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We are thankful for the contributions to this journal from our authors, and for the overall support from within the legal fraternity.

About the Editors

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Note from the Editors

Under the Project ‘Increasing Women’s Representation in Law’, the Federal Ministry of Law and Justice Pakistan, Women in Law Initiative Pakistan, and Group Development Pakistan joined hands to lead the first of its kind and the first ever Women in Law Awards and Symposium in Pakistan. Our publication, the *Pakistan Journal for Diversity and Inclusion* is a successful outcome of this project.

Over the past one year, we encouraged lawyers, law students, scholars, and practitioners from all over Pakistan, regardless of their professions, to submit entries for our Journal that covered topics ranging from a number of diversity and inclusion issues within the legal fraternity in Pakistan, to a holistic analysis of how diversity and inclusion are implemented via an intersectional approach and through an interdisciplinary perspective. Some of our common themes included: (i) why representation matters; (ii) structural impediments towards women’s advancement in law; (iii) women’s representation in the judiciary; (iv) women and bar politics; (v) workplace, women, and the law; (vi) justice sector with a gender and child justice lens; (vii) women and their contribution to law and jurisprudence; (viii) by the men, for the women: lack of representative voice in laws impacting women. As part of this unique and time-sensitive project, we are delighted and honoured to have received submissions that showed great depth of research and critical analysis on contemporary issues regarding the lack of diverse and inclusive professional spaces for women.

The Journal features eight articles on contemporary topics that hold great significance within the legal discourse of Pakistan. Nida Usman Chaudhary and Sara Raza discuss the need for transparency and accountability in the process of judicial nominations and appointments to increase diversity and inclusion at the bench. Rida Hosain delves into analyzing the importance of having female voices in the higher judiciary -especially the Supreme Court- in order for women victims and survivors to be heard and provided justice by a female judge hearing cases through a similar lens. Mehak Zaraq Bari explains the challenges gender-based violence (GBV) victims face in seeking redressal in our criminal justice system, including through the recently established GBV courts in

Pakistan. Beenish Zia emphasizes the importance of increasing women's representation in decision-making processes and law-making when those laws specifically impact women. Abira Ashfaq highlights the inconsistency in Pakistani laws that affect children and the dire need for our legal system to bring in amendments to protect them against crime, violence, forced labour and child marriages. Zahbea Zahra and Shafaq Farooq review and analyze the issues that female prisoners face in achieving access to justice due to a lack of female representation and female legal counsels in the criminal legal system of Pakistan. Muhammad Saquib Mangrio discusses the need for establishing rehabilitative care for victims of abuse and violence and the significance of advancing women's representation in judicial and legislative branches to bridge the gap between law making and law enforcement in the criminal justice system. Finally, Bismillah Kiani investigates the lack of implementation in Pakistan of numerous international legal obligations and agreements pertaining to labour law and the extremely difficult circumstances that women and girls find themselves in, as they are increasingly made victim of forced labour and forced marriages.

We aim to gather voices from a diverse and a much more representative group of people who could turn this publication into a platform where new ideas could be shared and exchanged, especially by those whose voices may not always be heard. Our goal remains to motivate lawyers, academics, practitioners, and intellectuals from various other professions to produce scholarship on discourse in Pakistan and increase diversity and inclusion through their research and writing.

If you wish to share with us your feedback or recommendations, please write to us at info@lawyher.pk.

The Editors

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Judicial Nominations and Appointments in Pakistan Under a Gender Lens

***Nida Usman Chaudhary and **Sara Raza**

Abstract

This article looks at the judicial nominations and appointments process with a gender lens and calls for objective and transparent criteria for nominations that may promote diversity and equality of opportunity in the judiciary for a more inter-sectional representation at the Bench in addition to other measures. It will also attempt to answer why such diversity is not only compatible with the notion of independence of the judiciary but also a desirable objective for rule of law in any civilized and democratic state.

Introduction

The judicial system in Pakistan traces its roots in the medieval times categorized into four eras by Dr. Faqir Hussain in his report on the judicial system of Pakistan.¹ In that, he states that our judicial system has been a product of an evolutionary process from the Hindu origins to the Mughal empire, and then the

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¹ Dr. Faqir Hussain, *Booklet of The Judicial System of Pakistan* (3rd edn, Federal Judicial Academy 2011). Available at:

<http://www.fja.gov.pk/uploaded_files/thejudicialsystemofPakistan.pdf>.

British colonization to the post-independence and present-day Pakistan era. In this way, it is not, in its entirety, a foreign system and is indeed heavily rooted in the culture and customs of the land that pre-date the British rule and their import of the British legal values that continue to be the basis of our modern-day justice system.

Understanding this historical origin and the nexus of culture, customs and traditions informing much of our judicial system is crucial in a society like ours with its feudal roots and a patriarchal stronghold. Thus, in our environment, systematic and structural inequalities are more likely to lead to an increased marginalization of women and minorities who subsequently face difficulties to access their basic rights and opportunities. It is, therefore, no surprise that in this evolutionary process from one era to another, the basic tenets of patriarchy and control have nevertheless survived and surpassed any and all attempts to reform the judicial appointments process.

For this reason, whilst there has been much reform on the appointment of the judiciary from the perspective of their *independence* from the executive and legislature, not much has changed from the perspective of an *inter-sectional representation* of the society by ensuring diversity in and through the judicial nominations and appointments process of superior courts.

According to the data available in the Baseline Report on the State of Women's Representation in Law 2020-21, women make up only 15% of the total judiciary in Pakistan.² The ratio decreases significantly at the High Court level where women make up only 5% of the judiciary.³

The state of women's representation in the subordinate judiciary is comparatively much better than at the superior tier. At the subordinate level, women make up 15% of the judiciary with Khyber Pakhtunkhwa leading by ensuring 22% representation of female judges in its subordinate courts. It is important to highlight that the process of recruiting judges in the subordinate courts is significantly different than the nominations and appointments process of the higher courts, in that, at the subordinate level, it is based on a competitive examination and recruitments are made in accordance with the Judicial Service Rules of each province. However, for superior courts, the nominations and

² Nida Usman Chaudhary, *Baseline Report on State of Women's Representation in Law* (Lawyher.pk 2021) 18 <<https://www.lawyher.pk/Uploads/Status-of-Women-Representation-in-Law-2020-21.pdf>> last accessed 15 Aug 2021.

³ Ibid, 16.

appointments take place in accordance with Article 175-A of the Constitution of Pakistan 1973 read with Rule 3 of the Judicial Commission of Pakistan Rules, 2010.⁴

At no instance, however, do gender, language, and ethnicity, together with religion, figure among the formal criteria for the appointment or nomination of judges. As a result, it is often the gendered, religious and ethnic minorities who continue to struggle to achieve equal access to this field of law, wherein the only explicit provision for the appointment of female judges can be found in the Family Court Act 1964 as amended by the West Pakistan Family Courts (Amendment) Act 1994.⁵ Therefore, it comes as no surprise that in 74 years of its history, no woman has ever been appointed as a justice of the Supreme Court including the likes of Justice (R) Fakhruddin Ali Khan who herself said: “there has been no woman in the Supreme Court and those who were to be elevated were sacrificed at the altar of gender bias.”

Justice (R) Nasira Iqbal has also highlighted that: “Five female judges were appointed to the high court in 1994; two of them had legitimate expectancy to become the chief justice[s] of the high courts of Punjab and KP [Khyber Pakhtunkhwa] respectively; however, both of them were superseded and were allowed to retire without being elevated to the Supreme Court of Pakistan.” In this way, Pakistan remains the only country in the (South Asian) region to not have representation of women in its apex court.

To understand the disparity in representation in the superior judiciary, it is important to understand that in Pakistan, judges are appointed based on experience unlike civil law regimes where judges are recruited at the beginning of their careers. As a result, several factors become extremely important when the question of nominations and appointments is moved. These include, amongst others, years of legal practice, reported cases, attendance in court, arguing cases oneself, and so on and so forth. In short, active legal practice backed by years of experience evidenced through reported cases and court attendance are all latent but crucial factors that play their part in improving the chances and possibility of securing a nomination for such an appointment. For

⁴ Judicial Commission of Pakistan Rules 2010, r. 3.

⁵ Livia Holden, ‘Women judges in Pakistan’ (2019) 26(1) *International Journal of the Legal Profession* 92.

women, these are not always forthcoming as equitably as they should because of systemic and invisible barriers that hold women back.

In many instances, women graduate from law schools are discouraged from pursuing legal practice; many do not even end up applying for their bar licenses and those who do find opportunities to work in law firms are more often than not, not given the level playing field to shadow the seniors in court or do not have the opportunity to assist with the litigation of cases they work hard to prepare on paper. These challenges have the potential to prevent women from meeting the credentials for nominations when the time comes which in turn may result in a gender imbalance within the judiciary, not just because women's labour remains invisible, but also because of how the constitutional provisions on the process of appointment in superior courts give arbitrary powers to the chief of each High Court to move the list of nominations for the Judicial Commission and the Parliamentary Committee to consider.

As Helen Irving aptly asserts:⁶

“Recruitment on the basis of seniority in the legal community or in the judiciary is likely to disadvantage women as long as there are fewer women already in senior legal positions.”⁷

Although, the era post-General Musharraf shows that a significant number of females were inducted in the lower courts as judges. In addition to that, the high courts had seen unprecedented levels of appointments and elevations. As a result, by 2010, the total increase in female members of the subordinate judiciary was reported to be around 46%;⁸ however, as Helen highlighted, in her paper, Aurat Foundation petitioned for the greater empowerment of women in the judiciary in November 2012. She further shared that around the same time, the UN Special Rapporteur Gabriela Knaul, Human Rights Watch and the Asian Chapter of the Human Rights Commission, petitioned against the inadequate representation of women in the higher judiciary and denounced the harassment of female judges in Pakistan.⁹

⁶ Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (Cambridge University Press 2008).

⁷ *Ibid.*, 140.

⁸ (n 5) 93.

⁹ *Ibid.*

Additionally, she shared that the Human Rights Commission of Pakistan (HRCP) had called for 33% of representation of women in the judiciary in line with the recommendation of the UN conference held in Beijing, without specifying whether or not the prescribed percentage had been reached among the lower ranks of the judiciary at the level of family courts.¹⁰ This indicates that concerns as to women's representation in the judiciary remained alive among activists and rights based organizations well beyond General Musharraf's attempt to increase their participation.

In addition to the marginalization and lack of representation of women, our benches also do not currently adequately represent minorities and those who are differently abled. The official sources currently do not show data divided into percentage of minorities and differently abled, which makes accessing this information difficult; but an examination of the list of the names of the sitting judges available on the websites shows that male members of the majority faith and ethnicity appear to dominate the Benches. This was, however, not always the case. The more historical records to the extent of the Lahore High Court at least, show a more diverse picture, especially pre-partition and then immediately in the years after partition.¹¹ However, since the past 30 years, we have seen an increasing decline in diversity on the Bench.

This article will, therefore, look at the judicial nominations and appointments process under a gender lens and call for objective and transparent criteria for nominations that may promote diversity and equality of opportunity in the judiciary for a more inter-sectional representation at the Bench in addition to other measures. It will also attempt to answer why such diversity is not only compatible with the notion of independence of the judiciary but also a desirable objective for rule of law in any civilized and democratic state.

Lastly, the article will put forward recommendations to suggest how the process of judicial appointments may be reformed to reflect and ensure more diversity on the bench.

Traditional Basis for Judicial Nominations

As discussed in the beginning of this paper, our current legal system has evolved over four 'eras' as dubbed by Dr. Faqir Hussain in his 2015 study on the judicial

¹⁰ Ibid.

¹¹ For a detailed record and account of history of Lahore High Court and Lahore High Court Bar see, Rustam Sohrabji Sidhwa, *The Lahore High Court and Its Principal Bar 1866-1988* (2nd edn, Maktaba Jadeed 1989). Available at the Lahore High Court Library.

system of Pakistan.¹² Namely, the Hindu period dated from 1500 BC to 1500 AD, the Muslim period from 11th century AD, the British period from 17th century onwards and the Post-Independence Era from mid-20th century to present day Pakistan.

His research shows that in the Hindu period, judges were appointed on the basis of their “*qualificationa*” and “*scholarship*” even though the choice was mostly restricted to upper caste i.e. Brahmins. This could possibly be because within the caste system, the Brahmins were privileged to be among the most learned of men but even so, the stress on scholarship along with qualifications indicates that a certain kind of acumen was pursued for appointments of this nature.

During the early Muslim period, the King was the head of judicial administration, and he made all appointments to judicial posts. Once again, persons of “*recognized scholarship*”, “*known competenc*” and “*high integrity*” were appointed to such posts.

The Mughal emperor continued the appointment of persons of “*high scholarship*” and “*good reputation*”, while instructions were given to the judges to be “*neutral*” and “*impartial*”. The Mughals were also more open to accountability, and complaints against judges were taken seriously. Corrupt officials were removed. The scales of justice were therefore very high.

The British laid more stress on the professional qualifications and standing such as the number of years of enrolment as a barrister, as subordinate judiciary, or a certain number of years of experience as a civil servant, etc. However, it must be noted that a 1/3 quota was prescribed to fill in positions from amongst these different professional backgrounds so that the Bench had a percentage of representation from among barristers, civil servants as well as members of subordinate judiciary with at least 5 years of standing.

Current Process of Judicial Nominations

Article 175-A of the Constitution of Pakistan, 1973 creates a two-tier process for the nomination and appointment of senior judiciary, including judges of the Federal Shariat Court. It envisages the establishment of a “Judicial Commission” (JC), which would comprise of 5 members for the nomination of judges of the Supreme Court and 9 members for the appointments of judges in the High Courts and a “Parliamentary Committee” (PC) comprising of four

¹² (n 1).

members from the Senate and four from National Assembly. Against each vacancy, a nomination is forwarded by the JC to the PC for consideration; thereafter the PC forwards the names to the Prime Minister who in turn forwards them to the President for appointment. However, in the *Nadeem Ahmad Advocate v. Federation of Pakistan* case, one of the suggestions put forth by the Court was that if the Judicial Commission's recommendation in favour of a candidate for judgeship was not accepted by the Parliamentary Committee, the latter should be required to give sound reasons for its decision before referring the matter to the former for reconsideration. In addition to specific reasons recorded, the PC requires a 3/4th majority in order to not confirm a nomination submitted by the JC.¹³

On the face of it, the two-tier process seems to offer a balanced power-play in the realm of judicial appointments between the Judiciary and the Parliament however, given that this was seen as an encroachment on judicial independence because of the potential of Parliament's influence on judicial appointments, the peripheral power-play between the JC and PC was settled in favour of the supremacy of JC in *Munir Hussain Bhatti v Federation of Pakistan*¹⁴ where the Court held that:

“the technical evaluation of a person's calibre as a Judge has to be made by the Commission, and once evaluated the recommendations of the Commission are to be looked as one”

The Court further asserted that the PC”

“can reject the nomination on the grounds falling within its domain for very strong reasons which shall be justiciable.”

While commenting on this case, Saroop Ijaz in his comment, aptly noted that”

“the observation that the PC's reasons for departing from the JC's recommendations would be ‘justiciable’ meant that the superior judiciary retained ultimate control over judicial appointments to the superior judiciary.”¹⁵

¹³ PLD 1165 (SC 2010).

¹⁴ PLD 2011 SC 407.

¹⁵ Saroop Ijaz, ‘Judicial Appointments in Pakistan: Coming Full Circle’ (2013) 1 *LUMS Law Journal* 90.

It can thus be safely stated that the two-tier process on paper is no more than a rubber-stamp formality in practice with the senior judiciary in control of the nominations.

In addition to the *Munir Case*, it must be noted that Article 175-A (4) of the Constitution empowers the Commission to make rules regulating its procedure. The Judicial Commission of Pakistan Rules (JCPR) 2010 were made under this Article and Rule 3 of the 2010 Rules further concentrates power in the Chief Justice of Pakistan to initiate nominations in the Commission for appointment against a vacancy in the senior judiciary.

The impact of this rule on the process of judicial nominations was seen most profoundly in the *Presidential Reference No. 01 of 2012*,¹⁶ where the then Chief Justice of Pakistan superseded the senior-most judge to appoint his junior as the Chief Justice of the Islamabad High Court in 2013 on account of a confusion of the age-principle where two judges had been appointed to the High Court on the same day; the older by age was to be considered a ‘senior’ for purposes of appointment. However, PC nevertheless, upheld the recommendation of the Commission to appoint the junior judge as the Chief Justice of Islamabad High Court – a point which was largely ignored in the advisory judgement of the Supreme Court delivered pursuant to the reference filed by the President who technically had no role in judicial nominations post 18th amendment.

In commenting on the two cases as discussed above, Saroop Ijaz summarized the position as regards the appointment of senior judiciary in the following words”

“If the two cases of Munir Hussain Bhatti, 2011 and the Presidential Reference, 2013 are studied in juxtaposition, a pattern emerges. The first case rendered the PC almost redundant, or at the very least, quite weak. The second judgment, while reaffirming the supremacy of the JC in general, also established, in particular, the powerful, steering role of the Chief Justice of Pakistan. It may seem that the progress made in the Parliament has now been undone by the Supreme Court. The debate in the Presidential Reference on the intent of the Parliament in promulgating the 19th Amendment is also peculiar, considering that the Parliament

¹⁶ PLD 2013 SC 279.

was not given much choice by the Court in passing it. It might be said that the Chief Justice is just one member of the eleven-member JC, and accordingly has one vote. That is unquestionably true in theory. However, after the introduction of the JCPR, it is only the Chief Justice who can initiate or propose a name for appointment, and the rest can either accept or reject it.¹⁷”

Accordingly, the nominations for the appointment of the senior judiciary are primarily concentrated in the hands of the chief justices of the courts of Pakistan.

Eligibility

Having discussed the process of nominations and appointments, it is also pertinent to now highlight the eligibility provisions within the Constitution of Pakistan for the appointment of a judge of the Supreme Court and the High Courts.

Article 177 of the Constitution deals with the eligibility of judges to be appointed at the Supreme Court and states that they must: “

- a. Be Pakistani Citizens,
- b. Have been a judge of the High Court for not less than 5 years at least, or
- c. Been enrolled as an advocate of the High Courts for not less than 15 years.”

In relation to the eligibility to be appointed as a judge of the High Court, the relevant provision is

Article 193 of the Constitution which states that they must:”

- a. Be Pakistani Citizens of not less than 45 years of age,
- b. Been enrolled as an advocate of the High Court for not less than 10 years, or
- c. Has been a member of civil service for not less than 10 years and has for a period of not less than 3 years served as the District Judge in Pakistan, or
- d. Held a judicial office for not less than 10 years.”

¹⁷ (n 15) 92.

As is evident from these two Articles, there is no direction related to any other personal attributes or competence and no statement as to equality and diversity to ensure an inter-sectional representation on the Bench. The nominations process is arbitrary and there is no public record of how and who all are/or have been considered for appointments. How many of those candidates have been women or from other marginalized groups such as minorities or the differently abled over the years? Primarily, the only “qualifications” that need to be met relate to professional standing and citizenship without offering much content or insight into the integrity, competence and other principles on which such nominations are to be based as will be discussed below.

Challenges for Diversity

The 2010 Rules as well as the Constitution are silent on the criteria of nominations and there is no mention of any attributes (other than seniority, citizenship, and professional standing) against which nominations are to be recommended. Consequently, the Rules and the Constitution merely shed light on “who” is supposed to make the nominations and not on “how” those nominations are to be derived in a way that promotes a cross-sectional representation on the Bench of people with highest attributes, reputation, integrity, and competence.

This arbitrariness causes several challenges and one of them as identified by Basil Nabi Malik is that the candidates themselves have:

“no idea what criteria he (or she) must fulfil for the purposes of being nominated or recommended for confirmation as a judge... there is a dearth of standardized criterion on which his performance could be adjudged for confirmation.”¹⁸

The Pakistan Bar Council (PBC) – the apex body of lawyers in the country- has also on various occasions raised concerns regarding the judicial appointments process and have called for more transparency in this regard. They believe that the judicial commission needs to dispel the impression that the “kith and kin” of sitting judges are given priority in appointments. An impression that was very much reflected in the October 2018 appointments where the seven judges that were appointed were either the chamber mates or kith and kin of sitting judges.

¹⁸ Basil Nabi Malik, ‘Judges Appointment’ (*Dawn*, 2 June 2015)
<<https://www.dawn.com/news/1185597/judges-appointment>> last accessed 1 Feb 2021.

This matter was further exacerbated when due to unsatisfactory performance, at least four of these seven appointments were not subsequently confirmed.

This experience is critical because it shows how catastrophic a closed process could be even for the judiciary as an organ. As Mirza Moiz Baig explains in his article:

“Judges not confirmed by the commission can be stripped of their dignity, becoming victims of a campaign of whispers and murmurs. Moreover, the public has no way of accessing the reasons that motivated the decisions rendered by the commission, nor can one learn about dissenting voices in its meetings. Given that the process is steeped in secrecy, the public at large remains uninformed and thus unable to critique — or, for that matter, even defend — such decisions.¹⁹”

Senior member of the PBC, Mr. Azam Nazeer Tarar reportedly regrets that the JC has been working without any rules of business despite several resolutions passed by the PBC.

In absence of objective criteria for the necessary attributes coupled with the supremacy of the judicial commission to make the nominations, to decide on any reservations by the PC on any of the nominations and general concentration of power to initiate nominations in the hands of the Chief Justices, this process becomes very arbitrary, which does not sit well with the traditional and current notions of justice, rule of law, democracy, equality, and fairness.

In other words, the post 18th and 19th amendment process of nominations along with the judicial interpretation of the provisions and the 2010 rules is breaking away from not just the traditional basis for judicial nominations but also from the global notions of objectivity, transparency, justice, equality, access, inclusion, rule of law, and diversity. It is, therefore, an anomalous development in our law and practice which is potentially leading to nominations on the bench which appear to be non-representative of the profession and the populace. As Ginsburg states:

¹⁹ Mirza Moiz Baig, ‘Judicial Appointment’ (*Dawn*, 21 April 2019) <<https://www.dawn.com/news/1477480>> last accessed 10 Feb 2021.

“Appointment mechanisms are designed to insulate judges from short-term political pressures yet ensure some accountability.”²⁰”

Democracy, Judicial Independence – Implications for the Judicial Appointments Process

In the afore mentioned sections, we discussed the provisions of judicial appointment and eligibility within Pakistan in some detail to highlight what was retained of the British system were the professional qualifications, standing and citizenship. It is now pertinent to also observe how gradually there is no reference left to high standards, integrity, scholarship, or competence nor any criteria of good reputation being embedded in the process or eligibility for nominations. There also appears to be no prevalent quota requirement for appointment in senior judiciary from people from different professional backgrounds in law as it was, in some way, under the British era.

The following analysis seeks to explore why traditionally, the personal attributes, reputation and competence of judges were important factors in their appointment but today, these attributes have been eroded to make way for quantifiable factors such as seniority, age etc.

One way to understand this could be that under monarchy the judges were dispensing justice in the name of the king and so they were not ‘independent’ in the sense of their appointment and allegiance to the king. With the advent of democracy and calls for judicial independence and separation of powers, the debate on personal attributes, seems to have been rested for attributes like integrity, impartiality, and good reputation, all of which do not seem to be capable of precise definitions making them difficult to be ‘justiciable’ in event of a dispute. What after all does good reputation entail and by whose standards? These are hard questions and so it is no surprise that the present-day Constitution has adopted the more quantifiable factors as criteria for eligibility of judges for appointments in superior courts under Article 177 and 193. As Baig explains”

“The judiciary’s anxiety while including other institutions in the appointment process is understandable. Our nation’s chequered history has witnessed a number of attempts to

²⁰ Thomas Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003) 43.

*trample upon the judiciary's independence — fostering a culture where calls for greater judicial accountability are viewed with scepticism and suspicion; however, such concerns must not become impediments in the way of greater transparency. We must not become prisoners of our past and inward-looking in our approach. Appointments to the superior judiciary should reflect the principles that form the bedrock of our democratic dispensation.*²¹

It could also, however, be attributed to a colonial hangover that has persisted since the focus on professional qualifications and standing was their import into the appointments process to begin with. In any event, it must be highlighted that in a democracy and in fact, more so in democracies, institutions should be based on principles of natural justice, inter-sectional representation and the rule of law which stands against both, the arbitrariness of decision making as well as the concentration of power in a single institution. These fundamental principles, all of which are in line with fundamental rights and the notion of fair representation, appear to be undermined if the grounds on which the lists of nominations for appointments to the superior judiciary are prepared without recourse to any objective principles such as transparency, diversity and affirmative action that could be taken under Article 25 of the Constitution.

The separation of powers between the three organs of the state – the judiciary, the executive and the legislature, is the hallmark of any civilized democracy. A failure to maintain this separation has historically led to governance challenges as well as a breakdown of political fabric contributing in turn to the socio-economic challenges in those states.

The process of appointment of the senior judiciary in Pakistan prior to the 18th and the 19th amendment envisaged a pivotal role of the President thereby, diluting the notion of separation of powers between two state organs to a significant extent. However, in subsequent cases such as in *Al-Jehad Trust v Federation of Pakistan*,²² the Supreme Court effectively rendered the executive discretion in judicial appointments ineffectual. The later cases after the constitutional amendment further established that the ultimate arbiters of judicial nominations and appointments would be the judges themselves. This

²¹ (n 19).

²² PLD 1996 SC 324.

was also reflected in the National Judicial Policy 2009, spearheaded by CJP, Ch. Muhammad Iftikhar, where it was stated that:

“The key features of the National Judicial Policy are strengthening the independence of the judiciary by its separation from the executive...”²³”

However, it seems that perhaps ‘independence’ has been interpreted to mean ‘unfettered freedom’ as opposed to ‘separation from interference’ of other state organs. Separation of powers does not mean that rules of natural justice and general principles of law such as transparency and objectivity do not apply. Nor does it mean that arbitrary decisions can be made, especially for people who are going to be the arbiters of disputes that affect the general public. To not have any such objective and transparent criteria for nomination, appointments, and selection of the judiciary to date, is to go against not just our own traditional and historic basis of judicial appointments as seen above, but also against the rule of law.

The Attorney General of Pakistan in the March 1998 Conference declared that:

“In order to effectively enforce the rule of law in any State, its judiciary has to be an emblem of neutrality, stability and continuity. To me, this institution is bound to suffer in its image if it exceeds its sanctioned role and undermines the conventions upholding its institutional values and one has to consider that, on the pretext of activism, it may not become a tool of power play.”²⁴ “

Furthermore, the Chief Justice of Australia (when he was Chief Justice of the State of New South Wales) in his October 22nd, 1997 address described the independence of the judiciary as”

“The independence of the judicial arm of government is not a benefit won by judges on some ancient industrial battlefield, and now jealously guarded as a perquisite of office. It is a constitutional principle with a sound practical rationale.

²³ National Judicial Policy 2009 (as revised in 2012), 1

<<http://ljcp.gov.pk/njcp/assets/dist/NJP/njp.pdf>> last accessed 20 Aug 2021.

²⁴ International Bar Association, *The Rule of Law and Human Rights in the Legal System of Pakistan: Access to Justice and Fundamental Rights* (Report, December 1998) 15.

Justice must be, and be seen to be, administered with impartiality.²⁵”

Thus, the concentrating of power of nomination without a declared benchmark as the basis for such a nomination, appears to be an arbitrary exercise of power that does not sit well with established principles of rule of law, natural justice and general principles of law. In this regard, Baig suggests that:

“Perhaps, our judiciary may remember that judicial independence can be guarded — not by creating the hegemony of one institution over others — but by affording everyone, especially judges themselves, certain procedural safeguards. The apex court would, thus, do well to maintain the standards of transparency and objectivity that it holds every other institution in this country accountable to. This, at the very least, entails publishing detailed minutes of the commission’s meetings, including an account of dissenting views and the factors that eventually motivate the commission’s decisions.²⁶”

Given that our Constitution entrusts the courts with an obligation to preserve, protect and respect the Constitution, there should be no reason why the nominations process should not be reformed to reflect a more transparent process rooted in principles of equality of access, fundamental rights, and inter-sectional representation. One of the recommendations we put forward is that there are certain fundamental objective principles that ought to be introduced in relation to judicial nominations for promoting a more inclusive, accessible, equitable and diverse Bench.

The Case for Devising Objective, Transparent and Clear Nominations Criteria

In other words, the independence of the judiciary is the hallmark of every civilized nation and democratic state. This is not only essential to the rule of law but is necessary for the fair and impartial resolution of disputes and while an independent and impartial judiciary is essential for the protection of human rights and for ensuring that there is no discrimination in the administration of justice; it is equally important to ensure that the judicial nominations process is transparent, objective and clear in order to sustain public confidence in the

²⁵ Ibid, 14.

²⁶ (n 19).

judiciary as well as to ensure that the legal profession upholds its basic tenets of equality and justice.

Objective nominations and appointments criteria are therefore, desirable because, the fair and equal representation of people from varying income brackets, ethnicities and adequate judicial training and socialization to not reinforce dominant or conservative attitudes prevailing in the judiciary will only result in judicial neutrality that can be achieved by developing appointment mechanisms which encourage inclusivity and diversity on the bench.

Globally, the consensus that appears to be emerging is that the judiciary – a body that is responsible to adjudicate on matters affecting the lives, rights, properties, freedoms and duties of people - would itself embody those rights and freedoms, in the way that it operates, so that a sense of public confidence in the justice system is promoted.

As early on as 1985, the United Nations General Assembly (UNGA) adopted the Basic Principles on the Independence of Judiciary, which recognize the importance of selecting people for judicial office on basis of attributes such as “integrity” coupled with “appropriate training” and “qualifications” in law whilst also stating that there shall be no discrimination in such selections on the basis of race, color, sex, religion etc. among others.²⁷ While judicial appointment mechanisms shall safeguard selection against any improper motives, it is highly imperative to understand that a requirement of a candidate to be a national of the country concerned is not to be considered a discriminatory criterion for appointment. Judges in Pakistan have a guaranteed tenure until they reach their age of retirement. Any appointment or elevation, according to the Basic Principles, shall be based on objective factors, in particular ability, integrity, and experience. As stated by Judge Sanji Monageng of the International Criminal Court (ICC): “A successful judiciary is one whose members are appointed following both the candidate’s legal qualifications as well as integrity.”²⁸

²⁷ United Nations General Assembly, *Basic Principles on the Independence of Judiciary* (UNGA Resolutions 40/32 and 40/146 of 1985).

