in the Context of Honour Killing

The Qisas and Diyat Ordinance 1990 reshaped the landscape of murder, but as much as it replaced provisions that were employed in the past by killers to escape serious punishment for honour killings,\(^{30}\) it introduced a new set of laws that allowed murderers to accomplish the same end—merely by other means.

A recent case, decided in October 2016,\(^{31}\) involving the killing of Kiran Bibi and Ghulam Abbas, is an archetypal example of how the qisas and diya laws operate in practice. In 2014, Faqeer Muhammad, father to Kiran Bibi, killed his daughter and her alleged lover, Ghulam, for carrying on a relationship outside of wedlock. It is not an uncommon occurrence in certain segments of Pakistani society for severe punishment or even death to flow from a perceived or actual infringement of the gendered rules of conduct prescribed to women. Any act of a woman that is believed to be ‘unchaste’ requires swift punishment in order to restore the honour of male members of the family. Men too are often subjected to the harsh consequences of violating these rules.

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\(^{29}\) Cheema (n 25), 56

\(^{30}\) Cheema (n 25), 53: The P.P.C., before it was amended by the Qisas and Diyat Ordinance in 1990, provided that those who killed while deprived of self-control due to ‘grave and sudden provocation’ were not guilty of murder but of the lesser offence of culpable homicide, which carried a minimal sentence—usually between one and three years.

Mr. Muhammad subsequently relied on the law relating to qisas and diya in order to escape punishment under s. 302 of the P.P.C. for killing his daughter and Ghulam. The mistake should not be made of equating this with the defence of grave and sudden provocation under British law; the injunctions of Islam do not allow for the reduction of a sentence or exemption from qisas on the basis of provocation, no matter how serious the provoking event may be. Under Islamic law, according to Justice Taqi Usmani, a person may only be exempted from qisas (equal retribution, amounting to a death sentence in the case of murder) where: (i) the killing is done in self-defence; and (ii) ‘where the deceased was committing an act for which the sentence under Islam was death’.

With regard to this, Justice Taqi Usmani stated that under Islamic Hudood laws the commission of zina (sexual relations out of marriage) is punishable by death, and therefore (as is the case with Mr. Muhammad), an individual who murders his wife/daughter for committing zina may be exempted from a death sentence under qisas. He may still be liable to ta’zir ‘for taking the law into his own hands’, but as we shall see later, that approach has many problems of its own.

Mr. Muhammad likely based his defense on his daughter’s conduct. S.309 allows a sane wali (legal heir) of the victim to waive his/her right of qisas (which in the case of qatl-i-amd amounts to a death penalty; s.302(a)) – without any necessary compensation. Furthermore, s. 310 allows the right of qisas to be compounded in exchange for compensation (badal-i-sulh), except where a female person offered in marriage is the compensation in question. These sections must be read in conjunction with s. 345 of the Cr.P.C., which provides that qatl-i-amd may only be compounded by ‘the heirs of the victims [other than the accused or the convict if the offence has been committed by him in the name or on the pretext of karo kari, siyah kari or similar other customs or practices]’.

Kiran Bibi was unmarried at the time of her death; therefore, Mr. Muhammad (the killer), his wife (Bushra), and their son (Waqas), were her wali. S. 309(2) of the P.P.C. allows the right of qisas to be waived by any one of multiple wali; a consensus of all the heirs is not necessary. Furthermore, an individual is not liable to qisas according to s. 306(b) if he/she is the parent or grandparent of the victim, but they may be punished with a term extending until twenty-five years (s. 302(c)). As such, while Waqas may have been his sister’s heir, he was legally barred from demanding retribution on her behalf against his father. Furthermore, s. 306(c) prevents a child from enforcing their right of qisas against a parent for qatl-i-amd, so Waqas would also have been barred on that front had he wished to demand retribution. In any event—he did not.

Mr. Muhammad was of course similarly barred from compounding the right of qisas with respect to himself under s. 345 of the Cr.P.C and s. 305 of P.P.C., but Bushra possessed the right to pardon him as a legal heir of the victim. Furthermore, Ghulam’s mother waived her right of qisas, leaving none whom wished to see Mr. Muhammad punished

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32 Wasti (n 28), 377
33 Warraich (n 23), 87
34 Wasti (n 28), 377
35 Alternative terms for honor killings
for the double murder. In the absence of any heir of the deceased parties willing to seek justice, Mr. Muhammad was allowed to walk free considering time already served.

It would appear from the example of this case, and many others, that it lies on the victim’s wali in the case of qatl-i-amld—where the evidential requirements of qisas have been met—to make the final determination of what punishment the accused is to receive. This case is by no means an outlier; however, the law in this area is not nearly as straightforward as illustrated.

The impression thus far has been that the court is meant to play the role of a mere referee in these events, present only to insure that the rules are followed, but that is far from true. Where an offence has been waived or compounded or where the evidential requirements of qisas have not been met, the court may nevertheless acquit or award ta’zir—a punishment that is given at the discretion of the judge—to the offender ‘having regard to the facts and circumstances of the case’. Ta’zir also arises as the result of a technical requirement under s. 304(1): an offense is only liable to qisas if the accused makes a voluntary and true confession to the court, or the requirement of witnesses is met under Article 17 of the Qanun-e-Shahadat 1984; otherwise, ‘the murderer is liable to ta’zir – a sentence of life imprisonment or death under 302(b)’.

Ironically, this means that a person accused of murder who is certain qisas will be waived or compounded is better off confessing to the crime than allowing the court to deliberate on his guilt or innocence. For this reason, there is normally no doubt as to the culpability of any individual whose punishment is waived. A confession is likely to have already been made.

According to Warraich, while this section grants the court considerable discretion, it has proved ineffective due to ‘technicalities’ or a ‘lack of judicial application’. He does not elaborate as to why there is a lack of judicial application of ta’zir, but it suggests that the court is unwilling to exercise such discretion because it would interfere with the regular course of proceedings, whereby the culprit and the victim’s wali are allowed to negotiate a settlement.

Finally, it is unclear why the court did not award a ta’zir punishment to Faqeer Muhammad under the principle of fasad-fil-arz, which provides for the punishment of an individual even in the event of waiver or compounding of qisas. The expression fasad-fil-arz (mischief on earth) is comparable to the presence of ‘aggravated circumstances’. According to s. 311 of the P.P.C., it includes the offender’s past conduct, whether he has previous convictions, the brutal or shocking manner of the offence, which is outrageous to public conscience, if the offender is considered a danger to the community, or if the offence has been committed in the name or on the pretext of honour. Fasad-fil-arz is meant to prevent an individual from committing heinous crimes and escaping punishment through the payment of diya. A terrorist or spree killer could hardly be allowed for policy reasons to rely on diya. Similarly, if an offence has been

36 See below
37 S. 338-E of the PPC 1860
38 Warraich (n 23), 85
39 Warraich (n 23), 87
committed in the name or pretext of honour, the court has the discretion to hand out a sentence of no less than ten years and up to fourteen years.\(^40\)

It is undoubtedly true that Mr. Muhammad killed his daughter and her alleged lover, but proving that he was motivated by honour is a separate matter entirely—one that the police in Pakistan are not always inclined to investigate. It is possible that the accused argued that the murder was committed for a reason other than honour, which would prevent the principle of fasad-fil-arz under s. 311 of the P.P.C. from applying. Furthermore, in a far more likely scenario, there was no heir willing to exercise his/her right to retribution. A major flaw in the principle of fasad-fil-arz is that it applies only where there is an absence of a consensus of wali—that is if one of several heirs disagrees with compounding of qisas. However, in this situation, both Bushra and Ghulam’s mother waived their right to qisas, and Waqas was barred from demanding retribution because the culprit was his own father. Therefore, there was no party remaining who was willing to exercise the right of qisas.

It will be obvious to the reader at this point that to a considerable extent, Pakistani penal law regards deliberate harm, even to the extent of killing, as a private matter between the perpetrator and the injured. In the absence of anyone willing to exercise their right of qisas, killers are often allowed to walk free. However, depending on the evidence available in the case, a ta’zir sentence may still be imposed on the killer at the discretion of the judge. Furthermore, killing in the ‘name or on pretext of honour’ will attract the principle of fasad-fil-arz, thereby mandating a minimum sentence for the accused by the court, so long as at least one of the victim’s wali wishes to exercise their right to qisas. And yet, despite these apparent safeguards, the issue of waiver and compound-ability in reference to honour crimes is still relevant in Pakistan today.

This may be because an analysis of the letter of the law does little to reveal how this law operates in practice. Institutionalised police bias, misogynistic and traditional attitudes towards women, and the practical application of the law leave unpunished the real harm suffered by real people—a matter which does not lend itself well to abstraction and the extensive discussion of technicalities. While on the surface it seems apparent that honour killings are condemned and are legally punishable, the reality of the law in this area paints a bleak picture. The next section will detail many of the issues plaguing the current law and it will expand upon the issues mentioned above.

2. **A Law Fraught with Problems**

This section will explore the reasons why the provision of qisas and diya laws is not justifiable. This will be done by identifying the key shortcomings of the law, especially as regards the uncertainty and contradiction apparent in many conflicting decisions of the Supreme Court. Furthermore, this section will demonstrate how the court’s approach to honour killings has failed to adequately distinguish the qisas and diya laws from the ‘un-Islamic’ defence of grave and sudden provocation under Pakistan’s pre-1990 penal codes.

\(^{40}\) A change introduced to s. 311 of P.P.C. by the Criminal Law (Amendment) Act, 2004 (I of 2005), s. 8(iv). The more recent Criminal Law (Amendment) (Offences in the name or pretext of Honour) Act 2016 has extended the sentence to one of life.
This section will also discuss whether *qisas* and *diya* laws have relevance in a modern criminal justice system, and whether reliance upon them in cases of honour killing runs contrary to the principles of Islam. In other words, does Islam recognise the right of an individual (or his tribe) to kill in the name of honour?

2.1. The Meaning of ‘Honour’

‘Honour’ is an element of the human condition that evades exact definition, particularly one that could be used in legal proceedings to consistently and accurately determine whether or not a crime was committed ‘in the name or on the pretext of honour’. The P.P.C. and Cr.P.C. are silent on what the term ‘honour’ encompasses, despite the fact that any law that relies upon a specific criterion to limit the application of a broad rule ought—at the very least—define the core element of the law that is employed to set the limits.

Good law is often that which strikes a desirable balance between certainty and flexibility. A law that is too precisely defined will invariably lead to absurd and unjust results, just a law that languishes in ambiguity will be subject to exploitation by those who wish to use its uncertainty to their benefit. Due to the convoluted nature of both the sections dealing with *qisas* and *diya* in the P.P.C. as well as the evidential law associated with these provisions, it is arguable that any law allowing the compounding of an offense is open to exploitation, whether or not crimes committed in the name of honour are excluded by instituting mandatory sentencing.

For instance, while the incorporation of honour crimes under the umbrella of *fasad-fil-arz* (s. 311) by the 2004 amendment to the P.P.C. is a step toward preventing the perpetrators of honour crimes from escaping punishment, the lack of clarification as to what constitutes honour killing is a source of considerable criticism. However, there is little reason why lawmakers should find it difficult to provide at least a rudimentary definition of the phrase ‘in the name or pretext of honour’. A reasonable guide as to what constitutes an honour killing may begin by considering whether or not there is a causal relationship between the killing itself and an alleged instance of adultery or behaviour that may be considered unchaste, or contrary to prevalent morals (a ‘but for’ test of causation). After all, most honour killings are committed as a result of such an accusation against a woman.41

Furthermore, the ambiguity of the word ‘honour’ is problematic because it exists in conjunction with the free reign of judicial discretion. A recent law reform known as the Criminal Law (Amendment) (Offences in the name or pretext of Honour) Act 2016 was passed on October 6, 2016. The effect of this law is to impose a mandatory life sentence on anyone who commits a murder in the name or pretext of honour, but this development in the law, as much as the 2004 amendment introduced by President Pervez Musharraf, provides no guidelines as to the meaning of ‘honour’. In fact, the law merely directs the court to refer to s. 311 (*fasad-fil-arz*) where the offence has been committed in the name or pretext honour.

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However, it is still up to the judge to determine whether or not a crime has been committed in the name of honour, and therefore whether the principle of *fasad-fil-arz* under s. 311 will apply in a particular instance, thereby barring the waiver of *qisas*. If the culprit is able to establish that a killing—for instance that of his daughter—was not motivated by honour, then not only will he avoid s. 311, but he will also not be liable to *qisas* (due to his familial relationship to the victim’s *wali* (s. 306). As a result, he will be held liable under s. 302(c), which leaves sentencing to the court’s discretion and requires no minimum sentence. In the case of *Abdul Haque v The State,* a man was sentenced to time already served (approximately two years).

It should be clear how, due to the absence of a definitive guide as to what qualifies as an ‘honour killing’, murderers are frequently able to evade mandatory sentences for such crimes. They can do so by arguing that the killing was committed for a motive other than honour, and as a result of judicial bias and the ambiguity of the law, they often succeed. Furthermore, the conflicting case law on the topic has done little to reveal how judges are likely to exercise this broad discretion available to them. As one prominent lawmaker explained, the death penalty and strict sentencing have always been available for individuals guilty of honour crimes (under *fasad-fil-arz*, for example), but ‘the problem was never just the sentence, but the absence of actual convictions’.

While this is not strictly a flaw in the law of *qisas* and *diya* itself, but one in the system, the amendments referred to above were intended to curb the practice of *diya* that had so far been given free reign. However, the introduction of mandatory sentencing has failed to a certain extent. It is applied primarily in cases that attract significant public notice, such as the recent murders of Qandeel Baloch and Zeenat Rafiq (concerning a mother who burned her daughter to death for eloping), but hundreds of such killings occur annually in rural areas, where there is a more lenient outlook towards honour crimes from both the police and the judiciary.

This aspect of the *qisas* and *diya* laws has been the subject of enduring criticism, and yet every amendment to date has failed to address this fundamental ambiguity in the definition of honour and the freedom of the courts to make such a determination. The coexistence of uncertainty and judicial discretion will always be in direct conflict to the interests of justice, because not only will the law lack certainty, but judges will be tempted to inject their personal biases into its application.

### 2.2. The Confused Nature of the Law

As stated in section 1.4 of the previous section, the opinion of the courts has been that under Islamic law a person may only be exempted from *qisas* where: (i) the killing is done in self-defence; and (ii) ‘where the deceased was committing an act for which the sentence under Islam was death’. According to Justice Taqi Usmani in *Gul Hassan*, this is because ‘under the philosophy of Islam taking life of someone who is masoom-ud-dam (whose blood is protected by law), is a very grave offence and entails the punishment of

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42 *Abdul Haque v. The State* [1996] PLD SC 1
44 Warraich (n 23), 87
qisas". Masoom-ud-dam is therefore a ‘protected’ category of person, the murder of whom is not permitted in Islam. A victim is clearly disqualified as masoom ud dam if she committed an act punishable by death prior to her murder, but what about those victims guilty of a lesser wrong, not liable to a death sentence? Does masoom ud dam only refer to those who are wholly innocent?

The court in The State v Muhammad Hanif was of the opinion that masoom ud dam referred only to those who have not committed any sort of offense, and not those who could possibly be prosecuted as a result of their actions (such as for battery or trespass). The disproportionate effect of this judgment is apparent in the fact that it gives defendants significantly greater room to argue that an individual was not masoom ud dam based on their conduct prior to death, resulting in a mitigation of punishment for the accused by means of waiver. Once again, the court’s reluctance to provide clarity in this area is a wasted opportunity to limit the application of waiver and compounding. In essence, under the current law the sentence for qatl will be determined by the culpability of the victim as well as the culprit’s motives.

Motive is certainly relevant in certain areas of criminal law, such as hate crimes, self-defense, and grave and sudden provocation, but the consideration of motive has the same drawbacks as considering a victim’s conduct. As one writer put it:

[The] neutrality objection operates on the premise that because ours is a society of different political opinions and moral viewpoints, governmental preference for one opinion or viewpoint over another should be minimized. Allowing motives to play a role in criminal punishment is necessarily predicated on assessing the moral worth of an actor’s decision to engage in criminal conduct based on a particular motive.

This begs the question, is it appropriate for the court to deliberate as to how deserving a victim was of death? To an extent, the law relating to qisas and diya requires the court to consider such factors. Does this not, indirectly, provide legitimacy to the actions of killers when a court—for instance—determines that a man’s conduct in killing his wife after finding her in a compromising situation is grounds for allowing diya or a reduced sentence? It requires officials to make moral judgments and to express their preference for certain kinds of conduct over others. This inevitably feeds into the cultural and social attitudes that have so far prevented any effective reform in this area.

Furthermore, despite Justice Taqi Usmani’s insistence in Gul Hassan that provocation has no relevance in Islamic penal law, the decisions of the court so far indicate that while there is no de jure recognition of grave and sudden provocation with respect to offenses liable to qisas, the principle remains alive in practice as regards punishments by ta’zir.

45 Wasti (n 28) 377
46 One whose blood is scared
47 Warraich (n 23), 87
48 The State v Muhammad Hanif [1992] SCMR 2047
49 Warraich (n 23), 89
50 Carissa Byrne Hessick, 'Motive's Role In Criminal Punishment' (2006) 80 S. Cal. L. Rev. 89, 91
Provocation is considered a mitigating factor in the justification of honour killings, opening the door to compensation in the form of diya,\(^{51}\) and indeed at one point the Supreme Court determined on appeal\(^{52}\) that even abusive language will qualify as mitigating circumstances in awarding a sentence under ta’zir.\(^{53}\)

The consideration of grave and sudden provocation as a mitigating circumstance is a significant shortcoming of the law: after all, the vast majority of honour killings occur in circumstances where there has been a perceived violation of a man’s personal honour, which ‘provokes’ a violent response, and this response is often against a family member. Due to the close familial connection between victim and wrongdoer, these cases are technically exempted from qisas and fall to ta’zir. The consideration of mitigating circumstances inevitably leads to significantly reduced sentences where the murder of women is concerned, since most women are killed in situations where mitigating circumstances in the form of a provoking event are present.

This is relevant to qisas and diya because proponents of the law argue that ta’zir is an effective tool in countering injustices arising from diya, but it has been demonstrated that the application of ta’zir in this regard is highly inconsistent and, as will be discussed later, prejudiced against women. Furthermore, ta’zir ordinarily applies in circumstances where the culprit is not liable to a sentence under qisas (and therefore compounding of the offence), although the state may impose a sentence whether or not diya has been accepted. Even so, ta’zir has proved to be less than effective at mitigating the effect of qisas and diya laws.

In this respect, it is arguable that the courts are paying mere lip service to Islamic doctrine, while in fact the reasoning that they are applying in cases is hardly distinguishable from the pre-1990s law of grave and sudden provocation. Furthermore, very little effort has been made to temper the drastic effect this has had on sentencing, such that many killers are able to walk free with time served. Given that ta’zir holds the potential to effectively combat the ability of killers to walk free after committing a murder, the courts ought to take a more progressive and neutral stance. Apart from a few rare cases, lower courts in Pakistan have demonstrated little intention to change the manner in which they have so far approached the problem.

### 2.3. What Role Does Diya Play in Contemporary Times?

Diya is money paid to a victim’s family as compensation for a murder and it has the effect of providing relief from legal retaliation proportionate to the crime in the form of qisas. Islamic scripture has shown a clear preference toward victims or their heirs accepting diya and waiving their right of qisas rather than demanding retribution, though it is their right to do so.

The Qur’an (5:45) says that ‘whoever gives [up his right as] charity, it is an expiation for him’. Furthermore, the Qur’an (3:134) states those individuals are successful ‘who restrain anger and who pardon the people - and Allah loves the doers of good’. Surah As-


\(^{52}\) Abdul Haque v The State [1996] PLD SC 1

\(^{53}\)Wasti (n 28), 389
Shura (42:20) reinforces this by saying that ‘the repayment of a bad action is one equivalent to it. But if someone pardons and puts things right, his reward is with Allah’.

These injunctions indicate that forgiveness is an act of charity—that while violence may legally be repaid with violence, it is preferred if one gives up their right to retribution. In fact, there is even a spiritual component to accepting diya, in that a person’s ‘reward is with Allah’ and that the final punishment lies with Him. These passages reflect the pre-Islamic roots of diya as an attempt to mitigate the impact of blood feuds—an exercise of restraint, as it were—but what relevance does diya have in a modern justice system, where law enforcement and the punishment of criminals is an obligatory duty of the state and occurs in a highly organised manner?

Badal, the concept of justice and revenge that forms a part of the Pusthun code of conduct known as Pakhtunwali, tends to displace the state-based legal methods of compensation and retaliation provided by law. Cases rarely find their way to the courts. Rather, they are usually settled by tribal jirgas, a council of elders who hear issues troubling the community and make decisions accordingly to settle the matter. These jirgas are rarely inclined to break from tradition; unfortunately, this means that individuals can often commit murders with impunity and evade punishment by paying blood money to the victim’s heirs. Furthermore, jirgas are formed entirely of men, with no representation given to women.

The verses of the Qur’an and the origin of diya indicate that it was never intended to be a method whereby the guilty could escape punishment, and yet that is what it has become to a substantial degree by accommodating the practice of honour killing. Furthermore, while Pakistani law does account for the culprit’s wealth when calculating the value of diya to be paid, it is more likely that wealthier parties will find it far easier to compromise with the victim’s wali than someone who is poor. Under classical law, however, diya could be satisfied by means of a long fast and payment of alms. As such, the contemporary role of diya in the criminal justice system of Pakistan bears only a tenuous relationship to the part it played in classical Islamic jurisprudence.

Alternatively, it is arguable that diya is a form of clemency. ‘In death penalty jurisdictions, once a defendant is sentenced to death, his or her last remaining procedural outlet is a grant of clemency or pardon from the executive.’ Pascoe distinguishes clemency in Western jurisdictions, which converts a sentence of death to one of imprisonment, from diya under Islamic law, which can result in a sentence being waived entirely (unless the state imposes a ta’zir sentence). Furthermore, diya is different from clemency in that it is up to private individuals to make the decision rather than the state. In Pakistan, through the exercise of s. 309 and s. 310 of the P.P.C., the victim’s wali may compromise with the killer even at the last moments prior to execution. In this regard, Pascoe notes that some commentators have compared diya to a wrongful death settlement in tort.

54 Gottesman (n 5), 448
55 Pascoe (n 1), 162
56 ibid 159
Nevertheless, whether or not diya is meritable for its use as a preventive measure against capital punishment, which is certainly a laudable goal from a human rights perspective, the scope of its application renders it an instrument to be employed by those whose intentions are not deserving of praise.

3. **The Disproportionate Effect on Women**

Perhaps the greatest objection to the provision of qisas and diya laws stems from the disproportionate impact it has had on the lives and freedom of women in Pakistan. The lenient and conservative approach that has thus far been reflected in the decisions of Pakistani courts is inextricably tied to the question of women’s rights. This section will address the cultural and social attitudes in Pakistan that view honour killings as appropriate and justified, and it will link these attitudes to the fact that as long as diya is available in some form or another, legislative reforms that merely go ‘half way’ are an insufficient cure to the problem. Furthermore, it will explore the informal tribal systems of justice present in rural areas of Pakistan that have played a crucial role in shaping the response of communities towards honour crimes and violence against women in general.