²⁸ Judge Sanji Monageng, ‘Effective Judicial Selections and Appointments’ (*UNODC*, 2018) <<https://www.unodc.org/dohadeclaration/en/news/2018/08/effective-judicial-selections-and-appointments.html>> last accessed 1 Dec 2020.

Furthermore, some constitutions specify an express commitment to gender and racial balance in the judiciary. The South African Constitution, for example, states that:

“The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.”²⁹”

What this indicates is that a judicial council can be constitutionally required to take a proactive role in the achievement of gender balance in judicial office.³⁰

According to the Commonwealth Latimer House Principles adopted in 2003,³¹ which provide guidance on the separation of powers, judges should be appointed *“on the basis of clearly defined criteria and by a publicly declared process”* so as to convey a fundamental commitment to transparency. At a minimum, the public must be informed of the characteristics that qualify persons for judicial office and the procedures that are followed when an individual applies or is considered for appointment.

The Principles further make clear that the criteria for judicial office should be informed by the fundamental objectives of equality of opportunity, appointment on merit and the need to address gender inequity and other historic factors of discrimination in the context of a particular society.

The Latimer Principles suggest inter alia that, judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process and in particular that, the process should ensure:

- (a) Equality of opportunity for all who are eligible for judicial office;
- (b) Appointment on merit; and
- (c) That appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination.

²⁹ The Constitution of the Republic of South Africa 1996, art. 174(2).

³⁰ (n 3) 136-141.

³¹ *The Commonwealth Latimer House Principles: Practitioner’s Handbook* (Commonwealth Secretariat 2017).

In view of similar objectives, the UK Constitutional Reform Act of 2005 dramatically changed the role of the Lord Chancellor and introduced an independent Judicial Appointments Commission (“JAC”), responsible for selecting candidates to recommend for judicial appointment to the Secretary of State for Justice.

The Judicial Appointments Commission ensures that merit remains the sole criterion for appointment and the appointments system is modern, open, and transparent. It selects candidates for judicial office on merit, through fair and open competition, from the widest range of eligible candidates. The JAC was set up to maintain and strengthen judicial independence by taking responsibility for selecting candidates for judicial office out of the hands of the Lord Chancellor and making the appointments process clearer and more accountable. The law allows the commission to prefer one person over the other for the purpose of increasing diversity where the two are of equal merit. The commission is further mandated to have regard to the need to encourage diversity in the range of persons available for selection for appointments.³²

The 2005 Act further introduced a Judicial Appointments and Conduct Ombudsman, responsible for investigating and making recommendations concerning complaints about the judicial appointments process, and the handling of judicial conduct complaints within the scope of the Constitutional Reform Act.³³

In an interview with Lady Hale, the first female President of the Supreme Court of the UK, was observed pointing out the importance of having a balanced gender representation on the bench and calls for more women to with time become part of the highest court. This perseverance of gender equality within Hale’s constitutional restraints is explained in the following words:

“My own view is up to a quarter [on the UK supreme court] is an important breakthrough but that there’s no right number of justices of either gender. An ideal balance would be at least 60/40 either way. And so, we still have a little way to go towards that.”³⁴

³² UK Constitutional Reform Act 2005.

³³ Ibid.

³⁴ Owen Bowcott, ‘White and male UK judiciary “from another planet”, says Lady Hale’ *The Guardian* (UK, 1 January 2019).

She also goes on to propose that she does not stand in favour of positive discrimination especially because “*no one wants to feel they have got the job in any way other than on their own merits*” and that if better outreach efforts are made, candidates applying for judicial office will be encouraged further.

Under Lady Justice Hallett, a Judicial Diversity Committee was formed in the UK in 2013. The Committee has each year pursued more initiatives to explore what might be done to accelerate progress. It has been strongly supported by judges from all backgrounds across the courts and tribunals in England and Wales.

It has worked with the Judicial Appointments Commission, universities, and professional bodies to host evening outreach events. The primary purpose of these events is to attract suitably qualified lawyers from groups currently under-represented in the judiciary and to enable them to explore the possibility of a future judicial career. The events provide a panel of varied speakers and an opportunity to meet serving judges. They may sow the seed of desiring to join the judiciary years ahead, when they are ready to apply.

Since 2015, the committee has run increasingly popular application workshops aimed at under-represented groups. These form part of a positive action programme which is intended to help candidates make stronger applications; but once they have completed the programme, they are expected to compete on merit with the other applicants. To attract more solicitors and legal academics to the senior judiciary, they have extended the eligibility of the High Court programme to those without litigation experience.

Between 2013 and 2017, the proportion of female judges in the tribunals has increased from 43% to 45%, and the percentage of Black Asian & Minority Ethnic (BAME) judges has increased from 9% to 10%. However, the proportion of judges with a non-barrister background in the tribunals decreased from 67% to 66% between 2015 and 2017.

As per the recent statistics published by the Committee on its website on 11 July 2019, showing the figures as of 1st April 2019, 32% of judges in the courts and 46% of tribunal judges were women. 51% of non-legal members of tribunals were women. Around half of the judges in the court aged under 50 are women. Women outnumber males among tribunal judges aged 40-49 (54% women) and 50-59 (52% women). 23% of the judges in the Court of Appeal and 27% in the High Court were women. 42% of Upper Tribunal Judges were women. Since

2014 there has been a 7% increase in women's representation among judges in the court. Of the 143 judges in the court who were appointed to a senior judicial role in 2018-19, 45% were women. 33% of judges in the court and 63% of tribunal judges were from non-barrister backgrounds (solicitor, CILEX or other). Representation by judges in the court decreased by 3 percentage points since 2014 and for tribunal judges, representation decreased by 5 percentage points over the same period. The proportion of BAME judges was higher in those joining the judiciary than in those leaving the judiciary. 11% of new judges in the court were BAME compared to 6% of those leaving, and 12% of the new tribunal judges were BAME compared to 5% of those leaving. BAME representation among judges in the court was generally lower than the general population, but in those aged 50 to 59, it was similar to the general population at this age (10% compared to 11%), while BAME representation among tribunal judges was similar or higher than that of the general population at all age bands from 40 and over. Non-legal members have considerably higher BAME representation than that of the general population at all age groups. More than half of the magistrates were women (56%). 12% of magistrates declared themselves as BAME. There were very few magistrates aged under 40 (5%) compared to 52% of magistrates who were aged 60 or over.

However, merely stating a rule for non-discrimination is not enough to ensure equality in practice. The law on paper as it currently exists in Pakistan for judicial appointments also makes no distinctions as to race, gender, religion etc. but at the same time, it must be asked whether that is enough to discharge one's responsibility as a legislator towards correcting the inequalities that exist in practice. Perhaps, for a country like Pakistan where structural inequalities and social barriers have created deep rooted imbalances in terms of access to opportunities among men and women and among marginalized and privileged classes, what is required is not only a passive injunction to avoid discrimination but rather, more proactive affirmative actions that address the glass ceilings that enable the discrepancies to persist.

This would be in line with the fundamental rights chapter in the Constitution of Pakistan, 1973 as well, which under Article 25, not only calls for equality of all citizens before the law but empowers the state to make any special provision for protection of women and children. This is not to suggest that women and members of minority communities are less able and therefore, need to be included, but only to highlight that the process presently being pursued is likely to go against the spirit of equality, inclusion, diversity, and equity in the absence of clear guidelines and transparency.

With more transparency in the nominations and appointments and more clarity as to the criteria and attributes which are to be considered for proposing judicial nominations, women and other underrepresented groups are likely to be aware of their standing as potential candidates for being nominated and elevated to become a judge on the basis of their competency. Hence, it is sufficient to say that the affirmative action as referred to above, in Article 25 of the Constitution of Pakistan, can be used as a start for a better outreach effort. Compare UK's situation to the one at hand, where the Supreme Court of Pakistan has not yet had a single female justice, hence usually representing the voices of a dominant gender, which clearly indicates that a demand for change and a shift from the previously prevalent attitudes and perspectives is much needed.

During Honourable Justice Mansoor Ali Shah's tenure as the Chief Justice of the Lahore High Court, some positive reforms in this aspect were introduced; however, they remained personality-led, which is perhaps another issue with the current system of judicial nominations and appointments, in that, it has no institutional benchmarks that can serve and survive individual personalities beyond their elevation or retirement.

As described by Waris Hussain in his paper:

“Chief Justice Shah began his tenure by demoting 30 judges from the bench who were accused of incompetence, bias, or inefficiency. In order to fill some of these positions on the bench, Shah called for pro-formas to as many as 250 intending lawyers, who were required to submit their cases' details, were scrutinized in a somewhat objective way and the result was that some of the best qualified were appointed. Chief Justice Shah has also called on the appointment process to be made more transparent over time. While the reaction to Shah's actions has been mixed, his focus on internally reforming the judiciary by making the appointment process more efficient, effective, and less prone to nepotism should be a catalyst for other High Courts and the Supreme Court.³⁵”

³⁵ Waris Hussain, 'Judicial Reform in Pakistan Bar and Bench' (*Academia.edu*, 2016) 5. <https://www.academia.edu/33702843/Judicial_Reform_in_Pakistan_Bar_and_Bench_Waris_Husain_Woodrow_Wilson_International_Center_for_Scholars> last accessed 1 Aug 2020.

Hussain is of the view that in addition to reforming the JC's internal operations, the Supreme Court should review its jurisprudence to recognize the substantial role that the Parliamentary Committee must play in judicial appointments. He notes that”

“Not only could this make the appointment process more transparent and cooperative, it would give the public a right to impact the appointment or promotion of judges through their elected officials in Parliament. Without such reforms, the judiciary will continue to deal with critiques concerning the self-perpetuating judicial appointment process, which may erode the public's support for the courts in general.”³⁶”

Thus, in the absence of any clear guidelines or criteria for judicial nominations, the exercise remains largely inscrutable, and it becomes difficult to ascertain what ‘merit’ means and what qualities, skills, characteristics, and expertise may be required for a lawyer to be considered for judicial nomination and those which may have the impact of undermining the public's trust in the institution of justice.

As experience from previous years show, the range of judicial nominations in Pakistan have been quite narrow and not in line with principles of inclusion, diversity and equality of opportunity therefore, there is a need to revisit the judicial nominations process in line with agreed best practices and global trends as well as in line with Pakistan's commitments under affirmative action for parity, sustainable development goals and fundamental rights by making it more inclusive, clear and transparent.

This proposition appears to be supported by the then senior member of Pakistan Bar Council, Mr. Raheel Kamran Sheikh who agreed that transparency in the process of judges' appointment or elevation can only be ensured if the system is open and transparent and based on objective criteria, which should be by and large accepted by the legal fraternity. He also pointed out that the PBC had passed several resolutions demanding amendments to the existing JC rules as these do not outline any objective criteria such as number of reported cases,

³⁶ Ibid.

number of total cases conducted, juristic ability and diversity of the candidates, besides integrity and good temperament.³⁷

He said that if objective criteria are laid down in the JC rules for the exercise of discretion by the Chief Justices of the High Courts, not only will it help the commission to function transparently but the bar representatives in the commission, on the basis of feedback from bar councils and associations, will also be in a position to object to cases of obvious discrimination in ignoring meritorious lawyers for the slots.

Another potential advantage of developing transparent criteria containing not just professional standing and citizenship but actual attributes, character, merit and standing as well as requirement to consider diversity and inclusion to weigh the nominations against, is the ease in the tug of war in terms of supremacy of the institutions because in presence of agreed criteria, the question of whether the nominations are moved from PC or JC is likely to be of less importance while the bigger question and the right question would become the actual objective assessment of potential nominees against the benchmark. It is therefore desirable that the judicial commission develops clear guidelines and formulates objective criteria as the basis for judicial nominations so that a more open and transparent process of judicial appointments can be introduced.

It is also imperative to understand and accept the challenge which ambiguous and non-transparent judicial nominations give rise to in Pakistan today. According to the United Kingdom's well-reputed organization JUSTICE, their objective of increasing judicial diversity acknowledges the problem of few women in their senior judiciary and even fewer BAME people. As a matter of express commitment to the rule of law, the organization's ultimate goal is to increase diversity in the judiciary, which will consequently lead to the development of law. Hence, justice will not only be done, but also "*be seen to be done by a judiciary which is more reflective of society today.*"³⁸

In American Bar Association's (ABA) Judicial Division, the Diversity Action Plan, approved at the 2012 Annual Meeting, it was stated that"

³⁷ Wajih Ahmad Sheikh, 'Bar for More Transparency in filling LHC judges Vacancies' (*Dawn*, 25 March 2019) <<https://www.dawn.com/news/1471677>> last accessed 1 Aug 2020.

³⁸ Justice, 'Increasing Judicial Diversity: The Challenge' (*Justice.org*, 2017) <<https://justice.org.uk/our-work/judicial-diversity/>> last accessed 1 Jan 2021.

“judges have a responsibility to ‘maintain the dignity of judicial office at all times and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence’ as embodied in the Model Code of Judicial Conduct.”³⁹

The Judicial Division has six judicial conferences, each of which has fully embraced the concept of diversity and inculcated within its membership an understanding that a diverse judiciary is a significant contributor to the legal profession and a promoter of ‘*public confidence in the independence, integrity and impartiality of the judiciary*’. Most importantly, in an attempt to increase diversity and inclusion, the Judicial Division also created the Standing Committee on Diversity in the Judiciary (SCDJ)⁴⁰ which is committed to promote diverse and equal participation in terms of race, gender, religious affiliations, sexual orientation, gender identity, as well as disability status. The goal of the entire leadership under ABA’s diversity initiatives is to actively provide equality of opportunity to both lawyers and judges with various and different backgrounds and to foster an environment that supports and strengthens inclusion. One of their primary objectives is also to encourage participation and recruitment of women judges and lawyers that promises training and leadership opportunities to them to further the advancement of a more representative judiciary.

Moreover, apart from the UK and USA, other regions such as southern Africa have also enthusiastically and actively consolidated transparent procedural policies and rules that help increase representation and accountability of a more independent judiciary. The Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers were adopted at the Southern African Chief Justices’ Forum Conference and Annual General Meeting, Lilongwe on

³⁹ American Bar Association Judicial Division, Diversity Action Plan (Approved by the Judicial Division at Annual Meeting 2012)
<<https://www.americanbar.org/groups/judicial/committees/scdj/diversity-action-plan/>>
last accessed 1 Jan 2021.

⁴⁰American Bar Association Standing Committee on Diversity in the Judiciary
<<https://www.americanbar.org/groups/judicial/committees/scdj/>> last accessed 1 Jan 2021.
The Judicial Division Standing Committee on Diversity in the Judiciary (SCDJ) provides a catalyst to promote equal participation of minorities in the profession through educational experiences, outreach opportunities and numerous publications.

30 October 2018. According to the Lilongwe Principles, the first and foremost transparency principle should be observed and adopted at each stage of the selection and appointment process, with the selection and appointment authority being independent and impartial i.e., free of any bias or prejudice, promising a fair process holistically.

However, unlike in other judicial systems, South Africa goes a step ahead and guarantees that during the selection and appointment procedure, all judicial appointees should exceed minimum standards of competency, diligence, and ethical conduct, with each appointment being made in accordance with merit. Moreover, most importantly, the Lilongwe Principles guarantee candidates a fair and impartial process of selection when they ensure that each appointment will engage relevant stakeholders at all stages of the appointment process, which is pertinent for the public to have confidence and place trust in the judiciary. Pursuant to the Principles, it was also extensively emphasized that a pre-determined and objective selection and appointment criteria be set out openly by the authority, which is advertised publicly and not changed or amended later during the said process. Furthermore, it was through these core Principles that a diverse bench became a requirement and necessarily mandatory in order to be more justly and fairly reflective of the society in all respects, so that candidates and judicial officers who deserve to be appointed are actively prioritized for the bench. The Lilongwe Principles have encouraged a fairer representation of deserving candidates by also pushing for a consistent process rather than just a transparent one and have focused on shortlisting of candidates with credibility and transparency embraced within the process. However, shortlisted candidates need to be vetted and commented upon by stakeholders in order to review the candidate's suitability and placement prior to the interview for the position. After an interview screening, the final candidates selected should be recommended for appointment on the basis of a fair and objective decision which fully and sincerely meets the criteria set for the appointment. Additionally, the formal appointment is mandatorily needed to be made in accordance with the constitution and the laws of different countries in Southern Africa, which will timely allow the judicial officers to assume office once appointed.

In Pakistan, unfortunately, the scrutiny around women's nomination, their participation in competitive leadership positions or around as much as the conversation about their inclusion and fair representation is marred with an myopic and limited understanding of the social and systemic barriers that hold women back in the profession. It is almost always thrown back at women in

terms of placing the fault somewhere in their lack of commitment to excel and grow in the profession and exonerates the flag bearers of the professional regulatory regime from any responsibility towards notions of “diversity” and “inclusion”. Still, there are questions in the pipeline of eligible candidates and women’s own apprehensions in coming forward and competing for leadership positions.

If in all these years this is the case, then the profession and its regulators must look inwards and see what systemic hurdles, underlying biases and other social and procedural anomalies there may be that hold women back from advancing in law instead of placing fault with women lawyers and their supposed lack of commitment. Introspective questions must be asked for any real progress to ensue.

It must, for instance, be asked: what steps and measures have been taken by those in control to address the disparity on the bench and bar? It must be asked what their plan to improve the pipeline of diverse candidates is and what they have done or will do to encourage and enable the participation of women and other marginalized groups to join the judiciary and other representative positions. Questions such as whether they have worked on any legislative reforms or amendments to rules that enable more women and other marginalized groups to participate on a level playing field will also prove to be crucial. Moreover, has any gap analysis or critical reviews of existing legislation and rules been undertaken to identify the procedural and technical provisions that disable meaningful participation of marginalized classes in the profession? For instance, was the impact on the potential of women candidates considered when the Legal Practitioner and Bar Councils Act 1976 was amended in 2018 that led to an increase in the number of years of legal practice of candidates for eligibility to run for provincial bar elections? What about inclusion of young professionals, differently abled and the minorities in leadership positions? If no such questions have been contemplated by those with power, then why accepting that women need to do more?

There is no longer any scope for ‘tokenism’ when it comes to representation. Women lawyers have called for equal participation of diverse members in the legal profession in all leadership positions. Female Lawyers have called for safe and inclusive workplaces including safe and accessible courts and have called for an end to discriminatory practices and more information on election processes and candidates and accessible voting processes including a digital / online / e-voting facility to be able to fully participate in the profession.

It is time our regulators and concerned bodies accepted the ground disparities and structural barriers that have led to a hegemonic playing field and played a leading role in introducing the necessary reforms and data collection for ensuring and enabling a diverse and inclusive legal profession to improve the stature of the profession on the diversity and inclusion index.

If our justice system aims to foster its perceived legitimacy, particularly in the eyes of the public, it is imperative to build and establish within the constitution a mechanism that upholds not only an independent judiciary, but a transparent, enabling, and credible procedure of nomination and appointment as exists in different parts of the world. As emphasized by Judge Sanji Monageng:

“it is also crucial that the judicial service commissions, the bodies responsible for conducting such interviews and recommendations, must be sufficiently independent as well as sensitive, for instance to issues of gender. “

Way Forward and Recommendations

In this article, we discussed the obligation of the judiciary to preserve, protect and respect the Constitution and noted that the judiciary as an organ of the state was responsible to adjudicate on matters affecting lives, rights, properties, freedoms, and duties of people.

We also considered at some length the global trends and practices towards the promotion and respect for human rights and fundamental freedoms without any discrimination, and acknowledged the UNGA Basic Principles on the Independence of Judiciary 1985 which recognize the importance of selecting people for judicial office on the basis of attributes such as integrity, appropriate training, qualifications and non-discrimination.

We asserted the importance of a transparent process for the institution of judiciary as a whole and noted that an arbitrary process of nominations does not sit well with notions of justice, rule of law, democracy, equality, and fairness. We saw that the Commonwealth Latimer House Principles 2003 which state that judicial appointments should be based on clearly defined criteria by a publicly declared process to ensure equality of opportunity, merit and consideration of progressive attainment of gender equity also lend support to this notion.

We looked at the institutional, social, and cultural barriers that have historically contributed to the challenges in the advancement of marginalized classes within the profession and reiterated the importance of intersectional representation in judiciary and of rules of natural justice, fair representation, and the need for diversity in judiciary.

In light of our extensive discussion, in the preceding sections, it is apparent that judicial nominations and the appointments process need to be reformed under a gender and diversity lens. In doing so, it needs to be mindful of the systemic, latent, and structural barriers that hold women and other underrepresented groups back.

In this regard, we present the following recommendations as a way forward:

A. Constitutional Reform

A Constitutional Amendment Bill along the lines of the UK Constitutional Reform Act 2005 be introduced to amend Articles 175A of the Constitution of Pakistan 1973 dealing with judicial appointments process as follows:

175AA. Appointment of Judges to the Supreme Court, High Courts and the Federal Shariat Court.-

The Commission by majority of its total membership shall nominate to the Parliamentary Committee one person, for each vacancy of a Judge in the Supreme Court, a High Court or the Federal Shariat Court, as the case may be.

[8A(i)] The Commission, in performing its functions of making such a nomination, must have regard to the need to encourage diversity in the range of persons available for selection for appointments.

[8A(ii)] Selections must be on merit provided that, where two persons are of equal merit, the commission shall prefer the one who will bring diversity within the group of persons who are the judges of the Court.

[8A(iii)] In making the nomination, the Chief Justice and the Commission must, in addition to 8A(i) and 8A (ii) have regard to the following factors amongst others;

- a. *qualifications and standing required under Articles 177 and 193*
- b. *recognized scholarship, legal acumen and/or known competence in field of law [and fiqh (for federal shariat court)]*
- c. *the principles agreed upon in the Pakistan Principles of Judicial Nominations and Appointments [such as, high integrity, good character, and reputation of highest standing, etc depending on what is agreed (see point B below)]*
- d. *extent of compliance with canons of professional ethics as contained in Legal Practitioners and Bar Council Rules 1976 or with code of conduct for judges of the SC and HC as contained in Notification No.F.SECRETARY-01/2009/SJC, where applicable,*
- e. *past record, criminal conviction,s or other delinquent behaviour*
- f. *consistency of filing tax returns and compliance with other financial laws, rules and/or regulations*
- g. *that no single gender shall constitute more than 2/3rd of the nominees for judicial appointments.*

B. Pakistan Principles of Judicial Nominations and Appointments

There is a need for the stakeholders to agree on certain principles or other action plan or roadmap for the sake of transparency, credibility, and consensus over the process of judicial nominations and appointments. In this regard, the Honorable Chief Justice of Pakistan along with the Judicial Commission of Pakistan and other stakeholders from the legal profession should initiate a dialogue within the profession to draft the Pakistan Principles of Judicial Nominations and Appointments process, after a participatory and consultative process involving all stakeholders with a view to build consensus and credibility in the process, on the basis on which such nominations and appointments are to be made. Such an honest, inclusive, holistic, and participatory exercise will help spell out the principles, factors, grounds, basis and/or policy considerations on the basis which nominations shall be moved thereby bringing much needed transparency in shape of a public document titled, “Pakistan Principles of Judicial Nominations and Appointments.” This may also serve as a guide and may be used in judicial or other academies in training of judges or other

stakeholders to prepare them for the role ahead and also for people to know what is likely to be taken into consideration in the making of a judicial nomination by concerned quarters.

C. Standing Committee on Gender and Diversity

A Standing Committee on Gender and Diversity should be established within, by or in tandem with the Judicial Commission of Pakistan under law with the mandate to improve the disparity, design, develop or undertake, monitor, and evaluate initiatives in this regard, along the lines of judicial diversity committees in the UK and in America.

D. Inviting Applications to fill vacancies in the Superior Judiciary

The Judicial Commission of Pakistan could draw inspiration from Ontario's Judicial Appointments Advisory Committee, where one of the first responsibilities that the committee delved into was writing a letter to the 1200 female lawyers in the province, asking them to consider applying to become a judge. This was a course of action which resulted in Ontario's 40 percent appointed judges being women from the years 1990 to 1992.⁴¹ If the Judicial Commission in Pakistan takes over the responsibility of calling all women and other marginalized persons practicing law in Pakistan to apply for vacancies in the senior judiciary, it may be viewed as a positive sign and an open invitation to a possibility of being accepted on the bench.

E. Consultative Sessions with the JCP and Judicial Academies

Consultative sessions with members of the Judicial Commission of Pakistan and Judicial Academies should be arranged to encourage them to voluntarily correct the gender and racial imbalance on the bench. There are various endeavors that they can undertake in this regard;

i. Outreach Events

Like in the UK, the Judicial Commission of Pakistan may also be encouraged to conduct outreach events to attract suitably qualified lawyers from groups currently under-represented in the judiciary and to enable them to explore the possibility of a future judicial career.

⁴¹ Alexander Bocker and Leny de Groot van Leeuwen, 'Ethnic Minority Representation in the Judiciary: Diversity among Judges in Old and New Countries of Immigration' (2007) *The Judiciary Quarterly*

<<https://www.rechtspraak.nl/SiteCollectionDocuments/Ethnic-representation-in-the-judiciary.pdf>> last accessed 1 Aug 2020.

ii. Career Development Workshops

The Judicial Academies should be encouraged to develop and run preliminary workshops to enable a potential pool of candidates to become stronger applicants for judicial nominations and/or appointments.

Ultimately, it is the actors from within the judiciary who will have to play a central role in rectifying the past polarity and disproportionate representation on the bench.

F. Broadening Eligibility at the Bench

The scope of eligibility could be broadened to attract legal academics and other qualified legal professionals not necessarily practicing law in the traditional sense to be eligible for judicial nominations.

G. Gap Analysis Study and Legislative and Administrative Reforms

A gap analysis study must be undertaken by the concerned authorities or designated committees to critically review existing legislation and/or the administrative and infrastructural set-up to identify the procedural, technical or enabling structures such as day care centers, designated toilets, parking spaces, harassment policies, maternity leave and benefits policies, ramps and accessible buildings or other necessary equipment or accessories, that lack of which disable meaningful participation of marginalized classes in the profession. Accordingly, relevant legislative, administrative, and infrastructural reforms could then be undertaken by relevant authorities and/or concerned officials.

H. Quota/Reserved Seats

In the event of a delay in the constitutional reform or other measures as recommended as a way forward in this article, a 33% quota for marginalized classes to enhance diversity in appointment of the senior judiciary by reserved seats to be filled by women, minorities and/or differently abled, may be introduced as a temporary corrective measure. This shall however not be construed as a cap and shall not bar them from also being nominated and appointed on general seats in accordance with the provisions of Article 175-A of the Constitution of Pakistan 1973 [amended as proposed in A. above] and Rule 3 of the Judicial Commission of Pakistan Rules 2010.

A Court of One's Own: The Importance of Female Voices in the Supreme Court of Pakistan

***Rida Hosain**

Abstract

This article emphasises the importance of the presence of a female representation's voice in the Supreme Court of Pakistan. It highlights how the Court has functioned without a dissenting voice, a voice speaking out against patriarchal norms deeply entrenched in our society. It argues that Article 184(3) of the Constitution strengthens the case for judicial diversity as it enables judges to exercise considerable discretion. It further argues that a female representation in the Court will break a cycle that continues to exclude women from all spheres of the judicial system. This paper analyses the Courts judgements on virginity examinations and honour killings to illustrate how an all-male Court has judged cases relating to violence against women. The majority decision in the Mukhtaran Mai case is used as a case study to demonstrate how the judicial system has failed to protect half the nation. It concludes by stating that a female representation in the Court is the beginning of the end of a patriarchal judicial decision-making process.

"When I'm sometimes asked, 'When will there be enough [women on the Supreme Court]?' and I say, 'When there are nine,' people are shocked. But there'd been nine men, and nobody's ever raised a question about that." (Ruth Bader Ginsburg)

Introduction

There has never been a female justice in the Supreme Court of Pakistan (the “**Court**”). For the last seventy-three years, women have had to plead and defend

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themselves before an exclusively male bench on the Court. The absence of a female judge has been particularly striking in cases relating to violence against women. Female judges bring lived experiences to their decision-making. They bring forward an inclusive perspective to cases. By highlighting how laws can be based on gender stereotypes, or how they might have different consequences for men and women, a female perspective strengthens the fairness of the adjudication process.

This is not an essentialist perspective. Rather, it highlights the oppressive conditions that dictate the experience of womanhood within patriarchal societies; the shared cultural and social subjugation that informs the lived experience of the 'fairer sex'. Justice Bertha Wilson illustrates how advocates of the constructionist perspective believe that gender has no impact on judgements – this belief is rooted within the ideal of an unbiased judiciary.¹ To claim that a male judge is no different from a female judge is to imply that patriarchal power does not insidiously influence decision making. The need for female judges isn't an empty politics of representation. It is the need for a re-examination, acknowledgement, and confrontation with an exclusively male judiciary at the apex court and its decisions. This is, above all, a structural critique.

The lack of female representation in the judiciary perpetuates the idea that men are the default and judgments on women consequently reflect this male-centric approach. Although, there are intersections of race, ethnicity and class that must be examined, and hence, the vast array of social groups waiting to be represented in the judiciary should result in an opening outward rather than a closing inward.

How will a female representation make a difference?

Erica Rackley talks about the paradox that arises when privileging judicial diversity.² If judges are supposed to be objective and exclude subjectivity from decision-making, why does lived experience matter when constituting a Court bench?³ Rackley concludes that the purpose of judicial diversity is to enact a

¹ Bertha Wilson, 'Will Women Judges Really Make a Difference?' (1990) 28 *Osgoode Hall Law Journal* 507.

² Erica Rackley, 'What a Difference Difference Makes: Gendered Harms and Judicial Diversity' (2008) 15 *International Journal of the Legal Profession* 37.

³ *Ibid.*

structural change wherein diversity becomes a given for the judicial system.⁴ The desired outcome is to remove the prefix “female” from judge and to eliminate perceptions of “difference: because there is no longer an all-male existing norm.

Lived experience is always relevant to the judicial process. As Dermot Feenan writes, judges interpret within the context of “the concrete particularities of human existence.”⁵ The trouble that courts face is that with the exclusion of women, it is only the male lived experience that is involved in judicial processes. There is significant harm caused to women when the illusion of objectivity governs judicial processes rather than an ethics of inclusion.

As Baroness Hale asserts while articulating the significance of female judges, “the experience of leading those lives should be just as much a part of the background and experience which shapes the law as the experience of leading men’s lives has been for centuries.”⁶ The lived experiences of women are essential due to the inequalities imbricated into social structures. To advocate for equitable representation is not to claim that representation solves all issues. Rather, it suggests that allowing minority voices into the decision-making process catalyses positive changes within decisions regarding minority groups. It is through the difference of the minority voice that equality becomes a tangible change rather than an empty signifier.

Feenan surveyed responses by judges in Northern Ireland to questions about female representation on the courts.⁷ It was stated that women tended to possess “experiential sensitivities” which “reflect nuances in understanding the role of judicial office that were not shared by male judges.”⁸

The case of *Safford Unified School District v. Redding* demonstrates the importance of equal representation in the context of the Supreme Court of the United States (US). It exposes a gendered rift on the US Supreme Court. A thirteen-year-old girl was strip searched at her school in Arizona based on suspicion that she was carrying drugs.⁹ She was made to pull her bra out and

⁴ Ibid.

⁵ Dermot Feenan, ‘Women Judges: Gendering Judging, Justifying Diversity’ (2008) 35 *Journal of Law and Society* 490, 518.

⁶ Rackley (n 2) at 41.

⁷ Feenan (n 5) at 517.

⁸ Ibid.

⁹ *Safford Unified School District vs. Redding* 557 U.S. 364, 129 S. Ct. 2633 (2009).

pull out the elastic on her underwear.¹⁰ The US Supreme Court unanimously held that this was unconstitutional.¹¹

During the course of the hearing, certain male justices made light of the strip search.¹² Justice Ruth Bader Ginsburg, the sole female justice on the bench was alone in expressing the severe impact a strip search could have.¹³ In an interview with Joan Biskupic, Justice Ginsburg stated that the comments by the male justices showed that they did not fully understand how a strip search could impact a young girl.¹⁴ “They have never been a 13-year-old girl” Ginsburg said.¹⁵ “It’s a very sensitive age for a girl. I don’t think that my colleagues, some of them, quite understood.”¹⁶

Justice Bertha Wilson concludes a paper, in which she discusses the prospects and pitfalls of being a female judge with the line: “Perhaps (female judges) will succeed in infusing the law with an understanding of what it means to be fully human.”¹⁷ For too long, the definition of human has been “man”. In cases that involve a gendered dimension, female representation in the judiciary becomes not a liberal, aesthetic decision but rather a structural reimagining of what it means to be human and who the law adequately represents. To understand what it is to be human must also include an understanding of what it means to be a thirteen-year-old girl. Representational equity is the first step of a long journey toward eradicating gender bias in the judicial process.

The Supreme Court in Pakistan

(a) Discretion of the Court in Pakistan

The role of judges in the Court does not involve a bare, mechanical application of the law – they have considerable discretion. Article 184(3) of the Constitution states, “... the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights

¹⁰ Ibid.

¹¹ Ibid.

¹² Valerie Strauss, ‘Ruth Bader Ginsburg and the case of the 13-year-old girl strip-searched at school’ (*The Washington Post*, 2020)

<<https://www.washingtonpost.com/education/2020/09/25/ruth-bader-ginsburg-case-13-year-old-girl-strip-searched-school/>> last accessed 20 Jan 2021.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Wilson (n 1) at 522.

conferred by Chapter 1 of Part II is involved, have the power to make an order of the nature mentioned in the said Article.”¹⁸ This section accords broad powers to the Court with regards to the enforcement of fundamental rights.

The Court has interpreted Article 184(3) in a way that allows any party to petition the Court regardless of whether they have been personally aggrieved by the act in question or not.¹⁹ Furthermore, and particularly in the recent past, the Court has used this section on its own motion (*suo moto*) i.e., in the absence of a petition by any interested party. This Article becomes extremely important when discussing judicial diversity. It allows the Court to act on matters it considers are of public importance and where the enforcement of a fundamental right is involved. This gives judges considerable latitude and power. It is crucial to have varied experiences and perspectives when such discretion is being exercised.

(b) Procedure of elevation to the Supreme Court

The procedure for elevating judges to the Court was amended through the Constitution (Eighteenth Amendment) Act 2010 and further amended through the Constitution (Nineteenth Amendment) Act 2010. Article 175(A)(1) of the Constitution states that there shall be a Judicial Commission of Pakistan (“JCP”) for the appointment of judges to the Court. Article 175(A)(2)(i)-(vi) of the Constitution sets out the composition of the JCP. It consists of the Chief Justice of Pakistan, the four most senior judges of the Court, a former Chief Justice of Pakistan (to be nominated by the Chief Justice in consultation with the four other judges), the Federal Minister for Law and Justice, the Attorney General of Pakistan and a Senior Advocate of the Supreme Court to be nominated by the Pakistan Bar Council.

The JCP nominates a candidate for vacancy and forwards the name to a Parliamentary Committee (the “Committee”).²⁰ The Committee consists of four members from the National Assembly and four members from the Senate.²¹ The Committee may confirm an appointment or by a three fourth majority reject the candidate.²² If the Committee does not notify its decision within fourteen

¹⁸ Article 184(3) Constitution of the Islamic Republic of Pakistan 1973.

¹⁹ Benazir Bhutto vs. Federation of Pakistan PLD 1988 SC 416.

²⁰ Article 175(A)(8) Constitution of the Islamic Republic of Pakistan 1973.

²¹ Ibid, art. 175(A)(9).

²² Ibid, art. 175(A)(12).

days, the nomination shall be confirmed.²³ If confirmed, the Prime Minister forwards the candidate's name to the President for appointment.²⁴

Despite the creation of the JCP, it is the Chief Justice of the Court (and other appellate courts) who has substantial authority when selecting judges. It is only the Chief Justice of an appellate court that can initiate the process of nominations.²⁵ The role of the Committee has been further watered down as the Court has held that the Committee's role in considering the suitability of the candidates must conform to standards which pass judicial scrutiny as the decisions of the Committee are subject to judicial review.²⁶ This essentially results in an ultimate control resting with the superior judiciary.

In *Munir Hussain Bhatti v Federation of Pakistan*, the Court stated the following with regards to the JCP:

“it comprises of people having an immense background and stature in the field of law and the judicial system. The purpose then was that the discretion in making judicial appointments should not be the forte of one man, as in the old system but should rather be devolved to a body comprised of people who could be trusted to make a just evaluation on the professional calibre, legal acumen, judicial skill, and all other related criteria relevant for the appointment of a person as a judge.”²⁷

A reformed process aimed at selecting judges based on merit has failed to appoint even one female justice to the Court. Additionally, the Court has laid down the criteria for selecting judges for the higher judiciary. The Court held, “while selecting the Judges, the authority should select the people of excellent character, superior calibre and meritorious record having deep insight and profound knowledge.”²⁸ This begs the question – in Pakistan's seventy-four years of independence, has there been no female justice who fulfils this criterion?

²³ Ibid.

²⁴ Ibid.

²⁵ Judicial Commission of Pakistan Rules 2010, r. 3.

²⁶ *Federation of Pakistan through Secretary Ministry of Law vs. Munir Hussain Bhatti and others* PLD 2011 SC 752, para. 18.

²⁷ *Munir Hussain Bhatti, Advocate and others vs. Federation of Pakistan and another* PLD 2011 SC 407 at para 22.

²⁸ *Al-Jehad Trust and others vs. Federation of Pakistan* PLD 1996 SC 324, para. 58.

Justice Nasira Iqbal, one of the first five women to be appointed to the Lahore High Court highlighted how not a single woman was appointed to any superior court in the country until 1994.²⁹ The first time a female judge was appointed to a High Court was during Benazir Bhutto's tenure.³⁰ The first female justice was appointed to the superior judiciary during the first female prime minister's term. This also indicates how essential it is for women to be in positions of power, in order to empower other women.

On being asked why a female judge hasn't been appointed to the Court, Justice Nasira stated: "It's male chauvinism. They don't want to appoint women; they want them to be at a lower standing."³¹ Justice Nasira went on to say: "There are women who are eligible to be appointed to the Supreme Court. There is a woman judge in Lahore who has apparently been at the High Court for five years, and there are also women judges at the Balochistan High Court."³²

The problem with the composition of the JCP is that it comprises predominantly of men. There has never been a female Attorney General in Pakistan. There has only been one female Federal Minister of Law and Justice. The exclusion of women from every sphere of the judicial system is a cycle that self-perpetuates. By introducing female voices into the Court, this cycle would be interrupted, and female voices would be introduced.

Some Landmark Decisions by Superior Courts in Pakistan

This section discusses how patriarchal norms and language have become entrenched in the judicial structure. It analyses how they manifest in the judgements and judicial process of the Court. Despite having little basis in fact, these views are naturalized, authorised, and strengthened through their repeated affirmation by the judiciary.

(a) Virginity Examinations

Virginity examinations including the two-finger test and hymen examinations in cases of rape and sexual violence had previously been common. These tests are used to determine the sexual history of the victim. In *Amanullah vs. The State*, the Court used the two-finger test to hold, "From this medical evidence,

²⁹ Aasma Mojiz, 'Eligible women judges denied promotions, elevations' (*Dawn*, 2016) <<https://www.dawn.com/news/1253902>> last accessed 20 Jan 2021.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

it is obvious that sexual intercourse had been freshly committed with the said lady and further that she was not a female of easy virtue and was not used to committing sexual intercourse.”³³ In *Haider Ali and others vs. The State* the Court observed, “the doctor medically examining the alleged victim had clearly found that the hymen of the alleged victim was old torn.”³⁴

The Court uses virginity examinations to ascertain whether a woman has been sexually active in the past and whether she consented to the act of sexual intercourse subject to dispute. This is a biologically unsound mode of detecting virginity. But it is not just the biology that is flawed, it is the ideology. It sets the precedent that a woman who has been sexually active in the past is less deserving of the Court's protection.

The Independent Forensic Expert Report of 2015 highlights the dangers of using virginity examinations.³⁵ It is a notion embedded in the patriarchal ideology that virginity is equal to ‘purity’ and therefore raping a virgin possesses a magnitude of reprehensibility that raping a non-virgin does not.³⁶ The Court essentially adjudicates upon rape cases on a spectrum that arises from arbitrary ideals of moral purity.

In March 2020, the use of the two-finger test was challenged in the Lahore High Court. The petition was before a single female justice – Honorable Justice Ayesha A. Malik. On 4th January 2021, Justice Malik announced her decision and held that the use of the two-finger test and hymen examinations for the purpose of ascertaining the virginity of a female victim of rape or sexual abuse was unlawful.³⁷

After decades of subjecting victims to these inhumane examinations, it took a female justice of a provincial High Court to declare virginity examinations as unconstitutional. This case strongly reinforces the dire need for a female justice on the Court. This case is ground-breaking not only for the decision that was reached but for the reasoning provided.

³³ Aman Ullah vs. the State PLD 2009 SC 542, para 3.

³⁴ Haider Ali and others vs. The State 2016 SCMR 1554, para 3.

³⁵ Independent Forensic Expert Group, ‘Statement on Virginity Testing’ (2015) 33 *Journal of Forensic and Legal Medicine* 121 and 122.

³⁶ Ibid.

³⁷ Sadaf Aziz and others vs. Federation of Pakistan and others 2021 PCr.LJ 205.

In her judgement, Justice Malik states:

“This in effect amounts to gender-based discrimination as it is neither a medical condition which requires treatment, nor does it provide any clinical benefit to the victim....”³⁸

The virginity test by its very nature is invasive and an infringement on the privacy of a woman to her body. It is a blatant violation of the dignity of a woman. The conclusion drawn from these tests about a woman’s sexual history and character is a direct attack on her dignity and leads to adverse effects on the social and cultural standing of a victim.³⁹”

The nuanced understanding of the social and cultural position of women represented here is important – it suggests lived experience and speaks to the importance of understanding how women are treated within Pakistan. Furthermore, Justice Malik’s recognition of gender-based discrimination is significant. It acknowledges that the law and investigative practices are not an objective force but rather an aspect of society that are vulnerable to patriarchal tendencies.

The clear denouncement of the virginity test as infringing upon dignity is one that seems obvious in retrospect. But it took several feminist voices to make this concern heard and adequately dealt with by the courts. Justice Malik exemplifies the radical potentialities of female judges in Pakistan and above all, of listening to women.

Female judges often pave the way forward – authoring decisions that catalyse further tidal waves of change. In a recent decision authored by honorable Justice Mansoor Ali Shah, on 25th March 2021, the Court declared virginity testing conducted for the purpose of determining virginity of rape survivors as unconstitutional (“**Atif Zareef Case**”).⁴⁰ The detailed judgement holds that examination of a rape victim by medical officers should be limited to determining whether or not the alleged victim was raped and should not include determinations on the virginity and chastity of a victim. In particular, the judgement states:

³⁸ Ibid, para 27.

³⁹ Ibid, para 28.

⁴⁰ Atif Zareef, etc. vs. The State Criminal Appeal No.251/2020 & Criminal Petition No.667/2020.

“A woman, whatever her sexual character or reputation may be, is entitled to equal protection of law. No one has the license to invade her person or violate her privacy on the ground of her alleged immoral character. Even if the victim of rape is accustomed to sexual intercourse, it is not determinative in a rape case; the real fact-in-issue is whether or not the accused committed rape on her.”⁴¹

The courts should also discontinue the use of painfully intrusive and inappropriate expressions, like “habituated to sex”, “woman of easy virtue”, “woman of loose moral character”, and “non-virgin”, for the alleged rape victims even if they find that the charge of rape is not proved against the accused. Such expressions are unconstitutional and illegal.”⁴²

This judgment is progressive, equitable and fair. It grants women the rights to dignity and to respect that the justice system has so often stripped from them. The question may arise – with a male judge authoring such feminist judgments, what substantive difference will a female judge bring to the bench? To insist on female representation, however, is not to insist that no male judge in the entirety of the Court is capable of making decisions that positively impact women, or that adequately address gender bias. Rather, it is to point out a structural lack, a deficiency that renders the judicial process capable of ignoring the voices of women – even if they might occasionally choose not to. Feminist criticism has often highlighted how women are the largest minority in the world. If fifty percent of the population experiences the Court as other, or as only peripherally and occasionally concerned with their interests, does this not undermine the authority of the Court itself?

According to Donald R. Songer and Kelley A. Crews-Meyer, research has shown that the presence of a woman on state supreme courts tends to increase the probability that male judges will support liberal outcomes in gender discrimination cases.⁴³ Rosemary Hunter summarized the extra judicial influence of female judges in that “women judges will...operate to educate and civilize their male colleagues by not allowing sexist comments, stereotyping and

⁴¹ Ibid, para 12.

⁴² Ibid.

⁴³ Donald R. Songer and Kelley A. Crews-Meyer, ‘Does Judge Gender Matter? Decision Making in State Supreme Courts’ (2001) 81 *Social Science Quarterly* 750.

gender bias to go unquestioned.”⁴⁴ The mere inclusion of female voices in the court could be enough to instigate a re-examination of judicial ideals that had remained unquestioned.

(b) Honour Killings

Honour killing is known as the practice of killing an ‘adulterous’ woman and at times her illicit partner to erase shame and restore honour.⁴⁵ In many instances, women have been killed on the mere suspicion of infidelity.⁴⁶ In most of the cases, women are killed by their male relatives including their fathers, brothers, uncles, husbands etc.

The judiciary, the very institution responsible for upholding the administration of justice, has continued to afford leniency to men who kill under the guise of honour. Despite repeated amendments to the law, the Court has shown an unwavering commitment to grave and sudden provocation as a mitigating circumstance in cases of honour killings.

The case of honour killings is metonymic for the treatment of women under an all-male judiciary. A woman’s life is considered secondary to a man’s perception of honour. Furthermore, the concept of “honour” itself has been defined within oppressive patriarchal contexts. The need for female representation on the Court is evident when judicial decisions on honour killings are examined. The introduction of the word “honour” seems to render the “killing” less offensive to male judges. This stems from the belief that women’s rights are contingent upon their relationship to men – an ideal that female representation in the Court could begin to undo.

S.300 of the Pakistan Penal Code

The old section 300 of the Pakistan Penal Code (“PPC”) contained the definition of murder.⁴⁷ The definition was subject to certain exceptions. The first exception was grave and sudden provocation.⁴⁸ In *Muhammad Saleh vs.*

⁴⁴ Rosemary Hunter, ‘More than Just a Different Face? Judicial Diversity and Decision-making’ (2015) 68 *Current Legal Problems* 119, 124.

⁴⁵ Rabia Ali, *The Dark Side of Honour: Women Victims in Pakistan* (Shirkat Gah 2001).

⁴⁶ *Ibid.*

⁴⁷ Pakistan Penal Code 1860, s. 300: “Except in the cases hereinafter exception, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death...”

⁴⁸ Exception 1 of Section 300 of PPC provided, “Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death

the State, the accused found his sister and her partner having sexual intercourse. He killed both of them. The Court held:

“He must be allowed, on the evidence, the benefit of shock, on making the discovery, such as is fully recognised in law as furnishing grave and sudden provocation within the meaning of Exception I to section 300, P.P.C, sufficient to cause loss of self-control.”⁴⁹”

The inherent problem with allowing honour killings to fall within the ambit of grave and sudden provocation is that they are presented as a legitimate defence to murder. Honour killings are usually deliberate and premeditated acts. Mark Cooney quotes a Pakistani scholar as stating, “what we may think is a murder or a crime against the state, in the honour value system is not a crime at all. On the contrary, it is an act of punishing those who violate the honour code.”⁵⁰

i. Amendments to the law

The criminal law in Pakistan was amended pursuant to a decision of the Court which declared Section 299 to Section 388 as repugnant to the injunctions of Islam.⁵¹ In particular, the Court noted that these sections did not provide for retaliation, compensation, and pardon as called for in the Quran and Sunnah.⁵² The result was the introduction of the Qisas and Diyat Ordinance 1991.⁵³ Section 302 was inserted into the PPC. Section 302 states that a person who commits murder shall be punished by (a) death as *qisas* or (b) death or imprisonment for life as *ta'zir* or (c) imprisonment of either description for a term which may extend to twenty-five years.⁵⁴

The new Section 302 of the PPC abolished the defence of grave and sudden provocation. However, this did not deter the Court from using the provocation defence to lower the sentences of men who claim honour as the reason for their crime. *In Abdul Haque vs. the State* (“**Abdul Haque Case**”), the Court held:

of the person who gave the provocation or causes the death of and other person by mistake and or accident.”

⁴⁹ Muhammad Saleh vs. The State PLD 1965 SC 366.

⁵⁰ Mark Cooney, ‘Death by family: Honor violence as punishment’ (2014) 16 *Punishment & Society* 406, 407.

⁵¹ Federation of Pakistan vs. Gul Hassan Khan PLD 1989 SC 633.

⁵² Ibid.

⁵³ Criminal Law (Fourth Amendment) (Qisas and Diyat) Ordinance 1991.

⁵⁴ S.302 Pakistan Penal Code 1860.

“We have also considered the fact that the appellant is Pathan and as such traditionally very sensitive about anything derogatory stated about his womenfolk and is expected to react very quickly on account of provocation. In the circumstances, we consider that plea of grave and sudden provocation on account of abusive language can be treated as mitigating circumstance in awarding sentence under Ta'zir even if this plea as such is not available and does not get any protection in the new amended law.”⁵⁵

In this case, the Court goes so far as to accept that the defence of grave and sudden provocation is not available under the law. Despite this acceptance, the Court gives the accused the benefit of provocation. This allegiance to grave and sudden provocation appears to be rooted in the belief that it is “natural” and “moral” for a man to kill a female relative when his honour is at stake. Honour killings rather than being classified as an unjustifiable crime are often considered by the Court as an emotional and natural response by a man. The Court essentially endeavours to justify the behaviour of the accused rather than punish it.

The Court’s decisions reinforce attitudes deeply embedded in our society – women have no honour of their own. Susan Brownmiller states: “A crime committed against her body became a crime against the male estate.”⁵⁶ This view is strengthened by the Court’s lenity and tolerance for honour killings.

The Court’s decisions are binding precedent for the High Courts and lower judiciary. The approach that the Court has adopted when deciding cases on honour killings permeates the reasoning of courts all across the country. In *Muhammad Ayub vs. The State*, the Lahore High Court accepted a plea taken by the accused that he killed his wife out of ghairat as he had seen her in an ‘objectionable position’ with another man. (“**Muhammad Ayub Case**”).⁵⁷ The Lahore High Court relied on a judgement of the Court to reduce the sentence of the accused from twenty-five years to five years. It was held:

⁵⁵ Abdul Haque vs. The State PLD 1996 SC 1, para 56.

⁵⁶ Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Ballantine Books 1975) 17.

⁵⁷ Muhammad Ayub vs. The State 1997 PCrLJ 2056.

“I have also considered the aspect from this angle that the appellant is an uneducated young man belonging to a tribe and area where no loose conduct of a female is tolerated, and family honour is relishly guarded. Furthermore, the appellant is in such an age group where tolerance is non-existent and rashness is the order of the day irrespective of the ensuing consequences. If he remains in jail for a long term there is a possibility that he comes out as a hardened criminal, which is not desirable.”⁵⁸

The Supreme Court decision in the Abdul Haque Case and the Lahore High Court decision in the Muhammad Ayub Case centralize the male perspective rather than the victims. They lend focus to the fact that an accused is “uneducated” or from an ethnic minority and therefore, expected for them to act in such a manner – as opposed to focusing on the grave crime that they committed. The judicial process adopts flimsy excuses to shift blame away from the perpetrators of gender-based crimes. The deaths of women that occur due to misplaced notions of “honour” are treated as peripheral and secondary to hurt the feelings of the man who committed the crime.

The Criminal Law (Amendment) Act 2004 introduced a proviso to Section 302 of the PPC, which stated that crimes committed on the pretext of honour would be liable for maximum punishment under the provisions of Section 302 (a) and (b). Additionally, the Criminal Law (Amendment) (Offences in the name or pretext of honour) Act 2016 was passed to specifically target honour crimes.

Despite these amendments, the Court continues to use the provocation defence to give lower sentences in cases of honour killings. The Court has created a distinction between a murder committed “in the name or on the pretext of honour” and murder committed under “grave and sudden provocation.” In *Muhammad Qasim vs. The State* the Court held:

“The said words indicate that a murder committed “in the name or on the pretext of honour” has to be a calculated murder committed with premeditation in the background of honour whereas the words used in the context of grave and sudden provocation in Exception 1 to the erstwhile Section 300, P.P.C. were “deprived of the power of self-control”. Such words used in Exception 1 to the erstwhile

⁵⁸ Ibid, para 10.

section 300, P.P.C. catered for a situation which was not premeditated and had developed suddenly leading to grave provocation depriving a person of the power of self-control. Such different phraseology used by the legislature in these distinct provisions clearly indicates catering for different situations and, therefore, the words "in the name or on the pretext of honour" ought not to be mixed or confused with grave and sudden provocation leading to depriving of the Power of self-control.⁵⁹"

This distinction developed by the Court is flawed. It is premised on the reasoning that simply seeing a woman in a "compromising" or "objectionable" position with a man is capable and sufficient to cause a man to be deprived of all self-control.

In Tandimand and another vs. Qasim Jan and another, the Peshawar High Court held:

"In the present case, the appellant has killed his wife when he had seen her in a compromising position with a stranger. The mode and manner as mentioned by him in his confessional statement does not suggest any pre-planning or premeditation on his part before killing his wife, therefore, his case squarely falls within the definition of section 302(c), P.P.C.⁶⁰"

"In view of the above, we hold that the murder of deceased by the appellant was not an honor killing (pretext of honor) but the incident was result of grave and sudden provocation which had erupted at spur of the moment.⁶¹"

In this case, a mere statement by a man that he was provoked was sufficient to shift a crime from being committed on the "pretext of honour" to a case of "provocation." The perpetrator of the crime is allowed to be the arbiter of his crimes, in a manner that completely alters the legal consequences of his actions.

The Case of Mukhtaran Mai

⁵⁹ Muhammad Qasim vs. The State PLD 2018 SC 840, para 4.

⁶⁰ Tandimand and another vs. Qasim Jan and another 2021 PCrLJ 469.

⁶¹ Ibid.

Any discussion about the struggles faced by women due to the patriarchal justice system would be incomplete without lauding the struggle of Mukhtaran Mai. In June 2002, members of the *Mastoi* tribe accused Shakoor, a twelve-year-old boy, of having an affair with an older woman from their tribe.⁶² Shakoor denied the accusations and stated that he had been kidnapped and sodomised by three Mastoi men.⁶³ When he threatened to report the incident, they manufactured the story of an affair.⁶⁴ Mukhtaran Mai (Shakoor's sister) was called to the tribal council to seek forgiveness for her brothers' illicit relationship.⁶⁵

The tribal council refused to accept her apology. To balance Shakoor's alleged affair with a *Mastoi* woman, the council ordered men of the *Mastoi* tribe to gang-rape Mukhtaran Mai.⁶⁶ She was taken to a nearby room and gang-raped by four men.⁶⁷ Mukhtaran Mai was then made to walk home barely clothed before a crowd of hundreds of villagers.⁶⁸ The Court in its majority judgement stated that the case involved a "blatant, heinous and untoward incident."⁶⁹ The Court proceeded to acquit all but one of the accused.

The majority decision authored by Honorable Justice Saqib Nisar is embedded in a deeply patriarchal thought process and furthers gender bias. In particular, the majority decision holds the following:

(a) Delay in filing FIR

The majority judgement cast doubt on Mukhtaran Mai's case as she waited eight days before filing an FIR. The Judgement states "[The] case of an unmarried victim of a young age, whose future may be stigmatized...cannot be held at par with a grownup lady, who is a divorcee for the last many years."⁷⁰ The Court established a false equivalence of virginity and the stigma of rape. Additionally, the Court completely disregarded the extreme trauma associated with rape and how that may result in a slower response time.

⁶² The State and Others vs Abdul Khaliq and Others PLD 2011 SC 554 ("*Abdul Khaliq*").

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid, para 3.

⁷⁰ *Abdul Khaliq*, (n 62) para 23.

In Mukhtaran Mai's memoir, she expresses her feelings after the rape, "I have made up my mind: I want to kill myself. That is what women in my situation do. I will swallow acid and die, to put forever the fire of shame that torments my family and me. I beg my mother to help me die. She must go buy some acid so that my life may finally end, since I'm already dead in the eyes of others!"⁷¹ This passage encapsulates the sheer trauma and agony that rape victims experience. It takes time to acquire the requisite strength to undertake a legal battle against your rapist. To use this against a victim is a grave injustice - an injustice that undermines the severity and specific mental and social ramifications of rape.

i. Myths about rape

The majority judgement states, "If the intention of the Mastrois was to take *badla*... (revenge) Mukhtaran Mai etc. has gone to the house of Khaliq, without the company and protection of their men folk; this was a good opportunity for Khaliq or for that matter any other male of the family to settle the score, but no harm was caused to anyone."⁷²

This completely ignores how rape is used to assert power. Brownmiller states, "All rape is an exercise in power, but some rapists have an edge that is more than physical..."⁷³. The Court decontextualizes the act of rape, characterizing it as a crime of opportunity rather than a violent exertion of power. An exertion of power that is further strengthened by the impunity and lack of accountability of rapists in Pakistan.

ii. Testimony of the victim

The Court casts doubt on Mukhtaran Mai's statement based on trivial inconsistencies.⁷⁴ In her memoir, Mukhtaran Mai states, "I pass from one night to another, taken from the darkness outside to the darkness inside an enclosed place where I can distinguish those four men only by the moonlight filtering through a tiny window."⁷⁵ The Court used minor inconsistencies in the victim's statement to assert that her case was a fabrication. This represents a failure to acknowledge the state of a victim after such an incident. It shows a lack of

⁷¹ Mukhtar Mai, *In the Name of Honour: A Memoir* (Atria Books 2006).

⁷² *Abdul Khaliq*, (n 62) para 19.

⁷³ Brownmiller (n 56) 256.

⁷⁴ *Abdul Khaliq*, (n 62) para 22 and para 30.

⁷⁵ Mai (n 72).

understanding of the severe psychological and emotional distress that a victim undergoes. It is unjust to expect the victim to recall every detail of the incident – especially when there is a significant gap between the date of the incident and the date of the trial.

Tina Karkera rightly stated that while a traditional tribal council made Mukhtaran Mai a victim, it was the judicial system of Pakistan that continued to victimise her.⁷⁶ Mukhtaran Mai confronted the system head on and was let down by the highest court in our country. However, Justice Nasir-ul-Mulk dissented to the majority decision in this case. His judgement provides an understanding of the social and cultural barriers for women in society. As stated above, this paper does not suggest that male judges are somehow incapable of prioritising women's rights. It is just that female judges provide an avenue through which justice is re-imagined. Women will no longer be dependent upon singular sane voices to uphold their dignity and provide them justice.

Conclusion

In several cases, the judiciary appears to have failed to protect women. An examination of the Court's judgements reveals that they are indivisible from gender bias and patriarchy. Women, by virtue of being marginalised, can challenge assumptions and stereotypes underpinning legal doctrines. They are able to confront what has previously been considered the norm. This article submits that to allow women to be heard and to give women just and equal protection under the law – there must be female representation in law, especially at apex level.