Finally, this section will explore the institutional bias of the courts towards a more lenient interpretation of the law with respect to honour killings by highlighting a number of cases where the courts have deliberately chosen not to limit the ambit of the law.

3.1. **The Value of a Woman**

In the life of most Pakistani women, there is an acknowledged and reinforced possibility of suffering bodily harm, or even death, if they violate the exacting rules of morality and honour prescribed by their culture. The preservation of honour (ghairat, izzat, or nang) is tantamount to man’s standing in his community, and within this gendered structure, a man’s reputation is balanced on the knife-edge of a woman’s chastity. ‘Rather than possessing honour herself, a woman is a symbolic vessel of male honor, therefore all of her actions are considered to reflect upon her male family members.’

The honour of a family or clan, therefore, is as much an indication of its worth as the land or wealth it possesses.

If this honour is ever brought into question, it can only be restored by punishing the transgressor. Failure to do so almost invariably results in a loss of face and social ridicule, which is central to the male identity in tribal societies. In fact, the honour of any single individual is inextricably connected to the honour of his family or clan. Therefore, as far as matters of honour are concerned, we must cease to think in terms of an individual's honour being violated. The close-knit ties of kinship that hold the tribal structures together ensure that if there is a response to a loss of honour, it is by the collective. As such, if a daughter’s unchaste conduct damages her father’s honour, the entire clan is likely to close ranks against her, which is precisely what makes these crimes so difficult to investigate and prosecute.

A woman’s existence in this patriarchal society is therefore characterised by the need to navigate the pitfalls of chastity and maintain a minimal social footprint so as not to tread

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on the honour of a superior, male member of her clan. Women are constantly followed by a reminder of their status by the practice of purdah (literally, curtain), which is embodied by concealment of the female form through the use of the hijab or burqa and physical segregation from men in order to maintain their dignity. Women in the vast majority of rural areas are required to observe a strict code as regards their public appearance, to the extent covering almost every inch of their bodies (including the eyes among the more conservative segments of Pakistani society).

In an address to an Amnesty International delegation, Hina Jilani, a Pakistani human rights activist and lawyer, highlighted some of the central issues of seeking justice for honour killings:

The law really facilitates such killings. Killings are private offences, against the individual, not the state, so who will bring and pursue the charges of murder? ... [T]he family of the girl will not pursue the case, as in their eyes no wrong has been done ... The prosecution case collapses on almost all the scenarios of an honour killing: In karokari cases there is no aggrieved party to pursue the case, society as a whole approves of the killing and usually there are no prosecution witnesses as nobody testifies against a family member. Since the killing takes place in a family context, forgiveness, voluntary or otherwise, is almost inevitable.\(^{58}\)

While this statement tackles many issues, it also indicates how purdah affects justice for honour killings. Due to the extreme seclusion to which women in these tribal societies are subjected, the affairs that concern them are taboo to anyone who is not part of the immediate family. As such, despite the disproportionate amount of violence against women, the ‘Pakistani law enforcement and legal system often consider these human rights violations a private, family matter’.\(^{59}\) In its 2007 World Report, the Human Rights Watch stated:

Survivors of violence encounter unresponsiveness and hostility at each level of the criminal justice system, from police who fail to register or investigate cases of gender-based violence to judges with little training or commitment to women’s equal rights.

Furthermore, 1235 of the 1339 individuals who were accused of killing the name of honour from 1998 to 2002 were the victim’s family members.\(^{60}\) It is precisely because these offences occur in a family context that compromise between the killer and the wali is so easy to achieve, especially when the cases drag on for years in court.

Unfortunately, international demands for greater rights of women are usually stonewalled by arguments of cultural relativism. This holds that the current model of human rights is


\(^{59}\) Palo (n 41), 95

\(^{60}\) ibid 98
merely a reflection of Western values; by extension, the ‘human rights’ of women are also modelled after the concern of women in the West, with little parallel to the needs of women in other parts of the world, particularly in countries with entrenched religious and cultural preconceptions as to the status of women.

3.2. Police and Judicial Bias

The State v Abdul Waheed case is a rare instance in which the courts took a progressive stance by setting a high evidential bar on any party accused of qatl-i-amd ‘attempting to benefit from exceptions or special provisos’ (in other words, anyone relying on diya). The court ruled that in the case of an accused killing another based on an alleged commission of zina, the onus is on the individual seeking waiver to produce four male Muslim eyewitnesses to the illicit sexual act, which was also the impossibly high evidential requirement to prove zina under the Hudood laws prior to 2007.

This may be interpreted as an attempt by the court to limit the impact of a victim’s conduct prior to her death on the sentence given to her killer, especially when a tenuous accusation of unchaste conduct is levelled against the deceased as a justification for the killing. This could have proved an effective tool against those acting in pursuit of their honour, had it actually been enforced in later cases. Unfortunately, in The State v Muhammad Hanif, not three months later, the Supreme Court overruled Abdul Waheed as regards the burden of proof on the accused, and they narrowed the definition of masoom ud dam to those wholly innocent of any offence.

Abdul Waheed is not an isolated case. There have been occasions when the courts have attempted to curb the tide of honour killings; however, even when the decisions are not overruled on appeal, they are generally ignored. This lack of follow-through is one of the reasons that the status quo as regards honour killings has survived as long as it has, despite considerable opposition in many levels of Pakistani society.

Furthermore, the court has gone as far as to equate the killing of an individual who engages in illicit sexual conduct with a female family member of the murderer with an act of self-defense. The Lahore High Court stated in one case, referring to Surah Al-Nisa (4:34): A husband, father and the brothers are supposed to guard the life and the honour of the females who are inmates of the house and when anyone of them finds a trespasser, committing zina with a woman of his family, then murder by him whilst deprived of self control will not amount to ‘qatl-e-amd’ liable to qisas because the deceased in such a case in not a Masoom ud Dam.

Unfortunately, this interpretation of Islamic injunctions is easily abused. Despite the fact that an adult woman is allowed to contract her own marriage without the permission of her guardian, accusations of zina are frequently employed against women who exercise

61 The State v Abdul Waheed, alias Waheed and another [1992] PCrLJ 1596 145
62 Warraich (n 23), 89
63 Warraich (n 23), 47
64 Warraich (n 23), 92
65 Muhammad Faisal v. The State [1997] MLD 2527 [5], p 2528
such rights. Amnesty International stated in a report that ‘police continue to register complaints of abduction and zina against women making use of this right, though police could easily ascertain if couples were validly married and thus not guilty of either abduction or zina.’

Similarly, in *Ghulam Yaseen vs. The State* the Lahore High Court had the opportunity to address the question of whether murders committed in the name of ghairat or honour ‘deserve any concession’. Based on a number of hadith (words, actions, or habits of the Prophet), the Lahore High Court determined that while the P.P.C. 1860 does not make ‘any allowance for Qatl committed under Ghairat’, it is clear that Islamic law does not see such a killing as equal to ordinary qatl-e-amd (intentional/deliberate murder). The court concluded that an individual who kills because of Ghairat deserves concession, and a mere five-year sentence was given to the individual for murdering a man and injuring his sister. In justifying its reasoning, the court referred to its duty under s. 338-F of the P.P.C. to interpret and apply the law according to the injunctions of Islam as laid out in the Holy Qur’an and Sunnah. Subsequently, *Ghulam Yaseen* has been relied open in many other cases to limit sentences on appeal.

These cases, among many others, give honour killings an aura of religious orthodoxy, while disregarding the fact that Islam instituted rights for women that had been historically deprived of them (such as the right of divorce, inheritance and legal personality). Relativist arguments notwithstanding, Pakistan are a signatory of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), which requires that ‘States Parties condemn discrimination against women in all its forms’. The UN Declaration on the Elimination of Violence against Women affirms that states must exercise due diligence to prevent, investigate and punish acts of violence against women, whether those acts are perpetrated by the State or by private persons (Article 4(c)).

Official responses to the issues concerning women indicate deep-seated institutional bias and a resistance towards seeing honour killings for what they truly are—acts of murder that are as deserving of the strictest punishment as any other offence which deprives a person of life.

**Conclusion**

Human rights organisations have applauded the 2016 reform of the honour killing law, despite the fact that it has ignored some of the central obstacles to justice. Furthermore, there is very little to prevent qisas and diya from finding its way back into the realm of honour killing much in the same way as it did in the case of *Federation of Pakistan v Gul Hassan Khan*. The Federal Shariat Court still has the power to declare law any repugnant to the injunctions of Islam. It is true that the political situation today is significantly different from what it was in 1980s, but statistics of honour killings have demonstrated that there has been little change in the frequency of deaths during the intervening years.

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66 Abdul Waheed v. Asma Jahangir (Saima Waheed Case), PLD 1997 Lahore 301
68 [1994] Lahore 392
69 Warraich (n 23), 90
On its own, the cultural attitudes towards the place of women will keep the practice alive, and it is inevitable that a test case will find its way before the FSC that will determine whether the new law can truly stand up in court.

Furthermore, the legislative reform was in response to substantial foreign and domestic criticism in a time fraught with allegations of corruption and attempts by minority parties to depose the government. As recently as May 2016, the Council of Islamic Ideology presented a number of recommendations to the government. It condemned honour killings but simultaneously argued that a man had the right to beat his wife if she refused sexual intercourse. This juxtaposition of conflicting ideas indicates the confused nature of the rights of women and the underlining attitudes towards the place of a woman within a home. It also indicates that progress made in the realm of women’s rights is suspect as mere political appeasement, with no follow-through whatsoever to establish the law on a firm footing.

Therefore, given that legislative reform alone cannot cure the problem and that state officials have demonstrated an unwillingness to exercise their powers in an impartial manner, the very first step, and in fact the smallest of steps required in the long road to women’s equality, is the repeal of qisas and diya laws. The competency to determine a punishment must lie with the court and the court alone, but so far even the courts have failed to properly exercise their considerable discretion.

This is due to the core elements of bias present in Pakistan’s society, law enforcement and judiciary, which come together to create an environment in which such crimes go unpunished or are not given the consideration that they are due. Therefore, the state must institute educational reforms on all levels to cure the defect of institutional bias. Furthermore, there must be thorough oversight of and mandatory sensitivity training for both the police investigating honour crimes and the judges adjudicating over them so as to inform them of the specific harm to which women are subjected and how to deal with it appropriately. This is essential particularly in regions far from urban centres where media scrutiny and government oversight is all but non-existent, and where victims are for the most part unaware of their rights.

Furthermore, the unofficial justice dispensed by jirgas must be sanctioned, seeing as how they base their legitimacy on draconian cultural practices that are inherently biased against women and not on any state-based legal authority. Jirgas are frequently responsible for condemning young women to death, and the recognition given to them by regional authorities runs contrary to the limited rights women possess under the law.
Counter-Terrorism and Human Rights: A Review of the ATC Trial Procedure in Pakistan

Zainab Mustafa*

INTRODUCTION

Pakistan has been suffering due to terrorism for over two decades. The legislature of Pakistan, in attempts to curb the spread of terrorism has drafted various specialized anti-terrorism legislation, namely, the Anti-Terrorism Act 1997 (ATA), the Protection of Pakistan, 2014 (PPA) and the 21st Constitutional Amendment Act which provides for the trial of civilians by military courts. PPA has since then expired, therefore, ATA is the primary counter-terrorism legislation currently.

ATA is a special law under which special anti-terrorism courts (ATCs) were established to try offences of terrorism. By virtue of being a special law, the ATA has an overriding effect on any other law. This rule is also provided for in Section 32 of the ATA. ATCs are frequently criticized because of the low rate of convictions and the lack of human rights safeguards. This criticism was used as a justification for promulgating the draconian PPA and the trial of civilians by military courts. This article therefore aims to trace the entire ATC trial process of ATCs highlighting the defects which lead to acquittals and the prevalent human rights abuses.

This article will first explore the defects prevalent in the pre-trial phase i.e. registration of a First Information Report (FIR) and the investigation of a terrorism offence by the Police. Subsequently the ATC trial process will be discussed.

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1 Lex Specialis derogat legi generali is a legal principle according to which a law governing a specific subject matter overrides a law that only governs general matters.
https://definitions.uslegal.com/l/lex-specialis/

2 The Anti-Terrorism Act 1997, Act No. XXVII of 1997, s 32:
“Overriding effect of Act. -1) The provisions of this Act shall have effect notwithstanding anything contained in the Code or any other law but, save as expressly provided in this Act, the provisions of the Code shall, in so far as they are not inconsistent with the provisions of this Act, apply to the proceedings before a special Court, and for the purpose of the said provisions of the Code, a Special Court shall be deemed to be a Court of Sessions.
2) In particular and without prejudice to the generality of the provisions contained in subsection (1), the provisions of section 350 of the Code shall, as far as may be, apply to the proceedings before a Special Court, and for this purpose any reference in those provision to a Magistrate shall be construed as reference to (An anti-Terrorism Court).”
1. **PRE-TRIAL PHASE**

1.1. **Defects in an FIR**

1.1.1. Registration of an FIR

Once a terrorism offence takes place, an FIR is registered. The procedure for recording an FIR is provided under Section 154 of the Code of Criminal Procedure, 1898.\(^3\) S. 154 places an obligation upon the police to register an FIR of a cognizable offence and therefore the Police does not have discretion to cause delay in the registration of a case under the law. Rule 24.5 (c)\(^4\) of the of the Police Rules supplements S 154. It is pertinent to note that an FIR is not an exhaustive document and if detailed facts are not mentioned in the FIR the correctness of it is not diminished.\(^5\)

Rule 22.45 of the Police Rules, 1934 (Police Rules) provides that all the registers that have to be maintained at each police station, with the FIR Register being one of them. Rule 22.46 states that no alteration in the form or method of keeping the books and no addition to their number may be made without the sanction of the Inspector-General. Rule 24.1 elaborates upon how the FIR should be recorded with special attention to the following matters:

a) The source from which the information was obtained and the circumstances under which the informant ascertained the names of the offenders and witnesses (if any are mentioned).

b) Whether the informant was an eye-witness to the offence.

Unfortunately, these rules are not adhered to strictly. Departure from the mandatory provisions of law creates room for doubt against the truthfulness of the allegation leveled against the accused in the FIR.\(^6\)

1.1.2. Tangential cases

S. 6 of the ATA provides a broad definition of terrorism which results in ordinary criminal cases falling within the jurisdiction of the Anti-Terrorism Courts (ATCs). A common criterion employed for an act to qualify as terrorism is the intention to “create terror in the public.” There is inconsistent as to the ambit of S.6 in the judgment of superior courts. Justice Asif Saeed Khan Khosa, in the seminal judgment *Basharat Ali*,\(^7\) provided a correct interpretation. Unfortunately, the route suggested in the judgment was not given much heed in following judgments.\(^8\) The decision is normally based on how serious (‘heinous’) the offence purportedly was and whether it amounted to spreading fear in the public.

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3 Criminal Procedure Code 1898, sec 154
4 The original copy of the FIR shall be preserved in the Police Station for a period of sixty years. One of the three copies shall be given to the complainant. Rule 24.5(c): One to the complainant unless a written report in Form 24.2 (1) has been received in which case the check receipt prescribed will be sent.
5 Jan Muhammad v Muhammad Ali, 2002 SCMR 1586
6 Imran Ashraf v The State, 2001 SCMR 424
7 Basharat Ali v Special Judge, Anti-Terrorism Court II, Gujranwala, PLD 2004 LHC 199
8 Syed Manzar Abbas Zaidi, 'Terrorism Prosecution in Pakistan: A Critical Appraisal' (Platform 2016) 28
To further compound this problem, the interpretation of what terror is, has to be applied by the police while registering an FIR. These FIRs are registered by policemen who are not well-versed in the law.\textsuperscript{9} Personal enmity cases are often closeted with terrorism cases by inserting Section 7 of the ATA (the penal application provision of the ATA);\textsuperscript{10} adding of this provision to an FIR can determine the life or death of an accused. Furthermore, the Prosecution Acts\textsuperscript{11} state that there has to be co-operation between the prosecution and police, even in regard to sharing of information in relation to registration of cases. However, there is very little, if not invisible coordination on the ground. As a corollary, people are charged with terrorism in FIRs by police without any institutional framework which would allow for joint decision-making or second opinions.\textsuperscript{12}

A common practice that has emerged is that when instances become publicized through media, and the state feels pressured to do something about it, the case is often registered under ATA, even if the case has no nexus with terrorism. These cases normally involve acid throwing, honor killings, attacks by mobs on law enforcement and other sensational events or crimes. This is highly unfortunate since such cases and other tangential cases add to the burden of ATCs and impede the successful prosecution of real terrorism cases in Pakistan.\textsuperscript{13} It is important to note that if the crime does not have a nexus with terrorism, the accused should be tried by an ordinary criminal court without infringement of any fair trial or due process rights. Furthermore, such poorly framed charges often lead to acquittals at the trial stage, thereby making the whole process redundant.

1.1.3. Delay in Lodging of an FIR

The Supreme Court has held that any delay in lodging of an FIR should be reasonably explained and that the Prosecution should not have derived any undue advantage through such delay.\textsuperscript{14} It casts serious doubt on the case of the prosecution. Thus, benefit of doubt should be extended to the accused and he should be acquitted. In such a scenario, the possibility of the FIR being fabricated cannot be excluded altogether. However, an unexplained delay is not fatal by itself and is immaterial if the evidence gathered by the prosecution is strong enough to get a conviction. It becomes significant in the case where prosecution evidence and other circumstances of the case tilt the balance in favor of the accused.\textsuperscript{15}

1.1.4. Overreliance on an FIR

Investigating Officers in Pakistan only do substantial work once the FIR has been registered and behave as if nothing has happened before it.\textsuperscript{16} The crime scene or preparation of a terrorism offence is not then given its due importance. This may be the

\textsuperscript{9} Interview with ATC Prosecutor Islamabad, May 2017
\textsuperscript{10} Syed Manzar Abbas Zaidi, 'Terrorism Prosecution in Pakistan: A Critical Appraisal' (Platform 2016) 29
\textsuperscript{11} Refer to Section 4.9.5 Role of the Public Prosecutor
\textsuperscript{12} Syed Manzar Abbas Zaidi, 'Terrorism Prosecution in Pakistan: A Critical Appraisal' (Platform 2016) 28
\textsuperscript{13} Syed Manzar Abbas Zaidi, 'Terrorism Prosecution in Pakistan: A Critical Appraisal' (Platform 2016) 19
\textsuperscript{14} Muhammad Nadeem v State, 2011 SCMR 872
\textsuperscript{15} Ayub Masih v The State, PLD 2002 Supreme Court 1048
\textsuperscript{16} Interview with ATC Defence lawyer, June 2017
reason why there is a callous disregard of crime scenes in Pakistan.\textsuperscript{17} The washing away of the crime scene when Benazir Bhutto was assassinated is a prime example.

1.1.5. Improper Registration of an FIR

Since there is an overreliance on FIRs, it becomes very crucial, as a corollary, that the FIR be registered in the proper manner. Police often do not name the accused in the FIR, misidentify the role of the accused, and challan unnecessary people.

If the accused is not named in the FIR, it raises the inference that there were no eyewitnesses which taints the case of the prosecution. Furthermore, the role of the accused needs to be clearly mentioned in the FIR. This not only helps in giving justice to the victims but the awarding of punishments is dependent on the roles attributed to the accused.\textsuperscript{18} Determining the role of the accused is essential since the ATA may not be applicable to the accused, as it is to the co-accused. Therefore, it would be a grave miscarriage of justice if the accused is not saved from the restrictive laws of ATA by identifying an incorrect role of the accused.

Additionally, a common practice referred to as ‘casting the net wide’ is used by the Police. In order to increase the number of accused in cases in the FIR or supplementary case diaries (zimmis) the police challan an unnecessary large number of people. So for example if the eyewitness has seen five people, the police will challan nine people. Normally, the other people that have been named in the FIR are let go by the police after taking bribes. This has become so common that it has become a part of police procedure even though there can be no expectation of getting bribes in high-profile terrorism cases. However, in practice it violates the rights of innocent people and destroys the case of the prosecution.\textsuperscript{19}

Therefore, it is necessary that the prosecution scrutinizes FIRs in order to ensure that only terrorism offences are charged under ATA. Furthermore, policemen should be given training on how to file an FIR properly so that they made be made aware of the implications of these defects at the trial stage.

1.2. Defects in Investigation

The investigative process to be followed in terrorism cases is as provided in the Cr.P.C. It consists of the following steps:

i. Site inspection
ii. Ascertaining of facts and circumstances that connect with the offence under investigation
iii. Discovery and arrest of suspected offender
iv. Collection of evidence related to the commission of the offence which may lead to the:
   a. Examination of various persons including accused and recording their statements;

\textsuperscript{17} Syed Manzar Abbas Zaidi, ‘Terrorism Prosecution in Pakistan: A Critical Appraisal’ (Platform 2016) 47
\textsuperscript{18} Muhammad Nawaz v The State, PLD 2005 Supreme Court 40
\textsuperscript{19} Interview with Defense lawyer (Islamabad), June 2017
b. Search of places or seizure of things considered necessary for investigation\textsuperscript{20}

d. Formation of opinion as to whether on material collected there is a case to place accused before the [court] for trial and if so taking necessary steps for the same by filing of a challan under Section 173 Cr.P.C.\textsuperscript{21}

One of the major reasons for acquittals in ATC trials is poor investigation by the police. An investigation commences once an FIR is lodged. It is conducted by the police and includes everything from the collection of evidence, recording of statements to the submission of the police report.\textsuperscript{22} If it appears to the investigating officer that there is insufficient evidence or no reasonable grounds of suspicion against the accused exist, such officer shall, if such person is in custody, release him on his executing a bond (with or without sureties) as such officer may direct, to appear, if and when required, before a Magistrate empowered to take cognizance of the offence on a police-report and to try the accused or send him for trial.\textsuperscript{23}

The ATA lays down a special procedure for conducting investigations of terror suspects as opposed to the general procedure provided under the Cr.P.C. However, for those matters where the special law is silent, the general law remains applicable.\textsuperscript{24}

Under Section 19 of the ATA, an investigation in all cases, other than those invoked under Sections 4 and 5, may be conducted by an individual officer or, if the Government deems it necessary, by a Joint Investigation Team (JIT). Ordering the composition of a JIT in such circumstances is the sole authority of the Government. The composition of a JIT offers a major advantage for a thorough investigation in anti-terrorism cases, as members having relevant expertise are chosen. Moreover, as the JIT is headed by an SP, who is a senior police officer, he has a large workforce at his disposal to get the job done. He may also call other departments to act in the aid of JIT. The SP also has a proper coordination mechanism between his and all relevant departments, therefore investigations conducted by a JIT have a better standing than those conducted by an individual police officer.