The end-goal of female representation in the Court is a structural change – wherein the lived experience of women is given weight. Eventually, hopefully, this will occur even when there is not a female judge hearing the case. But for this to happen, women must be allowed into positions of power and disrupt the foundation of the male-centric judiciary. The decision of Justice Mansoor Ali Shah in the Atif Zareef Case and Justice Nasir ul Mulk's dissent in Mukhtaran Mai's case are commendable but it leaves the patriarchal structure of the judiciary itself unshaken. The necessity for female representation in the Court is not erased by a single decision or dissenting opinion. Rather these decisions throw the need for female representation in the court into even sharper relief.

⁷⁶ Tina Karkera, 'The Gang-Rape of Mukhtar Mai and Pakistan's Opportunity to Regain Its Lost Honor' (2006) 14 *American University Journal of Gender, Social Policy & the Law* 163, 176.

The cycle of exclusion of female judges from the Court must be broken. There must not be another Mukhtaran Mai.

A Socio-Legal Exploration of Women's Access to Justice in Pakistan

***Mehak Zaraq Bari**

Abstract

This article seeks to explore the social, cultural, and legal aspects of why women face a greater difficulty in accessing justice through the formal legal system in Pakistan. Moreover, hindrances in the criminal justice system for GBV victims and the impact of the pilot Gender Based Violence Court would be addressed. Lastly, progressive legislation and recommendations to improve access to justice for women in Pakistan will be put forward.

Introduction

‘Access to Justice’ as per its narrow meaning means improving an individual’s access to court or guaranteeing them legal representation.¹ However, the modern interpretation and the United Nations Practitioner’s Guide defines it as an individual's ability to seek remedy for their grievances through formal or informal institutions of justice in compliance with human rights standards.² This approach focuses on the inadequacies and limitations of the legal justice system and calls for reforms by simplifying procedural and formal requirements as well as improving awareness and knowledge of the people. It further maintains that true access to justice must consider social variables which have been negated

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¹ Mauro Cappelletti and Bryant Garth (eds.), *Access to justice: 1* (Giuffrè Editore/Alphen aan den Rijn 1978).

² United Nations Development Programme, *Programming for Justice: Access for All: A Practitioner’s Guide to a Human Rights-Based Approach to Access to Justice* (Keen Publishing Bangkok 2005).

historically as they adversely impact the ability of marginalized and vulnerable people such as women to access justice.

Pakistan has over two million cases pending in its lower and superior courts putting immense pressure on its legal system which produces various challenges such as hindrances in the development of a prosperous economy, doubt in rule of law and inefficient governance.³ However, women experience further hindrances in their ability to access justice despite women's rights being enshrined in the Constitution of Pakistan⁴ and Pakistan being a signatory to the Convention on the Elimination of Discrimination Against Women (CEDAW) as well as other international treaties.⁵

Pakistan has ranked low in various global gender surveys. The Georgetown Institute for Women, Peace and Security in 2018 ranked Pakistan the fourth worst country for women in terms of inclusion, justice, and security.⁶ The Global Gender Gap Report 2020 ranked Pakistan at 151 out of 153 countries due to low participation, representation and ownership and control of resources by women.⁷

Furthermore, even though laws exist protecting women, there are glaring problems when it comes to enforcement in practice because of deep-rooted social, cultural, and economic barriers and biases. A woman's ability to access justice depends on her status in society which varies according to her social position in terms of class, religion, education, economic independence, region, and location (urban or rural), cultural and traditional values, caste, educational profile, and marital status. In all spheres of public and private life women face

³ APP, 'Over 2m cases pending in superior, lower judiciary' (*The News*, 18 August 2020) <<https://www.thenews.com.pk/print/702243-over-2m-cases-pending-in-superior-lower-judiciary#:~:text=National&text=ISLAMABAD%3A%20A%20data%20issued%20by,courts%20and%20the%20district%20judiciary>> last accessed 3 Feb 2021.

⁴ The 1973 Constitution of Pakistan guarantees equality of rights to all citizens irrespective of sex, race, and class and empowers the government to take affirmative action to protect and promote human rights.

⁵ The relevant treaties requiring equal access to justice which Pakistan is a signatory to are: Universal Declaration of Human Rights (articles 7 and 8)

International Covenant on Civil and Political Rights (articles 2 and 14)

International Covenant on Economic, social and cultural Rights. (Articles 2 (2) and 3)

⁶ Jeni Klugman et al. *Women, Peace, and Security Index 2017/18: Tracking Sustainable Peace through Inclusion, Justice, and Security for Women* (GIWPS and PRIO, Oslo 2017).

⁷World Economic Forum, Global Gender Gap Report, 2020.

direct, cultural, and structural discrimination through a deeply entrenched system of patriarchy.

The Socio-Cultural Landscape for Women's Access to Justice

Due to Pakistan's patriarchal culture, the structural inequalities have limited women to the margins of the society, and impeded women's meaningful involvement in their personal, professional, and political decision-making processes. There are several discriminatory laws that have a negative impact on women. Furthermore, there is a social stigma attached to women who seek litigation. The Department of Foreign Affairs and Trade, Australia (DFAT) reports on the cultural practice of '*purdah*'⁸ i.e., segregating women from unrelated men which restricts the mobility of women outside the home particularly in rural and conservative areas.⁹ The report observes that in large urban centres such as Lahore, Karachi and Islamabad, women participation is much higher than those of conservative society outside the urban areas where *purdah* is rigorously observed.¹⁰ This has practical implications of limited mobility including hindrances in getting health services, obtaining support during a humanitarian crisis and accessing courts. Moreover, due to economic dependencies and poverty, litigation is too expensive and time consuming for women to pursue.

In addition to that, dangerous societal norms and conservative practices in Pakistan, such as child marriages, watta satta (bride-exchange), honour killings, are widespread. Unlike rape and other forms of sexual violence, what makes these acts more disturbing is their social acceptance, especially in the rural conservative areas of the country.¹¹

Marriage, domestic disputes, and family matters are often seen as a part of private life where even though state laws exist to condemn them, they are more than often not implemented. A report illustrates a domestic violence case involving a '16-year-old girl where the police delayed lodging the FIR saying

⁸ Literal meaning 'curtain'.

⁹ Australian Government DFAT, 'Country Information Report Pakistan' (DFAT, 2019).

¹⁰ Ibid.

¹¹ Ayesha Qaisrani, Sadaf Liaquat, and Elishma Noel Khokhar, 'Socio-economic and Cultural Factors of Violence against Women in Pakistan' (*Sustainable Development Policy Institute*, 2016).

first that a blood relative of the victim had to be present, and then delayed it further by saying this was a family dispute and not their concern.’¹²

Babur states that Pakistan's patriarchal setup gives command of all aspects of women's lives to men and leaves them reliant on men on matters of their choice, mobility, control over resources and productive and reproductive choices and rights.¹³ Pakeeza argues that the social and legal attitudes towards women have been influenced by pre-Islamic tribal cultures even though the Constitution of Pakistan is in accordance with the Islamic Shariah Law. This has led to the continual neglect of women's rights under the dominance of men and created a long-lasting impression that matters such as spousal disputes, divorce, domestic violence etc are familial matters that do not require legal consideration.¹⁴

The Socio-Legal Bias

The Pakistani Legal system is burdened by a lack of trained lawyers, lack of judiciary per caseload, as well as procedural hurdles that have led to a massive backlog of cases.¹⁵ Additionally, there is also an enforcement bias, wherein enforcement of a decree takes years, and further causes pressure on the women from family and communities to forego their rights.

Also, the public nature of litigation does not appropriately cater to the sensitivity of the subject: an uncomfortable, hostile environment for women dominated by patriarchal notions can discourage women from fighting for their rights against men who have wronged them. This may also result in women preferring not to take their cases to courts because of the fear of being further humiliated or not being understood from a gender-sensitive lens.

Stereotyping and gender bias have far-reaching effects on women rights. They obstruct women's access to justice in all areas of law and may especially affect victims and survivors of violence. Stereotyping distorts perceptions and results in decisions based on preconceived beliefs and myths rather than relevant facts.

¹² Ayesha Khan and Sarah Zaman, 'The Criminal Justice System & Rape: An Attitudinal Study of The Public Sector's Response to Rape in Karachi' (War Against Rape and Collective for Social Science, 2012).

¹³ Z. U. Babur, 'Violence Against Women in Pakistan: Current Realities and Strategies for Change' (2007) (Unpublished dissertation for Master of Arts Degree in Peace and Conflict Studies, European University Center for Peace Studies Stadtschlaining/ Burg, Austria).

¹⁴ Shahzadi Pakeeza, 'Domestic Violence Laws and Practices in Pakistan' (2015) 6(1) *VFAST Transactions on Education and Social Sciences* 2309-3951.

¹⁵ International Crisis Group, *Reforming Pakistan's Criminal Justice System* (Asia Report No. 196, 2010) <<https://www.refworld.org/pdfid/4d00dee42.pdf>> last accessed 1 Aug 2021.

An example of this is seen in rape cases where, when medical examination of an unmarried victim suggests she might not have been a virgin at the time of the offence, there is a weak presumption that she could have consented to the act. The Committee on the Elimination of Discrimination Against Women in its recommendations has stated that judges often adopt inflexible standards about what they believe to be an appropriate behaviour for women and punish those who do not fit into these stereotypes.¹⁶ This affects the credibility given to the arguments and testimony of women as parties and witnesses.¹⁷ Moreover, the Qanun-e-Shahadat Order (Law of Evidence), 1984 provision that a woman when deposing in court may be assisted by another woman has led to the overall value of the testimony of a woman being treated as half that of a male witness which further encourages stereotyping women as too emotional or not intelligent enough. The issue of stereotyping is further exacerbated by the lack of diversity in Pakistan's Judiciary with male dominated benches.

Against this background, this article will be exploring the broad area of gender-based violence by highlighting the hindrances to access of justice of rape victims. There is vast literature on the concepts of GBV and Rape by academics but it is outside the scope of this paper. However, there is a lack of statistics and data pertaining to the situation in Pakistan specifically on Gender Based Violence (GBV), rape and women's access to justice.¹⁸ Most statistics on GBV that are collected by NGOs and Civil Society are from police-stations, newspapers, and media reporting. Caroline Bates in her Study on Gender Equity, Justice and Governance in Pakistan, has also pointed out the lack of sufficient governmental data on GBV and knowledge among judges, prosecutors, police and among the general population on what constitutes GBV, as well as other issues such as sexual and work-place harassment disproportionately affect women over men.¹⁹

¹⁶ Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 33 on Women's Access to Justice* (UN Doc. CEDAW/C/GC/33, 2015).

¹⁷ Ibid.

¹⁸ Rakhshinda Parveen, *Gender-Based Violence in Pakistan: A Scoping Study* (Gender Equity Program, Aurat Foundation 2011)

<<https://www.humanitarianlibrary.org/sites/default/files/2014/02/GENDER%20BASED%20VIOLENCE%20-%20R%20PARVEEN%20%282%29.pdf>> last accessed 14 Aug 2021.

¹⁹ Ibid.

Gender based Violence and Issues during Course of Justice

The United Nations Declaration on the Elimination of Violence Against Women 1993, defines GBV as: 'Any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.'²⁰

Throughout the region, GBV is one of the most frequent issues faced by women. According to the Pakistan Demographic and Health Survey, 32% women have experienced physical violence in Pakistan and 40 % of ever-married women have suffered from spousal abuse at some point in their life.²¹ However, these statistics do not accurately represent the full extent of cases due to underreporting and attrition.²² Moreover, gauging the prevalence of GBV is not a simple task due to the differentiations in the definitions of violence, significant underreporting, and lack of comprehensive analytical studies on the issue.²³ A study shows that on average six women were kidnapped, four were raped, three committed suicide and four were murdered every day in Pakistan in 2012.²⁴ These statistics only reflect the reported cases gathered through police records and the real picture is grimmer.

GBV is one of the most extreme and pervasive forms of discrimination against women severely impairing the enforcement of their rights and hence has been formally recognized as a part of the 1993 Vienna Conference. The 1993 Vienna Conference stated that gender-based violence included racial prejudice and sexual harassment and recommended the elimination of violence against women through legal action and the mainstreaming of gender equality by obligating states to protect women against violence of any kind occurring within the family, at the workplace, in the community or in any other area of social life. However, throughout the Criminal Justice System, Pakistan has failed to protect women against GBV and their right to access justice. It is noted that the criminal justice system is a part of our socio-cultural context and hence, as such, reflects the norms that govern gender and society in Pakistan.

²⁰ United Nations, *Declaration on the Elimination of Violence Against Women* (Resolution No.A/RES/48/104, 1994)

²¹ Pakistan Demographic and Health Survey 2012

²² Ibid.

²³ Parveen Azam Ali and Maria Irma Bustamante Gavino, 'Violence against Women in Pakistan: A Framework for Analysis' (2008) 58(4) *Journal of Pakistan Medical Association* 198-203.

²⁴ Parveen (n 18).

The National Commission on the Status of Women (NCSW) recognizes procedural shortcomings in Pakistan's justice system starting from the police stations, which is usually the first institution sought for redressal.²⁵ These range from lack of information desks in police stations to help women obtain legal services to the non-availability of medical rape kits in the police stations and the disinclination to contact women's shelters or crisis centres when the woman complainant seeks help from police.²⁶ Furthermore, often police staff are ignorant about the law itself, and women cannot be detained at police stations after dusk.²⁷

Moreover, Police are usually indifferent and place the blame on the woman for inviting trouble onto herself. This can be illustrated by the September 2020 motorway gangrape incident. The victim was travelling from Lahore to Gujranwala along with her children and her car stalled due to shortage of petrol; she was robbed and raped at gunpoint. Lahore's Capital City Police Officer (CCPO) caused public outrage when he remarked that the victim had failed to take due precautions before setting off for her journey.²⁸ According to the CCPO, she could have avoided being at the wrong place at the wrong time by taking the more populated GT Road to Gujranwala instead of going via the motorway, and she ought to have checked how much fuel her car had before setting off.²⁹ He apologized after being severely reprimanded by the executive and fearing legal action.³⁰

War Against Rape (WAR) conducted an attitudinal study of the police towards rape victims and came across biases and stereotypical mentality. It is reported that: 'Case files show that police officers are judgmental and often refuse to take action despite the procedures in place. One survivor, age 30 and divorced, who was gang-raped by three men in her home, was grilled by police officers about

²⁵ Sohail Akbar Warraich, 'Access to justice for survivors of sexual assault – a pilot study' (National Commission on the Status of Women, 2017)

<<https://ncsw.gov.pk/SiteImage/Downloads/Access%20to%20Justice%20%20for%20Survivor%20of%20Sexual%20Assault-%20A%20Pilot%20Study-min-Compressed.pdf>> last accessed 14 Feb 2021.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Naveed Siddiqui, 'Motorway rape occurred because victim travelled 'late night without husband's permission', CCPO tells Senate panel – Pakistan' (*Dawn*, 28 September 2020) <<https://www.dawn.com/news/1582117>> last accessed 4 Aug 2021.

²⁹ 'Lahore CCPO apologises for remarks blaming motorway gang-rape victim' (*Dawn*, 14 September 2020) <<https://www.dawn.com/news/1579650>> last accessed 14 Feb 2021.

³⁰ Ibid.

the reasons for her divorce before they were willing to file the FIR. She was then told by a senior officer that the case was fabricated and that she was of bad moral character.³¹ Furthermore 'In the case of an older woman, age 60, the police did not believe her allegation, with one officer saying that the accused had a beautiful wife so why would he wish to rape an elderly woman?' And in another case involving two married women who were gang raped. 'The duty officer at first refused to lodge an FIR, stating that the women were already married so they should not worry about what has happened to them.'³²

Female officers make up less than 1% of the country's police force, which partly accounts for the reluctance of women to file complaints in the first place.³³ Moreover, the victim needs to file an application for the transfer of her case to the few female police stations³⁴ that do exist.³⁵ The model of all-female police stations has been unsuccessful, marginalizing female police officers and providing ineffectual services to women victims.³⁶ Efforts to raise the profile of gender within policing, through the Gender Crime Cell, particularly in relation to data collection, appear to have had insignificant impact.³⁷

According to a US Department of State Human Rights Report 2018, police often accept bribes from the accused and in return abuse or threaten victims to drop charges, especially when the accused are influential community leaders.³⁸ Also, police demand bribes to register the offense and investigations are often superficial.³⁹

After the September 2020 incident two different ordinances were notified. The Anti-Rape (Investigation and Trial) Ordinance 2020 and the Pakistan Penal

³¹ WAR (n 12).

³² Ibid.

³³ Human Rights Commission of Pakistan, 'State of Human Rights in 2018' (HRCP 2019) <<http://hrcp-web.org/publication/wp-content/uploads/2019/04/State-of-Human-Rights-in-2018-English.pdf>> last accessed 14 Feb 2021.

³⁴ The Government of Pakistan's fifth periodic report to CEDAW, dated 23 October 2018, noted that 20 Women Police Stations had been established in different cities all over Pakistan.

³⁵ Gulmina Bilal Ahmad, *Women Police in Pakistan* (Individualland 2012) <<https://www.individualland.com/downloads/womenPolice/Women%20Police%20in%20Pakistan.pdf>>.

³⁶ Caroline Bates (n 17).

³⁷ Ibid

³⁸ Bureau of Democracy, Human Rights, and Labor, '2018 Country Report on Human Rights Practices: Pakistan' (United States Department of State 2019) <<https://www.state.gov/wp-content/uploads/2019/03/PAKISTAN-2018.pdf>> last accessed 1 May 2021.

³⁹ Ibid.

Code (Amendment) Ordinance 2020 which expanded on the definition of rape, included harsher punishments for perpetrators, and banned the degrading 'two-finger' test for victims of rape. Additionally, they called for the establishment of special courts and rape crisis centres. Some of these will be discussed in detail later.

Medico-Legal Officers (MLO) in the Police stations often lack necessary equipment to conduct medical examinations and victims are almost never tested for HIV/AIDS, pregnancy or referred for counselling.⁴⁰ MLOs also carry the same type of biases as displayed by police officers. Moreover, the MLO training is built upon value judgments about women's morality and mental competence.⁴¹ The collection of evidence at the early crucial stages of an investigation gets adversely affected when the MLO writes off the authenticity of the incident.⁴² Moreover the police and the MLO are often not clear about the procedures that should be followed. According to WAR reports case studies, in the case of two women raped by men claiming property rights over their home, the MLO asked for an FIR before doing an examination arguing that it was a civil case and, hence wasting time. Moreover, in another case a 6-year-old rape victim was refused a medical examination by a Woman MLO since a mobile phone was stolen from the victim and she wanted the incident reported to the police first. When the examination did take place, the report failed to mention vaginal bleeding.⁴³

Until recently, the practice of using the two-finger test (i.e., whether two fingers can be inserted in the vagina) was prevalent despite being not prescribed in the medico legal guidelines and standard operating procedures issued by the Provincial Health Departments. This test puts into question the survivor's sexual history which results in biased opinions by the MLO resulting in writing off the victim's testimony. Women rights activists, academics, journalists, and advocates petitioned that the hymen test and the 'two-finger test' as part of medical evaluation of women victims was an intrusive and demeaning practice

⁴⁰ Sarah Zaman and Maliha Zia (on behalf of War Against Rape and Aurat Foundation) 'Women's Access to Justice' (2013) 54th CEDAW Session Working Paper submitted to the Committee on Women's Access to Justice

<https://www.ohchr.org/documents/HRBodies/CEDAW/AccessstoJustice/AuratFoundationAndWarAgainstRape_Pakistan.pdf> last accessed 1 Aug 2021.

⁴¹ WAR (n 12).

⁴² Ibid.

⁴³ Ibid.

which was unnecessary and had no scientific basis.⁴⁴ The petitions explained that the test was based on the flawed assumption that a woman 'habituated to sexual intercourse' was less likely to have been raped.⁴⁵

In the High Court Petition of Sadaf Aziz etc Versus Federation of Pakistan WP No.13537 of 2020, Justice Ayesha Malik in a 30-page judgement stated:

“The virginity tests are discriminatory against the female victim as they are carried out based on their gender, therefore offends Article 25 of the Constitution. Consequently, to the extent that the 2020 Guidelines, SOPs and the 2015 Instructions mandate the TFT or the hymen test for the purposes of ascertaining the virginity of the victim are declared to be illegal and against the Constitution and the Federation and Provincial Government should take necessary steps to ensure that virginity tests are not carried out in medicolegal examination of the victims of rape and sexual abuse.”⁴⁶

Furthermore 'The provincial government should devise appropriate medico-legal protocols and guidelines, along with standard operating procedures in line with international practice that recognize and manage sensitively the care of victims of sexual violence. This includes regular training and awareness programmes so that all stakeholders understand that virginity tests have no clinical or forensic value.'⁴⁷

In the case of Criminal Appeal No. 251/2020 & Criminal Petition No. 667/2020 Arif Zareef, and others v The State 2021, Honorable Justice Syed Mansoor Ali Shah along with his fellow judges examined the medico-legal report and the doctor's statement confirming commission of sexual assault, the Chemical Examiner's report and the DNA test report, testimony of the Complainant and her companion. Though the companion did not witness the crime, his statement fully corroborated the Complainant's testimony. Rape is a crime that is usually committed in private, there are hardly any witnesses that can produce direct evidence. And so, the Court did not insist on producing the same, especially if

⁴⁴ Wajih Ahmed Sheikh, 'Punjab notifies abolition of two-finger test' *Dawn* (Lahore, 14 November 2020) <<https://www.dawn.com/news/1590266>> last accessed 1 May 2021.

⁴⁵ Ibid.

⁴⁶ *Sadaf Aziz etc. v Federation of Pakistan* WP No.13537 of 2020.

⁴⁷ Ibid.

the victim's testimony is sufficient for conviction. The Court also differentiated between rape victims, who stands on a higher pedestal than that of an injured witness; the former suffers psychological and emotional damage, while the latter suffers physically.

The Court further concluded with the use of multiple references such as a study published by WHO, that the TFT (two finger test) had no scientific merit or clinical indication, nor was the appearance of the hymen a reliable indication of intercourse. There is no known examination that can prove a history of intercourse. An intact hymen does not rule out sexual assault, and a torn hymen does not prove previous sexual intercourse. Only findings: such as fresh tears, bleeding, oedema etc. are to be documented. Medical Officers can only state whether there is evidence of recent sexual activity and injuries. The duty is to provide adequate healthcare and comfort, and to assist in prosecution with medical evidence, not to determine virginity or chastity.

The issue does not stop at the police station; with low number of female lawyers and lack of female judiciary, women litigants often feel alone in a hostile environment. Prior to its repeal in 2016, Qanun-e-Shahadat Order 1984, Section 151(4) in the Law of Evidence pertaining to sexual offences provided that: "Impeaching the Credit of Witness- When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.⁴⁸". This provision used to blame the victim for a history of immoral behaviour linked to a casual attitude towards sexual intercourse, either in the form of adultery or fornication and/or being sexually "habituated" before marriage. While it has been repealed, its socio-cultural impact remains present within the system. Section 21(j) of the Act states that the circumstances under which and the terms in which a victim makes a complaint of rape are relevant for evidentiary purposes. While the intended purpose of this provision and Section 21 as a whole is to provide a safeguard against false or "mala fide" complaints (complaints made with dishonest or ill-intent), it is often used as an instrument of prejudice and gender bias and becomes the cause of humiliation and scrutiny for victims seeking justice for crimes committed against them, as it questions the victim's intention due to delay in reporting the incident. According to WAR, one or two weeks of delay in reporting the rape can be

⁴⁸ Qanun-e-Shahadat Order 1984, s. 151(4).

accepted in court, but longer delays lead to the accused being given greater benefit of doubt and give more opportunity for the accused to run away.⁴⁹

In the latest Supreme Court case discussed above⁵⁰, it was also noted that using the sexual history of a victim, making observations about her hymen is an affront to the reputation and honour of the survivor, and violates Article 4(2)(a) of the Constitution, which prohibits any action detrimental to the body or reputation unless in accordance with the law. Article 14 of the Constitution mandates dignity of a person is inviolable. It is an absolute right, not subject to law and non-negotiable. In criminal trials it is the accused who is on trial, not the victim. The SC also emphasized that courts should discontinue the use of inappropriate expressions; “habituated to sex”, “woman of easy virtue” and “non-virgin”. Even if the charge of rape is unproven, these expressions are unconstitutional and illegal.

The Supreme Court noted that courts allowed opinion of medical experts as per Article 151(4) of the Qanun-e-Shahadat Order, 1984 stated that when a man is prosecuted for rape or attempted rape, it is allowed to show the victim was of general immoral character to impeach her credibility. This is inadmissible in evidence after omission by the Criminal Law Amendment (Offences Relating to Rape) Act, 2016. This does not bar questions during cross examination, or any defense evidence led to prove that some other person, not the accused, is the perpetrator. This omission also does not bar any questions regarding the sexual history of the Complainant with the accused, when the accused intends to prove he had consent. Federal Shariat Court of Pakistan also declared Article 151(4) to be repugnant to the Injunctions of Islam. Article 146 of the Qanun-e-Shahadat Order, 1984 allows the courts to forbid questions regarding past sexual history if it finds it indecent or scandalous but can allow them if they relate to facts in issue. Section 12(3) of the Witness Protection Act, 2018 forbids questioning a victim about previous sexual behaviour, unless it is a relevant fact in the case. The courts must balance the right of the accused to make a full defense and the potential of prejudice to the complainant's rights to dignity and privacy, to keep the scales of justice even for both.

If pre-trial bail is granted, offenders often torment the victim and family to whom the state provides no protection, leading to attrition. According to Schedule II of the CrPC 1898, rape is a non-bailable offence, however judges

⁴⁹ WAR (n 12).

⁵⁰ *Arif Zareef etc v The State*, Criminal Appeal No. 251/2020 & Criminal Petition No. 667/2020.

often grant bail based on circumstantial evidence. Bail before-arrest is also quite common in these cases.⁵¹ Under the premise of innocent until proven guilty, defendants have the right to bail. The grant of these bails causes extreme distress to women as they see it as the court not believing them. Furthermore, the offender's bail leads to harassment and intimidation of the survivor. WAR reports in the case of *The State versus M. Akram*, Case No. 431 of 2008, that despite the survivor submitting various applications to the police and court for receiving intimidation and death threats from the accused who had been granted bail, the accused was not remanded back in police custody and the applications were treated as a documentational burden. They were not entertained by either the police or the court; instead, the survivor was mocked for being in the habit of filing useless applications and 'acting like a lawyer.'⁵²

Most women due to pressure from the society and family, take back the case or reach an out-of-court settlement which is often brokered by the police, especially when the case involves family members as the offender.⁵³ There are also cases when the police tell the victim's family not to report the case because it will affect the lives of their other daughters.⁵⁴

Many victims and their families are forced to relocate due to the social ostracization and stigma attached with sexual violence. However, the government does not provide for alternate housing and there are very few shelters that these women can seek refuge in. These shelters are also considered taboo and are a last resort. They are considered to be for 'loose' women who have been turned away from the respectable segment of society. It is reported that:

"Government centers lacked sufficient space, staff, and resources. Many daru-ul-amans were severely overcrowded, with conditions that did not meet international standards. Some shelters did not offer access to basic needs such as showers, laundry supplies, or feminine hygiene products. In some cases, women were reportedly abused at the government-run shelters, their movements were severely restricted, or they were pressured to return to their abusers. There were some reports of women exploited in prostitution and sex trafficking in

⁵¹ WAR (n 12).

⁵² Ibid.

⁵³ Sarah Zaman (n 41).

⁵⁴ WAR (n 12).

shelters. Some shelter staff reportedly discriminated against the shelter residents, assuming that if a woman fled her home, it was because she was a woman of ill repute.⁵⁵

In many cases, women do not report violence against them nor do they seek justice because of the larger issues that they might face once they try to do so. To address some of these issues on October 2017, Pakistan's first gender-based violence (GBV) court was inaugurated in Lahore, Punjab. Information is scarce regarding this court.

Gender Based Court

Judge Shazia Munawar, an instructor of the Punjab Judicial Academy spoke on the 3rd Punjab Women Judges Conference "Role of Women Judges: Developing the Gender Perspective" (29th November to 1st December 2019) about the Gender Based Violence Courts. She stated 'Narrowing down to Punjab, Gender Based Cases against women have been reported as 7,678 in 2017 with an increase of 5% from 7,313 cases reported in 2016, whereas police stations, on the whole received 28,923 calls on Punjab Public Helpline. But merely 7678 registered cases succeeded to be reported in the courts with the lodging of an FIR (out of [28,923]). If we look at the conviction ratio, it is 4.25% in 2017 against the reported cases, which is comparatively low.'⁵⁶

Shazia Munawar went on to say that due to the nature of these crimes, when women are subject to these forms of violence, their family does not support them.⁵⁷ Fearing how society will respond, attitudes of the police, and evidential requirements, women are very unlikely to pursue their cases. Additionally, the daunting court environment, procedure, and manner of questioning during cross-examination are also discouraging factors.

Regarding the judges, Shazia Munawar stated that judicial internalization of gender stereotyping, as well as their discriminatory attitude, discourage women from pursuing justice. Even though a complaint may be filed, and the case may be registered, it is unlikely to reach its rightful end. These views are harmful, and she emphasized that at least judges should understand the concept of

⁵⁵ Bureau of Democracy, Human Rights, and Labor, '2018 Country Report on Human Rights Practices: Pakistan' (United States Department of State 2019) <<https://www.state.gov/wp-content/uploads/2019/03/PAKISTAN-2018.pdf>> last accessed 1 May 2021.

⁵⁶ The 3rd Punjab Women Judges Conference 'Role of Women Judges: Developing the Gender Perspective' held in December 2019.

⁵⁷ Ibid.

consent. She further implored the audience to think about stereotyping by way of an illustration and asked whether sitting in a car or going out with a man established consent. She indicated that the appearance and attire of women is taken into consideration even though it is doubtful to be responsible for the rape. It is due to these factors the victim feels like the accused rather than the person wronged.

Towards the end of the discussion, she moved towards solutions, and she acknowledged the gender-based training that the Punjab Judicial Academy and 300 judges received by multiple organizations which helped improve the GBV Court environment. Special measures had been taken to create a conducive environment to maintain victim confidentiality. Additionally, screens and curtains were installed in the court (between the witnesses and the accused) and an effort was made to maintain an appropriate distance between the parties. She also pointed out that the option of using a video link was also provided specifically for these cases, as well as a separate witness room. Moreover, gender sensitive guidelines had been issued in the Lahore High Court Practice Note which included important safeguards such as the provision of a trained female support staff that would provide support during the recording of evidence, as well as special way of cross-examination whereby the judge may vet the questions of the opposing counsel to make sure that they are appropriate. Furthermore, the court had power to ask questions and call upon witnesses.

She also stated that the GBV cases had been covered by closely following the procedures and guidelines set out by the Supreme court⁵⁸ and with sufficient case management the court had expeditiously handled cases and the conviction rate rose from 4.25% to 16.5%.

The Guidelines were provided by the Supreme Court Case of *Salman Akram Raja and Another Vs. Government of Punjab* – 2013 SCMR 203 where a 13-year-old girl was subjected to gang rape, but no formal FIR was registered. Upon entry of the complaint the Sub-Inspector took the victim to the Hospital for a DNA test but even after positive DNA findings, no FIR was lodged. The victim tried to commit suicide and a *Suo Motu* action was initiated where the Supreme Court gave directions for courts, police, hospital, and medical practitioners in matters concerning the complaint process, as follows:⁵⁹

⁵⁸ *Salman Akram Raja and Another Vs. Government of Punjab* 2013 SCMR 203

⁵⁹ *Ibid.*

1. A victim's statement under S 164 CrPC should be recorded by a female Magistrate and as soon as a victim is composed.
2. The Magistrate before proceeding to record the statement, shall ensure that the victim is made comfortable and free from any extraneous pressure.
3. Trials for rape matters should be held in camera, and by female judges, where possible, and after regular court hours. An open trial should be an exception.
4. Screens or such other arrangements should be placed between the victim and other vulnerable witnesses, and the accused parties.
5. Questions posed on behalf of and during the cross-examination should be presented, firstly to the Presiding Officer who would then present them to the victim in a language that is clear and not degrading.
6. Evidence of rape victims, particularly juvenile victims, should be recorded via videoconferencing.
7. The evidence of rape victims should be recorded through videoconferencing so that the victims do not need to be present in court.

However, Shazia Munawar went on to assert that there were still certain challenges. She highlighted that the court itself could not preside over all the cases and that they needed trained efficient police officers who knew the law and had to be made aware of the GBV Court and its specific features.⁶⁰ Furthermore, dedicated public prosecutors and defense counsels as well as Lower judiciary should receive gender sanitization training and relative training for cross examination of gender-based victims including children. Additionally, certain loopholes in the investigation process relating to the proving of the case, as well as medical and forensic evidence, must be addressed.⁶¹ She also pointed out that the mental health of the witnesses must be considered, as they would have undergone psychological trauma.

She further discussed the judgment writing process stating that it was for judges not to carry perceptions from their personal life into their judgments. She stated

⁶⁰ (n 57).

⁶¹ Ibid.

that judging women's characters, reputations, and past sexual events should not be part of the process and instead strict adherence to the law should be followed.⁶² Lastly, she spoke about the establishment of more gender-based violence courts all over Pakistan.

In June 2019 it was reported that an evaluation of the gender-based violence court was undertaken after six months which disclosed that the GBV Court was well received as the conviction rate for rape cases heard in the specialized court rose to 16.5 %. Hence, Pakistan's Supreme Court approved the establishment of specialized gender-based violence courts in each of Pakistan's 116 districts.⁶³ However, little data on their progress is available.

Recommendations and Conclusion

Based on the many reports and findings of the various NGOs and Civil Society Organizations, Access to Justice for Women, specially in the context of Sexual and Gender Based Violence is largely hindered by cultural biases and prejudices often against women. There have been progressive legislations⁶⁴ that the government has introduced including Rape being now an offence under the Penal Code after amending the discriminatory Hudood Ordinance 1979. Moreover, the Criminal Law (Amendment) (Offense of Rape) Act 2016 has made the use of DNA testing compulsory and criminalizes revealing the identity of victims.

There is, however, a dire need for broad sweeping and comprehensive gender sensitization training among police officials, MLOs, lawyers and the judiciary. A clear set of ethical guidelines and procedures must be developed for the registration of complaints and expeditious conduct of investigations and trials,

⁶² Ibid.

⁶³ Zarizana Abdul Aziz, 'Gender Based Violence Courts in Pakistan: A Gap in Gender Equality Remains, but a Promising Start' (*OxHRH Blog*, June 2020), <<http://ohrh.law.ox.ac.uk/gender-based-violence-courts-in-pakistan-a-gap-in-gender-equality-remains-but-a-promising-start/>> last accessed 14 Feb 2021.

⁶⁴ Non-exhaustive list includes: Anti-Rape Act 2016; Anti-Honour killing Act 2016; Punjab Protection of Women against Violence Act 2016; Punjab Marriage Restraint Amendment Act 2015; Sindh Child Marriage Restraint Act 2014; Domestic Violence Prevention and Protection Act Sindh (2013) and Baluchistan (2014); Prevention of Anti-Women Practices (Criminal Law Amendment) Act 2011 (pertaining to forced marriages and inheritance deprivation in the name of custom); The Women in Distress and Detention Fund (Amendment) Act 2011; Right to Ownership (Women) Act 2011; The Acid Control and Acid Crime Prevention Act 2011; The Protection Against Harassment of Women at the Workplace Act 2010 (AJK 2011, Punjab 2012, Gilgit-Baltistan, 2013).

the breach of which must be backed up by clear and strict disciplinary procedures. There needs to be a specific emphasis on rules for questioning victims during investigation and trial, and a revised curriculum and training material for police and MLOs to eliminate gender bias and the drawing of outdated and inhumane assumptions about the victim based on her appearance, personal life, or marital status.

For a sound jurisprudence to develop, the judiciary must receive training on the concept of consent and the psychology of rape and trauma. Rape is a non-bailable and non-compoundable offence according to Schedule II of the Criminal Procedure Code 1898, but there still remains a large instance of out of court settlements and grants of bails within the legal system. Bails must be made conditional and revoked in the event of the accused harassing or threatening the victim. Restraining orders against the accused must be made mandatory in cases where bail is granted, and the brokering of out of court settlements in rape cases by justice actors must be met with strict disciplinary action.

In the broader context of the legal system, there is a dire need for increased diversity in the police and judiciary, particularly in higher positions. There must be compulsory female officers in every police station and a larger representation of female police officers as a whole.

A vital piece of the legal puzzle that Pakistan still lacks is a witness protection program. While there are many cases of a sensitive nature that come to Pakistani courts that could benefit from such a program, perhaps the already traumatized and vulnerable victims of rape and sexual offences could benefit the most. Furthermore, there is a need to develop jurisprudence on the operation of Section 21(j) of the QSO 1984 in terms of how it should apply to sensitive cases such as those of GBV and sexual offences.

While it is nowhere near comprehensive or ideal, Pakistan's problem is not so much a lack of substantive legislation but in the apparatus that brings that legislation into effect. In order for real change to take place within the Pakistani Criminal Justice System, the state must fulfil its obligations under Article 5(a) of CEDAW which reads: 'States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other

practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.’⁶⁵

⁶⁵ Convention on the Elimination of Discrimination against Women, art. 5.

By the Men for the Women – Lack of Representative Voices in Laws Impacting Women

***Beenish Zia**

Abstract

Law is made by the legislature, executed by the executive, and implemented by the judiciary.¹ The legislature decides what is legal and what is illegal, the executive enforces that law, and the judiciary interprets it to implement the law. All three branches of state governance play an equally important role individually and collectively by regulating other branches through various mechanisms. They are independent but interlinked.

To adequately understand the scope of women's representation in laws impacting women, it is pertinent to analyze the prevailing situation regarding women's representation at the decision-making level of all three branches. In the words of late Justice Ruth Bader Ginsberg: 'Women belong in all places where decisions are being made. It shouldn't be that women are the exception.'

In Pakistan, the Parliament forms the legislative branch, the Prime Minister and the Cabinet constitute the executive

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¹ Governmental Structure of Pakistan, National Democratic Foundation
<<http://www.democraticfoundation.com.pk/govt-structure-of-pakistan#>> last accessed 20 Oct 2021.

branch, whereas the Courts form the judicial branch. The first section of this paper will evaluate the current situation of gender parity at the legislative, executive and judicial branches individually, followed by an analysis addressing the collective impact. The second section will focus on a case study based in Iceland; a country which has made significant progress in achieving gender balance by enhancing the representation of women in law. The third and final section of the paper recommends an action plan for Pakistan to adequately cope with the prevailing challenges due to the lack of women's representation.

PART 1: Branches of Governance and Gender Parity

In this part, the three branches of governance will be individually and collectively analyzed through a gender perspective to contour the current dynamics of each branch. The simple portrayal of gender ratio at the top tier of these branches – occupying the most influential and significant positions with the highest level of decision-making powers – reflects the reality of the situation and facilitates an adequate evidence-based response. The data presented in this chapter has been collected and compiled primarily from official state websites as of 20th October 2021.

A. Legislative Branch

The legislative branch of Pakistan's governance system comprises of a Parliament, also known as the *Majlis-e-Shoora*. The Parliament includes² a President and a bicameral legislature with the National Assembly or lower house and the Senate or upper house.

² The Constitution of the Islamic Republic of Pakistan 1973, art. 50.

	TOTAL SEATS	RESERVED SEATS FOR WOMEN	WOMEN ON GENERAL SEATS	WOMEN ON RESERVED SEATS FOR OTHER PURPOSES
National Assembly	342	60	09	01
Senate	100	17	01	01
Total	442	77	10	02

Table 1. Women Representation within the Parliament

As referred to in Table no. 1, the National Assembly has 342 seats³ which comprise of 272 general seats, 60 reserved seats for women and 10 reserved seats for non-Muslims. The Assembly currently has 70 women⁴ as members of the National Assembly which makes almost 20 percent of the total seats of the National Assembly. Among these 70 seats, 60 are elected against reserved seats for women, 01 is elected at a reserved seat for non-Muslims and only 09 women are elected on general seats against an open merit.

Gender imbalance is quite evident in the Senate also. Out of the total 100 seats,⁵ 17 are reserved for women. Currently, there are 19 women Senators constituting only 19 percent of the total Senate seats – 17 come from the reserved seats quota for women, whereas 01 each comes from the reserved technocrat seat⁶ and the general seats⁷ quota.

As of today, the Parliament altogether has **20 percent** women parliamentarians while almost 18 percent of them are on reserved seats and only 02 percent are elected on general seats against an open merit. It is pertinent to mention here

³ Existing Composition of the National Assembly of Pakistan

<<http://www.na.gov.pk/en/content.php?id=2>> last accessed 20 Oct 2021.

⁴ Women elected on General, Reserved, and Non-Muslim Seats of the National Assembly of Pakistan <http://www.na.gov.pk/en/mna_list_w2.php?list=women> last accessed 20 Oct 2021.

⁵ Composition/Structure, Senate of Pakistan

<<http://www.senate.gov.pk/en/essence.php?id=10&catid=4&subcatid=138&leftcatid=125&catitle>About%20the%20Senate>> last accessed 20 Oct 2021.

⁶ Senators, Senate of Pakistan <http://www.senate.gov.pk/en/current_members.php?id=-1&catid=261&subcatid=2&leftcatid=71&catitle=Members%20of%20Senate?id=-1&catid=261&subcatid=2&catitle=Members%20Senate> last accessed 20 Oct 2021.

⁷ Ibid.

that throughout the history of the Parliament of Pakistan the situation has not improved substantially. Women have never been adequately represented. In 2010, there were only 22.2% women in Parliament whereas in the year 2011 and 2012, there were 22.5%, in 2013 and 2015 only 20.7%, and barely 20.6% from 2015 to 2018⁸.

A report by the Journal of Research Society of Pakistan⁹ provides a statistical comparison of women elected on general seats in contrast to women appointed on reserved seats. The highest possible number of women elected in the Parliament on general seats has been 16, during the 2008-2013 tenure. There is no doubt that the representation of women has increased over the years due to various reasons including the quota of reserved seats for women. However, it is vital to not lose sight of the rationale behind the reserved seats system. The application of reserved seats quota is meant to act as a temporary arrangement to facilitate the marginalized community to progress enough to ensure equal opportunities solely based on open merit, not having to rely on reserved quotas. The quota system does not exclude women from being considered on open merit against general seats, that is in fact the preferred position. In addition to being elected on general seats, the reserved seats system is in place to serve as a balancing mechanism against the social imbalance due to the lack of equal opportunity available to those marginalized groups that may otherwise not be equally represented on general seats. The true objective of quota system is to improve gender parity between male and female Parliamentarians on general seats¹⁰ through affirmative action.

Furthermore, the consistency of political participation of women is also extremely low. Unlike their male counterparts, the majority of female politicians are only elected once. Data shows,¹¹ 29 women have been elected once, 10 women elected twice, 2 women elected thrice, 2 women elected four-

⁸ Statista Research Department, 'Proportion of seats held by women in parliament of Pakistan 2009-2018' (*Statista*, 26 August 2020) <[⁹ Naveeda Noreen et al., 'An overview of Women Representation in National Assembly of Pakistan and their career persistency' \(2019\) 56 \(2\) *Journal of the Research Society of Pakistan* 214.](https://www.statista.com/statistics/730579/pakistan-proportion-of-seats-held-by-women-in-national-parliament/#:~:text=This%20statistic%20shows%20the%20proportion,about%2022.2%20percent%20in%202009.> last accessed 20 Oct 2021.</p></div><div data-bbox=)

¹⁰ Tahir Malik and Irfan Ghauri, 'How reserved seats for women are reserved for privileged' *The Express Tribune* (Islamabad, 12 July 2018) <<https://tribune.com.pk/story/1755698/1-reserved-seats-women-reserved-privileged>> last accessed 20 Oct 2021.

¹¹ (n 9) 215.

times, 1 elected five-times and only 1 elected six-times. As reflected by these statistics, the persistency of women in the National Assembly on general seats decreases by each re-election. The same is reflected in the data¹² for Women Parliamentarians on reserved seats: 198 women have been elected once, 66 women elected twice, 36 elected thrice and merely 8 elected four times.

Even though women's participation in the political sphere has considerably increased over the passing years, women have not been able to secure adequate representation in the Parliament. The little progress which has taken place is largely due to reserved seats and not to general seats, which reflects the societal resistance and pushback against accepting more women in decision-making positions. Some of the major reasons of the lack of representation of women in the Parliament include the patriarchal mindset embedded within the Pakistani society which resists accepting women in decision-making positions, the male-dominated political system giving preference to a man even where the woman is more qualified, the traditional gender roles and gender-based discrimination.

In more than 70 years of its existence, Pakistan has not been able to ensure equal opportunity for the representation of women in Parliament. Today, from amongst 442 seats of Parliament (National Assembly and the Senate collectively), a total of only 89 women can sit in the Parliament.

B. Executive Branch

The constitutionally created positions of the executive branch include the Prime Minister, the Federal Ministers, Ministers of State and the Advisors.

The Prime Minister is elected through voting by the Members of the National Assembly who then advises the President of Pakistan regarding the appointment of the Federal Ministers and the Ministers of State who are also members of the Parliament, and Advisors. Currently, there are 27 Federal Ministers,¹³ 4 Ministers of State¹⁴ and 4 Advisors.¹⁵ Among all three tiers, there are a total of 4 women – 3 as Federal Ministers and 1 as a Minister of State. This adds up to a mere **11 percent** of women at the top tier of the Executive branch.

¹² Ibid, 216.

¹³ Federal Ministers, National Assembly of Pakistan <http://www.na.gov.pk/en/fmins_list.php> last accessed 20 Oct 2021.

¹⁴ Ministers of State, National Assembly of Pakistan <http://www.na.gov.pk/en/smins_list.php> last accessed 20 Oct 2021.

¹⁵ Advisors, National Assembly of Pakistan <http://na.gov.pk/en/advisors_lists.php> last accessed 20 Oct 2021.

	TOTAL APPOINTED	WOMEN
Federal Ministers	27	03
Ministers of State	04	01
Advisors	04	00
Total	35	04

Table 2. Women Representation within the Executives

It is pertinent to mention that the connection between the three pillars of the governance structure becomes more evident than ever at this point. The Ministers are appointed from within the members of Parliament. The lack of women’s representation in the Parliament, hence as a consequence, is bound to reflect and contribute to the lack of women’s representation in the Executive branch. Since the pool of women within the parliamentary body is extremely limited, it has a ripple effect amplifying the same lack of representation within the Executives.

The tragedy of gender imbalance is contoured when 49 percent of the population is subjected to not just the laws made by a Parliament comprising 80 percent of male legislators, but the execution is also left at the behest of executives, 89 percent of whom are men. This leads to a lack of trust between the state and its citizens. To address the increased filtration and systematic elimination of the female perspective, it is crucial to bring the conversation around gender parity to the mainstream and facilitate actual gender sensitization and gender inclusivity.

C. Judicial Branch

The top level of the judicial branch of Pakistan includes the Supreme Court, the High Courts, and the Sharia Court. Jointly, these Superior Courts and their subordinate divisions formulate the entire judicial branch of the state governance.

There are currently 15 sitting judges in the Supreme Court of Pakistan, among whom none is a woman.¹⁶ In the 74-year long history of Pakistan, no female judge has ever been elevated to the Supreme Court of Pakistan. In fact, Pakistan

¹⁶ Honorable Judges, Supreme Court of Pakistan
 <<https://www.supremecourt.gov.pk/judges/honorable-judges/>> last accessed 20 Oct 2021.

is the only country across South Asia to not have had a single female judge at the Supreme Court level.¹⁷

In the High Courts, even though the situation is better than that of the Supreme Court, it is still reflective of only regression and severe gender imbalance. The Lahore High Court¹⁸ has 47 sitting Judges of which only 02 are women. The Sindh High Court¹⁹ has 31 sitting judges with only 02 women judges. The Peshawar High Court²⁰ has a total of 14 sitting judges and only 01 female judge whereas the Balochistan High Court²¹ has 09 sitting judges and not a single woman, same as the Islamabad High Court²² with 09 sitting judges and the Federal Shariat Court²³ with 03 sitting Judges. At the High Court level, Pakistan has altogether 05 women judges out of the 112 appointed judges.

¹⁷ Ahsan Jehangir Khan, 'Representation and the legal community' (*The News*, 17 December 2020) <<https://www.thenews.com.pk/print/759714-representation-and-the-legal-community>> last accessed 20 Oct 2021.

¹⁸ Honorable Sitting Judges, Lahore High Court <https://data.lhc.gov.pk/judges/sitting_judges> last accessed 20 Oct 2021.

¹⁹ Honorable Judges, Sindh High Court, Karachi <https://sindhhighcourt.gov.pk/sitting_judges_body.php> last accessed 20 Oct 2021.

²⁰ Sitting Judges, Peshawar High Court <https://peshawarhighcourt.gov.pk/app/site/35/c/Sitting_Judges.html> last accessed on 20 Oct 2021.

²¹ Sitting Honorable Judges, High Court of Balochistan <<https://bhc.gov.pk/judges/hon-judges>> last accessed 20 Oct 2021.

²² Sitting Honorable Judges, Islamabad High Court <<https://ihc.gov.pk/>> last accessed 20 Oct 2021.

²³ Present Honourable Judges with Date of Assumption of Office, Federal Shariat Court <<https://www.federalshariatcourt.gov.pk/en/sitting-judges/>> last accessed 20 Oct 2021.

	SITTING JUDGES	WOMEN JUDGES
Lahore High Court	49	02
Sindh High Court	31	02
Peshawar High Court	14	01
Balochistan High Court	09	00
Islamabad High Court	06	00
Federal Shariat Court	03	00
Total	112	05

Table 3. Women Representation with the Superior Judiciary

There is a well-established judicial precedent that the senior most Judge of the High Court and the Supreme Court may have the “legitimate expectation” to be appointed as the Chief Justice of that respective Court.²⁴ The concept of legitimate expectation provides a structure to the appointment process. A candidate can formulate an expectation to be treated the same way as the relevant authority has treated others in the similar position, paving a consistent practice. The concept of legitimate expectation holds immense importance as the most common way of being elevated to the Supreme Court from the High Courts is to first be appointed as the Chief Justice of their respective High Court. Appointment as the Chief Justice, in itself, has been a challenge for the female judiciary, there are examples like Justice Khalida Rashid²⁵ and Justice Fakhar-un-Nisa Khokhar²⁶ among others.

The process of the appointment of judges to the Supreme Court, the High Court and the Federal Shariat Court is now governed by Article 175-A of the Constitution of Pakistan²⁷. Even though Article 175-A lays down the process of

²⁴ *Supreme Court Bar Association of Pakistan v Federation of Pakistan and others* PLD 2002 SC 939.

²⁵ Zaeem Mumtaz Bhatti, ‘Women underrepresented in superior judiciary?’ (*Pakistan Today*, 29 July 2019) <<https://archive.pakistantoday.com.pk/2019/07/29/women-underrepresented-in-superior-judiciary/>> last accessed 20 Oct 2021.

²⁶ Ayesha Siddique Khan, ‘Feminization of law and judiciary in Pakistan’ (*The Express Tribune*, 13 September 2020) <<https://tribune.com.pk/story/2263846/feminisation-of-law-and-judiciary-in-pakistan>> last accessed 20 Oct 2021.

²⁷ The Constitution of the Islamic Republic of Pakistan 1973, art. 175-A.

judicial appointments in the superior courts in detail, the gender imbalance in judicial appointment continues.

Due to the extreme discrimination faced by women in law, there are only **05** percent women compared to 95 percent men appointed as judges within the superior judiciary. Courts are the primary source of relief for any citizen. In any conflict, may it be between two individuals or an individual and the state, courts are to provide justice and be a source of relief. No man is above the rule of law which the courts are to ensure. The predicament born out of 95 percent of sitting judges being men cannot be ignored. The drastic imbalance raises problems in practice and amplifies the lack of trust by laywomen to expect a sensitized approach by the judiciary towards crimes committed against women on the basis of their gender. These considerations are important as they contribute to the legal exercise of judicial discretion which can potentially have a very significant impact on the outcome of any given case and consequently, establish judicial precedents which have lasting impacts. The seclusion of women from judiciary has resulted in the absence of the female perspective in jurisprudential development of Pakistan. The law that has been developed through judicial precedent and judicial discretion, especially for matters in relation to women and children would have been much more gender sensitized if the gender perspective was not eliminated.²⁸

A strong perception is created that a judiciary which is not willing to accept women within its own structure and leadership positions cannot be seen by women in general to be sensitive towards the protection of their rights.

D. Rationale

Gender equality is a constitutionally protected right²⁹ but the implementation of this right is left at the behest of structures which have failed to include women time and again. The deep-rooted discrimination has facilitated the constant rise of instances of domestic violence, honor killings, forced marriages, female infanticide, marital rape, gang rape, rape and many other crimes committed against women based on their gender. According to news reports, every 2 hours, a woman is raped in Pakistan whereas convictions for rape cases are as low as

²⁸ (n 25).

²⁹ The Constitution of the Islamic Republic of Pakistan 1973, art. 25-A.

2 percent.³⁰ The Global Gender Gap Report of 2021³¹ ranks Pakistan at 153 out of 156 countries, better than only Iraq, Yemen, and Afghanistan. Uniformed progress at all branches of governance is vital to improve the condition of gender parity in the most effective way throughout the country.

Women form almost 49 percent³² of the total population of Pakistan. For every 105 men, there are 100 women. A country where women form nearly half of its population, it is reasonable to consider half of each branch of governance to be represented by women to address the lack of representative voices in laws impacting women.

Gender parity at all branches of the governance is of utmost importance as it contributes towards shaping a country in its entirety. Since its inception, Pakistan has only been able to progress to the point where only 20 percent of the Legislature, 11 percent of the Executive and 05 percent of the Judiciary comprises of women.

PART 2: Case Study of Iceland

The Republic of Iceland is an ideal case in point to further support the argument in favor of gender parity at all three branches of a state as it is truly reflective of the progress that can be made by improving gender representation.

There are some basic similarities between the core structure of governance between Pakistan and Iceland that are to be highlighted as they contribute towards making Iceland an appropriate practical case-study. Both the countries are governed through three independent branches of the governance – the legislative branch which vests its powers within Parliament, the executive branch which includes the Cabinet and Ministers and the judicial branch which covers the Courts. Additionally, both the countries have a President as the Head of the State and a Prime Minister as the Head of Government along with a multi-party system. Even though Iceland is a very small country with an even smaller

³⁰ Shaikh Abdul Rasheed, 'A woman is raped every 2 hours in Pakistan. How long are we going to let that continue?' (*The Nation*, 24 December 2015) <<https://nation.com.pk/24-Dec-2015/a-woman-is-raped-every-2-hours-in-pakistan-how-long-are-we-going-to-let-that-continue>> last accessed 20 Oct 2021.

³¹ *Global Gender Gap Report 2020* (World Economic Forum 2021) 10, 38.

³² Samaa Web Desk, 'Population census 2017: Men outnumber women in Pakistan' *Samaa* (Islamabad, 25 August 2017) <<https://www.samaa.tv/news/2017/08/population-census-2017-men-outnumber-women-pakistan/>> last accessed 20 Oct 2021.

population³³ compared to Pakistan – there is a lot that Pakistan can understand and learn through the progress Iceland has made over the years.

Iceland has been at the top of the World Economic Forum’s Global Gender Gap index for more than a decade now,³⁴ which means it has the smallest gender gap and the best representation of women in leadership positions in the entire world. Even though Iceland is far from achieving the equilibrium for gender parity, it is surely is the most gender-equal country in the world and the closest to attain gender equality.

Almost half of Iceland’s population comprises of women, just like Pakistan³⁵. However, unlike Pakistan, access to influential positions for women, even though not ideal, is much better. In Iceland, at the legislative branch, 38 percent of the Parliamentarians in 2017 were women.³⁶ At its executive branch³⁷, there were 46 percent women at the post of Government Ministers in the year 2019 and 47 percent as the elected representatives at the local government level in the year 2018. In the judiciary for the year 2018, women constituted 38 percent of the District Judges, 47 percent of the Appeal Court Judges and 12 percent of the Supreme Court Judges.³⁸ Even the incumbent Prime Minister of Iceland is a woman.

³³ Rosamond Hutt, ‘These 10 countries are closest to achieving gender equality’ (*World Economic Forum*, 17 December 2019) <<https://www.weforum.org/agenda/2019/12/gender-gap-equality-women-parity-countries/>> last accessed 20 Oct 2021.

³⁴ (n 32) 6, 10.

³⁵ ‘Population of Iceland 2011-2021, by gender’ (*Statista*, 23 March 2021) <<https://www.statista.com/statistics/594582/total-population-by-gender-in-iceland/>> last accessed 20 October 2021.

³⁶ ‘Women and Men in Iceland 2019’ *Hagstofa Islands/Statistics Iceland* (2020) <<http://hagstofan.s3.amazonaws.com/media/public/2019/bee89182-0be-4072-a164-cd7e13cee176.pdf>> last accessed 20 Oct 2021.

³⁷ ‘Women and men on the same education level have difference average income from work’ (*Statistics*, 8 March 2019) <<https://www.statice.is/publications/news-archive/social-affairs/women-and-men-in-iceland-2019/#:~:text=At%20the%20beginning%20of%202019,the%20newly%20formed%20Appeal%20Court>> last accessed 20 Oct 2021.

³⁸ Ibid.

	PAKISTAN	ICELAND
Population – Women	49%	50%
Legislature – Women	20%	38%
Executive – Women	11%	46.5%
Judiciary – Women	05%	53%

Table 4. Statistical Comparison of Pakistan with Iceland

As reflected by the available data, Iceland has made immense progress towards ensuring better gender balance in all three branches of state governance. This progress is reflected through statistics and practical improvements addressing matters concerning what women want.

In Iceland, the equality of women is protected by law³⁹. The law caters to different challenges faced by women at length and provides legal protection to practical struggles and therefore facilitates real progress. There are laws that cover gender discrimination in direct and indirect forms. This includes addressing the problem of gender-based wage gap and gender-based violence. Furthermore, Iceland obligates public company boards, government councils and committees to have at least 40 percent gender equality and companies with more than 25 employees to have a gender equality program in place. It also bans discriminatory advertising and objectification of women and provides the best maternity and paternity policies in the world. Moreover, Iceland teaches gender equality from as early as the pre-school level right up to university education and bounds educational materials and textbooks to be designed not to discriminate against either sex.

The magnitude of the seriousness of Iceland regarding ensuring gender balance is reflected by their Ministry of Gender Equality. The core purpose of this Ministry is to put in place proper checks and balances for achieving their goals and to act as a watchdog. The Ministry operates through three sub-divisions: Equal Status Council, the Complaints Committee, and a Centre for Gender Equality. It conducts research, advocates, and advertises for the purpose of navigating the public mindset in the right direction and tackles legal, cultural,

³⁹ Por Meghan Werft, ‘7 Laws That Show Why Iceland Ranks First for Gender Equality’ (*Global Citizen*, March 2017) <<https://www.globalcitizen.org/es/content/7-iceland-feminist-law-women/>> last accessed 20 Oct 2021.

historical, social, and psychosocial approaches to gender equality for practical, lasting and grass-root level progress.

There is a deep and revolutionary history that has brought Iceland to where it is now. Change does not just happen on its own, there is a journey involved. A journey from which every country must learn. The “Women’s Day Off”⁴⁰ or “The Long Friday” marked on 24 October 1975 is without doubt one of the most significant days in the history of Iceland. On this day, nearly 90 percent⁴¹ of women in Iceland decided to demonstrate their importance by collectively going on a strike. Instead of going to the office, doing their housework, or performing childcare they took to the streets in thousands to rally for equal rights. Women refused to work, cook, etc for a day. That day changed the way women were seen in the country and helped put Iceland at the forefront of the fight for equality. It marked the beginning of women’s emancipation in Iceland by triggering historic changes.