However, in practice, JITs are not regularly formed, rather subinspectors conduct investigations as provided in the Cr.P.C. These sub-inspectors neither have the expertise and experience nor thorough knowledge of the ATA procedures.\textsuperscript{25} Poor investigation may, then, lead to bail of the accused in terrorism cases. In \textit{Muhammad Noman v the State and another},\textsuperscript{26} where the police had failed to investigate the allegations made by the

\textsuperscript{20} M. Mahmood, \textit{The Code of Criminal Procedure} (vol. 1, 2016) P. 631

\textsuperscript{21} Lal Khan \textit{v} SHO, Police Station Kotwali Jhang, 2010 PCrLJ 182

\textsuperscript{22} Code of Criminal Procedure 1898, Act no. V of 1898, Section 4(1)(l); Lal Khan and another \textit{v} SHO, Police Station Kotwali Jhang, 2010 PCrLJ 182, para 6:

“Job of investigation consisted of spot inspection; ascertainment of facts and circumstances touching the offence under investigation; collection of evidence and apprehension of accused as and when sufficient evidence in support of the charge was made available.”

\textsuperscript{23} Code of Criminal Procedure 1898, Act no. V of 1898, Section 169

\textsuperscript{24} The Anti-Terrorism Act 1997, Act No. XXVII of 1997, Section 32

\textsuperscript{25} Interview with defense lawyer (Islamabad, 15 July 2017)

\textsuperscript{26} Muhammad Noman \textit{v} the State and another, 2017 SCMR 560,
accused, rather had conducted a one-sided investigation against the accused, the Apex Court held bail to be a matter of right and not merely “grace.”

1.2.1 Site Inspection

As soon as the FIR is recorded, a police officer is supposed to immediately proceed to the crime scene and if he is not competent to conduct the investigation, then to ensure that the scene is preserved and the evidence is not contaminated.

A site map, or plan of the scene, is to be drawn up by the investigating officer. The procedure to be followed is laid down in Rule 25.13 of the Police Rules. It requires that two copies of the site map be made, one to be submitted with the final report and one to be retained by the police for departmental use.

Where the crime is of a heinous nature, and the investigating officer considers that an accurate map is required, he is obligated to summon the patwari and cause him to prepare two maps. In one of these maps references are then added by the investigating officer based on his observations – this map may then be produced in Court. While on the other map, references are to be added based on witness statements.

1.2.2. Cordonning Areas for Terrorist Investigation

Furthermore, Sections 21A and 21B of the ATA lay down the rules for cordonning off areas for the purposes of a terrorist investigation. The investigating team has wide powers to not just cordon off areas but to also order the immediate removal of a person from such an area or an area adjacent to it, or to restrict the access of pedestrians and vehicles. However, this is a mechanism rarely used by the investigators; instead crime scenes are often contaminated leading to serious defects in the collection of evidence.

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27 Muhammad Noman v The State and another, 2017 SCMR 560: Poor investigation leading to the granting of bail to the accused:

“True that the country is confronted with a formidable terrorist activities from one end to the other… however, this should not, in any manner, distract the Court of Law from doing justice in a given case, when, the investigation/inquiry carried out is neither satisfactory nor it is free from malice and the citizens' implication in such nature of cases is not free from reasonable doubt, thus, they cannot be left at the mercy of the police's traditional chicanery indulging in such like tactics, not authorized by the law.”

“In the present case, the facts and circumstances would show that the investigation was one-sided and the other aspects of vital importance were not touched much less investigated into without any explanation offered by the investigating officer present in court, therefore, the case of the petitioner squarely falls within subsection (2) of Section 497, CrPC. being susceptible to further inquiry. Therefore, in our considered view, the petitioner is found entitled to grant of bail as a matter of right and not as a matter of grace.”

28 The Police Rules, 1934, Rule 25.10

29 Muhammad Ashraf Khan Tareen v the State, 1995 PCrLJ 313:

“Preparation of the site plan by the expert is necessary only if the Investigating Officer considers it proper to have the assistance of a technical man, otherwise there is no bar to the making of map by the police officer who investigates the case”

30 The Anti-Terrorism Act 1997, Act No. XXVII of 1997, Section 21B

31 Interview with Defense Lawyer (Islamabad, 15 June 2017)
1.2.3. Maintenance of Case Diary in Investigation

Under Section 172 Cr.P.C it is mandatory for an investigating officer to enter day to day proceedings of the investigation in a special diary. Case diaries are required to be submitted in the form given in the Police Rules, at 25.54. Setting forth the time at which the information reached him; the time at which he began and closed his investigation; the place or places visited by him; and a statement of the circumstances ascertained through his investigation. Case diaries are required to be as brief as possible and must record only those incidents that have a bearing on the case.\(^{32}\) This diary may be used at the trial or inquiry, not as evidence in the case but to aid the Court in such inquiry or trial.\(^{33}\) The object of recording “case diaries” under this section is to enable Courts to check the method of investigation by the Police.\(^{34}\) Therefore, it is very crucial, in order to minimize potential human rights abuses and to encourage the adherence to proper law and procedure, that the case diary entries be accurate and made with diligence. If a police witness who has failed to keep a diary as required by Section 172, the evidence of such police officer is open to adverse criticism and may diminish its value but it does not make that evidence inadmissible.\(^{35}\)

Unfortunately, the mandatory provisions of Section 172 Cr.P.C are ignored by the Police, whereby they are required to maintain case diaries of the investigation. These diaries may be later used by the Court for assistance. However, the investigating officers fabricate the day’s events, that is instead of noting the events as and when they happened, they note everything once in the police station and manipulate the wording and chronology of investigation to match their oral versions (if summoned for testimony or during cross-examination).\(^{36}\)

1.2.4. Out-dated Investigative Tools

Investigative tools in Pakistan are not up to date with scientific developments,\(^{37}\) even though under the law evidence required through modern means is admissible.\(^{38}\) For instance, when blood samples are collected from the crime scene they are sent to forensic science laboratory. The report is very rudimentary and lacks concrete evidence; it simply alludes to the fact that the blood was human, and it does not even identify the blood. Thus, where the prosecution is relying on the medical report for corroboration of the ocular testimony, there tend to be many unexplained lacunae. To further compound the problem, there is only one forensics agency in Punjab, while there is none in Sindh. Moreover, tools for gunshot residue, iron-testing or print-barrel testing are not used.\(^{39}\)

\(^{32}\) The Police Rules, 1934, Rule 25.53
\(^{33}\) 19 Bom. BR 510
\(^{34}\) Peary Mohan Das v D. Weston and Others, 16 CWN 145
\(^{35}\) Zahiruddin v Emperor, PLD 1947 PC 13
\(^{36}\) Interview with Prosecutor, (Islamabad, 25 May 2017)
\(^{37}\) Riaz v SHO, PLD 1998 Lahore 35
\(^{38}\) The Anti-Terrorism Act 1997, Act No. XXVII of 1997 Section 27B
1.2.5. Failure to effectively use available mechanisms

A major factor that contributes to the poor investigations is the police’s failure to effectively use the mechanisms available to them. For instance, the mechanism under the ATA to cordon off the site to save it from contamination is hardly ever used.\(^\text{40}\) The famous “hosing down”\(^\text{41}\) of the assassination site of former Prime Minister Benazir Bhutto was a huge failure of the investigation agencies and illustrates the total disregard of investigative procedures.

Site plan is one of the most crucial components of the investigation, and the Courts heavily rely on this plan to corroborate the ocular testimony.\(^\text{42}\) It is essential that the site plan accurately depicts the crime scene, but the investigating authorities at times carelessly or even deliberately create inconsistencies in the investigation. In *Muhammad Wali Shah v the State*,\(^\text{43}\) where the investigating officer had deliberately failed to mention the names of the witnesses on the plan, it led to serious doubts in the veracity of the prosecution’s case, resulting in the acquittal of the accused persons.

Moreover, evidence is routinely tampered with. For instance, empties have to be submitted into evidence even before the recovery of the gun. However, this is not the practice. Everything is recovered and placed together in evidence thereby breaking the chain of custody of evidence or raising doubts as to the credibility of the empties being fired from the gun in the commission of the crime or later on by the police just to show recovery of empties.

Every piece of recovery has to be sealed and stamped at the crime scene and then sent for forensics. In practice, evidence is brought to the police station and then wrongfully signed and stamped to show that the procedure was completed at the crime scene.\(^\text{44}\) Such practices not only contaminate the evidence, but also cause delays in investigation during which time the accused is held in custody, even if s/he is innocent. Moreover, all written documentation of investigation, from site maps and daily diaries to recording of witness statements, are crudely and poorly undertaken by the concerned investigating officers. These procedures are learned on the job and passed on from seniors to juniors. Thus, all irregularities are now institutionalized to the “detriment of the criminal justice system.”\(^\text{45}\)

Witness statements must be taken down promptly and verbatim. If these are missing, then it creates doubts on the veracity of these statements, thereby harming the prosecution’s

\(^{40}\text{Syed Manzar Abbas Zaidi, “Terrorism Prosecution in Pakistan” (Report Peaceworks No. 13, United States Institute of Peace 2016) 15-16}\)


\(^{42}\text{See *Mst. Rukhsana Begum v Sajjad*, 2017 SCMR 596; *Muhammad Asif v the State*, 2017 SCMR 486; *Sardar Bibi v Munir Ahmed*, 2017 SCMR 344}\)

\(^{43}\text{*Muhammad Wali Shah v the State*, 2017 PCrLJ 779}\)

\(^{44}\text{Interview with prosecutor, (Islamabad, 25 May 2017)}\)

\(^{45}\text{Zaidi, “A Critical Appraisal”, 54}\)
Police may also ‘pad’ witness statements which later do not corroborate with circumstantial or documentary evidence, thereby weakening the prosecution case.\(^{46}\)

False FIRS are registered to frame persons for the possession of narcotics or to show the commission of assault where the wounds were self-inflicted.

To cover their own tracks the Police have devised an unofficial mechanism of skipping FIR pages so as to skip the sequence and after having coached witnesses and received the post-mortem report, they then backdate the FIR to reflect all of these “facts”. However, this sacrifices the trial, as it does not tally with the rest of the timeline.

Such practices also contribute towards ‘case management’, where prosecution attorneys are actually involved in the drafting of the police report and everything is done under their guidance.

All of these flaws and gaps in the investigation ultimately lead to human rights violations, as the accused who is essentially ‘innocent until proven guilty’ suffers due to such incompetence and negligence. He serves lengthy periods in custody, whether in police lockups or judicial lockups, until the Court discharges and/or acquits him for insufficient evidence or gross flaws in the investigation.

1.2.6. Defective Investigations

The ATC or a High Court, as the case may be, under Section 27 of the ATA is empowered to penalize investigating officers for defective investigations with imprisonment for up to two years, or with fine or with both.\(^{47}\) However, as explained by an ATC Judge based in Karachi, police officials are suspended or given notice to show cause\(^{48}\) in such circumstances. This does not have much effect as delinquent persons are still given remunerations during suspension, and more importantly, it is practically impossible to penalize every investigating officer responsible for defective investigations.\(^{49}\) The reason, as is self-evident, being the institutionalization of illegalities and irregularities in investigation.

Nonetheless, delinquent officers have faced punishments in the past in pursuance of Section 27 of the ATA,\(^{50}\) as “investigation by the police formed the backbone of the criminal justice system and investigating officer, enjoyed authority in the matter of investigation … such authority would unquestionably demand accountability.”\(^{51}\) The Peshawar High Court also observed that defective and improper investigations had “eroded the confidence of the general public in the police … which was touching the lowest ebb of its credibility.”\(^{52}\)

Furthermore, similar penalties are embodied within Section 27AA of the ATA for falsely implicating an innocent person in terrorist investigations. However, such measures are

\(^{46}\) Interview with ATC Judge, (Karachi, 25 July 2017)
\(^{47}\) Muhammad Saeed Khan v State, 2012 PCrLJ 1337
\(^{48}\) See Ghazi Marjan v the State, 2014 PCrLJ 1750 (Peshawar)
\(^{49}\) Interview with ATC Judge (Karachi, July 2017)
\(^{50}\) See Ashrafullah Khan v the State, 2003 PCrLJ 872
\(^{51}\) Waqar Ahmad v the State, PLD 2015 Peshawar 218
\(^{52}\) Waqar Ahmad v the State, PLD 2015 Peshawar 218
rarely undertaken and ‘terrorist’ deaths in police encounters remain a common occurrence.

Therefore, keeping in mind the various defects during the investigation phase of a terrorism offence, it is recommended that investigating officers be provided ‘crime scene bags’ and more importantly trained to use these bags properly. Policemen should also carry notepads with them at all times, so that any developments in the investigation may be recorded there and then. Furthermore, there must be an internal oversight mechanism for ensuring that the mandatory provisions of law are adhered to, with periodic reports submitted to the concerned DSP who may seek assistance from the Office of the Prosecutor to identify deficiencies in investigation.

1.2.7. Completion of Investigation

An investigation report under the ATA is to be submitted within 30 working days, meaning thereby that the investigating officer/JIT shall have 30 working days to complete their investigation. This differs from the Cr.P.C wherein 14 days are allotted for the completion of an investigation. This report is signed and submitted to the ATC directly by the investigating officer, while under the Cr.P.C, a police report is forwarded to the Magistrate through the public prosecutor. Final reports and incomplete reports recommending initiation of trial are sent in Form 25.56(1). This is called the challan form.

Although under Section 19 of the ATA the public prosecutor is not involved in the submission of a final report, it is still a mandatory component for compliance with Section 173 of Cr.P.C and Section 9(4) of the Punjab Criminal Prosecution Service Act, 2006. Moreover, under Section 19B of the ATA, it is obligatory for the public prosecutor to scrutinize the case file “to ensure that all pre-trial formalities have been committed.”

Under Section 19(2) of ATA, any act on the part of a person conducting the investigation, which causes or effects a delay in the investigation or the submission of the police report, are taken as “wilful disobedience of an ATC’s orders”. A person who commits such defaults shall be liable to be held in contempt of Court. Section 37 deals with cases of contempt of Court, which provides that a person who “abuses, interferes with or obstructs

53 The Anti-Terrorism Act 1997, Act No. XXVII of 1997 Section 19(1)
54 Code of Criminal Procedure 1898, Act no. V of 1898 Section 173(1)
55 Case law exists that challans should be sent up only filled in the above form, so not following this direction would amount to procedural anomaly.
“A police report under section 173 of the Code [of Criminal Procedure] including a report of cancellation of the first information report or a request for discharge of a suspect or an accused shall be submitted to a Court through the Prosecutor appointed under this Act.”
58 The Anti-Terrorism Act 1997, Act No. XXVII of 1997, Section 19 B
the process of the Court in any way or disobeys any order or direction of the Court”⁵⁹ may be punished with a maximum of six months imprisonment and with fine. In *S.I Kazi Shahid Ali v The State*,⁶⁰ the accused (a police officer) was investigating a criminal case, but, he having not completed investigation within time as provided under Section 19(1) of ATA moved the Trial Court for extension of time which was granted from time to time. On the relevant date, the accused moved another application for extension of time which was dismissed and the accused was simultaneously convicted as he was found guilty of not submitting the challan within the stipulated time as this fell within the ambit of contempt of Court in terms of Section 19 (2) of ATA.

1.2.8. Role of the Prosecutor

As noted above, both under the ATA and Cr.P.C, public prosecutors have specific functions in respect of a police report. These functions are reiterated and further enunciated in the specific laws establishing the prosecution service in each of the provinces. In Punjab, under Section 9 of the Criminal Prosecution Service Act, 2006, (CPSA) the prosecution branch has the following functions:

- To scrutinize⁶¹ the report and return it to the SHO or investigating officer within three days if found to be defective for the removal of such defects;
- To submit the report for trial if found to be fit for such purposes;
- If required, to submit in writing the results of such scrutiny to the Court with his opinion on the same;
- Where the report is interim, to examine the reasons for delay, and if he thinks fit to request the Court for postponement of trial until the completion of investigation, or to commence the trial on the basis of the interim report.

When the prosecutor reviews the police report, the prosecutor must consider whether there are any defects/shortcomings in the report. The defects may either be ‘remediable’ or ‘non-remediable’. A remedial defect can be removed and this would not result in a miscarriage of justice. However, a non-remediable defect cannot be remedied since it has an impact on the integrity of the evidence.

Scrutiny of the police report by the prosecutor’s office is a vital component of criminal proceedings, as the police are not very proficient or well-versed when it comes to the law.⁶² Where the prosecutor is available and willing to provide assistance, it is beneficial for the trial. Otherwise, it may suffer from serious flaws which are hard to rectify at later stages. Following are some examples of such flaws.

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⁵⁹ The Anti-Terrorism Act 1997, Act No. XXVII of 1997, Section 37(a)
⁶⁰ S.I Kazi Shahid Ali v The State, 2003 PCr.LJ 1468
⁶¹ Nadeem alias Deema v DPP, Sialkot, 2012 PCrLJ 1823, para. 6:
“Scrutinize means to examine a matter from all pros and cons and attend all its aspects with due care and caution inasmuch as to make deep search or inspect the matter in close, [careful] and thorough manner.”
⁶² Nadeem alias Deema v DPP, Sialkot, 2012 PCrLJ 1823, para. 8
a) Inclusion of incorrect provisions in the report

Where incorrect legal provisions are included in the report, the case eventually suffers. Even though, amendment of charges is possible during trial, it is very limited in scope. Therefore, it is essential that these flaws be removed before the case is sent to trial. Where the prosecutor’s office does voice their objections, the police then proceed to remove the fatalities or errors from these reports.

Moreover, the prosecutor may flag a case to be unfit for trial and suggest its dismissal; however, the same has to be confirmed by the Court. Thus, the accused essentially remains in custody while the Court deliberates upon the fatalities in the investigation or case.63

b) Lack of interest shown by public prosecutors

Regardless of the legal mandate, public prosecutors are hardly ever interested in these trials, let alone scrutinize police reports and raise objections on them.64 Courts are often hard-pressed to even ensure their presence.65

Therefore, it is crucial that the importance of rigorous scrutiny of the police report by the prosecutor needs to be emphasized since the police are not well versed with ATA procedures. Furthermore, the investigating authorities also need to be trained because every defect in the investigation and/or the police report cannot be remedied and may lead to fatal flaws in the prosecution’s case.

2. Commencement of an ATC Trial

As mentioned previously, the ATA is a special law which is applicable in specific circumstances. By virtue of being a special law,66 the ATA has an overriding effect on any other law. This rule is also provided for in Section 3267 of the ATA. However, the said section also states that the Code of Criminal Procedure 1898 (Cr.P.C) shall apply to the anti-terrorism courts (ATCs), as long as the provisions of Cr.P.C are consistent with the ATA. Under Section 32 the special courts are deemed to be Courts of Session and consequently provisions of the Cr.P.C and the Qanun-e-Shahadat Order 1984 (QSO) are applicable to the proceedings before the special courts.68 Cr.P.C is applicable to Anti-terrorism courts only to the extent that its provisions are consistent with the provisions of ATA and in case of inconsistency the provisions of Cr.P.C are to be struck down.69 Section 32 of the ATA also recognizes that where there are no provisions provided in the ATA, the provisions in the Cr.P.C come into force.70 This is why the trial procedure for

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63 Interview with Prosecutor (Islamabad, 25 May 2017)
64 Interview with Prosecutor (Karachi, 25 July 2017)
65 Interview with Defense Lawyer, (Islamabad, 15 June 2017)
66 _Lex Specialis derogat legi generali_ is a legal principle according to which a law governing a specific subject matter overrides a law that only governs general matters. https://definitions.uslegal.com/l/lex-specialis/
67 The Anti-Terrorism Act 1997, Act No. XXVII of 1997, Section 32:
68 _Mehram Ali v Federation of Pakistan_, PLD 1998 SC 1445
69 _State v Anis Bawani_, 2000 PCrLJ 1418
70 _Syed Nawaz Hussain v State_, 2014 PCrLJ 1256
Session Courts, as laid down in the Cr.P.C, is the same procedure followed by the ATCs.

2.1. Witness Intimidation
A major challenge faced by the prosecution is that of witness intimidation.

The 2014 Amendment to the ATA introduced protection measures for judges, witnesses and prosecutors through the use of screens, allowing trials to be held in jail premises or through video link, and the establishment of witness protection programs. However, unfortunately there is a lack of awareness regarding the existence of the 2014 amendment. Furthermore, S 265-C requires that the prosecution provides the defence with witness statements under Section 161 and 164. However, there is a misconception surrounding the mandatory nature of this provision. The Prosecution can shield the name of the witnesses if there is a risk to the witness’s life.

As one lawyer revealed, when interviewed, that the prosecution by sharing the statements of the witnesses with the accused risk putting the witnesses in harm’s way, especially if the accused belongs to a powerful party. To minimize this risk, the court can be requested not to disclose all the evidence to the accused. However, even where this is followed by the courts, there have been instances where the police have been bribed into leaking copies of the case files to the accused. This puts the witnesses at risk of not just being harmed but also of being bribed into changing their statements or retracting their statements altogether, greatly damaging the case of the prosecution.

2.2. Non-Uniformity in Standards of Evidence
Under Article 131 Qanun-e-Shahadat Order the Judge determines the admissibility of evidence. This gives the judge wide discretion in accepting and/or rejecting the evidence presented in the court during trial. The issue with such discretionary powers is that it results in non-uniform standards of evidence being applied in the cases.

Generally, the standard of evidence is very high for terrorism cases i.e. beyond shadow of a doubt. Since there is heavy dependence on ocular evidence along with the high evidentiary standards, in the case of any slight discrepancies in the statements of different witnesses, the “benefit of doubt tends to favour acquittal of the accused.”

However, at other times judges ignore minor discrepancies in evidence as being irrelevant if other reliable evidence was placed on record. ATCs have a settled principle that, “the procedural defects and sometimes even the illegality committed during the course of investigation, shall not demolish the prosecution case nor vitiate the trial.” ATCs in different areas seem to treat evidentiary standards differently which may lead to an inconsistent development of the law.

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71 Code of Criminal Procedure, 1898, Act No. V of 1898, Chapter 22A Trials Before High Courts and Courts of Session
72 Interview with Prosecutor (Islamabad, 25 May 2017)
74 Zaidi, “A Critical Appraisal” 21
2.3. Hostile Witnesses

Another issue that arises during the recording of evidence in a trial is when witnesses turn hostile. This usually happens because the witnesses are afraid for their safety as they have to be in close proximity to the accused in the court room. Unfortunately, the Pakistani criminal justice does nothing to reassure the safety of the witnesses. “No anonymity whatsoever is afforded to the witnesses, and according to law…full disclosure of the antecedents of the witnesses to the defence is mandatory.”

Other reasons for why witnesses turn hostile may include logistical and financial costs incurred by them when they have to travel back and forth for multiple court hearings. Since they have to incur such costs personally it may lead the witnesses to accept “compensation” from the opposing parties, in return of retraction of their statements. Not only do witnesses resile but at times even complainants and victims withdraw their statements, gravely affecting the trials.

2.4. Trials in Absentia

The ATA allows for trials in absentia which is a clear violation of Article 9 and 10A of the Constitution of Pakistan guaranteeing the right to a fair trial. The right to a fair trial includes the right to be heard and “condemning of the accused without affording an opportunity of hearing is also contrary to the principles of natural justice.”

There are two options available to the accused under the ATA: (i) it can approach the ATC within 60 days to request to set aside his conviction recorded in absentia as per Section 19 (12) of the ATA by showing that he did not abscond on purpose; or (ii) he could surrender before the High Court by filing an appeal under Section 25 of ATA with a prayer to set aside the conviction and to acquit him on merit or remand the matter back for fresh trial by setting aside the impugned judgment.

Keeping in mind the multitude of challenges in the trial process of ATCs it is crucial that the process be reformed. One of the many reasons for the high rate of acquittals in terrorism cases is the fact that witnesses are too scared to come forward due to the lack of safeguards. Therefore, it is necessary that an advocacy strategy be put into place to spread awareness of the existence of the 2014 amendment to the ATA, and to operationalize it. Furthermore, in order to operationalize the amendment SOPs may need to be drafted or High Court Rules. Provincial amendments can also be made in the Code of Criminal Procedure. Identity protection orders may also be introduced.

CONCLUSION

It is evident from the above discussion that the pre-trial phase and trial process of terrorism offences in ATCs are riddled with defects. Numerous human rights abuses take place as matter of routine which only lead to a higher rate of acquittal in ATC cases. Not only does the process need to be legally reformed but more importantly the relevant

75 Zaidi, “A Critical Appraisal” 34
76 Zaidi, “A Critical Appraisal” 35
77 Anti-Terrorism Act, 1997, Act No. XXVII of 1997, Section 19 (12)
78 Imad v State, 2015 YLR 2036
actors need to be trained and informed of the correct procedures, in order to ensure that the law is being correctly and effectively implemented.
Deprivation of Liberty during Investigation, Preventive Detention and Internment

Minahil Khan*1

INTRODUCTION

The criminal procedure in Pakistan often remains shrouded in legal complexity and jargon. Scant guidance is available to inform citizens or State functionaries of their rights and obligations under the law. A conspicuous element of the criminal justice system is its provision to enable the deprivation of liberty of persons. Two primary categories of detention exist under Pakistan’s law. The first relates to the holding in custody of a person concerned in a criminal offence. This process entails the arrest, subsequent remand of the individual, and the continued detention of a person under trial. The second relates to measures taken by the State in a preventive capacity i.e. preventive detention. Preventive detention does not involve the charging of the concerned person for any criminal offence but may relate to measures in connection with the security and integrity of Pakistan or the maintenance of public order.

Safeguards under Article 10 of the Constitution exist specifically to strictly regulate State actions which result in the deprivation of liberty of persons. Yet abuses in the process continue to take place and greater scrutiny is required to ensure that lawful procedure is not abused. This article will explore the different domestic legal frameworks that are used to detain individuals in Pakistan.

1. ARREST, REMAND AND BAIL

The process relating to deprivation of liberty under the general criminal law commences with the formal arrest of an accused pursuant to an investigation.

Arrests generally permit the Police to keep an individual in custody for up to 24 hours. Beyond this period, judicial authorization is required for any further deprivation of liberty of the accused. Under the Constitution of Pakistan as well as the Section 167 of the Criminal Procedure Code (Cr.P.C.), an individual who is arrested must be produced before a Magistrate within 24 hours. If after arrest, physical custody of accused is required for investigation beyond the initial period of 24 hours, the Police may seek the physical remand of the individual from the concerned Court.

Where the Magistrate does not deem the individual’s physical custody with the Police to be necessary for investigation, he may remand him into magisterial custody also known as judicial remand. It is to be noted that it is only after an accused is granted judicial

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remand that he may apply for bail under Section 496 or Section 497 of the Cr.P.C, depending on whether he is involved in a bailable or non-bailable offence.

Both these forms of remand (physical and judicial) can extend to 14 days from the date of the order. These forms of deprivation of liberty are for the purposes of allowing the Police to complete their investigation. They therefore, operate before the filing of the Police Report/Challan (whether interim or final) under Section 173 of the Cr.P.C.

The filing of the Police report in Court before the expiry of the period of fourteen days from the time of registration of F.I.R. is a mandatory requirement under the Cr.P.C.. However, if the investigation cannot be completed within this time period, Section 173 Cr.P.C. allows the police to file an interim report within 3 days of the expiry of the initial fourteen days period (17 days in total from the date of registration of F.I.R.). In either case, the filing of the police report is a mandatory requirement of the law and any detention in Police custody beyond this period would be unlawful amounting to illegal detention.

A separate regime under the Cr.P.C governs the deprivation of liberty of an accused after the submission of the interim or final Police report. This is also known as judicial remand but operates under Section 344 Cr.P.C and is distinct from the remand provisions of Section 167 Cr.P.C. above. In essence remand under Section 344 is granted to provide legal cover to individuals who are denied bail at this stage and therefore must remain in custody pending trial. It operates by allowing the Court to make adjournments in the case for various purposes for up to fifteen days at a time. Where the accused has been arrested for a bailable offence and is willing to give bail, the Court is bound to release the individual after the physical remand period ends, as bail is a right for bailable offences i.e. judicial remand cannot be given for continued detention of the accused in cases where the offence alleged is bailable and the accused is willing to post bail. Where bail is not granted (non-bailable offences) after the remand period, the Court may send the accused into judicial custody by warrant. The warrant notes the next date of appearance of the accused and is duly stamped by the Court.

If the accused was in physical remand for the duration of the investigation period, his custody may continue in the form of judicial remand under Section 344 after filing of the Police report or he may be admitted to bail under Section 496 or Section 497 depending on whether he is involved in a bailable or non-bailable offence.

1.1. Arrest

The investigation process for a cognizable offence commences once a First Information Report (FIR) is registered by the Police under Section 154 of the Cr.P.C. The Police are

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2 Cr.P.C. 154. Information in cognizable cases. Every information relating to the commission of a cognizable offence if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the Provincial Government may prescribe in this behalf: Provided that if the information is given by the woman against whom an offence under section 336B, section 354, section 354A, section 376 or section 509 of the Pakistan Penal Code, 1860 (Act XLV of 1860) is alleged to have
then empowered under Section 156\(^3\) to conduct an investigation into any cognizable offence. In cases of non-cognizable offences, investigation may only commence subject to authorization by a Magistrate; a warrant of arrest is required before an arrest can be made.

A formal arrest authorizes the detention of an individual for a period of twenty-four hours in which the Police conduct the investigation. As per Article 10 (2) of the Constitution of Pakistan all persons who are arrested and detained in custody shall be produced before a Magistrate within a period of twenty-four hours of such arrest. The importance of a formal arrest is highlighted by the fact that an individual cannot be interrogated in relation to a crime unless he is first formally arrested.\(^4\)

1.2. Remand

A remand is a re-committal to custody of a person who has been brought before the Court. There are three types of remand under the Cr.P.C.: physical, judicial and transitory.

In general, the issue of remand may be understood through Section 167 which envisages a situation where the investigation cannot be completed within 24 hours. This section is in the nature of an exception to Section 61 Cr.P.C. which provides that a police officer shall not detain an arrested person for a longer period than under all the circumstances of the case is reasonable, and such period shall not in the absence of a special order of a Magistrate under Section 167 exceed 24 hours.

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\(^3\) Cr.P.C. 156. Investigation into cognizable cases. (1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial. (2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate. (3) Any Magistrate empowered under section 190 may order such an investigation as abovementioned.

\(^4\) Muhammad Rizwan v. the State, 2013 PCrLJ 600 [Karachi]. However, it is to be noted that in situations where pre-arrest bail has been granted the accused is required to join the investigation and may be interrogated by the Police as well but he/she cannot be arrested unless the bail is first withdrawn by the Court.
These two sections contemplate an investigation is to be completed within 24 hours of the arrest of a person but if the investigation cannot be completed within that period, then the Police Officer shall forward the accused to the nearest Magistrate who may authorize detention of the accused for such custody for a term not exceeding 15 days in the whole. If the Magistrate is not the trial Magistrate, and he thinks that further detention is unnecessary he may order the accused to be forwarded to the trial Magistrate.

1.2.1. Physical Remand

As noted above, an arrest permits the Police to detain an individual for the purposes of investigation for up to twenty-four hours. Where the Police cannot complete their investigation within twenty-four hours, they must request for the continued custody of the individual through an application for physical remand under Section 167 of the Cr.P.C.\(^5\)

The basis for seeking remand was discussed in *Rasool Bux v. the State*\(^6\) where the Karachi High Court explained that under Section 54 Cr.P.C. (grounds for arrest) the police officer has "reasonable suspicion" of the accused having been concerned in the crime thus justifying his arrest. Section 167 on the other hand, requires a police officer to have “grounds for believing” that the accusation or information received by him against the appellant is well founded. According to the Karachi High Court, the police should

\(^5\) Cr.P.C. 167. Procedure when investigation cannot be completed in twenty-four hours. – (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 61, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation if he is not below the rank of sub-inspector shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate. (2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case from time to time authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case or send it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction: Provided that no Magistrate of the third class, and no Magistrate of the second class not specially empowered in this behalf by the Provincial Government shall authorise detention in the custody of the police. (3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing. (4) The Magistrate giving such order shall forward a copy of his order, with his reasons for making it, to the Sessions Judge. (5) Notwithstanding anything contained in sections 60 and 61 or hereinbefore to the contrary, where the accused forwarded under subsection (2) is a female, the Magistrate shall not, except in the cases involving qatl or dacoity supported by reasons to be recorded in writing, authorise the detention of the accused in police custody, and the police officer making an investigation shall interrogate the accused referred to in subsection (1) in the prison in the presence of an officer of jail and a female police officer. (6) The officer in charge of the prison shall make appropriate arrangements for the admission of the investigating police officer into the prison for the purpose of interrogating the accused. (7) If for the purpose of investigation, it is necessary that the accused referred to in subsection (1) be taken out of the prison, the officer in charge of the police station or the police officer making investigation, not below the rank of subinspector, shall apply to the Magistrate in that behalf and the Magistrate may, for the reasons to be recorded in writing, permit taking of accused out of the prison in the company of a female police officer appointed by the Magistrate: Provided that the accused shall not be kept out of the prison while in the custody of the police between sunset and sunrise.

\(^6\) Rasool Bux v. the State, 2005 Y L R 915 [Karachi]
have some tangible evidence with them which converts their opinion from a "reasonable suspicion" (Section 54) to "believe" (Section 167) about the involvement of the accused within 24 hours of arrest and for that there should be grounds to show that the accusation or information is well founded.

While the guidance in *Rasool Bux* is useful, it is often hard to apply in actual cases. Specific guidance on when physical remand may be requested by the Police and subsequently granted by a Magistrate is mentioned in the Police Rules (provides grounds for requesting remand) as well as in the Lahore High Court Rules and Orders Vol. III, Chapter 11, Part B (guidance for Magistrates when granting remand).

i. Guiding Principles for Remand: Jurisprudence of the Superior Judiciary

The superior judiciary in Pakistan has adopted a pro-rights approach to Section 167 Cr.P.C. and has repeatedly attempted to provide guiding principles for pre-trial detention/remand which aim to curtail the potential for abuse inherent to this process. The landmark judgment in *Ghulam Sarwar v. the State* in 1984 marked the first real attempt by the superior judiciary in Pakistan to consolidate the legal principles relating to remand and provide guidance to Magistrates. In this case, Justice Muhammad Munir Khan laid down the fifteen principles which were aimed at regulating the grant of remand and improving accountability in the process. Some of the key principles identified included:

- During first 15 days, the Magistrate may authorize the detention of the accused in judicial custody liberally but shall not authorize the detention in the custody of the police except on strong and exceptional grounds and that too, for the shortest possible period;
- The Magistrate shall record reasons for the grant of remand.
- After the expiry of 15 days, the Magistrate shall require the police to submit complete or incomplete challan and in case, the challan is not submitted, he shall refuse further detention of the accused and shall release him on bail with or without surety.
- After the expiry of 15 days, no remand shall be granted unless, the application is moved by the police for the grant of remand/ adjournment.
- Before granting remand, the Magistrate shall assure that evidence sufficient to raise suspicion that the accused has committed the offence has been collected by the police and that further evidence will be obtained after the remand is granted.
- The Magistrate shall not grant remand/adjournment in the absence of the accused and shall give opportunity to the accused to raise objection, if any, to the grant of adjournment /remand.
- The Magistrate shall examine police file before deciding the question of remand.
- If no investigation was conducted after having obtained remand, the Magistrate shall refuse to grant further remand /adjournment.
- The Magistrate shall not allow remand/ adjournment after 2 months (which is a reasonable time) of the arrest of the accused unless it is unavoidable.

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7 *Ghulam Sarwar v. The State*, 1984 P Cr. L J 2588 [Lahore]
In another landmark case, *Noor Muhammad v. SHO Police Station Klur Kot, District Bhakkar*, the Lahore High Court further laid down the principles useful for determining whether a person should be remanded to police custody or judicial/magisterial custody:  

- In order to form an opinion as to the necessity or otherwise of the remand applied for by the police, the Magistrate should ascertain what previous similar orders (if any) have been made in the case, and the longer the accused person has been in custody the stronger should be the grounds required for a further remand to police custody.
- Under no circumstances should an accused person be remanded to police custody unless it is made clear that his presence is actually needed in order to serve some important and specific purpose connected with the completion of the enquiry.
- When an accused person is remanded to police custody the period of the remand should be as short as possible.
- In all ordinary cases in which time is required by the police to complete the enquiry, the accused person should be detained in magisterial custody.
- A prisoner, who has been produced for the purpose of making a confession and who has declined to do so, or has made a statement which is unsatisfactory from the point of view of the prosecution, should in no circumstance be remanded to police custody.
- If the physical remand is granted by a Magistrate a copy of the order has to be forwarded to the Sessions Judge under section 167(4) of the Code of Criminal Procedure who can *suo moto* review the same under section 439-A of the Code of Criminal Procedure. However, if the physical remand is granted by a Special Court or an Executive Magistrate not under the administrative control of the Sessions Judge, he need not send a copy of the order to him.

Moreover, the following cases set out additional important principles and observations made by the superior judiciary on the principle of remand under Section 167 Cr.P.C.

1872 Pun Re (criminal) No. 17 P. 21 (D.B.)
- Remand may not be granted on a mere expectation that time will show the guilt of the accused.

*Mst. Kaisari v Sarkar* 1973 PCr. LJ 156
- Remand to police may not be granted on the ground that the presence of accused is necessary to finish the investigation or to get from the accused a confessional statement or to force him to give a clue to stolen property.

*Muhammad Siddiq v. Province of Sindh* PLD 1992 Karachi 358
- Remand is not to be granted automatically after the police makes such a request.

*Sohail v. The State* 1995 PCr. L J 369 Karachi

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8 Noor Muhammad v. SHO Police Station Klur Kot, District Bhakkar, 2000 YLR 85 [Lahore]
The purpose of the words "from time to time" in section 167(2), Cr.P.C. must be in mind of all Magistrates when they remand an accused in police custody. If they find that further detention of the accused in police custody is unnecessary, they must order the accused to be forwarded to a Magistrate having such jurisdiction. Or in alternate they should refuse to authorize detention of the accused in the custody of the police. It has been observed that majority of the Magistrates ignore these requirements of section 167(2), Cr.P.C. Further, the Magistrates must satisfy themselves that the accused was not previously in the custody of the same police station for more than fifteen days. It would be better for them to get in writing from the police officials who bring the accused for getting his remand in the police custody that the accused was not in custody in their police station prior to the said remand.

**Senator Asif Ali Zardari v. The State** 2000 MLD 921
- Even in cases relating to the Anti-Terrorism Act 1997, a remand order would be illegal if at the time of its passing the accused was not produced before the court in violation of the mandatory requirements of section 167(3), Cr.P.C. and section 19(4) of Anti-Terrorism Act, 1997.

**Haseeba Taimor Afridi v. The State** 2013 SCMR 1326
- Under section 167, Cr.P.C. it is the duty of the Magistrate to satisfy himself that there are grounds for believing that the accusation or information is well founded for justifying custody of an accused with the police.

**Liaquat Ali v. The State** 2016 P Cr. L J 1566Lahore
- The law is clear as laid down under section 167, Cr.P.C. that a person in his private capacity could not apply for the police custody of an accused.

ii. Period of Remand & Entry in Police Daily Diary

It is to be noted that the maximum period of remand that can be obtained under the Cr.P.C. is fourteen days in addition to the initial detention after arrest of twenty-four hours. However, the higher judiciary has encouraged Magistrates not to automatically grant the maximum period but rather to make this determination on a case to case basis.\(^9\)

In cases brought under the Anti-Terrorism Act 1997, the remand provisions are significantly more expansive. An Anti-Terrorism Court (ATC) is deemed to be a Magistrate for the purposes of the Anti-Terrorism Act 1997 and is therefore empowered to grant physical or judicial remand.\(^10\) The ATC may grant physical remand for a period of thirty days at a time, up to a total remand period of ninety days.\(^11\) Extensions beyond

\(^9\) Misbah-ul-Hassan v. the State, 2005 P Cr. L J 1709 [Lahore]
\(^11\) Section 21E. (1) and (2), Anti-Terrorism Act 1997.
the initial thirty days are to be granted if the ATC is satisfied that further evidence may be available and that no bodily harm has been or will be caused to the accused.\textsuperscript{12}

Under Section 167 of the Police Order 2002 and Rule 22.48 of the Police Rules 1934, all persons in police custody have to be entered into the Police Daily Diary Register (Roznamcha).\textsuperscript{13} Failure to do so would have disciplinary consequences for the concerned police officer and may even result in his dismissal under Rule 22.50 (para. 1) of the Police Rules, 1934.\textsuperscript{14,15}

iii. Abuse of Process in Remand Cases: Observations of the Superior Judiciary

A perusal of the case law relating to Section 167 Cr.P.C. quickly reveals that the process is rife with abuse. A common theme is the apparent ‘cooperation’ between the lower Judiciary and the Police through which irregularities or illegalities by investigating officers are shielded by the orders and conduct of Magistrates. The following is a non-exhaustive list of the faulty or corrupt practices in remand cases as reported in judgments of the superior judiciary in Pakistan.

- Although Section 167(4), Cr.P.C. requires that the Magistrates shall forward a copy of the order of remand to the Sessions Judge, yet they do not care to do the needful. The Magistrates authorize the detention of the accused in police and judicial custody as a matter of course in token of co-operation with the police.\textsuperscript{16}
- Magistrates grant remand in a mechanical manner without going through the material available in the police diaries in violation of the law and jurisprudence by the superior judiciary.\textsuperscript{17}
- It has been mostly observed that neither the Magistrates ask for the entries in the diaries relating to the case nor make the effort to go through the nature of accusation or information for believing that there are reasonable grounds to believe that the accusation/information against the detained accused is well founded.\textsuperscript{18}
- Most of the Magistrates usually write the following or similar words as a routine whenever any accused is brought before them for the purpose of remand:

\textsuperscript{12} Section 21E. Remand, Anti-Terrorism Act 1997.
\textsuperscript{13} All proceedings undertaken for remand of accused should have also been incorporated in Daily Diary (Roznamcha). The daily diary is intended to be a complete record of all events which take place at the police station. It should, therefore, record not only the movements and activities of all police officers, but also visits of outsiders, whether official or unofficial, coming or brought to the police station for any purpose whatsoever. Reference: - Rule 22.48 Sub rule 2, Police Rules, 1934.
\textsuperscript{14} Noor Muhammad v. S.H.O., Police Station Klur Kot, District Bhakkar, 2000 Y L R 85 [Lahore].
\textsuperscript{15} If any police officer makes a false entry in Daily Diary (Roznamcha) knowingly or he has reason to believe that it is to be untrue, disciplinary proceedings may be initiated against the delinquent police officer. Reference: - Rule 22.50, Police Rules, 1934.
\textsuperscript{16} Ghulam Sarwar v. the State, 1984 P Cr. L J 2588 [Lahore]
\textsuperscript{17} Rasool Bux and another v. the State, 2005 Y L R 915 [Karachi]
\textsuperscript{18} Sohail v. the State, 1995 P Cr. L J 369 [Karachi]
"The accused does not complain maltreatment against the police. He is remanded to police custody for ... days."

These two sentences are mostly written by the Magistrates in spite of their knowledge that the accused may be subjected to torture by the police.\(^1\)

- It has become a shameless routine of several corrupt Police Officials, to arrest an accused in a blind F.I.R., get remand for fifteen days from any Magistrate, show him released on papers under Section 169, Cr.P.C. and then arrest him in another blind F.I.R.\(^2\)
- The accused is not shown to have been produced before a Magistrate within 24 hours of his arrest. When produced, the order of remand is often shown to have been passed \textit{ex post facto}.\(^3\)
- Successive orders of remand, which are presumed to be judicial orders, are granted sans any reasons and are non-speaking in nature.\(^4\)
- Remands in totality often far exceed the prescribed limit of 15 days in the whole.\(^5\)
- The concerned police officers fail to transmit a copy of the entries in the diary or to forward the accused to the concerned Court.\(^6\)
- The police engage in many degrading actions against the accused including but not limited to the blackening of the faces of the accused and their family members/relatives; making them to ride on donkeys; getting their head, beard, eyebrows, eye lashes etc. shaved; taking off their shoes and making them stand for hours in cold as well as in scorching heat according to the available season etc.\(^7\)
- It has become a common practice with the police to enter forcibly and trespass the houses of the people and to torture the innocent inmates of the houses in violation of the law relating to breaking open of \textit{Zanana} which provides legal protection to the womenfolk including \textit{Chaddar} and \textit{Chardewari}.\(^8\)
- The failure to follow the Instructions mentioned in the Police Rules (regarding remands to police custody) have facilitated in a number of custodial killings.\(^9\)

\subsection*{1.2.2. Judicial Remand}

Where the physical presence of the accused is not essential to the police investigation, a Magistrate is discouraged from granting physical remand. In such cases, where the accused is alleged to have committed a bailable offence, he/she is entitled to bail as of right and be released from custody. Where bail is denied in non-bailable cases, the Court will extend the accused’s detention through the mechanism of judicial remand. Here the

\(^{19}\) Ibid
\(^{20}\) Ibid
\(^{22}\) Ibid
\(^{23}\) Ibid
\(^{24}\) Ibid
\(^{25}\) Ibid
\(^{26}\) Ibid
\(^{27}\) Ibid
accused would be sent to prison awaiting the finalization of investigation or the commencement of trial. Judicial remand is of immense importance as no bail application can be moved when an accused is in physical remand of the police.

Judicial remand operates in two ways. Where the police seek physical remand under Section 167 of the Cr.P.C, the Court can instead grant judicial remand where it feels that the physical presence of the accused is not needed for the police investigation. This judicial remand cannot last longer than 14 days. Where physical remand is granted to the Police for a period less than the maximum, the remainder of this period can be given as judicial remand.