Only 5 years later, in 1980, Ms. Vigdis Finnbogadóttir became Europe’s first female President and the first woman in the world to have been democratically elected as a head of state. She herself considers her win to have been absolutely impossible had it not been for the women who went out on the streets on 24 October 1975 and liberated women from the false image that had shackled them for so long. Ms. Vigdis went on to hold the office for the next 16 years, setting Iceland on the path to become an increasingly gender-balanced country and to make it a pioneer of gender parity and a role model for what a country can achieve by ensuring equal rights for women. Change of such a magnitude requires collective action and solidarity of human rights defenders – primarily women, political will, and tools such as legislation, gender budgeting and quotas.

The growth that Iceland has experienced can primarily be attributed to three elements: firstly, to the women and human rights defenders who had the courage and zeal to go against the tide by stepping up, challenging and protesting against the norm of power accumulation at the hands of men; secondly, to the women who created the right kind of noise cancelling out the false perceptions created

⁴⁰ Anna H. Yates, ‘Women’s Day Off in Iceland – The Day that Changed Everything’ (*What’s On*, 17 October 2015) <Women's Day Off in Iceland - The Day that Changed Everything | What's On in Reykjavik, Iceland (whatson.is)> last accessed 20 Oct 2021; Steven Johns, ‘The Iceland women’s strike, 1975’ (*libcom.org*, 24 October 2016) <The Iceland women’s strike, 1975 (libcom.org)> last accessed 20 Oct 2021.

⁴¹ Kristie Brewer, ‘The day Iceland’s women went on strike’ (*BBC News*, 23 October 2015) <<https://www.bbc.com/news/magazine-34602822>> last accessed 20 Oct 2021.

by men and making their voices heard which brought forward the challenges women faced which included sexual harassment, abuse and much more; and lastly, women and men who are sharing power at important positions with each other in harmony and supporting each other in the fight for gender equality. All these factors and many more played a significant role in this fight for gender equality. Just like any other country, Iceland also faces cultural, political, social, academic, and economic challenges but its women fought hard to shatter the glass ceilings for a better future. Women in Iceland fought for their rights by empowering themselves with knowledge and wisdom. This is what led to the mass movements of the 1960s and 1970s including the famous Women's Day Off of 1975 – uniting women in their struggle for equal rights and influencing politics.

In the last 45 years – since the October of 1975 – the world has seen what Iceland has been able to achieve. This is what happens when women have equal voices. When women and men form equal parts in the population of a country, they must be equally represented at all major and minor segments of the society: may it be as students, health care workers, teachers, engineers, scientists, lawyers or may it be at the core of governance as part of the judiciary, executive or the legislature. The balance in representation facilitates better understanding, co-existence, and support for each other's individualistic needs. It is only with equal representation for equal people that equal voices can be heard, and equal rights can be ensured.

PART 3: Way Forward

Problems and solutions go hand in hand. While it is important to understand the problems in depth, it is equally important to discuss and develop potential solutions for those problems. Merely contouring the problems with no roadmap to eliminate them is inadequate. It is evident that Pakistan is way behind in the race for gender parity but what needs to be considered now are the steps that can provide short term and long-term solutions to the drastic gender imbalance and help Pakistan become more inclusive, balanced and harmonious.

One of the major elements missing in the debate around ending gender discrimination is the consideration of the role that men have to play in it. To counter gender discrimination, it is important to include men and outline what needs to be done by them. Merely empowering women is not enough. There is a pressing need to revise the school curriculum with a gender lens to address this problem at the grass-root level. What is being taught in schools reinforces stereotypical gender roles on impressionable young minds contributing to

continue the vicious cycle of patriarchy and misogyny. With a gender-neutral curriculum, students will not be prejudiced against the female gender and contribute towards a more accepting and balanced society on the whole.

It is time to accept that conducting gender sensitization trainings for grown men in powerful positions has a very limited practical impact, if any at all. Once the mindsets are developed in a certain way, influencing, or improving them is difficult and unlikely. To counter this, a special course on gender parity and empathy needs to be taught from primary years of education right up to the university level. Those are the years when young minds are shaped forever. It is natural when a properly sensitized youth culture becomes part of the system, it will have a more balanced impact.

The two recommendations stated above are long-term solutions which will take years to practically present the much needed and lasting progress. Meanwhile, there is a need to re-evaluate the quota system for more immediate relief. Either there is insufficient quota set or there is no quota for reserved seats at all. The Parliament needs to increase the reserved seats quota to ensure a fair chance for the opinion of women to be paid any heed. A quota as low as 17 percent in the National Assembly is easily sidelined and the purpose of reserved seats is lost. Reserved seats are meant to make up for the loss of opportunity of the marginalized segments of a society and bring them at par with the rest of the society and facilitate real progress and improve the dynamic of general seats. It has been made evident over time that with the current negligible amount of quota, it is easy for the majority to suppress the voices of the extreme minority of mere 17 percent, therefore, the Parliament is unable to inject gender parity within its structure. It is imperative that bigger quotas for women be set for the Parliamentary seats.

Another useful factor would be the establishment of a Ministry for Gender Parity, similar to that of Iceland which can focus on improving gender representation nationally. The Ministry will work out the dynamics and details of all the initiatives taken and to be taken to increase gender parity. It will provide checks and balances and coordination for such initiatives. The Ministry can also be responsible to conduct regular surveys to provide evidence-based suggestions and structures for progress and provide a source of relief for women suffering from gender discrimination at different levels, for different reasons. The establishment of such a ministry will be a landmark achievement for Pakistan.

Laws that are made to promote gender inclusivity need to be revisited regularly to study the practical impact of those laws and analyze whether it is in compliance with the rationale of the law. One such law is the section 206 of the Elections Act 2017⁴² which mandates each political party to incorporate at least 5 percent representation of female candidates in their final list of selected candidates for elective offices including Parliament. It has been witnessed that this 5 percent quota was utilized by allotting seats in areas where the relevant party had near to no chance of winning the candidacy and thus fulfilled the bare minimum of 5 percent while not giving women a fair chance and disregarding the rationale behind quotas. The practical outcome of section 206 reflects the importance of increasing the percentage allotted to women. It is important to ensure the implementation of quotas to be in-line with their intended outcomes – in ways that the quota is not filled through tricks but rather facilitate real representation.

Furthermore, the lack of women's representation in the bureaucracy (executive branch) can be reduced through two mediums: firstly, by creating awareness regarding a career in bureaucracy in primary and middle schools to educate young girls about this possibility; and secondly, through increasing the incentives given to women to join this field. A focused approach will help navigate young minds towards careers in bureaucracy through the Central Superior Services (CSS) exams which will contribute towards balancing the pool of people within the executive branch and therefore bring forward a more gender balanced approach.

Lastly, there is a pressing need for the nomination and appointment process of judges in the superior judiciary to be made transparent. The factors considered for appointments and the entire selection process needs to be made public. The arbitrary process of nominations and appointments have negatively impacted women who qualify to be elevated to senior positions within the Judiciary. With a transparent process where the factors considered for appointment and rejection of candidates is made public, it will be easier to ensure fair play and will make gender-based vetting difficult at the very least.

With these recommendations and other positive steps in place, Pakistan can progress towards a more gender-balanced country. However, for now, laws and rules are being made by men for women. The voices and opinions of women are being snubbed or completely ignored. What is lagging is the proactive and constructive effort to substantially improve the prevailing situation. Along with

⁴² Elections Act 2017, s. 206.

long-term steps, there are many short-term changes which will have lasting impact but the first step for any real progress is the acceptance of the existence of the problem – there is a lack of representative voices in laws impacting women and that needs to change not just for women but for a better, more inclusive, and prosperous Pakistan. If there is one thing that is undisputed, it is that Pakistan cannot progress without empowering its women. In the words of late Quaid-e-Azam Muhammad Ali Jinnah, *‘No nation can rise to the height of glory unless your women are side by side with you. We are victims of evil customs. It is a crime against humanity that our women are shut up within the four walls of the houses as prisoners. There is no sanction anywhere for the deplorable conditions in which our women have to live.’*

Protecting Childhood in Pakistan: An Overview of Laws Protecting Children

*Abira Ashfaq

Abstract

This article reviews child protection laws that seek to prevent exploitative child labor and violence against children, enable their constitutional right to education and shield them in the criminal justice system. My focus will be to provide constructive analysis of these laws and how these can be strengthened substantively if inconsistencies and conflicts are reduced. For example, multiple provisions in the criminal laws refer to various age and gender criteria which are not related to practical protection of children; all provinces do not prohibit child marriage, and this further hinders child protection; and laws mandating education of children between the ages of five and sixteen run contrary to labor laws that permit employment of children above fourteen. This article posits that child protection in general can also be enhanced if laws prohibiting child labor and marriage and making education compulsory are implemented effectively and holistically along with other laws protecting children from crime and violence. It begins with an evaluative overview of the new ZARRA law of 2020 which aims to improve recovery of missing and kidnapped children and leads into other inter-connected criminal laws, juvenile justice, institutional arrangement for protection, right to education, and labor laws.

Introduction

In 2010, the Parliament devolved several matters including child protection to the provinces. Since that time, provincial assemblies and occasionally the National Assembly, on matters of national concern, enacted an array of child protection laws. These were passed to prevent exploitative child labor and violence against children, enable their right to education and protect those

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accused of crimes in the criminal justice system. While many of these laws are enacted so that Pakistan can meet its international obligations under treaties it has ratified, especially the Convention on the Rights of the Child 1990 (hereinafter referred to as “CRC 1990”)¹, and reflect a gradual embrace of the uniform age of childhood, there are still deficiencies in the substantive law and their application. Article 1 of the CRC 1990 states a ‘child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier’. This paper is an evaluative overview of the laws enacted to protect children from violence and how they interplay with other child protection legislation in the areas of child marriage, education, labor, and the juvenile justice system. Some of these child protection laws have disparate age and gender arrangements instead of a uniform equal protection regime of all children under the age of eighteen. This creates ambiguities making uniform application of the law difficult and inconsistent. Hence for better child protection, the state must evaluate age and gender anomalies, irregularities, and potential conflicts among laws in light of data and research from child rights advocates and guidance from international human rights bodies.

Overview of Laws at the Federal Level

The Constitution of the Islamic Republic of Pakistan has several provisions addressing the rights of children.² Article 11 states that no child under the age of fourteen years shall work in ‘any factory or mine or any other hazardous employment’. Article 25A, added in 2012, states that ‘the State shall provide free and compulsory education to all children of the age of five to sixteen years’ while Article 25 guarantees equality before the law of all citizens, prohibits ‘discrimination on the basis of sex’ and allows for ‘special provision’ for the protection of women and children. Article 26 prohibits discrimination on access to public places, and that allows for special provision for women and children as well.

Although Parliament devolved the subject of child rights to the provinces through the passage of the Eighteenth Amendment of 2010, the federal government, from time to time, amends criminal laws to protect children as it is a national subject. Some recent laws pertaining to children include additions to the Pakistan Penal Code 1860 (hereinafter referred to as “PPC 1860”) which pertain to new crimes of sexual violence against children, a revised federal law to protect children who enter the criminal justice system accused of offences,

¹ Convention on the Rights of the Child 1989.

² Constitution of the Islamic Republic of Pakistan 1973.

and legislation to strengthen police investigation and recovery of children who are kidnapped. Article 19 of the CRC 1990 requires state parties to ‘take all appropriate legislative, administrative, social and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.’ Recently enacted laws are an indication of Pakistan’s endeavors to protect children and prevent violence directed against them.

Zainab Alert, Response, and Recovery Act and Kidnapping in the PPC

In 2020, the Parliament enacted the Zainab Alert, Response, and Recovery Act (hereinafter referred to as “ZARRA 2020”) named after a girl from Kasur who was a victim of a heinous kidnapping in 2018. This Act creates a new state agency called the Zainab Alert, Response, and Recovery Agency. The Agency’s primary purpose is to coordinate and promote investigation of cases of missing or abducted children by, among other things, sharing of alerts on television, radio and social media, operation of a toll free helpline to report such cases, and conducting research on the geographical patterns of kidnapping and abduction.³ The parliament’s expansive new definitions of the terms ‘abduction’ and ‘missing child’ are intended to address a defect in the manner in which law enforcement officials dealt with such cases. Police officers routinely entered names of children reported missing in the daily register or the ‘*roznamcha*’ instead of presuming that a cognizable offence such as kidnapping might have been committed that would require expeditious investigation.⁴ This informal and inactive approach, entrenched through decades of police practice, meant police did not promptly investigate such cases and children’s chance of recovery was significantly lowered. At risk abducted children in the meanwhile could be forcibly moved far from their home or subjected to violence because of the failure of the police to file the First Information Reports (FIRS) in a timely manner.

In ZARRA 2020, the Parliament defines a ‘missing child’ as anyone whose whereabouts are unknown or a runaway regardless of time elapsed and

³ Zainab Alert, Response, and Recovery Act (ZARRA 2020), s. 3, 5.

⁴ Such problems exist in other South Asian countries as well. In a landmark decision, *Bachpan Bachao Andolan v. Union of India & Others* [2013], Supreme Court of India, the court underscored the importance of filing timely FIRs in cases of missing children and instructed police stations across the country to compulsorily register missing complaints of any minor by presuming a cognizable offence (kidnapping usually) has been committed and appoint a special police officer to handle complaints of juveniles. It noted that in 3000 cases of missing children in year 2011, only 500 FIRs were filed while the others remained untraced and ‘mere slips of paper in police stations.’

circumstances.⁵ This imposes a responsibility on police officers to investigate if a child's absence is reported regardless of how long they've been missing. Abduction is defined in three parts and includes: 1) the use of 'will, force, threat, violence, coercion, or deceit to induce child under eighteen to move from one place to another'; 2) kidnapping as defined in PPC 1860; or 3) to have unlawful custody of a child or remove a child from custody of parent or lawful guardian.⁶ Police must now treat cases of missing and abducted children as cognizable and thus investigate them to avoid a penalty.⁷

Effective enforcement of this law would significantly improve child recovery as police officers would be discouraged from exercising discretion as to whether a case should be investigated or not. Discretion is subjective and reflects stereotypes or the individual officer's bias concerning the reporting person and the child's class, gender, religion, and ethnicity. A common perception found among law enforcement officers is that only very young children can be kidnapped and that children are usually kidnapped for ransom. Police officers often make assumptions that ultimately harm investigation. They assume adolescents cannot be legally kidnapped if they go willingly with an adult, they are familiar with, that if a teenage girl is missing, she must have eloped with someone and advise parents to wait for news of a wedding (*nikahnama*), and if a teen boy is missing, he is a runaway, and no crime can be registered as he did so of his own volition.⁸

Substantively, the law is not lacuna free. Although it specifies that all children under eighteen are within its protective ambit, its linkage to the definition of abduction to provisions in the PPC 1860 raises concerns.⁹ The code contains several kidnapping provisions, at least four of which cover children; but these four do not extend consistent protection to all children and set varying age and gender criteria for different children, which makes it incompatible with the definition of childhood in ZARRA 2020.¹⁰

⁵ ZARRA 2020, s 2(j).

⁶ ZARRA 2020 s 2(d).

⁷ ZARRA 9020 ss 8 and 9.

⁸ Interview with Mohammad Ali, President, Roshni Helpline (Karachi, Pakistan, 22 January 2021).

⁹ Zainab Alert, Response, and Recovery Act (ZARRA 2020), s 2 (d)

¹⁰ An earlier draft of the ZARRA Bill passed by National Assembly in 2019 contained amendments to s 364A (kidnapping or abducting a person under the age of fourteen) and s 369 (kidnapping or abducting child under ten years with intent to steal) that changed the age specified from fourteen and ten respectively to eighteen.

Section 364A (kidnapping or abducting a person under fourteen) of the PPC 1860, protects only children under the age of fourteen and leaves those between fifteen and eighteen outside its ambit. The mental fault or culpability (*mens rea*) element for this offence is that the kidnapper intends one or more of the following - that the child be murdered, subjected to grievous harm, slavery, or lust of another or be at risk of such harm. Similarly, Section 369 of the PPC 1860 criminalizes the abduction of a child under the age of ten with the intention of that movable property be dishonestly taken from this victim. Furthermore, Section 366A of the PPC 1860 (procurement of a minor girl) protects only girls under the age of eighteen. This section makes punishment with imprisonment and fine liable on whosoever 'induces any minor girl under the age of eighteen years to go from any place or to do any act' with the intention that she be forced or seduced to illicit intercourse or knowing that there is likelihood of the same. Section 361 of PPC 1860 (kidnapping from lawful guardianship) criminalizes the taking or enticing of a minor from their lawful guardians and covers boys under the age of fourteen and girls under the age of sixteen.'

The laws appear to provide enhanced protection to girls and younger children and resonate with a perception that such children are more vulnerable. Such laws are compatible with Article 25 of the Constitution which allows the state to introduce special protection for women and children. The CRC 1990 recognizes that childhood is not immutable and as children grow up states must be cognizant of their 'evolving capacities' for decision-making.¹¹ The CRC Committee has recommended that the more children gain experiences and understanding, the more parents and guardians have to 'transform direction and guidance into reminders and advice and later to an exchange on an equal footing.'¹²

However, criminal law requires consideration of 'evolving capacities' as well as how children of different genders and ages face uniquely different risks. Criminal law provisions for kidnapping should not have multiple age and gender differences if these are not informed by current trends in crimes against children. Younger children are more likely to be exploited in begging and older children face the risk of sexual and labor exploitation. Vulnerability to crime is

¹¹ CRC 1990, art. 5.

¹² UN Committee on the Rights of the Child, *The right of the child to be heard* (General Comment No 12, CRC/C/GC/12, 2009) para 84. The CRC Committee has issued a general comment on the 'Right to be Heard' (Article 12 of CRC 1990) and explains how this right is one of the four fundamental values of the CRC. The others are right to non-discrimination, the right to life and development, and the primary consideration of the child's best interests, para 4.

also linked to age, gender, social status, disabilities, minority status, and life experiences. Violence against children is gendered, yet all children are at risk of violence. Boys from low income and poor backgrounds are more likely to be employed outside the house or move autonomously in public spaces while girls have more restrictions imposed on their mobility. Girls may be more vulnerable to sexual violence at home while boys in contrast are more likely to suffer harm in the criminal justice system¹³ and public spaces. In a recent case a minor Christian girl was sexually groomed by a visitor to her house.¹⁴ Boys and transgender children may be procured for sexual exploitation in the manner envisioned in section 366A of PPC 1860 which currently only applies to girls. Younger children may be more susceptible to deception, but there is no reason to assume children of ages eleven to eighteen are not kidnapped and deprived of property. Exclusion of certain categories of children from these sections runs against the spirit of the equal protection clause of Article 25 of the Constitution and the CRC 1990 and weakens implementation of ZARRA 2020.

In 2019, Roshni Helpline recorded approximately 500 cases of missing children in Karachi out of which 300 were those of boys and most were between the ages of eleven and eighteen.¹⁵ Sahil, an organization based in Islamabad that works on child rights, reported 3,800 cases of child sexual abuse in Pakistan in 2019 and identified boys between the ages of six and fifteen and infant girls and those between ages sixteen and eighteen as most vulnerable.¹⁶ Thus statutory sections with multiple gender and age differentials are incongruent to practical protection of children at risk and not in their best interest unless supported by evidence. The CRC committee has stated that ‘appropriate’ legislative, administrative, social, and educational measures to address violence against children in Article 19 of CRC 1990 does not mean ‘acceptance of some forms of violence’ and requires an ‘integrated, cohesive, interdisciplinary, and coordinated’ approach to prevention, investigation, reporting and referrals.¹⁷

¹³ UN Committee on the Rights of the Child, *The right of the child to freedom from all forms of violence* (General Comment 13, CRC/C/GC/13, 2011) paras 19, 72(b).

¹⁴ Ishaq Tanoli, ‘Underage Marriage: Aarzo is 14 years old medical board tells SHC’ *Dawn* (9 November 2020) <<https://www.dawn.com/news/1589446>> last accessed 6 Feb 2021.

¹⁵ Mohammad Ali (n 8).

¹⁶ Zehra Abid, ‘In Pakistan’s Kasur, child rapes and killings continue unabated’ *Al-Jazeera* (Kasur, 28 October 2019) <<https://www.aljazeera.com/features/2019/10/28/in-pakistans-kasur-child-rapes-and-killings-continue-unabated>> last accessed 6 Feb 2021.

¹⁷ UN Committee on the Rights of the Child, *The right of the child to freedom from all forms of violence* (General Comment 13, CRC/C/GC/13, 2011) paras 39.

Sexual abuse of Minors

Since 2015, media have reported on the pervasive and rampant nature of sexual crimes against children in Pakistan after several such incidents of child sexual abuse were revealed in District Kasur of Punjab. Investigation revealed the operation of criminal gangs involved in child pornography.¹⁸ Parliament responded with the Criminal Law (Second Amendment) Act 2016 (CLA 2016). This act added crimes to the Pakistan Penal Code 1860.¹⁹ In 2011, Pakistan had also ratified the Sale of Children, Child Prostitution, and Child Pornography, an Optional Protocol to the CRC.²⁰ Hence the passage of these laws was an expedient first step to codify some legal protections contained in this instrument.²¹

Section 292A of the CLA 2016 criminalizes seducing a child; its *actus reus* has two alternative components – one, seducing a child with the intent to involve them in any sexual activity or two, exposing them to any obscene or sexually explicit material. There is no *mens rea* or mental fault requirement for exposure to obscene content. The section does not mention an age bracket for enforcement. Section 292B criminalizes child pornography or ‘visual depiction’ of identifiable children in sexually explicit conduct. The section holds consent of the child, their parent or legal guardian immaterial. Similar to 292A, it does not refer to age and uses the term ‘minor boy or girl’. It is likely to be interpreted as a strict liability offence as it does not have an explicit *mens rea* requirement. The sheer act of making pornographic content with a child where they are identifiable, regardless of parental or their consent, is a criminal act.

¹⁸ Zehra Abid (n 15); Salman Masood, ‘Rapes and Killings of Children Haunt a Corner of Pakistan’ *The New York Times* (Chunian, 3 October 2019) <<https://www.nytimes.com/2019/10/03/world/asia/pakistan-child-rapes-killings-kasur.html>> last accessed 6 February 2021.

¹⁹ The Criminal Law (Second Amendment) Act 2016 (CLA 2016), ss 82 and 83, also amends the age of criminal responsibility of a child from seven to ten (s 82). The old section 83 deemed a child between seven and ten ‘who has not attained sufficient maturity of understanding to judge’ was incapable of an offence and CLA 2016 changes these ages to twelve and fourteen respectively.

²⁰ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 25 May 2000, entered into force 18 January 2002) UNTS Vol. 2171 p. 227.

²¹ The Optional Protocol (n 20), Article 3 requires that, as a minimum, states include in their criminal or penal law, *inter alia*, these activities: sale of children for sexual exploitation, child prostitution, and pornography. Other state obligations include extradition for prosecution for these crimes (Art. 5(1)), and ‘measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process’ (Art. 8).

Section 377A in the CLA 2016 criminalizes ‘sexual abuse’ and unlike the other three offences, this section specifically mentions age and extends protection to all children under the age of eighteen. The *actus reus* is employing, using, forcing, enticing, or coercing any person ‘to engage in fondling, stroking, caressing, exhibitionism, voyeurism or any obscene or sexually explicit conduct or stimulation of such conduct either independently or in conjunction with other acts.’ Like section 292A (seducing a child), it does not have an express *mens rea* requirement. It also holds consent of a person under the age of eighteen as irrelevant. Section 328A criminalizes ‘cruelty to a child’ and uses the phrase ‘child’ and does not refer to age. The *actus reus* in this section is the *willful* assault, ill treatment, neglect, or abandonment of a child or an ‘omission or a commission that results in or has, potential to harm or injure the child by causing physical and psychological injury’ to the child.’ It does not have an overt *mens rea* and any deliberate cruelty, through action or inaction, is punishable under this provision.

Including references to the universal age of childhood kidnapping, rape, and sexual abuse sections of the PPC 1860 would make these offences more precise and aid police investigation and criminal prosecution. Adding language in each provision deeming consent immaterial would also be helpful for police officers in registering crimes and investigating them accordingly. Precise legislative guidance on how consent is vitiated because of age, lack of understanding, duress, threats, coercion, disability, and deception, would also improve application of these laws.²² A person does not make a truly informed choice when they do not have the freedom and power to choose. Moreover, making child rape sections in the PPC also conform in terms of age with other child protection laws would strengthen them. Section 375 (v) of the PPC 1860 renders consent of a girl under sixteen immaterial. This section too should ideally refer to the universal age of eighteen. Conflict also arises with child marriage. Sindh has specified the age of eighteen for both boys and girls while the Child Marriage Restraint Act 1929 sets it at eighteen for boys and sixteen for girls.²³ In cases of minor girls over the age of sixteen, police officers would be in a legal quandary; if they follow ZARRA 2020, they would presume the child is missing or abducted, but they are within legal limits to assume, in the alternative, that the child has contracted a marriage. Such conflict in the laws undermines

²² Cf to UK legislation, Sexual Offences Act 2003, ss 74, 75, and 76 on consent. S 74 states that ‘a person consents if he agrees by choice and has the freedom and capacity to make that choice’, s 75 contains evidential presumptions on consent and s 76 conclusive presumptions on consent.

²³ Sindh Child Marriage Restraint Act 2013; cf to Child Marriage Restraint Act 1929

investigation which is further complicated by the fact that precise ages of children are often unknown and birth registration is very low.²⁴

Child Protection Institutions

Effective child protection requires a holistic approach which means child protection laws and institutions regulating marriage, prohibiting employment, and mandating education are funded, mobilized, and synchronized with one another. The CRC Committee has recommended that primary prevention of violence against children is ‘through public health, education, social services, and other approaches.’²⁵ In their General Comment from 2011, they aspire that states ‘overcome isolated, fragmented and reactive initiatives’ to child protection and prevention of violence and eliminate violence through ‘comprehensive child rights-based caregiving and protection measures’.²⁶ In the last decade, the provinces have passed several laws on children’s rights in the area of marriage, education, and labor. These laws, taken in aggregate, envision an overall protection regime for children at risk and could facilitate inter-sectoral referrals.

Provinces have legislated the formation of child protection bodies and institutional mechanisms for children who need protection. Each province brings a unique definition of a child at risk and in need of protection as those who are susceptible to or victims of various forms of violence. The Sindh Child Protection Authority Act 2011 expressly includes, *inter alia*, children in need of ‘special protection’ as those exposed to exploitative labor, beggary, human trafficking, sale and use of drugs, armed conflict, those without primary caregivers, or those infected with HIV or AIDS.²⁷ The Balochistan Child Protection Act 2016, echoing language from CRC 1990 guidance on ‘best interests of a child’, provides an expansive definition of violence on children that includes ‘maltreatment’, ‘neglect’, ‘physical’, ‘sexual abuse’ and ‘mental

²⁴ Child Rights Movement, *Implementing Child Rights in Pakistan: Alternative Report for UN CRC (5th Periodic Report, 2015)* para 30. Pakistan ‘lacks a comprehensive, efficient and universal system of birth registration with its birth registration rate estimated to be one of the lowest in the world, about 30% overall. From 2009 to 2013 even fewer children, a mere 27%, have been registered according to UNICEF.’

²⁵ UN Committee on the Rights of the Child, *The right of the child to freedom from all forms of violence* (General Comment 13, CRC/C/GC/13, 2011) para 3(g).

²⁶ *Ibid* paras 11(c), (d), and (e).

²⁷ The Sindh Child Protection Authority Act 2011, s 2(c).

violence’.²⁸ ‘Mental violence’ is further elaborated and includes scaring, terrorizing, threatening, denying emotional responsiveness, mental health, medical, and educational needs, or placing in solitary confinement. Sexual abuse and exploitation includes internal and external trafficking, prostitution, and forced marriage.²⁹ The Khyber Pakhtunkhwa (KP) Child Protection and Welfare Act 2010, (amended in 2016 and 2018), has a detailed definition of a ‘child at risk’ and includes orphans, those with disabilities, children of migrant workers, children living or working on the street or in brothels, those living in extreme poverty, those born in jail or imprisoned with mothers, and children whose parents are unfit or incapacitated.³⁰ The 2010 KP Act deems a ‘child in conflict with the law’ to be a ‘child at risk’ as well.³¹ It sets up courts for children’s protection and guardianship and also sets forth penalties for child offenders. The penalties refer to the Juvenile Justice Ordinance 2000 (JJO 2000) with different penalties for children between twelve and fifteen versus those between fifteen and eighteen overlap and possibly conflict with a newly enacted federal juvenile justice law.

In 2018, the Parliament enacted the Juvenile Justice System Act 2018 (JJSA 2018) which superseded the JJO 2000. The latter established juvenile courts among other things. In line with the universal definition of child given in Article 1 of the CRC, this act protects all children under the age of eighteen. Some of its key protections include provision of free legal aid for child victims, special courts that conduct *in camera* trials of juvenile defendants, mandatory informing parents or legal guardians and probation officers of a child’s arrest, easy acquisition of bail, and lighter rehabilitative or restitution-based sentences.³² There is an absolute ban on capital punishment for a person who committed a capital offence during the age of juvenility.³³

This act purports to bring Pakistan in conformity with Articles 37 and 40 of the CRC 1990 in ensuring that the juvenile justice system serves the best interest of the child, and that arrest, detention, and imprisonment of a child are used only as a matter of last resort and capital punishment and life sentence without

²⁸ Cf to UN Committee on the Rights of the Child, *The right of the child to freedom from all forms of violence* (General Comment 13, CRC/C/GC/13, 2011) paras 20, 21, and 22 on neglect, mental, and physical violence.

²⁹ The Balochistan Child Protection Act 2016, ss 2 (r) to (w).

³⁰ The Khyber Pakhtunkhwa Child Protection and Welfare Act of 2010, s 2(e).

³¹ *Ibid*, s 2(e)(i)

³² Juvenile Justice System Act 2018 (JJSA 2018), s 3 (legal aid), s 4 (juvenile court), s5 (arrest), s 6 (bail), s 9 (disposal), and s 11(trials).