After the culmination of the initial fifteen-day period from arrest wherein either physical or judicial remand is granted and investigation ought to be completed, any further detention of the accused may only be granted under the provisions of Section 344 of the Cr.P.C.\(^28\)

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

(i) Some evidence should be adduced before the Court which should be sufficient to raise suspicion of the accused’s guilt and the Court should be sure that further evidence to strengthen the suspicion is expected to be collected;  
(ii) A police report in writing of acts constituting the offence must be produced to enable the Court to take cognizance of the offence; and  
(iii) If the nature of the case is such that no cognizance of the offence can be taken without previous sanction, then such sanction should be produced to enable the Court to take cognizance of the offence.\(^29\)

No single order of remand by a Magistrate under Section 344 can exceed fifteen days at a time. However, there is no limit on the total period of a series of orders of remand. Further remand under S. 344 can only be made if sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and that it appears likely that further evidence may be obtained by remand.\(^30\)

i. Transfer back to physical remand once judicial remand has been granted

Generally, under the Cr.P.C. only in exceptional cases can a Magistrate having sent an individual to judicial remand, send him back to the police on physical remand. This is to be distinguished from the procedure under the Anti-Terrorism Act 1997 where such a transfer back to physical remand is specifically authorized. Under Section 19(5) of the Anti-Terrorism Act 1997 if an accused has been released from police custody, remanded

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\(^28\) Criminal Procedure Code, sec 344 Power to postpone or adjourn proceedings  
\(^29\) Dr. Aijaz Hassan Qureshi v. Government of the Punjab through Secretary Home Department Government of Punjab, Lahore and another, PLD 1977 Lah 1304  
\(^30\) Amir v. Bakhshu and six others, PLD 1975 Lah 625
to judicial custody then the ATC is authorized to grant physical remand to the Police or any other investigating agency joined in the investigation for the purpose of further investigation in the case.

In Adeel v. The State the Court held that it is settled law that once an accused is sent to Judicial lockup he cannot be handed over to Police subsequently and successive remand cannot be given except in extraordinary circumstances. If remand is required in exceptional cases, then it must be on the basis of detail given in the application for remand and the reasons given by the Magistrate concerned.\(^{31}\)

1.2.3. Transit Remand

Transitory remand is granted when an accused is arrested outside the local jurisdictional limits of the Magistrate who issued a warrant of arrest and he/she is brought before the local Magistrate who may authorize his transfer to the warrant issuing Magistrate. Section 86\(^{32}\) of the Cr.P.C governs transit remands while further guidance is given to Police officials through Rule 26.20\(^{33}\) of the Police Rules.

2. Preventive Detention

As we saw that the accused under investigation may be deprived of his/her liberty, additionally, the State is empowered to deprive individuals of their liberty under a preventive detention framework. Preventive detention is detention without criminal charges. This form of deprivation of liberty essentially aims to prevent serious future harm, based on a person’s activity, rather than on the express commission of a crime and is primarily an executive measure as opposed to a judicial one. It is therefore an exceptional measure of control which is strictly regulated by specific statutory provisions.

Preventive detention has always fallen within the purview of State authorities as evidenced by the Foreigners Act 1946, the Security of Pakistan Act 1952 and the Maintenance of Public Order Ordinance 1960. The sudden increase in terrorism and sectarian violence in the 1990s led to an expanded role of preventive detentions under the Anti-Terrorism Act 1997. Today, preventive detentions have acquired increasing importance as a component of the State’s counter-terrorism response in Pakistan.

\(^{31}\) Adeel v. The State, 2016 YLR 2212 [Peshawar]

\(^{32}\) Criminal Procedure Code, sec 86 Procedure by Magistrate before whom person arrested is brought Such Magistrate or District Superintendent shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court

\(^{33}\) 26-20. Transfer of arrested persons... (1) If a police officer lawfully arrests a person, without warrant, in a district in which the investigation, enquiry and trial cannot be held, and the offence is non-bailable or such person cannot give bail, he shall take or send such person before the District Magistrate or 1st Class Magistrate having jurisdiction over the area and obtain an order for the transfer of the prisoner to the district in which the offence was committed. (2) No accused or convicted person shall be taken in custody from one district to another or from one province to another, except under the written order or warrant of the Magistrate or other lawful authority directing such transfer.
The general framework for preventive detention is found under Article 10 of the Constitution which also provides express safeguards. The purpose of detentions is to protect State security or public order in non-conflict situations. The increase in militancy in the Federally and Provincially Administered Tribal Areas (FATA/PATA) and its impact on terrorist activity in the rest of the country led the military to conduct several large scale operations in the Tribal Areas under the Constitutional framework provided by Article 245 of the Constitution. Yet, specific laws were needed to regulate these operations and provide a comprehensive framework for dealing with those caught in operations areas. This led to the promulgation of the Actions (In Aid of Civil Power) Regulations of 2011 (AACPR) which among other things, provided for an indefinite internment mechanism for ‘incapacitating the miscreants’. This form of deprivation of liberty finds global precedent in internment laws applicable in times of conflict.

2.1. Constitutional basis for Preventive Detention: Article 10 of the Constitution

No law providing for preventive detention shall be made except to deal with persons 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.34

It is clear from the wording of Article 10 that preventive detention in general is prohibited under the Constitutional framework except in certain limited circumstances. Today, there are four main statutory instruments in Pakistan which provide for preventive detention. These instruments may be regarded as implementing legislations pursuant to Article 10 of the Constitution in that they operate within the scope of the exception specifically provided for by this Article.

- Anti-Terrorism Act, 1997;
- Maintenance of Public Order Ordinance, 1960;
- Security of Pakistan Act, 1952; and
- Foreigners Act, 1946.

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34 Constitution of Pakistan 1973, art 10 (4)
2.1.1. Overview of Preventive Detention Provisions in Legislation under the Article 10 Framework

The tables below provide an overview of the major features of preventive detention under these implementing laws.

<table>
<thead>
<tr>
<th>Implementing Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anti-Terrorism Act 1997</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Operative Clause</th>
</tr>
</thead>
<tbody>
<tr>
<td>S. 11EEE: arrest and detention of suspected persons³⁵</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Period of Detention</th>
</tr>
</thead>
<tbody>
<tr>
<td>Initial period of three months</td>
</tr>
<tr>
<td>Total period of detention cannot exceed twelve months</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Detaining Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Government.</td>
</tr>
<tr>
<td>Armed Forces.</td>
</tr>
<tr>
<td>Civil Armed Forces</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Mechanism for Initiating Detention</th>
</tr>
</thead>
<tbody>
<tr>
<td>An order is issued by the Government directing detention and specifying custody and the period of detention</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Aim of Detention</th>
</tr>
</thead>
<tbody>
<tr>
<td>To prevent person proscribed under S. 11 EE ATA from committing offences relating to terrorism, national security and sectarian violence</td>
</tr>
</tbody>
</table>

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³⁵ Section 11EEE: Power to arrest and detain suspected persons.

1) Government if satisfied that with a view to prevent any person whose name is included in the list referred to section 11EE, it is necessary so to do, may, by order in writing, direct to arrest and detain, in such custody as may be specified, such person for such period as may be specified in the order, and Government if satisfied that for the aforesaid reasons it is necessary so to do, may, extend from time to time the period of such detention for a total period not exceeding twelve months.

2) The provisions of Article 10 of the Constitution of the Islamic Republic of Pakistan shall mutatis mutandis apply to the arrest and detention of a person ordered under sub-section (1)
### Operative Clause

**S. 11EEE: preventive detention for inquiry**

### Period of Detention

- Initial period of thirty days.
- Total period of detention cannot exceed ninety days.

### Detaining Authority

- Federal Government.
- Armed Forces.
- Civil Armed Forces

### Mechanism for Initiating Detention

An order is issued by the Government after recording reasons for detention

### Aim of Detention

To prevent offences relating to: national security and sectarianism

### Implementing Law

**Maintenance of Public Order Ordinance 1969**

**Operative Clause**

**S 3: power to arrest and detain suspected person**

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

37 Section 3: Restrictions on the movements of suspected persons and their detention-(1) The [Federal Government] if satisfied with respect to any particular person, that, with a view to preventing him from acting in any manner prejudicial to the defence or the external affairs or the security of Pakistan, or any part thereof, it is necessary so to do, may make an order:

a) directing such person to remove himself from Pakistan in such manner, before such time, and by such route, as may be specified in the order;

b) directing that he be detained Provided that, within a period of twenty-four months commencing on the day of his first detention in pursuance of an order made under the clause, no person, other than a person who for the time being is an enemy alien or who is employed by, or works for, or acts on instructions received from, the enemy, or who is acting or attempting to act in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof or who commits or attempts to commit any act which amounts to anti-national activity as defined in a Federal law or is a member of any association which has
### Period of Detention

Three months initially and then as long as deemed fit. Period of detention cannot exceed six months at a time

### Detaining Authority


### Mechanism for Initiating Detention

An order in writing has to be given by the Government directing the detention, specifying the custody and period of detention.

### Aim of Detention

To prevent persons from acting in a manner prejudicial to public safety or the maintenance of public order.

### Implementing Law

Security of Pakistan Act 1952

### Operative Clause

S3: Restrictions on the movements of suspected persons and their detention

### Period of Detention

Within a period of twenty-four months from the commencement of the first day of detention no person can be detained for more than a:

- Total period of eight months in the case of a person detained for acting in a manner prejudicial to public order
- Twelve months in any other case

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for its objects, or which indulges in, any such anti-national activity, shall be detained in pursuance of any such order for more than a total period of eight months in case of a person detained for acting in a manner prejudicial to public order and twelve months in any other case.

38 Section 3 Power to arrest and detain suspected persons

39 This is not applicable to a person who is considered an enemy alien or who is employed by or works for an enemy, or a person acting or attempting to act in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof. This time limit also does not apply where a person commits or attempts to commit any action which amounts to anti-national activity as defined in a Federal law or is a member of any association which indulges in any anti-national activity as laid down in Article 10(7) of the Constitution and S. 3 of the Security of Pakistan Act, 1952.
<table>
<thead>
<tr>
<th>Detaining Authority</th>
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</thead>
<tbody>
<tr>
<td>Federal Government.</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Mechanism for Initiating Detention</th>
</tr>
</thead>
<tbody>
<tr>
<td>Order by the Federal Government directing detention along with supplementary provisions relating to the place of detention etc.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Aim of Detention</th>
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</thead>
<tbody>
<tr>
<td>To prevent persons from acting in any manner prejudicial to the defense or the external affairs or the security of Pakistan (or any part thereof)</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Implementing Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreigners Act 1946</td>
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</table>

<table>
<thead>
<tr>
<th>Operative Clause</th>
</tr>
</thead>
<tbody>
<tr>
<td>S. 3(2)(g): power to make orders for arrest detention or confinement[^40]</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Period of Detention</th>
</tr>
</thead>
<tbody>
<tr>
<td>Within a period of twenty-four months from the commencement of the first day of detention no person can be detained for more than a:</td>
</tr>
<tr>
<td>- Total period of eight months in the case of a person detained for acting in a manner prejudicial to public order</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Mechanism for Initiating Detention</th>
</tr>
</thead>
<tbody>
<tr>
<td>Order by the Federal Government which may make provisions for supplementary matters necessary for giving effect to the provision of law (such as place and period of detention)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Aim of Detention</th>
</tr>
</thead>
<tbody>
<tr>
<td>In the interest of the defense, external affairs or the security of Pakistan (or any part thereof)</td>
</tr>
</tbody>
</table>

[^40]: Section 3 (2) (g): Order under this section may provide that the foreigner- shall be arrested and, in the interest of the defense or the external affairs or the security of Pakistan, or any part thereof, detained or confined.
2.1.2. Judicial Review

The Constitution provides for substantive as well as procedural safeguards against the abuse of preventive detention. The safeguards apply both to the legislature in enacting the law and the executive in executing it. The Supreme Court of Pakistan, in the case of Abdul Aziz v. West Pakistan,\(^{41}\) observed that any law relating to preventive detention must incorporate the given safeguards, but even if it does not, the requirements, being constitutional, must be read into such law, and the aggrieved person may seek redress if they are disregarded. The Court observed in yet another case that a law which negates these safeguards, expressly or by necessary implication, is void to the extent of such inconsistency.\(^{42}\) Since preventive detention is a serious encroachment on the liberty of an individual, the provision of the Act has to be strictly construed in favour of the subject and mandatory provisions, if disobeyed, should result in the release of the detainee. Furthermore, the Courts cannot challenge or question the reasonableness of the legislation.

2.2. The Safeguards applicable to Preventive Detention under the Article 10 Framework

Article 10 bifurcates the safeguards which are to apply to regular detention and those applicable to preventive detention. Articles 10(1) and 10(2) apply to cases of remand/pretrial detention whereas Articles 10(4) to 10(8) are applicable to preventive detention.\(^{43}\)

Article 10 is meant to provide safeguards to every person against arbitrary arrest or detention. A person can be arrested either under the ordinary law or under the law relating to preventive detention. A person arrested under ordinary law has the following safeguards:

- That he shall be informed of the grounds for his arrest as soon as possible;
- That he shall be allowed to consult and be defended by a legal practitioner of his choice;\(^{44}\)
- That he shall be produced before a Magistrate within 24 hours of his arrest excluding the time necessary for the journey if any, from the place of arrest to the Court of the Magistrate; and
- That he shall not be detained longer than the said period without the sanction of the Magistrate.\(^{45}\)

So far as the person arrested under any law relating to preventive detention is concerned, the safeguards are:

\(^{41}\) PLD 1958 SC 449
\(^{42}\) Govt. of Pakistan v. Roshan Bijays Shaukat, PLD 1966 SC 286
\(^{43}\) Constitution of Pakistan 1973, art. 10: Safeguards as to arrest and detention
\(^{44}\) PLD 1975 SCMR 01
\(^{45}\) 1975 P.Cr.L.J. 1413.
That no person detained under any such law can be detained for a period exceeding three months, unless he is given an opportunity to appear before the Review Board in person, and the State obtains the opinion of the said Board that there is sufficient cause for such detention before the expiry of that period;

If the detention is continued after the said period of three months, the State will have to obtain opinion of Review Board, before the expiry of each period of three months, that there is, in its opinion, sufficient cause for such detention;

That the authority ordering the detention shall, within fifteen days from such detention, communicate to the detenu the grounds for his detention, and shall afford him the earliest opportunity of making a representation against the orders of his detention;

That no person shall be detained for more than a total period of eight months in case of a person detained for acting in a manner prejudicial to public order and twelve months in any other case within a period of twenty-four months commencing on the day of the first detention.

The detainee is also entitled to be heard in person or through his counsel by the Review Board and he may also consult a legal practitioner;

Similarly, the composition of the Review Board is provided by the Constitution itself. According to Article 10(4) members of the Review Board are appointed by the Chief Justice of Pakistan and the Board consists of a Chairman and two other members, each of whom is or has been a Judge of the Supreme Court or a High Court;

Communicating the grounds to the detainee and review by the Board are two mandatory provisions. Their denial will amount to violation of the law and will render the detention illegal.

2.2.1. Article 10 Review Boards
As seen above, the laws providing for preventive detention under Article 10 of the Constitution have different maximum periods for detention. However, one aspect which applies to all detentions under these various statutes is the review of detention by a Review Board after every three months. They are the primary protection mechanism available to persons detained in preventive custody and thus attempt to balance the security concerns of the State with the fundamental rights of the people. Thus, after every three months, a Review Board is required to provide an opportunity to the detainee to be heard in person, review his case and report if there is sufficient cause for continued detention.

The Board may be constituted both as needed and wherever necessary. The sine qua non for the constitution of the Review Board is detention for a period beyond three months. The Review Board is also responsible for determining the place of detention; fix
subsistence allowance for detainee’s family. Furthermore, detainees are entitled to communication of the grounds and the opportunity to make representation against the order.

The following sections highlight some of the prominent cases relating to these protections.

i. Communication of grounds

With regard to the communication of grounds, it has been held that they are to be delivered in writing and communicated in a language which is understood by the person facing detention and in a script which can be read if the person is literate. Communication therefore means imparting to the detainee sufficient knowledge of all the grounds on which the order of detention is based; grounds detention should not be vague and indefinite they cannot be extraneous. The Court has confirmed that the maximum limit for the communication of grounds is fifteen days and this has to be maintained when passing preventive detention orders.

ii. Right to make representation

As per Article 10(5), it is not only necessary to communicate the grounds of detention but also to afford the earliest opportunity of making a representation against the order.

These representations are forwarded to the Review Board for consideration. It has been held by the Lahore High Court in Muhammad Siddiq v District Magistrate that the importance of this right cannot be whittled down and must be given effect to. Furthermore, the Court found that the representation must be decided by the Government without any delay and within a reasonable period of time.

The representation cannot be heard and decided by the same authority which originally passed the detention order as that is a sheer violation of the principle that ‘no body can be a judge of his own case’. It is also to be noted that the filing of representations does not debar the detainee’s right to sue for a habeas corpus writ under Article 199 of the Constitution.

3. Internment under Article 245

The deprivation of liberty in counter-militancy operations are governed by the Actions (In Aid of Civil Power) Regulations of 2011. The legal basis for internment under the

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46 R. 8, West Pakistan Public Order Detenu Rules: The Government may grant an allowance for maintenance of the dependents of a detainee with regard to the consequences on the detainee’s dependents of his deprivation to earn
47 Constitution of Pakistan 1972, art. 10 (5)
48 Mr. Kubiv Dariusz v Union of India, AIR 1990 SC 605 at 609
49 Harikisan v State of Maharashtra, AIR 1962 SC 911 at 914
50 Arbab Akbar Adil v GOvt. of Sindh through Home Secretary, Govt. of Sindh, Karachi, PLD 2005 [Kar] 538
51 Ghulam Ahmed v Govt. of Sindh, PLD 1988 [Kar] 237
52 Muhammad Siddiq Khan v Dist. Magistrate, PLD 1992 [Lahore] 190
AACPR stems from the Constitutional provision governing the requisition of the Armed Forces by the Federal Government for ‘actions in aid of civil power’ under Article 245 which provides:

(1) The Armed Forces shall, under the directions of the Federal Government, defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so.\(^{53}\)

The purpose of the current notification deploying armed forces in FATA/PATA and the subsequent regulations issued therein is to curb the grave threat to the territorial integrity of Pakistan created by miscreants and to incapacitate them by interning them during the continuation of the action.\(^{54}\) The notification was issued in 2011 by the Federal Government and defined that the geographical parameters of the application of the emergency is only applicable to FATA and PATA.

Once a notification is issued under Article 245, the jurisdiction of the High Courts ceases to exist in relation to areas where the Armed Forces are acting in aid of civil power.\(^{55}\) This includes the High Court’s powers to entertain writ applications and therefore enforce fundamental rights. Once a notification under Article 245 is issued, the application of all fundamental freedoms and safeguards enshrined in the Constitution, including Article 10, is excluded. Thus, the only safeguards and protections available to detainees interned in FATA/PATA are those set out in the AACPR.

The table below illustrates the major features of the AACPR as they relate to internment.

<table>
<thead>
<tr>
<th>Definition of Internment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Restricting any person to a defined premise during the period the counter-insurgency operation is ongoing in order to incapacitate them from committing any offence or further offences under this Regulation or any other law, for securing peace in the defined area.(^{56})</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Interning Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>Governor; Interning Authority(^{57})</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Power to Intern</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Interning Authority can intern any person who</td>
</tr>
<tr>
<td>(a) may obstruct actions in aid of civil power in any manner whatsoever; or</td>
</tr>
<tr>
<td>(b) if not restrained or incapacitated through internment shall strengthen the miscreants’ ability to resist the Armed Forces or any law enforcement agency;</td>
</tr>
</tbody>
</table>

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\(^{53}\) Constitution of Pakistan, art. 245 (1)

\(^{54}\) Preamble to ACCPR

\(^{55}\) Constitution of Pakistan, art. 245 (3)

\(^{56}\) Section 2(g), AACPR

\(^{57}\) Section 8(1) and (2), AACPR
or

(c) by any action or attempt may cause a threat to the solidarity, integrity or security of Pakistan; or

(d) has committed or is likely to commit any offence under this Regulation so that the said person shall not be able to commit or plan to commit any offence during the actions in aid of civil power.\(^{58}\)

### Internment Centre

An internment center can be any ‘compound, house, building, facility or any temporary or permanent structure’.\(^ {59}\) The procedure for internment as laid down by the Provincial Government(s) pertain to the wellbeing of detainees which includes their food, health, treatment, religious freedom, visitation by family, counseling and psychological treatment etc.\(^ {60}\)

### Mechanism for Initiating Detention

The detention is initiated with the issuance of an order of detention by the Interning Authority.\(^ {61}\)

### Time Limit on Detention

- The power to intern shall be valid from the date of the issuance of the order of internment until the continuation of actions in aid of civil power\(^ {62}\)
- Review must take place within 120 days\(^ {63}\)

3.1. Safeguards during Internment

The AACPR also has provisions of human rights and oversight as enshrined in Chapter Six under which an administrative tribunal is constituted. This administrative tribunal also known as an Oversight Board is notified for each internment center by the Governor.\(^ {64}\) Each person interned is entitled to a review of his or her internment within a period not exceeding 120 days from the day of the internment order.\(^ {65}\) The review is followed by a report prepared by the Board for the Governor.\(^ {66}\) There is an express

\(^{58}\) Section 9(1), AACPR. The Regulation also allows for the internment/preventive detention of any person which is expedient for peace in the defined area. Additionally, the Interning Authority has the power to detain a person who, despite not being in the defined area, is suspected of having committed acts or has nexus with the actions prohibited under the law.

\(^{59}\) Section 2(i), AACPR

\(^{60}\) Section 2(j), AACPR

\(^{61}\) Section 9 (4), AACPR

\(^{62}\) Section 11, AACPR

\(^{63}\) Section 14 (1), AACPR

\(^{64}\) Section 14 (1), AACPR

\(^{65}\) Section 14 (1), AACPR

\(^{66}\) Section 14 (1), AACPR
prohibition on torture\textsuperscript{67} and the Board is responsible for conducting trainings and creating awareness regarding human rights standards.\textsuperscript{68}

The table below illustrates the specific safeguards and protections provided to internees under the AACPR and the Rules and Procedures framed thereunder.

<table>
<thead>
<tr>
<th>Right to Challenge the Lawfulness of Detention</th>
</tr>
</thead>
<tbody>
<tr>
<td>• The Interning Authority has the power to either accept a request for withdrawing an order of internment or may do so on its own\textsuperscript{69}</td>
</tr>
<tr>
<td>• The Interning Authority, after thorough review, may (a) Direct that the person is an offender and after the conclusion of the actions in aid of civil power he shall be handed over to the law enforcement agencies for formal prosecution; or (b) Accept the request and may also take an undertaking or guarantee from the family or the jirga or the community.\textsuperscript{70}</td>
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</tbody>
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<thead>
<tr>
<th>Review of Detention by an Administrative Body</th>
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<tbody>
<tr>
<td>Oversight Board for each Interment Centre is comprised of two civilians and two military officers to review the case of each person interned within a period of time, not exceeding one hundred and twenty days, from the issuance of the Order of Internment.\textsuperscript{71}</td>
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<table>
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<tr>
<th>Right to be Registered and Held in a Recognized Place Of Internment</th>
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<tbody>
<tr>
<td>• An internment Centre could be a compound, house, building, facility or any temporary or permanent structure that is notified by the Governor or any officer authorized by him to serve as a premises where persons are interned.\textsuperscript{72}</td>
</tr>
<tr>
<td>• The interning authority shall issue an interning order in respect of each person who shall be kept in the internment center.\textsuperscript{73}</td>
</tr>
<tr>
<td>• The Detaining Authority shall maintain a proper register of persons interned and also maintain their record.\textsuperscript{74}</td>
</tr>
</tbody>
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<tr>
<th>Access to Medical Care</th>
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<tr>
<td>• The AACPR requires the Governor to prescribe the internment</td>
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</table>

\textsuperscript{67} Section 15, AACPR
\textsuperscript{68} Section 14 (4), AACPR
\textsuperscript{69} Section 10 (1) AACPR
\textsuperscript{70} Section 10 AACPR
\textsuperscript{71} Section 14 (1) AACPR
\textsuperscript{72} Section 2 (1) AACPR
\textsuperscript{73} Section 9 (4) AACPR
\textsuperscript{74} Section 9 (6) AACPR
procedure with respect to the wellbeing, food, health, treatment, religious freedom, visitation by family, counseling and psychological treatment etc. of the miscreants interned.  

- The Internment Procedure, 2011 issued pursuant to the AACPR requires every internee on admission to be examined by a Medical Officer within 24 hours.
- In case of a female Internee, the examination is to be carried out by a Lady Medical Officer.

Religious Practice

- The AACPR requires the Governor to prescribe the internment procedure with respect to the wellbeing, food, health, treatment, religious freedom, visitation by family, counseling and psychological treatment etc. of the miscreants interned.
- The Internment Procedure, 2011 issued pursuant to the AACPR stipulates that every internee be allowed to perform his religious obligations within the precinct of the Internment Centre, as long as they do not excite religious sentiments or propagate against other religions, sects, country or government.

CONCLUSION

Deprivation of liberty is an acceptable and lawful mechanism to deal with threats to public safety and national security. Therefore, it is recognized and given due protection by the Constitution and implementing laws. Used correctly, it can prove to be an invaluable tool to counter the unique challenges being faced by Pakistan in its fight against crime, terrorism and militancy. Unfortunately, there have been instances where detention laws have been used indiscriminately and arbitrarily which undermines their effectiveness and runs contrary to its purpose. To uphold the rights enshrined in the Constitution of Pakistan and strengthen the legitimacy of our counter-terrorism and counter-militancy responses it is essential that the parameters of detention mechanisms be understood and carefully observed.
Negotiations between India and Pakistan over the Kashmir Issue

Mehak Mubin*

INTRODUCTION

“If we want to normalize relations between Pakistan and India and bring harmony to the region, the Kashmir dispute will have to be resolved peacefully through a dialogue, on the basis of the aspirations of the Kashmiri people. Solving the Kashmir issue is the joint responsibility of our two countries . . . Mr Vajpayee, . . . I take you up on this offer. Let us start talking in this spirit.”

General Pervez Musharraf, 2002

These were the words spoken by the President of Pakistan, General Pervez Musharraf in January 2002 with regards to the now seventy year old dispute over the much talked about territory of Kashmir. This territory has been a source of constant disturbance between the two neighboring countries- India and Pakistan. Although great efforts have been made by both the sides as well as by third parties to resolve the issue, it seems that it requires much more dedication and commitment. The purpose of this paper is to chronologically analyze the negotiations and/or agreements that were held between India and Pakistan over Kashmir, highlighting the various strategies utilized over the years. However, before I delve specifically into the methods and techniques used to carry out these negotiations between the two countries, it is imperative to set the historical context of this issue.

1. ORIGIN OF THE KASHMIR CONFLICT

Since their emergence as independent states from the British Empire, in 1947, India and Pakistan have gone to war four times and one of those wars was over the territory of Kashmir. Kashmir was one of the princely states of India and after the independence it had to make the decision of acceding to either of the two newly independent states. The delay in the deciding process being caused by The head of the state of Kashmir, Hari Singh, (a Hindu Maharaja2) was delaying the decision making process because of which the anxiety and tension between the two states was rising as both were keen to control the territory.

Both sides had its own reasons for wanting Kashmir to accede to its side. India propagated the ideology of an inclusive, secular state and she believed that this ideology would not be upheld if Kashmir, the Muslim majority territory, was not made part of the

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1Sumanta Bose, *Kashmir: Roots of Conflict, Paths to Peace*, (2003), 1

2 Maharaja is the Sanskrit title for King.
Indian Union. On the other hand, Pakistan came from the school of thought that it was formed as a safe haven for the Muslims of the sub-continent and “from its inception, Pakistani nationalism has been firmly based on the notion that Pakistan is territorially and ideologically incomplete without Kashmir.” However, it seems that over the decades, the initial reasons that motivated these two states kept evolving and somewhere along the road, they became driven more by their egos than any genuine intention of resolving the issue.

Negotiation experts and authors, William Ury and Robert Fisher, explain that when two parties are involved in this kind of a situation, there are three approaches employed. The first approach is based on what you can do on your own; the second one is centered on what the other party can do; and if neither of these approaches gets to a reasonable solution, then a third party should be brought in which can focus on the interests, options and criteria. However, in the case of Kashmir, history shows that the process of negotiation worked in reverse; they started with the third approach i.e. third party mediators.

2. **Third Party Mediator Approach**

In January 1948, India filed a complaint to the United Nations Security Council about Pakistan sponsored terrorism in that area of the Kashmir which was in the works of acceding to India. On the hearing of this complaint, the UN Security Council established the United Nations Commission for India and Pakistan (UNCIP) and the concept behind this Commission was to serve as a mediator between the two states. In April 1948, the Security Council adopted a resolution that instructed the Commission to go to the Indian subcontinent and establish their offices there and inform the Governments of India and Pakistan that its aim was to facilitate any measures that could be taken to restore peace and order in Kashmir. The resolution also required the government of Pakistan to withdraw those Pakistani nationals who had entered in Kashmir to fight for accession. Once, the Commission had determined that Pakistan had made sufficient progress in removing such persons, and then the government of India was to start withdrawing its military forces from the area and reduce them “progressively to the minimum strength required for the support of civil power in the maintenance of law and order.” The UN Security Council hoped that once that was accomplished, then a Plebiscite Administration would be established that would hold a plebiscite so as to conclusively solve the question of accession of Kashmir to India or Pakistan.

Following this, two resolutions were passed on August 13, 1948 and another one on January 5th, 1949, in which the Commission made clear that the conflicting parties needed to understand that the future status of Kashmir would not be determined without considering the wishes of its people, therefore the democratic method of holding a plebiscite was chosen as the way forward. Both the parties agreed to these resolutions.

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3 Bose (n 1) 8.
5 Bose (n 1) 39.
6 ibid
and in fact they also signed a cease fire agreement that defined a cease fire line delineating the territorial limits of both states. It is said that the Prime Ministers of both the countries agreed to this because they did not want to fail their newly formed states.\(^7\)

In this instance, involving a third party proved to be beneficial because the UN put things into perspective by clarifying that what mattered was that the people of Kashmir had the power to decide their own future. It also in a way presented the two nations with an ultimatum: if they did not demilitarize the territory, any further actions regarding the accession would not take place which would ultimately be disadvantageous for them.

The purpose behind the mediations carried out by the UN was to establish an “agreed program of progressive demilitarization” so as to formulate and attempt to create a setting ideal for “the free expression of opinion for the purposes of plebiscite.”\(^8\) The UN Commission proposed a joint conference and in September 1949, asked the two governments to submit their contentions for arbitration to an arbitrator who would “decide these questions according to equity and his decisions to be binding on both the parties.”\(^9\) Although, Pakistan was ready to accept these terms, India was hesitant to move forward because it wanted to know with certainty which issues would be arbitrated furthermore, it was reluctant to talk about “disbanding and disarming” of its forces.\(^10\)

Over the course of the years, the UN appointed a number of mediators who struggled and failed to bring the conflicting parties to any sort of agreement because each time one of the parties would refuse to participate in the negotiations.

Several reasons can be attributed to the failed attempts at negotiations. At the time that the Kashmir conflict first emerged, the UN was still a nascent body and an international issue of this magnitude required to be dealt with more hard work and strategy.\(^11\) UN had an authoritative position in the international arena but it had not yet gained the influence that it has today and therefore both the states used and dismissed it whenever it would suit their positions. Whenever a resolution would be passed, it would be “diplomatically accepted by both the nations and then undiplomatically disregarded”\(^12\) and the UN could not do much because at the end of the day its resolutions and arbitrations were recommendatory in nature and not binding upon the parties.

It is essential for a mediator to establish its credibility because only then will the parties give it due respect and listen, understand and communicate with it their fears, aspirations and interests with regards to the particular conflict. The first and prime step to be taken by the mediator is to identify the interests of the parties and understand their goals. Once

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\(^7\) Bose (n 1) 40.


\(^10\) Das (n 9) 276.


\(^12\) Rajan (n 11) 16.
this is done, then the parties together with the mediator can explore the possible strategies and outcomes to deal with the conflict. In the case of Kashmir, it seemed that the goal of the UN was not aligned with the interests of the parties and that can be attributed as one of the setbacks of this international body.

According to Fisher and Ury, in order to succeed at a negotiation, one should aim to reconcile the interests and not the positions. This is because the conflict always lies in the needs and the concerns of the parties. The UN’s goal to create an “environment conducive” enough for the plebiscite to take place ignored to take into account the interests of India and Pakistan. Both the states had showed interest in holding a plebiscite but India’s interest was to ensure security and territory in that area, while Pakistan’s main interest was to have some degree of presence in the region. The positions of these parties was to get a victory over each other in Kashmir but their interests were to some extent different which were hindering them from reaching a conclusion. The UN did not particularly work on their interests and therefore, all the resolutions that entailed demilitarization so that a plebiscite could be arranged were rejected by the parties. It is undoubtedly difficult and time consuming to determine the interests of each party and especially if they are extremely firm on their position, then it is not an easy feat to make them change their mind. However, in order to attempt to do so, the starting point would be to “figure out where their minds are now.”

One of the techniques that the UN could have adopted is the one text procedure. Under this strategy, the UN as a mediator could have focused solely on the reasons behind the demands made by each party. The UN Commission could have held private meetings with each party, noting down their interests and concerns and then drafting innovative plans to ameliorate the situation. The appointed mediator by the UN could have prepared a draft addressing the pertinent issues and then kept amending it with the feedback and consultations from both parties. This may count as mere speculation but if the UN would have adopted this approach it could have simplified the process decision making and prevented the parties from reaching a deadlock.

Although there was nothing wrong with the UN resolution calling upon Pakistan to withdraw its forces from Kashmir but it had not called upon India to do same and this conveyed the message to Pakistan that the UN was implicitly accepting India’s claim in acquiring Kashmir. Similarly, India felt that the UN had not explicitly mentioned or given enough importance to the Instrument of Accession that was signed by the leader of

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14 Fisher and Ury (n 4) 42.
15 Rajan (n 11) 16.
16 ibid
17 Fisher and Ury (n 4) 44.
18 Fisher and Ury (n 4) 114.
19 Fisher and Ury (n 4) 118.
20 Fisher and Ury (n 4) 118.
the government of Kashmir back in 1947 who wanted to accede to India.\textsuperscript{22} It is clear that such grievances against the UN were not letting either of the nations to trust the UN as the mediator and therefore, all the proposed resolutions seemed unacceptable to them.

The situation that the UN had found itself in is reflective of the concept referred to by Fisher and Ury as the assumption of a fixed pie.\textsuperscript{23} Since both the parties were adamant on their positions and they saw the dispute as either being resolved in their favor or the other party’s, they were not interested in coming up with innovative solutions or even in widening the range of options available to them. This approach is what the UN should have aimed at eliminating and bringing in the concept of “invent first, decide later.”\textsuperscript{24} A brainstorming session is suggested to work the best in such situations whereby the participants sit together, bring up the issue, engage in a dialogue and invent ideas “without pausing to consider whether they are good or bad, realistic or unrealistic.”\textsuperscript{25} The objective behind this exercise is to stimulate the participants to think without any hesitation and the fact that they will not be judged or criticized for their proposed ideas will make them more confident in sharing their plans in greater detail. The exchange of information makes the negotiating environment more amicable and appealing for the parties to drive harder to get to a solution. Although, in the case of India and Pakistan, it could be argued that to carry out an exercise like this would not have been the easiest task for the UN.

By 1960, it had become apparent that all the endeavors made by the UN had proved to be futile and despite all the conferences arranged by the mediators such as Owen Dixon or by his successor Dr. Frank P. Graham, the result was always the same and no agreement was reached. It did not matter if the conference lasted for five days as it did in the case of the Tripartite Conference in New Delhi, India on July 20, 1950 or if it went on for a few hours, it would still fail to reach a settlement. When the UN Security Council realized that its role as a mediator was not effectively progressing with the issue, it decided to take a back step.

3. The 1970’s: A Shift in the Negotiation Policy

A shift was seen in India’s outlook towards this issue in 1971 when it signed the Simla Agreement with Pakistan. This was a move from involving third party mediators to having bilateral negotiations. In 197, India and Pakistan once again found themselves at war with each other while the liberation movement in East Pakistan was gaining headway. The war left Pakistan in a weak position as it lost it eastern territory. India’s approach at this point was to formulate an agreement and include the Kashmir conflict within it. Some of the provisions included in this agreement were that both the countries should “settle their differences by peaceful means through bilateral negotiations or by any other peaceful means mutually agreed upon between them.”\textsuperscript{26} Secondly, Kashmir was

\begin{itemize}
\item \textsuperscript{22} Subbiah (n 21) 181.
\item \textsuperscript{23} Fisher and Ury (n 4) 61.
\item \textsuperscript{24} Fisher and Ury (n 4) 62.
\item \textsuperscript{25} Fisher and Ury (n 4) 62.
\item \textsuperscript{26} Agreement of Bilateral Relations, July 2, 1972, India-Pak., 858 U.N.T.S 71, art. 1(ii) at 72.
\end{itemize}
divided by a Line of Control (LoC) between the two countries. India made it clear through this agreement that it does not want to involve any third party in resolving the Kashmir conflict and that both the nations should take up the responsibility of coming up with a solution on their own.

This looked like it would prove to be advantageous because it meant that both the parties were ready to communicate with each other without someone convincing them to do so and successful negotiations are all about effective communication. However, in order to have an optimal outcome from a bilateral negotiation, it is imperative that both the parties sit on the table with a mindset that they have “a genuine interest in generating movement towards settlement by taking responsibility and making concession.”\(^\text{27}\) From one perspective, this step also seemed like a good idea because sometimes, it is better to put back the “dominating and distracting effect” that the third party participation can have and it is more beneficial to have “private and confidential means of communicating with the other side.”\(^\text{28}\) Having said that, both countries should have entered into this agreement viewing it as a negotiation and not a debate. The latter approach would only lead them to blame one another for each other’s shortcomings, consequently leading both sides further away from reaching any agreement.

The years preceding these bilateral negotiations witnessed India blaming Pakistan for its failure to withdraw its troops from Kashmir as the reason behind the UN resolutions not working out, while Pakistan blamed India for not showing full commitment towards the idea of conducting a plebiscite. This blame game did nothing but incite the parties to take extreme defensive measures which was definitely not the right way to go about a negotiation.\(^\text{29}\) Bilateral negotiations are one of the techniques that fall under the ambit of dispute resolution but it can only succeed when both parties are motivated to use their skills and efforts to formulate a method that can lead to a settlement. Historians suggest that this was the spirit behind the framing of the Simla Agreement but when it came to the execution part it seemed that intent from both the sides was lacking. There were no timely and continuous meetings and in order to solve a complicated and an unending conflict such as this, a lot of back and forth communication is required and “without any clearly articulated schedule for meetings or mandatory methodology for negotiating, the nations have avoided discussions and maintained stalemate with no sanction.”\(^\text{30}\)

4. **Understanding the Need of the Hour**

In the wake of the 21st century, it appeared that both the nations were more open to coming together, putting the Kashmir issue higher up in their priority list and speak with each other to resolve the problem. According to Fish and Ury, when the two sides with differing perceptions meet and make their aspirations explicit in an honest fashion, the discussion always progresses because they are now actively listening to one another and

\(^{27}\) Rajan (n 11) 10

\(^{28}\) Fisher and Ury (n 4) 110

\(^{29}\) Fisher and Ury (n 4) 27 & 39

\(^{30}\) Rajan (n 11) 13
trying to understand their point of view.\textsuperscript{31} This is exactly what happened in 2002 when Atal Bihari Vajpayee, the Prime Minister of India invited General Pervez Musharraf, the President of Pakistan to Agra to discuss the issues and conflicts between them- one of them being the Kashmir issue. It was announced at the Agra Summit that both the sides understood the need to resolve this conflict which meant that although they viewed the situation differently, they were ready to work on the problem together.\textsuperscript{32} However, the talks were suspended again because no consensus was reached regarding cross border terrorism; another opportunity lost.

The failure of these negotiations may be attributed to the fact that the conflicting parties were being too ambitious with all the issues they had on their agenda. At times it is better to strategize how to deal with all issues beforehand so that no one issue ends up negatively impacting the rest. When India acknowledged the ‘centrality’ of the Kashmir issue, in return it wanted Pakistan to give assurances regarding the problems of cross border terrorism. However, India did not feel that Pakistan’s commitment towards their cause was genuine enough for them to trust Pakistan and hence these talks failed.

With regards to having a number of items to be negotiated upon, Craver wrote in his book that it is advisable to first list down the items in order of importance and degree of difficulty attached to them. Sometimes, the parties prefer to first discuss the less complicated ones and once they begin settling down on those, it gives them further motivation to move forward.\textsuperscript{33} One of the downsides of this approach is that during this process the parties might get tired at some point and their desire to keep negotiating might diminish.\textsuperscript{34} At the Agra Summit, the fact that both the nations agreed upon the urgency of solving the Kashmir issue along with other matters was a commendable first step because that gave them the confidence that it will yield a positive outcome. Although, not many details of the talks were addressed, it seemed that the questions that had to be discussed overlapped with one another and a disagreement on one issue demotivated them and prevented them from moving towards a settlement.

5. \textbf{Third Party Mediations: A Path of Cooperation}

Fish and Ury have discussed that during negotiations the conflicting parties often tend to overlook the fact that “the most powerful interests are basic human needs.”\textsuperscript{35} In the Kashmir issue, these could be identified as the needs of the people of Kashmir and how significant it is to make these people feel like they were a part of the process. As a result of doing so, these actors would be able to develop trust in the two nations and would be ensured that their ideas and concerns would also be taken into consideration and this would have helped in fostering a healthy environment for a productive negotiation to take place. So when talks between India and Pakistan finally resumed in 2004-2007, it seemed that both parties were more supportive of involving the people of Kashmir in the process.

\begin{flushleft}
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\textsuperscript{31} Fisher and Ury (n 4) 36-37
\textsuperscript{32} Fisher and Ury (n 4) 38
\textsuperscript{33} Charles B. Craver, \textit{Skills & Values: Legal Negotiating}, (3\textsuperscript{rd} edn. LexisNexis 2016)
\textsuperscript{34} Craver (n 33) 33.
\textsuperscript{35} Fisher and Ury (n 4) 48.
\end{flushleft}
According to the two parties, “the main idea was to infuse realism as well as humaneness into the negotiations.” Although, this was the plan that both the parties wanted to go forward with and they held high hopes that such a strategy would lead to a win-win situation for all the parties involved, the unstable political situation in Pakistan proved to be an impediment in executing this plan and yet again no agreement could be officially reached.

Before January 2004, there were more than thirty-five occasions on which the Heads of the States of India and Pakistan met and there had been at least been twelve rounds of talks between 1989 and 1998, yet none of those talks achieved a resolution. To this day, no set agreement has taken place regarding this dispute which begs the question that can this issue ever be resolved and if so then what techniques should be employed to do so.

Analysts have suggested that it is time to revisit using a third party mediator. Although, the UN proved to be an unsuccessful mediator, times have changed and maybe a third party intervention will prove to be more profitable now. However, in order for that to happen, the participants of the conflict will have to comprehend that a settlement is better for their existence and the mediator who will be brought in will also have to promote the idea that a resolution is needed for the “betterment of humanity at large.” Charles Hauss in his book, International Conflict Resolution, explains that “in win-win conflict resolution, all parties are happy with the outcome because, at least over time, they all will benefit from it.” Such a resolution is only possible when the participants tread on the path of cooperation. Both the nations will have to let go off their firm positions and try to look at the broader picture. The reason why there has been no progress in this direction is because they are not ready to move from their “hard-lined positions on contentious issue such as demilitarization, territorial partition and plebiscite.”

On the one hand, Pakistan is not ready to recognize the Line of Control (LoC) as an international boundary because according to them this acceptance would mean losing control over the territory forever and on the other hand, India is adamant on maintaining this boundary even though they know that such an attitude will not lead to any solution.

The impetus to move past these positions undoubtedly has to come from the parties involved but having witnessed that the bilateral negotiations did not fare so well in the past, it would be much more efficient to have “low-key, indirect, and discreet” third party facilitation. There is a need to give a push to both the nations to look beyond what happened in the past, the grudges they held against each other and instead focus on moving forward. A mediator can give this push and Bercovitch mentioned in his book,

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39 Charles Hauss, International Conflict Resolution, (Bloomsbury Academic 2001) 6
40 Rajan (n 11) 17.
41 Bose (n 1) 220-221.
Mediation in International Conflict, that the mediation tool that would work best in facilitating a negotiation in the Kashmir dispute is called the “formulation intervention.”\(^{42}\) The formulation strategies would include several steps such as starting off with choosing a neutral meeting site so that it is easier to control the environment, then establishing the base line rules and making the parties feel comfortable by guaranteeing them that the mediation will be carried out in private and nothing said or done will be released in the press. Further, the mediator can have a proper methodology in terms of having an agenda for the meeting and breaking down different parts of the issue.\(^{43}\) The mediator will have a tough job of maintaining the emotions of the participants in the room because there will be a tendency that the conflicting parties might get carried off on a tangent and then the entire purpose of the negotiation would be defeated if they end up debating over matters that were not even remotely related to the main issue at hand. In order for that not to happen, the third party mediator will have to keep the procedure focused and intervene every time he/she sees a threat of the discussions collapsing. The intervention on the part of the mediator will also involve him/her reconciling the common interests and the disagreements and then making substantive suggestions, proposals and suggesting the concessions that each party can make.\(^{44}\) The third party mediator should make India and Pakistan that despite their differences, they do common interests, such as reducing the economic and political costs of maintaining military forces in Kashmir; improving international reputation by showing that both of them have good intentions in reaching a settlement; and progressing towards normalizing their ties with regards to trade and travel.\(^{45}\) By sharing this information with the parties, the mediator is trying to formulate creative incentives to give an outlook to them that it is always possible to reach a resolution that is mutually beneficial.

The question that arises then is that who should be the mediator. It would be naïve to think that when it comes to resolving international disputes, that “a well-meaning actor, motivated by altruism, is keen to resolve a conflict.”\(^{46}\) This is because mediators have political affiliations as well and they have motivations to enter into mediation as they know they will be making some gains out of it.\(^{47}\) One of the ways of dealing with the threat that is attached to having one political actor as a mediator is to have a group of diplomats or influential people from different countries selected by both the parties who can come together as a team to mediate this issue. Some of these mediators may not be officially present at the mediation table but they can work behind the scenes with the parties by holding private meetings and providing them with the assurances and the confidence to go ahead and try to resolve the dispute.