³³ *Ibid*, s 16

possibility of release are never imposed for crimes committed when a person was under the age of eighteen.³⁴

However, problems persist in the institutionalization of rights in the juvenile justice system. Adolescent girls are more likely to be detained with adult women and transgender girls with adult men;³⁵ probation officers do not perform tasks delegated to them in the act; police and medical-legal officers not ideally sensitized to juvenile detainees, and police stations are often too small to accommodate these defendants. Metropolitan cities of Pakistan such as Karachi are more successful in enforcing juvenile justice laws compared to smaller cities. Moreover, these are better implemented when judges, advocates, and organizations (situated in these cities) champion them.³⁶ Building infrastructure and capacity of the various bodies prescribed in the plethora of federal and provincial laws enacted after the 18th Amendment, would be instrumental in protecting children.³⁷

Prohibiting Child Marriage

UNICEF estimates that ‘21 percent of Pakistani girls are married by the age of 18, and 3 percent before 15’.³⁸ Early age marriage adversely impacts the health, education, and employability of the children involved specially girls. Girls are likely to suffer domestic violence at home, experience decreased mobility, and

³⁴Human Rights groups highlighted that the trial of children under the Anti-Terrorism Act 1997 in special courts violated their CRC Article 37 and 40 rights. See The Institute of Social Justice, ‘Trial of children under the Anti-Terrorism Courts’ *The Institute of Social Justice* (Islamabad, 8 February 2013) <<http://www.isj.org.pk/trial-of-children-under-the-anti-terrorism-courts/>> last accessed 1 May 2021.

³⁵ Transgender Persons (Protection of Rights Act) 2018, s 6 requires ‘separate prisons, jails, confinement cells’ for transgender persons.

³⁶ Mohammad Ali (n 8); see more on children in the juvenile justice system in Human Rights Watch, *Prison Bound: The Denial of Juvenile Justice in Pakistan* (Human Rights Watch 1999). See Justice Neelofer Shahnawaz’s role in promoting juvenile courts and rights in Karachi.

³⁷ See Child Rights Movement, *Implementing Child Rights in Pakistan: Alternative Report for UN CRC* (5th Periodic Report, 2015) paras 5 and 6. The CRM highlights that bodies set up for monitoring and coordination of children’s rights do not have resources, capacity, and budget allocation. It reports that ‘these bodies have little power to enforce strategies, decisions and their implementations’ and that provincial bodies, like the Sindh Child Protection Authority, struggle with administrative issues and provincial mechanisms of the federal body, the National Commission on Child Welfare and Development (NCCWD) ‘lack clarity, roles and responsibility’.

³⁸ Saroop Ijaz, Time to End Child Marriage in Pakistan, (*Human Rights Watch* 9 November 2018) <https://www.hrw.org/news/2018/11/09/time-end-child-marriage-pakistan>

drop out from school.³⁹ The Convention Against all Forms of Discrimination against Women 1979 (CEDAW 1979) calls on countries to legislate a minimum age for marriage and make the ‘registration of marriages in an official registry compulsory’.⁴⁰ The CEDAW Committee ‘considers that the minimum age for marriage should be 18 years for both man and woman’ and recommends that different ages of marriage for boys and girls⁴¹, based on assumptions that girls have a different rate of intellectual development or that their intellectual and physical development is immaterial at the time of betrothal, be abolished.⁴² This may run contrary to some religious and traditional views but is sound policy advice.⁴³ Research shows that countries with strict laws prescribing eighteen as the official age of marriage, in accordance with international law, do better in reducing adolescent fertility.⁴⁴

Sindh is the only province to have specifically legislated against child marriage after 2010 by enacting the Child Marriage Restraint Act 2013 that follows CEDAW recommendations.⁴⁵ It applies to both boys and girls and renders any

³⁹ UN Committee on the Elimination of Discrimination against Women and the UN Committee on the Rights of the Child, *Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices* and *Joint general comment No. 18 of the Committee on the Rights of the Child and joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women on harmful practices* (CEDAW/C/GC/31/CRC/C/GC/18, 2014) para 22.

⁴⁰ CEDAW 1979, art. 16 (2); Pakistan ratified CEDAW on December 3, 1996. The CRC 1990 does not set a minimum age for marriage but does require that states register births as a way of controlling child marriage.

⁴¹ Child Marriage Restraint Act 1929 (applicable in KP, Balochistan, and Punjab) sets eighteen years for boys and sixteen years for girls.

⁴² UN Committee on the Elimination of Discrimination against Women, *Equality in marriage and family relations* (General Recommendation No. 21, HRI/GEN/1/Rev.9 (Vol II) 337, 1994) paras 36 and 38.

⁴³ Kalbe Ali, ‘CII endorses Underage Marriage’ *Dawn* (Islamabad, 22 May 2014) <<https://www.dawn.com/news/1107849>> last accessed 6 Feb 2021; see also APP, ‘Senate Passes Bill to Fix marriage Age as 18 for Girls’ *Pakistan Today* (Islamabad, 29 April 2019). <<https://archive.pakistantoday.com.pk/2019/04/29/senate-passes-bill-to-fix-marriage-age-as-18-for-girls/>> last accessed 6 Feb 2021. Although the Senate has passed a bill regulating child marriage, it did not become law possibly because of opposing views on a national age for marriage.

⁴⁴ Minzee Kim, Elizabeth Heger Boyle, Wesley Longhofer, Hollie Nyseth Brehm, ‘When Do Laws Matter? National Minimum-Age-of-Marriage Laws, Child Rights, and Adolescent Fertility, 1989–2007’ (2013) 47 (3) *Law & Society Review* 587, 590-591.

⁴⁵ The Sindh Child Marriage Restraint Act 2013 repeals the Child Marriage Restraint Act 1929 for the province of Sindh.

marriage where one party is under eighteen a crime and hence voidable.⁴⁶ Those who can be held responsible for such offences include a man if he is older than eighteen years and marrying a child, anyone who solemnizes and facilitates the marriage and the parents or lawful guardians of the child.⁴⁷ Parents are liable if they do an act promoting or permitting solemnization; their omissions may also be punishable as there is a rebuttable presumption that parents are liable for negligently failing to prevent a marriage.⁴⁸ The court has power to issue an injunction to prevent such marriages.⁴⁹

Balochistan and Khyber Pakhtunkhwa have not passed a law banning child marriage but have referred to it in other instruments. Balochistan's Child Protection Act 2016 classifies 'forced marriage' as a form of sexual abuse. Although the Act does not elucidate the meaning of the word 'forced', CEDAW and CRC committees jointly commenting on harmful practices have stated that child marriage, where one party is under eighteen, is 'forced marriage' as 'one or both parties have not expressed full, free, and informed consent'.⁵⁰ The Khyber Pakhtunkhwa Child Protection and Welfare Act of 2010 does not criminalize child marriages and simply states protection against child marriage 'shall be provided in accordance with federal laws in vogue on the subjects.'⁵¹

Without a uniform age of marriage, girls in Pakistan, have unequal legal protection. Implementation of other laws such as ZARRA 2020 and criminal laws protecting children from violence is also weakened. Police fall prey to stereotypes and evade lodging complaints of missing girls and presume a valid marriage has ensued. Discourse and older laws marking puberty as a sufficient indicator for marriage, as opposed to a legislated age, leads to anarchy and confusion in enforcement.⁵² This is compounded by missing birth registration

⁴⁶ Sindh Child Marriage Restraint Act 2013, ss 2(a) and (b).

⁴⁷ Ibid, ss 3, 4 and 5.

⁴⁸ Ibid, s 5(2).

⁴⁹ Ibid, s 11.

⁵⁰ UN Committee on the Elimination of Discrimination against Women and the UN Committee on the Rights of the Child, *Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices* and *Joint general comment No. 18 of the Committee on the Rights of the Child and joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women on harmful practices* (CEDAW/C/GC/31/CRC/C/GC/18, 2014) para 20.

⁵¹ The Khyber Pakhtunkhwa Child Protection and Welfare Act of 2010, s 30.

⁵² See Child Rights Movement, *Implementing Child Rights in Pakistan: Alternative Report for UN CRC* (5th Periodic Report, 2015) para 13. The parallel Federal Shariat Court system in

documents, an essential tool according to the CRC 1990 in curbing child marriage. Justices of the Peace routinely fail to check birth records or accept concocted certificates and issue marriage licenses verifying that the parties are acting of their own free will.⁵³

Right to Education and Freedom from Exploitative labor

Exclusion of children from schools aggravates a child's exposure to violence. Out of 51.53 million children in Pakistan between the ages of five and sixteen years, there are 22.8 million out of school in Pakistan.⁵⁴ In 2010, the National Assembly of Pakistan added Article 25-A to the constitution that states that free and compulsory education is a fundamental right for all children between the ages of five and sixteen. Consequently, Sindh, Punjab and KP enacted right to education laws fleshing out the right to education.⁵⁵ Sindh and Punjab require private schools to enroll and provide free education for disadvantaged children to at least ten percent of their total numbers.⁵⁶ All laws call for a joint role for the government, parents, and schools to implement the law with the state responsible for schools being operational and parents obligated to enroll children and ensure they attend.

However, post-devolution child labor laws that allow adolescents (defined as children ages fourteen to eighteen) conflict with Article 25-A's objective to secure compulsory education for all children between ages five and sixteen.⁵⁷ Labor laws also run counter to Article 31 of the CRC 1990 which require states to recognize children's rights to rest, leisure, and play.⁵⁸ Adolescents are permitted to work in non-hazardous professions and the laws merely limit work hours to seven a day with rest periods after every three hours, and absolutely no

Pakistan defines puberty as the end of childhood; childhood is set at 18 years for boys and 16 years or puberty for girls in Zina Ordinance 1979,

⁵³ Mohammad Ali (n8).

⁵⁴ Pakistan Education Statistics, 2016-17, National Education Management Information System Academy of Educational Planning and Management Ministry of Federal Education and Professional Training Government of Pakistan Islamabad, (March 2018), s 4.1.4.

⁵⁵ Sindh Right of Children to Free and Compulsory Education 2013; Punjab Free and Compulsory Education Act 2014 (PFCEA); and Khyber Pakhtunkhwa Free Compulsory Primary and Secondary Education Act 2017.

⁵⁶ See s 3(3) of the Sindh Right of Children to Free and Compulsory Education Act 2013; s 13 of the Punjab Free and Compulsory Education Act 2014.

⁵⁷ KP, Punjab and Sindh laws define children as those under the age of fourteen and adolescents as above that age but under eighteen. See Khyber Pakhtunkhwa Prohibition of Employment of Children Act 2015, s 2(1)(a); Punjab Restriction on Employment of Children Act 2016, s 2(a); Sindh Prohibition of Employment of Children Act 2017, s 2(i).

⁵⁸ CRC 1990 Article 31(1).

work past 7 pm in the evening.⁵⁹ Establishments and factories hiring adolescents must maintain registers at their premises documenting adolescents employed and also send this information to the labor inspector.⁶⁰ While these safeguards marginally meet the standard set forth in Article 32 of CRC 1990 that the minimum age for admission into non-hazardous employment be set, the practical result is working children do not get adequate time for rest, education, and recreation.⁶¹ For children fourteen to sixteen, who are legally permitted to labor for seven hours a day, the law provides an illusory protection. The Sindh Prohibition of Employment of Children Act 2017 adds aspirational language that the establishment hiring an adolescent ensures a child gets education as guaranteed by Article 25-A⁶²; this shift of onus is impractical as commercial incentives might outweigh the best interests of the child.

Many low-income families send their children to work in factories, homes, shops, and hotels where the child is in the physical custody and *de facto* guardianship or *care* of the owner of the establishment or the employer. The CRC committee posits that all children under eighteen are ‘in the care’⁶³ of someone who is usually a parent, guardian, teacher, or a social worker in a care environment.⁶⁴ Although, a workplace supervisor/employer could be a caregiver, the reality of children’s employment in Pakistan is such that they are not capacitated or incentivized to protect children. It is easier to monitor children’s attendance in school and enforce attendance than supervising them at the workplace or placing demands on employers.⁶⁵

⁵⁹ Ibid (n 55) s 5 Punjab; s 7 KP; s 7 of Sindh.

⁶⁰ Ibid. s 9 of Punjab law; s 11 of the KP Act; S 11 of the Sindh Act.

⁶¹ UN Committee on the Rights of the Child, *On the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31)* (General Comment No 17, CRC/C/GC/17, 2013) para 29. ‘The Committee notes that in many countries, children are engaged in arduous work which denies them their rights under article 31. Furthermore, millions of children are working as domestic workers or in non-hazardous occupations with their families without adequate rest or education, throughout most of their childhood.’

⁶² Sindh Prohibition of Employment of Children Act 2017, s 22.

⁶³ Convention in the Rights of the Child 1990, Art. 19(2).

⁶⁴ UN Committee on the Rights of the Child, *The right of the child to freedom from all forms of violence* (General Comment 13, CRC/C/GC/13, 2011) paras 33, 34.

⁶⁵ M. Weiner, ‘Child Labour in Developing Countries: The Indian Case’ (1994) 2 *Int. J. Children’s Rts.* 121.

Conclusion

Institutions protecting children in various sectors – crime, juvenile justice, education, labor - must be capacitated to provide children with holistic, integrated, coordinated, and comprehensive protection. Children exposed to one form of violence such as exclusion from school or early entry into work are likely to suffer other forms of violence. Inconsistent criminal laws for kidnapping and sexual exploitation with respect to age and gender are not ideal for child protection and inhibit proper investigation and prosecution. Pakistan's gradual embrace of the universal age of childhood is evident in recent federal enactments. Applying this universal age to interlinked laws would make criminal investigation of crimes against children more robust.

Stricter labor laws could enhance school attendance. If there are no exceptions for children between ages fourteen and sixteen which allow them to engage for a set number of hours in non-hazardous work, this could have an impact on enforcement of right to education laws.

Female Prisoners and Limitations to Increasing Their Representation in Law

***Zahbea Zahra and **Shafaq Farooq**

Abstract

This article analyzes the evolution of legal representation with regards to the laws governing female prisoners. The insufficient number of female lawyers available and the social and legal effects resulting from this prospect have been reviewed to highlight it as a major issue in the prevalence of justice. The Prisons Act 1984 and the Pakistan Prison Rules 1978 have been evaluated to depict how certain provisions have been specifically devoted to women. Additionally, the issues in the accountability procedure prevailing regardless of these legislations have been discussed by considering the defects in the system, and how these prevented women from getting adequate or competent representation in the criminal justice system of Pakistan. For this reason, the prospect of female defendants acquiring legal counsels that can adequately resonate with them amidst rising patriarchal constraints has also been discussed. As such, the analysis continues to infer the consequences resulting from a lack of female lawyers by diverting attention towards the obstruction of their rights in light of due process, autonomy and rule of law. In this way, a nexus between the constitutional provisions, fair trial and access to justice has been explored. Moreover, the article uses an integral quantitative element to observe the notion of legal representation for female prisoners according to members of

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the legal fraternity. The analysis concludes by suggesting reforms and promoting women's representation in law.

Introduction

Despite the existence of laws to protect female accused and convicts confined in Pakistani jails or prisons, female prisoners have been poorly treated in jails. As highlighted in the research by Khushboo Ali Bhagri on Women Prisoners in Pakistan: A Case Study of Rawalpindi Central Jail, female prisoners have been subjected to ill-treatment and sexual harassment during their confinement in Rawalpindi Central Jail.¹ This is likely because the implementation of the laws drafted to increase legal representation for female convicts are not implemented in their true sense nor reflect the purpose for which they were created.

National laws

The Constitution of the Islamic Republic of Pakistan (1956), the supreme law of the country from March 1956 to 1958, deemed every citizen including women to be entitled to “equal protection of law” and that no person shall be arbitrarily deprived of their life or liberty.² It further continued to provide all prisoners, regardless of their gender, the right to “due process of law” and “autonomy”. The Prisons Act (1894) and Pakistan Prisons Rules (1978) were legislated to state that no prisoner could be imprisoned except under a lawful warrant or order issued by a competent Court.³ The Pakistan Prison Rules further prescribe that search and examination of women prisoners shall be carried out by a female warden under orders of Deputy Superintendent or Medical Officer.⁴

The current Constitution of the Islamic Republic of Pakistan (1973) ensures that every citizen living in Pakistan shall be given the “right to fair trial” and that “access to justice” must be assured for every individual living within the territory of Pakistan.⁵ Moreover, the Constitution further states that no discrimination shall be made in terms of enforcement of rights and duties with regards to sex or gender.⁶ The purpose of including such a provision within the

¹ Khushboo Ali Bhagri, ‘Women Prisoners in Pakistan: A Case Study of Rawalpindi Central Jail’ (SSRN, 2010) 4

² Constitution of Islamic Republic of Pakistan 1956, art. 5.

³ Pakistan Prisons Rules 1978, r 14.

⁴ *Ibid*, r 21.

⁵ Constitution of Islamic Republic of Pakistan 1973, art. 10-A.

⁶ *Ibid*, art. 25.

supreme law of the land is to maintain accountability and equal protection of all citizens in accordance with the ambit and regulation permitted by the law.

For the regulation of right to due process of law, the “right to appeal” and petitions against conviction is also provided to male and female prisoners under Chapter V of Pakistan Prisons Rules (1978).⁷ Furthermore, to ensure that “rule of law” prevails, the Criminal Procedure Code 1898 (CrPC) provides a process for appeal when the appellant is in jail so that the right of access of justice is available to convicts at all times during his/her incarceration.⁸

International laws

Pakistan is a signatory to various international conventions and treaties which were established to provide protection to individuals living in prisons. To analyze how international human rights related to female prisoners are being violated in Pakistan, one may retreat to basic human rights. The Basic Principles for Protection of all Persons under any Detention or Imprisonment (1988) states that all persons deprived of their liberty and who are convicted for a crime shall not be ill-treated, and their inherent “right to dignity” shall be protected at all times.⁹ However, in Pakistan the “right to dignity” for female prisoners remains a question. Despite having laws for protection and safety, women prisoners are likely to be subjected to violence, oppression, and exploitation in prisons.¹⁰

Such violations of basic human rights paint a clear picture of how various international human rights enforceable through international conventions and treaties are not being properly implemented in Pakistan.

To evaluate Pakistan’s duty to ensure basic human rights for female prisoners, one may refer to the Universal Declaration on Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR) and International Convention on Economic, Social and Cultural Rights (ICESCR) since Pakistan is not only a signatory to these international conventions but has also ratified them. These international conventions state that all individuals are

⁷ Pakistan Prisons Rules 1978, Chapter 5, r 90, 91, 92, 94 and 99.

⁸ Criminal Procedure Code 1898, s 420.

⁹ Basic Principles for Protection of all Persons under any Detention or Imprisonment 1988, principle 1.

¹⁰ Mueen Abid, Saima Riaz, Memoona Khalid & Razia Iqbal, “Sexual Harassment Experiences of Female Prisoners in Jail” (Pakistan Journal of Psychological Research, Vol. 35, 2020) 83 <https://www.researchgate.net/publication/341569538_Sexual_Harassment_Experiences_of_Female_Prisoners_in_Jail>

“equal before law” and that they shall be entitled to protection of law without “discrimination”.¹¹ Considering that the UDHR carries the essence of customary international law, these principles should be extended to all areas of law. These can be interpreted to infer that women prisoner should not suffer discrimination, and that they should be protected from all forms of violence and exploitation.¹² Contrary to this notion, Pakistan has unfortunately seen a lot of discrimination, violence, and sexual abuse against women in prisons.¹³

Moreover, international law provides all prisoners, including female inmates, a basic “right to an adequate standard of living”¹⁴. Contrary to this standard, prisoners in general and female prisoners are specifically deprived of basic life necessities and live-in poor conditions. For example, they receive inadequate medical care, rehabilitation policies are questionable, and they often end up being mistreated in the prisons.¹⁵ Overall, one may consider that in accordance with national and international law, female defendants and convicts are entitled to certain protections and basic fundamental and human rights, in order to increase their legal representation in law through acts, statutes and conventions. However, the issue of non-implementation or poor enforcement of such laws acts as obstacles in increasing legal representation of female convicts suffering in various prisons throughout the country.

Reasons for female prisoners’ inadequate representation in law

The need to make the legal community more gender inclusive serves the crucial purpose of bridging the wide gap towards attaining an equal number of female lawyers. Additionally, it would also contribute to achieving an overall progressive society based on both equality and equity. With the legal profession in Pakistan being primarily male dominated, lack of inclusivity in this regard appears to be a noticeable feature when it comes to women’s limited representation in law. Having an adequate number of female lawyers improves diversity in the legal system¹⁶. With 85% of the respondents in our survey

¹¹ Universal Declaration on Human Rights 1948, art. 7; International Covenant on Civil and Political Rights 1966 art. 2 and 26; International Covenant on Economic, Social and Cultural Rights 1966, art. 2 and 5.

¹² Convention on Elimination of All Forms of Discrimination Against Women 1979, art. 6 and 7.

¹³ Gul Muhammad Baloch, ‘From arrest to trial court: the story of women prisoners of Pakistan’ (2013) 91 *Procedia – Social and Behavioral Sciences* 158-170.

¹⁴ ICCPR 1966, art. 10; UDHR 1948, art. 25.

¹⁵ Human Rights Watch, ‘Pakistan: Poor Conditions Rife in Women’s Prisons’ *Human Rights Watch* (New York, 7 Sept 2020) <<https://www.hrw.org/news/2020/09/07/pakistan-poor-conditions-rife-womens-prisons>> last accessed 1 May 2021.

¹⁶ Amber Darr, “Women in law” *Dawn* (15 November 2016)

agreeing that lack of female lawyers is an issue for women going through legal proceedings, such diversity can be specifically helpful for female prisoners as it would give them a more viable chance of finding a suitable legal representative. In furtherance to this, it may also help in removing cultural, and political impediments that prevent women from accessing justice. The United Nations reinforced this notion on a similar account because diversity in this sense can help in making the criminal justice system more accessible for women¹⁷.

Lack of inclusivity and gender discrimination

With 56.7% of our survey's respondents agreeing that patriarchy and male dominance create obstacles that prevent women from opting for litigation, the resulting lack of inclusivity and gender discrimination can also be construed as obstacles that prevent females from embracing litigation actively¹⁸. For instance, despite the legal education and competence of many young law students and fresh graduates, they may be subjected to sexism or other forms of discrimination in firms or courts¹⁹— a factor indicating that a lot of work is required to make courts and the overall legal environment welcoming for women²⁰. Advocate Fatima Khan pointed out “harassment, intimidation and discrimination” to be some of the issues female lawyers are forced to endure.²¹ One may consider writer and advocate Zainab Z. Malik's account to be relevant here; she revealed how she and her colleagues had been badgered by an older male lawyer until she accepted a book about recipes and how working women posed a danger to their children.²² So while Article 25 of the Pakistani Constitution directs that discrimination on the basis of sex is prohibited, such discrimination operates under our nose on a daily basis. Since such instances paint the legal fraternity in a negative light, women are discouraged from entering the legal field. While safety is usually the most commonly heard

<https://www.dawn.com/news/1296348>

¹⁷ United Nations General Assembly, A/RES/67/187 (2013) Annex, para. 52(b)

¹⁸ Nikolaus Benke (1996) “Women in the Courts: An Old Thorn in Men's Sides” *Michigan Journal of Gender & Law* 3(1)

¹⁹ Jawziya F. Zaman and Sara Malkani, ‘Can the women of law get justice?’ *Dawn* (Karachi, 7 October 2018)

²⁰ Web Desk, “Justice for all: Women lawyers demand greater participation” *Geo News* (30 September 2020)

²¹ Allia Bukhari, ‘Why do we need more women in law?’ *Express Tribune* (Karachi, 9 July 2020) <<https://tribune.com.pk/story/2254093/why-do-we-need-more-women-in-law>> last accessed 1 May 2021.

²² Zainab Z. Malik, ‘Skirt lengths and bhuna gosht: What women in Pakistan's legal fraternity face’ *Dawn* (Lahore 10 March 2020) <<https://www.dawn.com/news/1394189>> last accessed 1 May 2021.

ground to support this notion, the underlying thought of a woman doing something akin to an allegedly established “man’s role” is also a common concern for those thriving from the benefits they receive from patriarchy. Therefore, when female lawyers are prevented from entering and excelling in the field, it incidentally limits the options available for female prisoners since they do not have many available avenues left for them.

Structure of the legal fraternity

The pioneering community of our legal fraternity is primarily male dominated. In this way, the discrimination can be traced to the most influential platforms in the system. In 2013, the Asian Human Rights Commission pointed out that out of the 103 judges in the superior courts, only 3 were female – such a statistic indicates Pakistan to be in breach of the obligation it owed under the UN Beijing Conference in 1996. This standard required 2.91% to be 33%.²³ While Pakistan finally welcomed its first Chief Justice of the Balochistan High Court, Honourable Justice Tahira Safdar only a few years ago,²⁴ the country still has a long way to go. This much is evident by how the seat of a justice of the Supreme Court is yet to be honoured by a woman. The same notion is extended towards female lawyers in the legal fraternity. Since the system has yet to evolve its structure to make itself completely accessible and convenient for female lawyers, our courts have still not housed an adequate number of female lawyers. Therefore, such a notion begs the absurd question of whether the system deliberately avoids paving an accessible and convenient path for women to thrive in the legal field or if female lawyers are simply unable to reach a standard where they can match the competence of their male counterparts – a notion which is obviously untrue and something that should be proven in practice.²⁵

In turn, this situation has had a dire effect on female prisoners. While considering this example, one notes how the lack of a proper enforcement and accountability mechanism is such a dire systematic defect that it ensures a domino effect which amplifies injustice at all stages. Whether it is the rule of

²³ Liliana Corrieri, *The Law, Patriarchy and Religious Fundamentalism: Women Rights in Pakistan* (Asian Legal Resource Centre (ALRC) & Asian Human Rights Commission (AHRC) 2013) 47-48.

²⁴ Syed Ali Shah, ‘Justice Tahira Safdar sworn in as first woman chief justice of a Pakistani high court’ *Dawn* (Balochistan 1 September 2018) <<https://www.dawn.com/news/1430350>> last accessed 1 May 2021.

²⁵ Ayesha Siddique Khan, ‘Feminization of law and judiciary in Pakistan’ (*Express Tribune* 13 September 2020) <<https://tribune.com.pk/story/2263846/feminisation-of-law-and-judiciary-in-pakistan>> last accessed 1 May 2021.

law itself or the principles of natural justice, such a defect illustrates a crack in the system that ends up contributing to oppression, persecution, and violation of human and fundamental rights rather than simply being a lawful prosecution. In this regard, some cases, like those revolving around sexual and/or other physical abuse, require prosecutors to be gender sensitized to access justice.

Socio-economic factors

The Cornell Center on Death Penalty Worldwide has reported that most female prisoners who are being held on death row charges are those originating from the lower social economic strata of the community.²⁶ This means that they cannot afford to pay for private or better representation. Since they are not sufficiently literate, they may not be able to defend themselves properly because the lawyers appointed by the state may not be adequately competent or trained, or they may simply not be able to handle the excess workload. For instance, in 2013 a research revolving around 100 women prisoners across the country showed that 54.4% of the prisoners in the Larkana and Sukkur prisons had no lawyer, and some inmates had either never met their lawyer or the ones who did manage to secure one by the State were able to do so after six or more months.²⁷ Hence, if a female enters the arena of drug trafficking to meet basic ends, is it reasonable or just to allow her to suffer more than what her crime merits, just by virtue of her not being able to afford a competent or private legal counsel? One may refer to the example of *Shagufta Iftikhar v The State*,²⁸ where an FIR revealed that a veiled woman had been involved in a dacoity. There was no means to identify the accused conclusively, and the accused was able to get bail after remaining in police custody for a year and a half without any proof and representation. There was no trial, nor was there any hint of one commencing any time soon. With this, we once more return to the issue of state responsibility, and the need to evolve our justice and education system to produce competent female lawyers.

Moreover, since most of the accused or convicted women are illiterate²⁹, a mere accusation originating from a social disagreement can allow them to suffer an indefinitely long time in prison. While the law itself requires for the accused to

²⁶The Cornell Center on the Death Penalty Worldwide, *Judged for More Than Her Crime, A Global Overview of Women Facing Death Penalty* (A Report of the Alice Project, Cornell Law School September 2018).

²⁷ Gul Muhammad Baloch (n 13).

²⁸ [2018] MLD 531 (LHC).

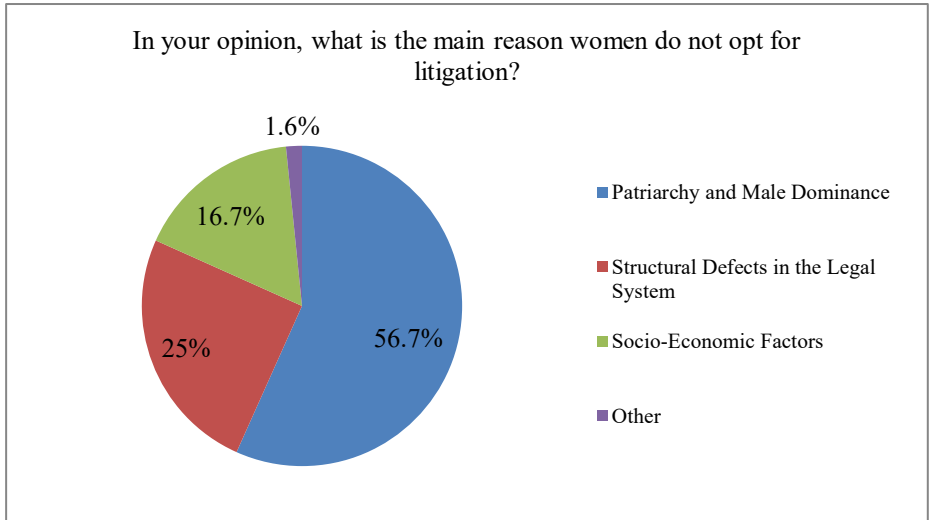
²⁹Gul Muhammad Baloch (n 13)

be presented before a magistrate within twenty-four hours, this notion is not always strictly followed. Since such victims of unlawful detention are unaware of their legal rights in the first place, and they have no competent legal representative to present their case, it gives way to a chain of unnecessarily unjust imprisonment sentences. For instance, a woman who was accused of killing her husband by her in-laws with the alleged intent to get her children's custody was not only locked up for over a year but also had to endure abuse and torture for a confession.³⁰ She could have been protected from such heinous acts had she been given proper legal representation in the first place.