The option that both the nations have is to seriously look into the possibilities of propagating the peace process. It should not be expected of either side to give up on the

\(^{42}\) Jacob Bercovitch, ‘Mediation in International Conflict: An Overview of Theory, A Review of Practice’, in Peacemaking In International Conflict: Methods and Techniques (United States Institute of Peace press 1997), 130-1

\(^{43}\) Bercovitch (n 42) 137-8.

\(^{44}\) Bercovitch (n 42) 137-8.

\(^{45}\) Rajan (n 11) 20.

\(^{46}\) Bercovitch (n 42) 135.

\(^{47}\) Bercovitch (n 42) 135.
territory but certain strategies can be employed to speak about the issue and to make good faith efforts to make a settlement.

It is difficult to say when and how this conflict will get resolved but it cannot be denied that a solution is the urgent need of the hour. The differing perceptions, the egos and hard line positions of the two nations have resulted in this issue to go on for almost seven decades now and so many wars have been fought that have led to loss of lives, money and effort. None of these wars have helped either of the two countries to get an upper hand over the other which illustrates that war is also not the answer to this conflict. Such a dispute requires patience and a committed task force which keeps the participants motivated through constant discussions to keep them on board and to make them understand the importance of maintaining a relationship and hence reach an agreement.
THE WTO AND ITS FAILURE TO CREATE A LEVEL PLAYING FIELD BETWEEN DEVELOPED AND DEVELOPING NATIONS

Zarmala Tashfeen*

INTRODUCTION

The World Trade Organization (WTO) was created in the General Agreement on Tariffs and Trade (GATT) Uruguay round in 1995. Whilst GATT only dealt with trade in goods, the WTO went further to encompass trade in services through the General Agreement on Trade in Services (GATS); intellectual property rights through the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Recently, the Doha and Bali rounds have also included development and trade facilitation to the ambit of the WTO.

The World Trade Organization had set out some laudable objectives it sought to achieve: to make trade free and fair through negotiations; to ensure predictability through transparency; and to help developing countries increase their capacities to benefit from a liberalized trade regime.48

Based on these objectives, the organization had immense potential. However, as will be seen in the course of this article, the World Trade Organization has time and again failed to provide a level playing field between the developed and developing nations, by enacting rules that benefit the rich over the poor countries.49 In other words it has “become little more than a smokescreen for the pursuit of private interests and the subordination of developing countries to the dictates of rich countries”.50

Although the shortcomings of the WTO in this respect can be substantiated by reference to a wide range of topics, this article will focus on four specific areas to illustrate how the World Trade Organization has failed to provide a level playing field between developed and developing nations. These four areas are the Dispute Settlement System of the WTO, *Zarmala Tasheen completed her LL.B (Hons) from Queen Mary University of London with an overall 2.1 and is currently working in the Supreme Court of Pakistan as a Law Clerk.


Agricultural subsidies, the TRIPS agreement, and the GATS agreement, respectively. The article will conclude with a discussion of the latest developments in the WTO, and ultimately comment on the future of the organization in light of its failure to treat developing and developed nations equally.

1. THE DISPUTE SETTLEMENT UNDERSTANDING (DSU)

In the World Trade Organization, disputes relating to trade between nations are resolved through the Dispute Settlement Understanding. According to Article 3.2 of the DSU, it exists to ensure predictability and security of rights and obligations of the member states. The dispute settlement process of the WTO was regarded as one of the most significant achievements of the Organization when it was established.

The prime reason why it was considered so important was because the DSU appeared to provide special treatment to developing and least developed nations, contrary to the process that existed under GATT. The Dispute Settlement Understanding contains numerous provisions conferring special rights to developing countries such as Articles 4.10 and 12.10 which set out that special considerations be given to developing countries in consultations; Article 3.12 which provides the possibility of an expedited process; and Article 24 contains special provisions for least developed countries. It has been regarded as advantageous "especially for the meek economically and politically unequal". In reality, however, the developing countries find the Dispute Settlement Understanding to work to their detriment. The main obstacle for developing countries is the sheer intricacy of the settlement process, whereby expertise is crucial to be able to bring a claim, let alone succeed. The need for expertise can be extremely expensive for developing countries. Ambassador Bhatia of India has stated on record that the considerable cost of the process is a crucial deterrent for using the system.

Most developing countries lack the required internal expertise to conduct dispute settlements themselves and thus have to resort to hiring external private expertise which can be


considerably expensive.\textsuperscript{56} Legal fees for parties in panel proceedings can be higher than US $10 Million\textsuperscript{57} which can be prohibitively costly for most developing countries to afford. In addition, WTO litigation is usually funded by private enterprises. This works to the disadvantage of the developing countries as big business interests are mostly at collision with those of the developing countries.\textsuperscript{58}

Another way in which the dispute resolution process works to the disadvantage of developing countries is through the sheer incapability of developing countries to impose rulings through retaliation against nonconforming developed countries. The retaliation rules for developing countries in this context have been described as “virtually meaningless” by Footer.\textsuperscript{59}

Under the Dispute Settlement Understanding, a member may retaliate against a member in breach, by suspending trade concessions or setting up barriers.\textsuperscript{60} For a developing country dependent on trade concessions granted by the richer countries, retaliation is an impossible route to follow. If at all pursued, it has resulted in more harm in terms of trade and revenue loss for the weaker country, without troubling the rich in any substantive manner. The retaliation request of Antigua, one of the smallest WTO members against he United States provides an example; in its request for retaliation, Antigua stated “ceasing all trade with the United States (Approximately USD $180 Million annually, or less than 0.02 per cent of all exports from the USA) would have virtually no impact on the economy of the United States, which could easily shift such a relatively small volume of trade elsewhere”.\textsuperscript{61} It has therefore been described as a complete waste of time and money for developing countries to go against larger developed countries.\textsuperscript{62}

A further obstacle for developing countries is the fear of political and economic pressure from developed countries. Bown and Hoekman note that developing countries may not want to initiate proceedings against certain developed countries out of the fear of retaliation in the form of decreased political support and economic assistance for development.\textsuperscript{63}

\begin{itemize}
\item \textsuperscript{56} Nottage (n 5)
\item \textsuperscript{57} Hakan Nordström and Gregory Shaffer, 'Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure', (2007) 7 (4) World Trade Review
\item \textsuperscript{58} Nottage (n 5)
\item \textsuperscript{59} M. Footer, 'Developing Country Practice in the Matter of WTO Dispute Settlement' (2001) 35 (1) Journal of World Trade 55, 94.
\item \textsuperscript{60} Nottage (n 5)
\item \textsuperscript{61} Recourse by Antigua and Barbuda to Article 22.2 of the DSU, \textit{United States- Measures Affecting the Cross Border Supply of Gambling and Betting Services (US-Gambling)}, WT/DS285/22, 22 June 200, para 3.
\item \textsuperscript{63} Chad P. Bown and Bernard M. Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' 2005 8(4) JIEL, 861
\end{itemize}
As a result of the above mentioned loopholes in the system, the developing countries have little faith in the DSU and their grievances remain largely unaddressed. This trust deficit is reflected in the unwillingness of developing countries and Least Developed Countries (LDCs) to initiate proceedings in the Dispute Settlement Understanding against the richer countries.

2. **Agricultural Studies**

The majority of the populations of poor countries live in rural areas, and therefore their main source of income is through agriculture. According to the World Bank, seventy percent of the world’s poor live in rural areas and rely on agriculture for their sustenance. It is therefore essential that these developing countries such as Pakistan, given their comparative advantage in agriculture, are encouraged and facilitated by other countries and WTO, to trade their agricultural produce freely without any restrictions or unfair conditions. This is, however, far from reality.

Developed countries, like the EU and particularly the United States of America, engage in providing heavy subsidies to their farmers both as farm support and export subsidies. These subsidies distort international markets through overproduction and dumping as well as cutting the demand in developed country markets for agricultural produce from the developing countries. Consequently, poor farmers in developing and least developed countries are pushed out of production and remain in perpetual poverty. It is particularly detrimental for countries like Pakistan and Bangladesh, whose economies depend largely on their agricultural exports.

This is evident from the manner in which both the United States and EU have responded to reducing their Overall Trade-Distorting Support (OTDS). The EU has taken advantage of weaknesses in provisions determining subsidy classification through “box shifting”, which is essentially reclassifying a large portion of its support as non-trade distorting. Manipulation of the loopholes, allowing a clever reclassification of the trade distorting subsidies, has practically rendered ineffective the provisions aiming to control the trade distortions.

Furthermore, in relation to cotton subsidies in particular, developed countries undertook a special commitment to reduce cotton subsidies in a more robust manner in the Doha Round, however there has practically been minimal implementation of this. In fact, the 2008 US

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Farm Bill failed to indicate any willingness on the part of the US to adhere to the repeated WTO rulings against cotton subsidies.\textsuperscript{67}

Recently in the 10\textsuperscript{th} ministerial conference in Nairobi the conditions for provisions of subsidies for agricultural exports were set out, according to which developed countries are to eliminate their subsidies immediately while developing countries get time till 2018 to eliminate their export subsidies. On the face of it this appears to be favorable for developing countries, but experts of agricultural negotiations insist that these provisions are in fact riddled with loopholes that allow for a lot of flexibility to developed countries.\textsuperscript{68} Unsupervised increase in farm subsidies under the garb of development or use of environmentally friendly technologies, in other words an abuse of the Green Box subsidies, can continue to distort agriculture.\textsuperscript{69}

This takes us back to where we began; superficially the World Trade Organization appears to create a level playing field but upon digging deeper, do we find that its provisions and decisions ultimately benefit the rich at the expense of poor countries.

3. **The Agreement on Trade Related Aspects of Intellectual Rights (TRIPS)**

The Agreement on Trade Related aspects of Intellectual Property Rights introduced a system for protection and enforcement of intellectual property claims. It includes patent protection, trademarks, copyrights, and other intellectual property rights.\textsuperscript{70} Although the rationale behind the agreement was that research and innovation will be encouraged through such protection and will thus lead to technological progress and economic development, the TRIPs Agreement has however, proved to be of immense disadvantage to developing countries.

This is because western powers are the primary producers of patentable knowledge and developing countries are at the opposite end of the spectrum: they are the consumers.\textsuperscript{71} Contrary to what the agreement purported to achieve, research shows that intellectual property rights do not necessarily help in economic development for poor countries whose Gross Domestic Product is below US $3,400.\textsuperscript{72} This is because such countries lack the ability

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\textsuperscript{67} Oxfam 2009, (n 17)


\textsuperscript{70} Oxfam 2002, (n 3)

\textsuperscript{71} Robert Hunter Wade “What strategies are viable for developing countries today? The World Trade Organisation and the shrinking of ‘development space’”, (2003) 10 (4) Review of International Political Economy, 621-44

\textsuperscript{72} Mohammad Towhidul Islam, “TRIPS Agreement and Economic Development: Implications and Challenges for Least Developed Countries Like Bangladesh”, (2010) 2 Nordic Journal of Commercial Law
to invest in up to date technology to compete with developed countries and neither do they have the means to conduct Research and Development of the same level.\textsuperscript{73}

The winners and losers are very obvious here. The TRIPS Agreement was a result of intensive lobbying by powerful companies and their governments, and it is therefore the rich countries that are the winners. The losers on the other hand are the developing countries who are suffering because of the ever increasing technology gap which is hindering their potential to integrate in the global market, and as a result is affecting their economic development.\textsuperscript{74}

The most significant problem posed by the TRIPS Agreement is the effect it has had on public health in developing countries with regard to the price of medicines. Prior to the TRIPS Agreement, the main supply of medicines came from generic drugs industries that provided patented drugs at a fraction of the price.\textsuperscript{75} They helped reduce the prices of drugs in the market through competition, however now that TRIPS is in effect, these drugs cannot enter the markets until patents have expired.\textsuperscript{76} And thus as a result they help generate immense profits for large drug companies in rich countries at the expense of the overall impact it has on health in developing countries.

According to a United Nations study, 150Mg of the HIV drug Fluconazole costs $55(U.S.) in India, where the drug does not have patent protection, and more than double in countries such as Philippines ($697) and Indonesia ($703), where the drug is patented.\textsuperscript{77}

Moreover, in relation to the effect of the TRIPS Agreement on Brazil, a World Health Organization sponsored study found that the greatest beneficiaries of the TRIPS Agreement have not been Brazilian companies or institutions, rather transnational pharmaceutical companies.\textsuperscript{78}

In response to these problems, in the Doha Declaration on the TRIPS Agreement and Public Health, two measures were stipulated to alleviate some of the burdens on poor countries. The first requirement was that countries with little or no domestic manufacturing capacity were to be allowed to import cheaper generic medicines under a compulsory license. However, since the mechanism is wrapped in red tape\textsuperscript{79} it has only been used once to export generic medicines from Canada to Rwanda. This apparent concession is clearly inadequate and

\textsuperscript{73} Islam (n 23)

\textsuperscript{74} Oxfam 2002, (n 3)

\textsuperscript{75} Oxfam 2002, (n 3)

\textsuperscript{76} Oxfam 2002, (n 3)


\textsuperscript{79} Oxfam 2009 (n 17)
insufficient given the large number of developing countries with abundant public health problems which lack the required manufacturing capacities.

The second stipulation was that Least Developed Countries (LDCs) would not have to fully adhere to TRIPS commitments for medicines until 2016. This has proven to be largely illusive given the fact that some LDCs such as Cambodia were pushed to introduce the TRIPS Agreement through the WTO accession process while other countries such as Uganda and Rwanda have been forced by circumstances to introduce the Agreement.\(^{80}\)

Furthermore, as if the current state of intellectual property rights’ protection was not benefitting the developed countries enough, the United States and EU have included certain “TRIPS-Plus” provisions in their regional trade agreements with developing countries which enforce further restrictions and limit access to affordable products and technologies.\(^{81}\)

Therefore, in light of the above it is evident that the TRIPS Agreement proved disadvantageous for the poor countries and very lucrative for the rich countries. This is yet another example of how the rich countries use the World Trade Organization as a platform to enact rules that work to their advantage.

4. **General Agreement on Trade in Services (GATS)**

The General Agreement on Trade in Services has been termed as the most important development in the multilateral trade system since 1945.\(^{82}\) It is governed by the principles of non-discrimination, according to which all service providers, regardless of whether they are local or foreign, must be treated equally. Furthermore, the agreement prohibits countries from making policies which directly or indirectly restrict market access.

Although premised on such commendable principles, the agreement has proven to be particularly troublesome for developing countries as it limits the government’s role to protect its own service sector. Services not only include commercial services but also the provision of basic amenities such as water, healthcare, education, the environment, and energy. These sectors relate to the basic requirements of a country and therefore should not be governed by the same principles as set out in GATS which calls for liberalization. Liberalization means privatization, and in the absence of strong regulation of such basic amenities, it can be disastrous. The potential catastrophic effects can be illustrated by the case of water privatization in Bolivia, which resulted in massive riots and ultimately failure.\(^{83}\)

The same can be extended to the example of hospital services. Suppose a country makes commitments to allow the establishment and running of hospitals for profit by foreign companies. Since GATS imposes restrictions on the government to regulate the actions of

\(^{80}\) Oxfam 2009 (n 17)

\(^{81}\) Oxfam 2009 (n 17)

\(^{82}\) Oxfam 2002, (n 3)

such hospitals, they cannot be compelled to provide emergency services, for instance, or take in patients who cannot afford their services.84

There is an evident problem here, especially regarding developing or poor countries. These foreign owned hospitals will most likely have exhausted the public system of its skilled and experienced staff and offer services only to those who can afford to pay for their services. A further problem that arises here is that nothing could be done if the foreign hospitals ultimately decide to shut down on short notice, which could result in a crisis in health care provision.85

Furthermore, there are four modes of supplying services under the agreement.86 These are cross border supply, consumption abroad, commercial presence, and movement of individuals. Although all these modes are available and apply to all countries, the actual finalization of rules and modalities is again complicated due to the different interests of the developed and developing countries.87

The developed countries stress on and emphasize the importance of negotiations on Mode 3 as it benefits them to have developing countries open up their markets to mega businesses from developed countries. On the other hand, the developing countries are much more interested in Mode 4, which allows their labor force to get into the North and send remittances back home. Both interests are based on the strengths of each side, however, we see that the balance is tilted in favor of developed countries as the world has opened up immensely in Mode 3 through liberalization and deregulation, and has rather contracted in Mode 4 by imposing stringent standards, quotas on and regimentation of the job markets.88

This again points to how the World Trade Organization operates to benefit the developed countries at the expense of developing countries. There is therefore a dire need for GATS to be rebalanced and modified so that developing countries are in a position to prioritize the provision of services to all their citizens, specifically the poor, above the interests of wealthy nations and powerful corporations.89 GATS should also be amended to make it clear that governments can limit liberalization in areas that are essential to national development and poverty reduction.

However, this is not what appears to be happening. Developed countries such as the EU are looking to access new markets for their corporations and are thus stressing to alter the system

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85 Oxfam New Zealand (n 35)


87 Oxfam 2002 (n 3)


89 Oxfam New Zealand (n 35)
of GATS negotiations in their favor. Until recently there has been a certain degree of flexibility allowing each country to decide by itself which sector(s) it wishes to liberalize, but the EU seeks to replace this system with one that sets targets for and promotes liberalization.

It is therefore evident that there is a stark imbalance in terms of protection of interests of the developed as opposed to the developing countries in the GATS agreement. This emphasizes the stance that the World Trade Organization upholds the interests of the former at the expense of the latter.

5. **BEYOND BANGLADESH AND NAIROBI: WHAT IS THE FUTURE OF WTO?**

After a long hiatus following the failure of the Doha Round, in December 2013 the 9th Ministerial conference took place in Bali. Instead of reaching any substantial agreement on the Doha Development Agenda, which had been pending since 2001, the greatest achievement was rather an agreement on trade facilitation. This was considered a breakthrough not only in terms of boosting economic growth around the world, but particularly for its importance for the developing world. The agreement sought to promote and ensure efficient trade throughout the world by reducing transportation costs, port handling delays and generally allowing for the smooth flow of trade.

On the face of it, this appears to be of considerable benefit to developing countries. However, the implementation of the agreement is extremely costly for developing countries and Least Developed Countries as they have to undergo enormous investments in order to implement these trade facilitating standards. Secondly, the Bali Ministerial failed to achieve anything on the agricultural or development front.

There was immense hope of resuming the talks left pending from the previous Doha Round pertaining to development, which would benefit the developing countries. As always, the Doha Development Agenda was avoided and attention was diverted to trade facilitation, which practically speaking, does not substantially contribute to alleviate the issues faced by the developing world.

Following Bali, the 10th ministerial conference took place recently in Nairobi in December 2015. The only prominent decision reached in this round was the decision to eliminate export subsidies, which, as mentioned earlier, is flawed in itself. However, the more pressing issue that came to light was the disagreement between developed and developing countries regarding the Doha Development Agenda. They appeared to agree to disagree and put the Doha Agenda effectively to rest, and as a result, “once again, the WTO negotiations offer a full cake to the developed nations and not even a slice to the developing countries.”

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91 *Seetha* (n 19)
The deadlock on the Doha Development Agenda, as seen in the Nairobi conference and the Bali round before it, has brought to light some pressing issues about the continuing validity of the World Trade Organization. There appears to be a blatant contrast between the objectives of developed and developing countries as the former want to negotiate on new trade agendas, investments, and climate change, whilst the latter are adamant on the implementation of the Doha Round, with special emphasis on the agricultural front. As has been highlighted in the preceding paragraphs, the World Trade Organization has continuously catered to the developed world and has thus failed to live up to the standards it had set out to abide by. The Nairobi conference was a major opportunity for the WTO to put these criticisms to rest by reaffirming the Doha Round, but the failure to do so makes it very unlikely that it will in the future.

From the point of view of the wealthy nations, the World Trade Organization is a success, catering to every demand they have, but from the perspective of the developing world, it is an abject failure; it is structured in a way that promotes exploitative competition, in which the former are at a perpetual and constant advantage.92 However, the rich nations such the United States and EU are also not satisfied. They claim that the World Trade Organization is a disappointment as it has not updated its rulebook since 1994 and has thus not kept up with the pace of international trade.93 As a result of these shortcomings, powerful regional trade blocs such as the Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP) have emerged, which threaten the balance of trade between developed and developing nations even more than under the World Trade Organization, as they are dominated by rich and powerful nations and discriminate against those outside the blocs. The developing countries, especially the emerging economies, frustrated with the WTO, may find it prudent to tag along with the mega regionals to get a piece of the pie instead of waiting for WTO to deliver. This will compromise the position of the other developing countries who maintain their faith in a fair multilateral system which is rule based and protects the small and weak economies against the onslaught of the multinationals under the garb of trade liberalization.

This can only be achieved if the current system is strengthened and restructured to keep pace with the technological and climate change realities. And most importantly, a balance needs to be struck between the negotiating ambition of the rich countries and safeguards for the developing countries. If the WTO fails to restructure, strengthen and modernize itself as a multilateral trading system in order to cater to the needs of both the developed and developing world equally, it is bound to cease to exist altogether.

93 Katinka Barysch and Michael Heise, ’Will TTIP harm the global trading system?’ (9 January 2014) <http://yaleglobal.yale.edu/content/will-ttip-harm-global-trading-system> accessed 26 March 2016
CONCLUSION

In light of the above discussion, it appears that the World Trade Organization has, since its inception, been catering to the demands of the developed nations, at the expense of the developing nations which have in turn further pushed them towards poverty and regression.

By failing to provide a level playing field between developing and developed countries the WTO has not only failed as an institution, but the current state of play implies the end for the organization is very near, given the preference and rise of mega regional trade blocks which go even further than the WTO itself to the detriment of the developing world.

It is submitted, therefore, that the World Trade Organization must rise from its ashes and provide a fair and balanced trading system, unlike the one it is currently functioning as, in order to safeguard the interests of the developing world, and protect them from being used by powerful nations and corporations for their benefit.
Restitution of Conjugal Rights under Islam

Maha Ali*

INTRODUCTION

Marriage confers important rights and entails corresponding obligations both on the husband and the wife. Some of these rights are capable of being altered by the agreement freely entered into by the parties. But mainly, the obligations arising out of marriage are laid down by the law. An important obligation is consortium which not only means living together, but also implies a ‘union of fortunes’. A fundamental principle of matrimonial law is that one spouse is entitled to the society and comfort of the other. Thus, where a wife without lawful cause, refuses to live with her husband, the husband is entitled to sue for the restitution of conjugal rights and similarly, the wife has the right to demand the fulfilment by the husband of his marital duties. The restitution of conjugal rights is often regarded as a matrimonial remedy, but at the same time, it has faced heaps of criticism. In majority of the cases in the sub-continent, the question which arises is regarding its origin, its roots in religion and its constitutional validity.

When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.

1. ORIGIN AND EVOLUTION OF RESTITUTION OF CONJUGAL RIGHTS

Marriage is considered more of a religious, than a social or legal contract, in most communities. For example, Dinshah Fardinji Mulla in his book, ‘Mohammedan Law’, explains that the object of marriage is procreation and legalization of children. Similarly, it is considered a ‘samskar’ or sacrament instead of a social-legal contract in the Hindu society.

In Gurdev Kaur v. Swaran Singh1, it was established that the action for restitution of conjugal rights was borrowed from old Ecclesiastical courts in England, and was, in fact, originally not a Hindu tradition.2 The concept of restitution of conjugal rights was transferred from the ecclesiastical courts to the Divorce Court by the Divorce Act of

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1857. If one spouse left the marital home, the other could ask the court for a writ for the
restitution of conjugal rights. In a case where no excuse for their absence was presented,
the court would order the spouse to return home. The penalty for non-compliance would
be “attachment”, which meant that the guilty party would be imprisoned until they agreed
to obey the court order. Christian marriages treated the woman as part of the man. Canon
law considered a man and his wife as one person, which meant that the case could only
be dealt with by Ecclesiastical courts and not by civil courts.

However, no such principle existed in Islamic or Hindu laws.\(^3\) Under the ancient Hindu
law, the most important duty of the wife was to honor and serve the husband, and it was
the duty of the husband to provide residence and maintenance for his wife. The remedy of
restitution was not mentioned in the Shastric texts. However, if one of them failed to
perform their marital duties, the other spouse was entitled to enforce his or her rights in a
court of law.\(^4\) The English Ecclesiastical law of the restitution of conjugal rights was
grafted into the existing Indian Penal Code in the nineteenth century with little
modification; consequently the area came under complete control of and was shaped by
Indian interpretations of marital rights and obligations.\(^5\)

The significant feature of the restitution of conjugal rights is that it is a remedy aimed at
preserving the marriage and not dissolving it. However, as observed in \textit{R. v. Jackson},\(^6\)
(where the wife was confined by her husband) this award proved to be impotent and not
useful. In fact, Lord Herchell described it in his judgment as ‘barbarous’.\(^7\) Earlier
marriages were formed on the fundamental principle that the wife was considered a
property of her husband, which is why she was required to live with him willingly or
unwillingly, in the home provided by her husband. In the case that the woman refused to
comply or left her husband, she could be compelled to live with him. M. A. Qureshi in
his book, 'Marriage and Matrimonial Remedies', explains this phenomenon by comparing
the women in those marriages with cattle which could be brought back to their masters in
the case that they ran away.\(^8\)

2. \textbf{HINDU LAW}

With the Hindu Marriage Act of 1955, the concept of a wife being unconditionally tied to
her husband was completely altered. According to Section 9 of the Act, both parties
could avail restitution of conjugal rights. In \textit{Baburao v. Sushila},\(^9\) the Madhya Pradesh
High Court stated that only when the petitioner deserves it should the restitution be
allowed. However, it cannot be granted if there is no hope for the parties to cohabit

\(^3\) Mary Lyndon Shanley, \textit{Feminism, Marriage and the Law in Victorian England}, (Princeton University
Press 1993), 177

\(^4\) \textit{Qureshi} (n 2) 82

\(^5\) Sumit Sarkar and Tanika Sarkar, \textit{Women and Social Reform in Modern India}, (Indiana University Press
2008), 289

\(^6\) \textit{R. v. Jackson} (1891) 1 Q. B. 671.

\(^7\) \textit{Qureshi} (n 2), 79

\(^8\) ibid

\(^9\) \textit{Baburao v. Sushila} A.I.R. 1960, M.P., 73
happily. It further states that, “in marital matters it is the attitude of the mind and the feelings that count, and no decree of the court can force the parties to live together.”

Despite the fact that all of the religions in India made references to marital duties and cohabitation, lawyers and judges continually pointed out during this period that importing the concept of restitution of conjugal rights was entirely inappropriate as it did not formally constitute part of any of the major religions in India. The most common practice, in cases of severe disagreements between couples, was that the wife would flee to her natal family. In the mid-nineteenth century, the Restitution of Conjugal Rights (Act XV of 1877, Schedule 11, Article 34) was available to the husband claiming the society of his wife. Formerly, women could seek help of the extended family in cases of violence against them by the husbands, but Section 259 of the Civil Procedure Code (1882) stated that the extended family could not interfere, particularly if the person ‘harboring’ her was a distant relative- such as an uncle instead of a parent.

Arguments were presented for and against the doctrine of the restitution of conjugal rights during the legislative debates on the Special Marriage Act, 1954 and the Hindu Marriage Act, 1955. In *Shakila Banu v. Gulam Mustafa*, the High Court observed:

“The concept of restitution of conjugal rights is a relic of ancient times when slavery or quasi-slavery was regarded as natural. This is particularly so after the Constitution of India came into force, which guarantees personal liberties and equality of status and opportunity to men and women alike and further confers powers on the State to make special provisions for their protection and safeguard.”

Later, in *T.Sareetha v. T. Venkata Subbaiah*, the Andhra Pradesh High Court held the Section 9 of the Hindu Marriage Act to be violative of the Indian Constitution. The Court indicated that the consequences of such a decree are “firstly to transfer the choice to have or not to have marital intercourse to the state from the concerned individual and secondly to surrender the choice of the individual to allow or not to allow one's body to be used as a vehicle for another human being's creation to the state”. The Court also stated that the section assailed on the touchstone of “minimum rationality... it promotes no legitimate public purpose based on any conception of the general good and hence, is arbitrary and void.”

3. **Islamic Law**

In Islamic law, according to A.A.A. Fyzee in ‘Outlines of Muslim Law’, the Holy Qur’an gives the husbands the right to retain their wives with kindness or part with them with an equal consideration. However, if the husband has not paid the dower money, he cannot ask for the restitution of conjugal rights under Islamic law. It is further discussed

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10 *Qureshi* (n 2), 84
11 *Sarkar and Sarkar* (n 5) 287
12 *Sarkar and Sarkar* (n 5) 288
13 AIR 1971 Bom. 166, ILR 1971 Bom. 714
14 AIR 1983 AP 356
15 Ibid
in the Hedaya\textsuperscript{17} that until the wife receives her dower from the husband, she may refuse her husband to a sexual relations.

Ameer Ali in the 'Mohammedan Law' has referred to the Hedaya again, which provides that the husband has no power to stop his wife from traveling or leaving his house to visit her friends until he has paid the whole amount of dower, because he does not have the right to “secure fulfillment before rendering fulfillment himself.”\textsuperscript{18} This rule was used in \textit{Eidan v. Mazhar Hossain}\textsuperscript{19} where the Allahabad High Court ruled that the wife could refuse to cohabit with her husband until he had paid the dower. Other such reasons due to which the court can refuse to grant order of the restitution of conjugal rights may be cruelty of husband or in-laws towards the wife, failure of husband to perform marital obligations, and second marriage of the husband. The Qur'an commands the husbands to keep their wives with kindness, or to part with them with an equal consideration.\textsuperscript{20} The husband can divorce a wife who is unwilling to live with him, or marry another woman, leaving his first wife in peace.\textsuperscript{21}

Owing to the Muslim husband being dominant in matrimonial matters, the Court leans in favor of the wife generally, and requires strict proof of all allegations necessary for matrimonial relief. The obligation of the wife to live with her husband is not absolute. The law recognizes circumstances which justify her refusal to live with him. For instance, if he has deserted her for a long time, or if he has directed her to leave his house, he cannot ask the assistance of the Court to compel her to live with him.\textsuperscript{22} Irregularity of marriage is also a valid defense to a suit for the restitution of conjugal rights, as it is necessary for a marriage to be valid according to Muslim law before the Courts can grant a decree of restitution of conjugal rights.\textsuperscript{23} In another judgment, it was discussed that Islam does not force the spouses a life devoid of harmony and happiness and if the parties cannot live together as they should, it permits a separation.\textsuperscript{24}

CONCLUSION

As understood, the restitution of conjugal rights is a part of the personal laws of the individual, thus they are guided by ideals such as religion, tradition, and custom. It is important to note here that the remedy for the restitution of conjugal rights is aimed at preserving a marriage and not at disrupting it, as in the case of divorce or judicial separation. This legal remedy aims at promoting reconciliation between the parties. It tries to protect the society from denigrating. But the final decision still remains with the parties: whether or not to obey the decree of restitution of conjugal rights and to continue with the matrimony.

\textsuperscript{17} Charles Hamilton, \textit{The Hedaya or Guide: A Commentary on the Mussulman Laws}, (2\textsuperscript{nd} edn. W.H. Allen, 1870) 54<https://archive.org/details/hedayaorguideac00hamigoog>


\textsuperscript{19} Eidan v. Mazhar Hossain 1877 I.L.L. All., 483

\textsuperscript{20} Surah 65, verse 3

\textsuperscript{21} (1934) 59 Bom. 426

\textsuperscript{22} \textit{Ali} (n 18), 383

\textsuperscript{23} PLD 1959 Lah. 1014

\textsuperscript{24} PLD 1959 Lah. 566
An Analysis of the Acceptable Standards for Living Conditions, Solitary Confinement and Unlawful Detention

Ahmed Farooq and Haniya Hasan*

INTRODUCTION

Contemporary times seem to find themselves doused in an oxymoronic paradigm where torture is widely abhorred, yet simultaneously practiced. In 1764, an Italian criminologist named Cesare Beccaria drafted one of the most influential critiques of the use of torture.¹ He contended that the use of torture in any form or manner for any given purpose prior to establishing criminal liability was contrary to the principle that an individual should not be punished absent a finding of actual guilt. He elucidated that in scenarios where criminal guilt is factually certain, torture is superfluous; where guilt is uncertain or improbable, the application of torture disregards the cost of harming the innocent. Beccaria rightly contested that most people are law-abiding,² and the general imposition of torture undoubtedly poses a substantial risk of harming the innocent.

1. EMERGENCE OF INTERNATIONAL LAW ON PROHIBITING TORTURE

The prohibition on torture is now a firmly established principle of international human rights law. It was first given an international legal platform in the 1948 Universal Declaration of Human Rights which postulated that ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’.³ The prohibition was given binding force, initially through the promulgation of the International Covenant on Civil and Political Rights (1966)⁴ and then specifically via the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Punishment (1987).⁵ Instances of torture against protected persons have also been delineated as a grave breach of the 1949 Geneva Conventions.⁶ The Statute of the International Criminal Court i.e. the Rome Statute also regards torture or inhuman treatment against civilians and prisoners of war as a war crime.⁷ Similarly, regional

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² Ibid Chapter 16.
⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (Torture Convention).
human rights instruments echo the law pertaining to the prohibition on torture. Article 3 of the European Convention of Human Rights, Article 5(2) of the American Convention on Human Rights, Article 5 of the African Charter of Human and Peoples’ Rights, and Article 8 of the Arab Charter on Human Rights prohibit torture within their respective jurisdictional capacities. The globally expansive entrenchment of the torture prohibition in international, regional, and national laws has led many commentators and jurists to deem it a peremptory norm/jus cogens, thereby, crystallising its place as a facet of customary international law.

2. **PAKISTAN’S RATIFICATION OF THE ICCPR AND UNCAT**

The International Covenant on Civil and Political Rights (ICCPR) and the International Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (UNCAT) are commonly cited as two of the most successful human rights instruments that outlaw severe violations and infringements. Pakistan signed both the UNCAT and the ICCPR in 2008 and ratified them in 2010.

In 2016, in accordance with UNCAT’s enforcement mechanisms, Pakistan submitted an initial report to the Committee Against Torture (the Committee), detailing the domestic measures that have been adopted to prevent torture in Pakistan. The Committee’s observations pertaining to Pakistan’s initial report were manifold. The ratification of certain human rights instruments, in addition to legislative, administrative and policy changes by the state were cited as positive aspects. However, the Committee, under the heading of ‘subjects of concern’ specifically included a critique of Pakistan’s detention centers and penitentiaries.

It is axiomatic to consider detention facilities and prisons as institutions where direct torture may be carried out against detainees. However, if we extricate ourselves from this obvious paradigm, it immediately becomes apparent that the UNCAT concerns itself with far more. General living conditions, the form of imprisonment, and the legal terms or the basis of

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12 For example, Article 14 (2) of the Constitution of the Islamic Republic of Pakistan (1973).
16 Committee against Torture, Initial reports of States parties due in 2011 Pakistan (received 4 January 2016) CAT/C/PAK/1.
17 Committee against Torture, Concluding Observations on the initial report of Pakistan (adopted 4-5 May 2017) CAT/C/PAK/CO/1.
18 Ibid para 28.
detention may potentially render a state party to the UNCAT in breach of its international obligations. While Paragraph 28 of the Committee’s concluding observations vis-à-vis Pakistan’s initial report propounded quite dire circumstances in state penitentiaries and detention facilities amounting to manifest violations, such as death due to torture and the sexual abuse of minors, the observations also included other instances amounting to torture. In this regard, paragraph 28 paints a bleak picture of severe over-crowding, unsanitary living conditions, a lack of medical services, the use of fetters, and instances of extended periods of solitary confinement.

3. **ACCEPTABLE STANDARDS FOR PRISONS AND DETENTION INSTITUTIONS**

Disregarding instances of direct torture, the ensuing deliberation indicatively outlines the acceptable standards for prisons and other detention institutions in terms of general living conditions and the forms or categorizations of detention. Thereby, the following text delineates instances short of actual/direct torture in imprisonment institutions that would, nonetheless, contravene the prohibition on torture.

3.1. Living Conditions

Both the Committee against Torture and the UN Human Rights Committee (HRC) have recognised that the conditions of detention may themselves constitute ill-treatment, and in extreme circumstances, torture. The UN Human Rights Committee asserted that regardless of whether individuals may be deprived of their liberty, their humane treatment and respect for their dignity is a basic standard of universal application. Similarly, the ICCPR in Article 10 obliges state parties to treat persons deprived of their liberty ‘with humanity and with respect for the inherent dignity of the human person.’ Jurisprudence related to Article 10 suggests that the HRC tends to include general conditions of detention within the Article’s purview. Ergo, when read along with Article 7 (the absolute prohibition on torture), the ICCPR grants detainees the right to not be tortured as well as the right to be treated with respect in detention. The latter right, therefore, encompasses treatment short of the threshold of direct torture. In *Kennedy v. Trinidad and Tobago*, the HRC held that while the beatings the victim was subjected to amounted to a violation of Article 7, poor living conditions such as overcrowding simultaneously violated Article 10.

In *Mukong v Cameroon*, the HRC established the minimum standards that must be observed regardless of a state party’s level of development, economic resources, budgetary constraints, or other monetary considerations. The HRC expounded that, “[t]hese include … minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed and provision of food of nutritional value adequate for health and strength.”

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19 Committee on Civil and Political Rights, General Comment No. 9 on article 10 International Covenant on Civil and Political Rights, para 1.
20 ICCPR art. 10
23 Ibid para 9.3.
In the context of Pakistan, the Committee has echoed HRC’s jurisprudence. It expressed concern about conditions such as overcrowding, violence among prisoners, lack of separation of different categories of detainees (adult and juvenile detainees), excessive periods of detention in facilities equipped only for short-term detention, lack of natural light or ventilation, unhygienic conditions, inadequate medical services or undue delays in the provision of medical services, and lack of recreation or educational facilities available to inmates. These are incompatible with the focal purpose of the ICCPR and the UNCAT in terms of ensuring respect for human dignity.

Broadly speaking, the laws governing Pakistan’s detention facilities largely fall in line with its international obligations insofar as they relate to torture provisions under the UNCAT and ICCPR. The following list is a non-exhaustive, illustrative analysis of Pakistan’s laws.

a) Pakistan Prison Rules 1978

The Prison Rules of 1978 constitute the authoritative manual in effect throughout Pakistan. The Rules mandate, *inter alia*, the provision of bedding and associated necessities, proper hygienic conditions of the wards and prison yards, opportunities for work and daily exercise if it accords with a prisoners’ specific health conditions, and participation in educational, religious and moral instructions and other games and sports, according to the needs and aptitude of individual prisoners.

b) FATA Internment Rules (2011)

Pakistan’s utilization of preventive detention to aid counter-terrorism operations across the Federally Administered Tribal Areas (FATA) do not disregard the need for certain safeguards in detention. The FATA Internment Rules (2011) provide for, *inter alia*: adequate lighting and arrangements for reading; reasonable facilities and utilities for bathing; clean drinking water; bedding, clothing and other similar facilities; an hour of daily exercise; library access; and, access to religious counsel. Provisions as to diet are stipulated, specifically in the context of maintaining good health. Visitation rights are provided for.

c) West Pakistan Detenu Rules 1962

The West Pakistan Detenu Rules of 1962 repealed all provincial internment rules to create a uniform standard in the treatment of detainees in Pakistan. These rules obligate detention facilities to provide the detainees access to, *inter alia*, medical care, family visits, sufficient clothing and bedding, games and exercises, and opportunities for work. Collectively, these rules constitute a comprehensive framework ensuring that detainees are provided with satisfactory living conditions while in custody.

3.2. Solitary Confinement/Incommunicado Detention

Solitary confinement is detention in isolation with limited contact with guards and other prisoners. It is a common disciplinary measure practiced in Pakistan’s detention centres.

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27 West Pakistan Detenu Rules, 1962.
Solitary detention is to be distinguished from incommunicado detention. Solitary confinement is qualified and, consequently, may be acceptable in certain circumstances. Incommunicado detention, however, refers to those circumstances where an individual has no contact with anyone excluding the members of prison security. Unlike solitary confinement, incommunicado detention is strictly prohibited.

The severity and proportionality of solitary confinement dictates whether it amounts to a contravention of the torture prohibition under the UNCAT. However, it seems that each case will largely turn on its own facts. The European Commission on Human Rights (ECHR), on the subject of solitary detention, postulated that ‘... regard must be had to the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned. Complete sensory isolation coupled with complete social isolation can no doubt ultimately destroy the personality; thus, it constitutes a form of inhuman treatment which cannot be justified by the requirements of security...’. However, the ECHR also remarked that ‘the prohibition of contact with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment’.

An instance where solitary confinement was acceptable was in Vuolanne v Finland. The detainee was placed in solitary confinement for a total of 10 days as punishment for being absent without leave during his military service. The HRC propounded that the “strictness, duration and the end pursued [did not appear to produce] any adverse physical or mental effects on him [the detainee]” with the only adverse effect being the inherent embarrassment prevalent due to the nature of the measure to which he was subjected.

In contrast, in Polay Campos v Peru, a period of nine months of solitary confinement during pre-trial detention was found by the Committee to amount to a violation of Article 10(1) ICCPR.

Essentially, while solitary confinement is a common disciplinary measure, it must be exercised within the bounds of proportionality and necessity, otherwise it risks becoming synonymous to torture and/or cruel treatment. An analysis of the Pakistan Prison Rules of 1978 is illustrative and broadly suggests that the framework governing Pakistan’s prisons is in conformity with international principles.

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28 OHCHR, Interpretation of Torture in The Light of The Practice and Jurisprudence of International Bodies (2011) pg. 10.
30 Ibid.
31 Ibid.
33 European Court of Human Rights, Messina vs. Italy, Communication 25498/94, 28 December 2000, par. 191
3.2.1. Pakistan Prison Rules 1978

The Pakistan Prison Rules delineate both the factual circumstances that must accompany impositions of solitary confinement as well as limits to the duration of such confinement. For example, Rule 623 propounds that each cell for solitary confinement must have a yard attached for occupants to breathe fresh air in addition to suitable sanitary and bathing arrangements\(^{37}\) while Rule 638 postulates that the court can award limited periods of solitary confinement proportionate to the duration of the entire imprisonment. Furthermore, Rule 639 stipulates that solitary confinement may not exceed fourteen days at a time and the time-period between consecutive impositions of solitary confinement must be no less than 14 days as well. Moreover, Rule 640 outlines certain administrative procedures for solitary confinement, which, for our purposes, include that every prisoner in solitary confinement shall be visited daily by a Senior Medical Officer or Medical Officer and the prisoner may be removed from solitary confinement if the Senior Medical Officer is of the opinion that solitary confinement is injurious to the mind or body of the individual imprisoned.

4. **UNLAWFUL DETENTION**

Detention or imprisonment is lawful if it is executed in accordance with the law. However, if imprisonment is characterised as being unlawful, it may amount to an outright contravention of the UNCAT and the ICCPR.

It is not the fact of being unlawfully detained that is decisive. Although unlawful detention is rightly abhorred, for our purposes insofar as they relate to the UNCAT, it is the uncertainty, fear and anxiety that may qualify as degrading treatment. Consequently, if for whatever reason, detention is characterised as being unlawful, it will amount to a violation of the torture prohibitions under international law.\(^{38}\)

Article 10 of the Pakistani constitution requires that persons detained in custody be presented before a Magistrate within 24 hours.\(^{39}\) This period, however, can be extended to 14 days under the Criminal Procedure Code 1898 (Cr.P.C) and even up to 90 days if the charges against the detained are terrorism-related.\(^{40}\) Procedural inefficiencies have led the police to go for the maximum period of custody even if the detainee’s activities do not support the application of it, i.e. they are not terrorism-related under the Anti-Terrorism Act, 1997. In addition, violations of the Cr.P.C are also rampant as magistrates continue to authorize detention beyond the mandated limits.

Preventive detention is referred to in Article 10 of the 1973 Constitution. While it is regulated by copious national legislation, the procedure for preventive detention is far from restrictive. It is quite advantageous for the prosecution to refer a case for preventive detention where the chances of securing a conviction through an ordinary criminal trial are low. Moreover, exceptionally, in FATA on charges brought under the Action in Aid of Civil Power Regulations, 2011 (AACPR), detainees may be transferred to detention facilities for

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\(^{37}\) Pakistan Prison Rules 1978, Rule 623


\(^{39}\) Constitution of the Islamic Republic of Pakistan (1973), art. 10.

indefinite detention. As the Constitutional provisions do not extend over FATA, the detainees are not able to access their charges, or file for a review of their detention under the Article 10 framework. While the AACPR provides for procedures of review, the Review Boards are in themselves practically constrained from working through the numerous review petitions expeditiously.

Unlawful detention is therefore a critical problem in Pakistan’s penal system due to a triad of judicial, procedural and prosecutorial hurdles. In the context of the torture prohibition, unlawful detention is not only in itself an element of torture, it can also contribute to other instances of torture. It must also be noted that if unlawful detention is a systematic and institutional problem, prisons are likely to become overcrowded with detainees. This directly compromises upon both internationally and domestically mandated living conditions in custody.

Conclusion

Direct torture was once practiced but with the promulgation of international human rights instruments it was outlawed. However, direct torture, via reference to questions of national security, broader moral imperatives, or the comforting demarcations of ‘good and evil – right and wrong’, continues to be practiced. With direct torture gleaning the limelight, general circumstances in penitentiaries and other similar institutions which may amount to torture are at risk of simply being swept under the rug. In Pakistan’s specific context, however, legislation upholding the state’s international obligations does exist; it is only a question of commitment and the vigilant implementation of those obligations.

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41 Action in Aid of Civil Power Regulations (2011), s. 9 (3).
42 Ibid s. 14(1).
43 Khan (n 40)
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