Survey analysis and Pakistan Prisons Rule (1978)

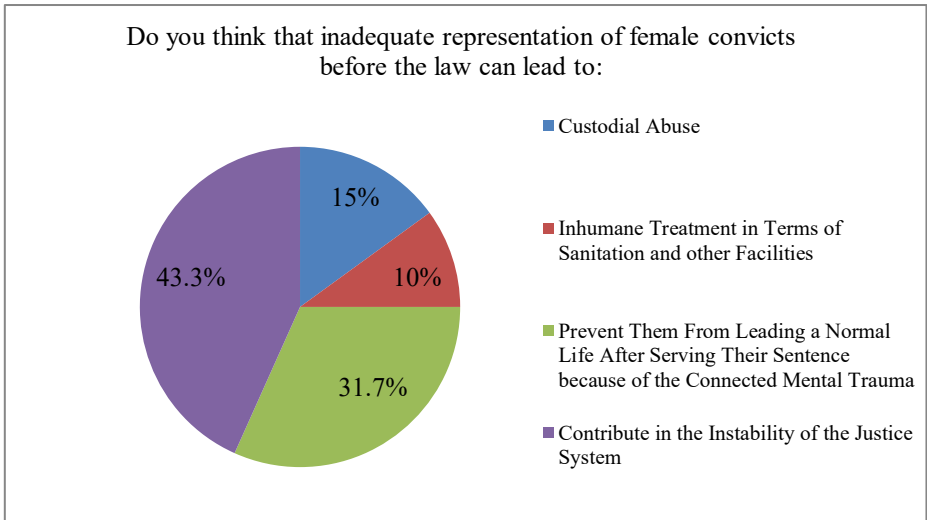
An online survey was conducted in which sixty practicing lawyers and law students were asked about their perception and awareness about the obstacles in female prisoners' representation in law based on their personal knowledge and experiences. Before answering the questions, they were given introductory information about the purpose behind the survey (i.e. to get an idea about how the concerned issue was perceived amongst ordinary members of the legal community). 51.7% of the respondents with a legal background were not aware that the Prisons Act 1984 and the Pakistan Prison Rules (1978) dedicate separate provisions for female inmates to cater to their needs. It further concluded that 56.7% persons consider patriarchy and male dominance to be the ultimate reason why females do not opt for litigation. On the other hand, 25% considered that structural defects in the legal system and 16.7% considered socio-economic factors to be the major obstacles for women opting litigation in the country. Considering these, it is crucial for the Pakistan Prison Rules to ensure female representation in prisons keeping these obstacles in mind – the rules should be amended to counter deep-rooted issues like patriarchy and socio-economic imbalances from depriving women of their legal rights.

³⁰ Sarah Alvi, 'Pakistani convicts teach inmates their legal rights' *Al Jazeera* (Karachi 23 May 2018) <<https://www.aljazeera.com/features/2018/5/23/pakistani-convicts-teach-inmates-their-legal-rights>>last accessed 1 May 2021.

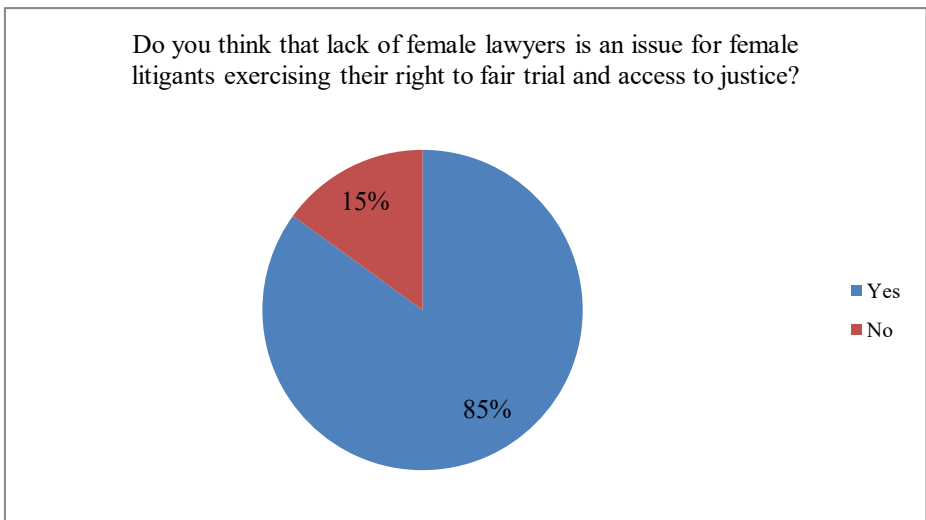


According to the survey, 21.4% people considered limited representation for female convicts and defendants, 12.5% perceived issues in procedural accountability, and 8.9% believed issues of female autonomy and limited number of female lawyers to be major hindrances in the practical application of the Prisons Act 1984 and Pakistan Prisons Rule 1978. However, 57.1% individuals contemplate that all of these can be perceived as a combined issue in the practical application of the abovementioned laws in Pakistan regarding female convicts and defendants.

Moreover, on the basis of the verdict given by these respondents, inadequate representation of female convicts before law contributes to the instability of the judicial setup. This is valid to the extent that it emanates the notion that a body obligated to play an essential role in the prevalence of justice is unable to do the task for which it was created. Hence, equal representation should be given to female prisoners before law to cater their needs fairly and justly to overcome this problem.



According to the survey, 77.2% of the individuals were aware that gender stereotypes affect women prisoner's representation before the law and 85% people think that lack of female lawyers is an issue that results in obstructing the fundamental right of fair trial and due process of female inmates. Therefore, feasible methods must be adopted to increase the number of female lawyers so that female prisoners can exercise the fundamental rights guaranteed by the Constitution of Pakistan, 1973.



After scrutinizing the Pakistan Prison Rules (1978), one may consider that the rules do not adequately cater the needs of women prisoners, nor do they specifically address certain common issues faced by women prisoners. The major problem being that the Pakistan Prison Rules (1978) have been drafted with a male centric lens which heavily focuses on the issues faced by male prisoners instead of providing an equal representation to all genders before law. Moreover, it does not provide a review mechanism to make sure that no violence is being conducted against female prisoners and their rights are protected instead of being abused by Investigating Officers (I.O), female/male wardens and other inmates during their time of sentence.

The defects in the Prisons Act 1984

While the Prisons Act 1984 has dedicated specific provisions to women, these may still appear to be insufficient. The legislation still appears to be unsuccessful in completely addressing the struggles female prisoners endure in prison. This is because the law does not address the importance of ensuring the basic human rights of the inmates and the relevant special requirements and does not prescribe prevention measures against the atrocities committed against the inmates. Leaving them with scarce autonomy, female prisoners practically have no chance of explaining how they have been subjected to an alleged offence to a court of law because the very prospect of representation available for such purposes is an unlikely and questionable reality. For instance, while female prisoners in Punjab may present their claim before the Learned Sessions Judges or the Inspector General of Prisoners,³¹ the intervening factors in the journey to reach this step may prevent them from doing so. Similarly, while official visits may be done to address female prisoners' complaints, the law itself is yet to dedicate special regulations for complaint registration.

No provision for legal representation

While the Act lays down many details for the governance of the prison, it does not provide a proper mechanism for a prisoner to follow to register a complaint. For instance, while the Act regards the Medical Officer to be responsible for the 'sanitary administration' of the prisoner, it does not provide any road that may be followed if the Officer fails to perform his duties. Even if a prisoner did know that she has a valid ground for a complaint – an unlikely factor owing to illiteracy and lack of awareness – fear of the authorities may prevent her from raising her voice. Likewise, if a female prisoner endures abuse, there is no

³¹ Report by the Commission, 'Prison Reforms in Pakistan' (Islamabad High Court in W. P. 4037 20 2020).

mechanism enshrined in this Act in order to acquire justice for her. In this way, with complete lack of representation within the prison, the cycle of injustice continues. In *Maria Sanam v The State*,³²For instance, the accused had been kept in a prison for nine and a half months, and no legal counsel had been able to prove or disprove her involvement in the alleged crime. Such a long duration of imprisonment continued until it was eventually brought to notice for bail purposes. Similarly, in *Mst. Fauzia Haveed v The State*³³, the accused had been detained in a prison for six months on account of delays in her trial. The delays could not be attributed to her, and there was no remedy available for her to pursue in prison during this time. She was eventually granted bail.

Section 14: Duties of the Medical Officer

Section 14 prescribes that whereby the Medical Officer, who should be a female to address the comfort and dignity of the female prisoner, reasonably believes that a prisoner has been subjected to a discipline or treatment that has had a detrimental effect on the prisoner's mental health, then it must be reported to the Superintendent in writing with anything else that she deems appropriate in support of his claim. Since these instances are reported by the Medical Officer to the Superintendent, there is nothing to ensure that the female convict's injury will qualify as grave enough to be reported by him. Even if it is reported to the Superintendent, the matter may or may not be reported to the Director of Prisons. Such a long chain based on hierarchy and discretion of one superior officer after the other rather than the gravity of the alleged injustice endured by the female prisoner are likely to prevent any chance of accountability and representation. For instance, proposing that the Superintendent will acquire a legal representative to present the female convict's case is definitely a stretch. In 1992, two women had been tortured in a police station while they were waiting for their trial in Kot Lakhpat Jail; they had no means to get the attention of legal authorities and the ordeal they faced was only brought to notice after their lawyers visited them a week later. Even though the Senior Woman Medical Officer confirmed their injuries, she did not report them to higher authorities. Eventually, the Magistrate's report denied the incident as well, and the complaint was not even investigated since there was no one to represent them.³⁴ In other cases, alleged presence of corruption may prevent an officer from

³² [2017] MLD 1373 (LHC).

³³ [2009] YLR 664 (IHC).

³⁴ Amnesty International, 'Women in Pakistan: Disadvantaged and Denied Their Rights' (1 December 1995)
<<https://www.amnesty.org/en/wp-content/uploads/2021/06/asa330231995en.pdf>> last accessed 1 May 2021.

reporting the case. Keeping this factor in mind, the imprisonment authorities may themselves serve as a hurdle in a female prisoner's representation despite the existence of this provision. This is considering that a female inmate is unlikely to have substantial social and financial support from the outside world, and so would be unable to acquire a counsel, or an independent and impartial body to review her grievance.

Section 27: Separation of prisoners

This provision instructs that whereby a prison accommodates both men and women, females are to be kept separate from the male inmates to prevent them from seeing, touching or talking to each other. Contrary to this provision, many instances emerge whereby the female prisoner is kept in supervision of a man, and this factor ends up being injurious to her mental and physical health.³⁵ Since prison authorities are the most likely perpetrators behind the issuance of such an act in the first place, a female prisoner is unlikely to be able to claim relief for this. While the provision enshrines the notion of segregation without any exception, the absence of any penalty for the perpetrators or possible relief for the victims prevents the regulation from being applied strictly – power play, intimidation and other evils may be frequent contributors behind such infringements.

Section 46: Punishments

Section 46(12) directs that female or civil prisoners cannot be punished with handcuffs, fetters or whipping. One may appreciate this factor since had this restriction not been penned, the possibility of exploitation and lawful torture might have emerged as well. The ban of this punishment does give a hint towards the cruelty of this punishment and may be considered in future reforms and possible prohibition of this punishment. Despite the discussion about reforms in this area, the fact that there is currently no independent complaint registration process gives way to the potential of such punishments occurring under a concealed cover. In September 1992, two female prisoners claimed to be punished in a torturous way; one of them was restrained and beaten with leather thongs for a night while the other miscarried following a vicious beating.³⁶ This provision presents a classic opportunity for the law to recognize any violation of the provision to be custodial abuse that automatically entitles victims to legal representation.

³⁵Yumna Rizvi, 'Women's prisons: A feminist issue' (*Dawn Prism*, 25 June 2019) <<https://www.dawn.com/news/1468981/womens-prisons-a-feminist-issue>>

³⁶ Amnesty International (n 29).

Consequences resulting from lack of female lawyers

Due to the lack of female lawyers in the legal profession, female prisoners face a lot of adverse consequences that act as a barricade for them in obtaining or securing justice. Various factors like patriarchal constraints, limited representation for women in law, societal/family pressure, non-availability of equal educational opportunities for females and several other reasons lead us to a world where despite the advancements of the 21st century, female convicts have to suffer from violation of their basic fundamental rights due to lack of female lawyers.³⁷ It can be said that female prisoners resonate and trust female lawyers more with the personal accounts required to present any defense against the alleged offense against them.³⁸

Violation of the equal protection clause

The Constitution of the Islamic Republic of Pakistan (1973) states that all citizens are equal regardless of their gender and are entitled to equal protection of law.³⁹ Moreover, in the case of *Akbari Begum v The State*,⁴⁰ it was observed that fundamental rights with regards to justice and fair trial shall be guaranteed and all citizens regardless of their gender shall be given access to justice. However, scarcity of female lawyers, who are more likely to be trusted by female prisoners in order to reveal the private information crucial to their case, poses a serious hurdle in their path towards access to justice and being protected by law as every other individual. In Pakistan, male convicts have a better chance of representing themselves due to the judicial system providing a comparatively more convenient environment owing to it being largely male dominated and the massive availability of male lawyers. Whereas due to lack of female lawyers, female prisoners are more hesitant towards sharing their personal information with a male lawyer due to the mindset of the society we live in and due to the lack of quality education as well. As a result of which, unfortunately, female prisoner's right of getting equal representation before the law gets infringed in the country.

Obstruction of right to fair trial and due process

The right to fair trial is a fundamental right according to which every citizen living in the country has a right to defend themselves in a situation where any

³⁷Yumna Rizvi (n 30).

³⁸ Findings of the authors' survey titled "Female Prisoners and Their Representation in Law" (Conducted in January, 2021).

³⁹ Constitution of Islamic Republic of Pakistan 1973, Article 25.

⁴⁰ [1985] PLD 123 (LHC).

civil or criminal charge is brought against them, in a just/fair trial before a competent court of law.⁴¹ However, this fundamental right gets constrained because of the lack of female lawyers who could represent female convicts in courts to make sure fair trial is being conducted and the female convict's right to due process of law is safely protected. In *NuzhatShoukat v Superintendent, Central Jail, Karachi*,⁴² The female defendant after being convicted by the trial court was unable to file an appeal or petition for mercy in the higher courts due to non-availability of competent women lawyers and lack of proper female representation in law. Hence, this can be perceived as an example of obstruction of a female convict's right to acquire justice at all levels. Moreover, due to other factors such as societal pressure, norms, and religious concerns, most of the women prisoners do not consider consulting a male lawyer alone or independently as an appropriate resort which prevents them from proceeding to further stages of fair trial and due process of law.

Curtailement of the right to privacy

The Cairo Declaration on Human Rights in Islam, signed and ratified by Pakistan in August 1990, affirms that everyone shall have the right to live in security for themselves, their dependents and their honor. Moreover, every individual shall have the right to privacy in the conduct of their private affairs and should not be placed under surveillance to besmirch their good name.⁴³ In this manner, every female prisoner has a right to privacy according to which she should not be placed under scrutiny which could harm her reputation by sharing private information regarding some previous affairs. However, due to the lack of female lawyers, the right of privacy of female prisoners gets curtailed when they have to share facts of a case with male lawyers whom they cannot trust with deeply personal information and fear that her good name/reputation would be harmed due to presence of various stigmas in society. Since this information is often used against her publicly in a court of law, female prisoners' hesitance towards revealing this information is merited.

Importance of female prisoners' right to legal representation

Ensuring that female prisoners can easily register a complaint before the law is crucial because it promotes a system of checks and balances by ensuring that the officers who exercise sufficient control over them do not get a clean chit where they act beyond their powers and at the expense of the female prisoners.

⁴¹ Constitution of Islamic Republic of Pakistan 1973, art. 10A.

⁴² [1992] PLD 108 (SHC).

⁴³ Cairo Declaration on Human Rights in Islam 1990, art. 18.

In this way, female prisoners' representation ensures accountability. It is important to define an express, clear, and independent system for female prisoners to be represented before the law to eliminate instances revolving around custodial violence, unjust punishments, lack of basic facilities such as sanitation, clothing, educational or rehabilitation opportunities etc. For instance, male juvenile convicts are not kept in the same vicinity as older male convicts, but the same approach is not adopted for female juveniles and adult female convicts. It was access to legal representation that allowed this change in the male imprisonment system. Hence, if female inmates are sufficiently represented before the law, Pakistan may be able to see the possibility of raising the standard of its prisons to one that is deemed internationally acceptable.

Legal reforms

The limitations regarding female prisoners' representation in law should be addressed immediately by the entire machinery of the state. In furtherance to this notion, responsibility must be divided amongst each organ of the state. Since the issues female prisoners face regarding their representation in law is largely dependent on gender-based factors seeping into areas like cultures, norms etc. it is crucial for lawmakers to ensure that women are primarily involved in the concerned law-making.

Eliminating gender discrimination in the legal system

Gender discrimination can be countered by initiating gender sensitivity trainings for both judges and lawyers. Senior lawyers should shoulder the responsibility of training female lawyers so that they can proficiently appear in a court of law to argue for their client; their role should not be limited to research work. Moreover, associated gender stereotypes should be discouraged and likewise, general gender stereotypes should be prohibited in the workplace. For instance, legal employers often tend to ask female lawyers about their plans to get married⁴⁴, have children or other domestic roles while interviewing them for a job. Such practices should be prohibited as they do not reflect the applicant's competence in any way.

Proper legal education and training

Legal education and training programs should step away from majorly theoretical content. Special gender sensitivity training program should be introduced where future legal practitioners are taught how to practically handle gender sensitive cases with the help of practical examples and exercises. It is

⁴⁴ Zainab Z. Malik (n 17).

extremely important to discourage toxic competitiveness, patriarchy, and gender discrimination currently prevalent in the system since these contribute to widening the gender-based gap in the professional arena. Legal education system should be evolved to ensure a proper grading system which is not purely reliant on rote learning or memorization, and female law students and fresh graduates should be given equal opportunities at all stages. Not only should senior lawyers lean towards investing significant time to training female law students and fresh graduates, but they should be expressly recruited to break the current taboos so as to set an appealing precedent for future generations.

Special efforts to fix structural defects

Fixing structural defects in the system will allow the justice system to improve female prisoners' representation in law. This would mean that the system is ensuring complete implementation of the law with an effective and unbiased accountability mechanism in place. It would place a special responsibility on the esteemed members of the legal fraternity to make the justice system more accessible for female prisoners and reject any issue that obstructs their representation in law.

Counter cultural impediments

Discriminatory norms and practices promoting women's inferiority and subordination have become so common that they are now accepted as a part of our cultures and traditions. Therefore, female inmates may accept their fate even where there is substantial room to prove their innocence; their acquaintances outside the bars of the prison would be ready to reject them on their possible return on account of the negative attention arising from such societal norms. This can be reasoned by how once women are stamped as inferior, any attention diverted to them is likely to be accompanied by criticism and social exclusion. Hence, unless such deep-rooted taboos are rejected to ensure that all female prisoners from any class and region of the country are free to strive for their rights, Pakistan's justice system will continue to lie under a dark cloud.

Body to objectively review violations

An independent body should be formed by the Federal Government to ensure that female prisoners are adequately represented before the law. This body should operate beyond the control of a prison superintendent and any other prison staff member. It should assess each prisoner's case separately. For instance, if a female prisoner's trial has been delayed by an abnormally long time due to lack of representation, the injustice should be rectified immediately. If the prisoner's case is related to a sexual offence, and she is unable to

communicate with a male lawyer or the lawyer is unable to provide their services in a competent manner, it should result in immediate replacement with a competent lawyer. If an objective assessment proves that the lawyer is unable or unwilling to represent the convict for her benefit, and instead intends to exploit the client financially, immediate replacement or accountability proceedings should be initiated.

Prevent socio-economic reasons from contributing in lack of legal representation

If the system can provide competent lawyers for female prisoners, they will not need to rely on their private pockets to be adequately represented before the law. Additionally, their privacy should be upheld to prevent social exclusion or other stigmas arising from cultural stereotypes. This is because these women are unwilling to opt for any option that attracts attention to them, and reforms in this area will allow them to access justice without infringing their dignity.

Awareness about legal rights

Majority of the female prisoners are unaware about their legal rights. The responsibility for this can be traced back to the prevailing education system and the operation of the imprisonment systems. Not only should schools incorporate knowledge about legal rights in their curriculums, but every prison should be held responsible for educating prisoners about their relevant rights. For instance, a female prisoner should know that being abused in custody entitles her to representation before the law in order to lodge her complaint. She should know that the State is responsible for providing a competent lawyer for her if she cannot afford one on her own. More importantly, she should be aware about the duties her legal representative owes to her, and so on.

Conclusion

Conclusively, after scrutinizing the current laws dealing with female defendants and convicts in Pakistan, one may infer that the notion of women prisoners facing extraordinary challenges while attempting to get legal recognition is a merited claim. There are plenty of factors that make them suffer miserably in the process of seeking justice. Among all the other reasons, it is worth mentioning that female convicts do not get an equal chance of representation in law due to lack of availability of female lawyers competent enough to take their case. Through the survey conducted, it can be concluded that female convicts resonate and trust female lawyers more with their personal information as compared to a male lawyer, who they think is likely to mock or exploit them at any stage of the case. Other than this, societal pressure, patriarchal constraints,

socio-economic reasons, defects in the legal system and lack of educational opportunities also prevent women from acquiring autonomy and equal representation in law. Therefore, it is important to reform our justice mechanisms to make remedies adequately accessible. For this purpose, a few reforms have been highlighted among which providing proper legal education, training to female convicts and elimination of gender-based discrimination in the legal system are the most important as they have the potential to make a difference in the society by increasing women representation in law.

A Road to Recovery: Does the Law Fulfil its Purpose of Providing Care to Victims of Abuse and Violence in Pakistan?

***Muhammad Saquib Mangrio**

Abstract

Often the victims of abuse and violent crimes, women and children comprise a very vulnerable section of the society in Pakistan. Recently published figures by civil society organisations further highlight this grim reality, and despite the presence of strict laws and punishments in the local legislature this trend has not seen much improvement in recent years. While issues pertaining to lack of enforcement and under-reporting of cases are well known, a frequently overlooked aspect of the criminal justice system relates to the protective and rehabilitative purpose of the law. While the Pakistan Penal Code of 1860 provides for deterrence in the form of death penalty, life imprisonment and other similar long-term sentences and monetary punishments, victims of abuse are generally left to their own devices in overcoming their physical and emotional injuries stemming from such abuse. Accordingly, this research paper focuses on the issues of trauma, victims' identity protection and provision of financial assistance by the state, and how participation of women in the judicial and legislative process can lead towards better decision-making and implementation of rehabilitative care plans catering to the specific needs of victims, especially in cases of sexual abuse and domestic violence. This article shall consider various studies published on this subject, legislative instruments and proposals currently in place, victims' accounts or studies published in the media, and experts' opinions. By highlighting this vacuum, it can be hoped

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that the necessary focus is also placed on the rehabilitative and restorative objective of the law.

Introduction

The state of affairs in relation to the protections provided to women and children in Pakistan is indeed a grim one. Even if one is to disregard the unavoidable possibility of under-reporting, the number of cases and incidents involving various forms of violence against this vulnerable segment of society highlighted by mainstream media outlets are enough to provoke a sense of urgency and fear.

While this in itself can be discussed at length, the purpose of the present paper is to highlight how, and to what extent, the local legislature provides for different forms of protection to women and children, as well as the many gaps present in local laws necessitating further intervention measures. Furthermore, a discussion shall also be held on the various reasons as to why despite existence of strict laws and penal provisions, crimes of abuse and violence against women and children are on the rise.¹

Following the above discourse, the focus of this article shall shift towards the rehabilitative purpose of the law. A brief overview of the relevant local laws, especially in light of our understanding of the current social dilemmas and taboos regarding trauma and depression, shall highlight why it is necessary to ensure, or at the very least propose, that local legislation be up to date in recognising the ground realities of how different forms of violence and abuse affect its victims in more than one way.²

Accordingly, while change may not take effect overnight, the discourse proposed above shall be a stepping-stone in highlighting certain overlooked aspects concerning victim rehabilitation and the State's role in providing basic care to its most vulnerable citizens.

It is crucial, therefore, to also signify the importance of having women in positions of power, and additionally, have fairer representation in matters concerning gender-based crimes and abuses perpetrated against children, so as to ensure that the scope of law is expanded from its traditional confines and is extended to newer areas whereby the rehabilitation and recuperation of a victim

¹ Correspondent, 'Violence Against Women, Children Increasing: Report' (*The News* 12 May 2021) <<https://www.thenews.com.pk/print/657470-violence-against-women-children-increasing-report>> last accessed 3 Feb 2021.

² Unaiza Niaz, 'Women's Mental Health In Pakistan' (2004) 3(1) *World Psychiatry* 60-62.

is given as much importance as the need to provide adequate punishment to a perpetrator.

Prevalence of Cases of Abuse and Violence against Women and Children

Incidents of Abuse against Children

The recent report published by Sahil,³ appositely titled ‘Cruel Numbers’, presents extremely disconcerting figures regarding incidents of child abuse in Pakistan. In the recent past, there have been many incidents, all too similar unfortunately, where a child has been made a target of the ill intentions of monsters pretending to be human beings.⁴

Before moving further, it would be useful to elucidate upon certain terms such as “child” and “abuse”. While there are certain inconsistencies under Pakistani laws,⁵ the majority consensus is that a “child” is anyone under the age of eighteen (18).⁶ Similarly, the term “abuse” or “child abuse”⁷ is defined under the relevant acts so as to include physical or mental violence, injury, exploitation, neglect, or negligent treatment, maltreatment or sexual abuse.⁸

It is said that children are the future,⁹ and if the aforesaid is to be considered as a factual statement, then it would not be wrong to say that the future of Pakistan is in grave danger. Given the need of the hour, the Government of Pakistan has

³ Sahil, ‘Cruel Number 2019’ <<http://sahil.org/wp-content/uploads/2020/03/Cruel-Numbers-2019-final.pdf>> last accessed 3 Feb 2021.

⁴ Malik Asad, ‘Man sentenced to death for raping, killing niece in Pindi’ (*Dawn*, 31 Jan 2021) <<https://www.dawn.com/news/1604580/man-sentenced-to-death-for-raping-killing-niece-in-pindi>> last accessed 3 Feb 2021.

⁵ For example, the definition of ‘child’ under the Employment of Children Act 1991 as well as the West Pakistan Shops and Establishments Ordinance 1969, and their provincial counterparts, means a person below the age of fourteen (14). Furthermore, pursuant to the Child Marriage Restraint Act 1929, while a male child is defined as a person below the age of eighteen (18), a female child is defined as a person below the age of sixteen (16).

⁶ Acts designed to promote and protect the rights of a child, e.g. the Islamabad Capital Territory (ICT) Child Protection Act 2018; the Punjab Destitute and Neglected Children Act 2004; the Sindh Child Protection Authority Act 2011; the Balochistan Child Protection Act 2016; and the Khyber Pakhtunkhwa Child Protection and Welfare Act 2010, all, in conformity with Article 1 of the United Nations Convention on the Rights of the Child, define child as a person below the age of eighteen (18).

⁷ The Acts mentioned in the aforesaid footnote vary slightly in the use of their terminologies.

⁸ The ICT Child Protection Act 2018, s 2(1)(c), provides a more comprehensive definition of the term ‘child abuse’, which for the purposes of this paper shall be used as a reference point.

⁹ UNICEF, ‘Children are both the makers and the markers of healthy, sustainable societies’ (*UNICEF*, 24 June 2013) <https://www.unicef.org/media/media_69712.html> accessed 4 Feb 2021.

taken many steps to curb the various forms of abuses directed towards children. The most prominent of such examples is the enactment of the Zainab Alert Response and Recovery Act 2020, as well as the launch of a Pakistan Citizen’s Portal (PCP) app for reporting incidents of missing children. Furthermore, the Federal Ministry of Human Rights, has been monumental in raising awareness campaigns on the rights of children, including protection against child labour, sexual abuse, forced conversions and marriages, and provision of free and compulsory education, to name a few.¹⁰

While such steps are noteworthy, given we have not witnessed a drastic decrease in the number of incidents of child abuse in recent years,¹¹ these raise the question if the problem has more to do with societal mindsets rather than implementation of the already existing strict laws and punishments.

Violence against Women

Much like the children in our society, the situation concerning the protections and rights granted to women is also a difficult one.¹² To avoid overlap with the definition of “child”, as stated above, the term “women” here shall be construed as females of or above the age of eighteen (18).

Violence against women is, again, not a new phenomenon. There have been countless reports on the occurrence of domestic violence against women, some going as far as to say that about 50% of women have, in one form or another, been victim of violence.¹³ While the author does take some reservations with the lack of sources cited for the aforesaid claim, given the social taboos

¹⁰ ‘MoHR uses art to launch campaign for child rights’ (*The Express Tribune*, 12 Oct 2019) <<https://tribune.com.pk/story/2077675/1-mohr-uses-art-launch-campaign-child-rights>> last accessed 4 Feb 2021; Zindagi Trust, ‘Child Protection Campaign Launched By MOHR’ (*Zindagitrust.org*, 5 July 2019) < <https://www.zindagitrust.org/news-details/child-protection-campaign-launched-by-mohr-10>> last accessed 4 Feb 2021.

¹¹ Compared to 3,382 cases of child abuse reported in 2018 (Cruel Numbers 2018 <<https://drive.google.com/file/d/1HWq1cktvfGb16y9iljjWcGLgUJf-g4kF/view>>), making up almost 10 cases per day, 2,846 cases of child abuses were reported in 2019 (Cruel Numbers 2019) bringing the number down to 8 cases per day.

¹² Saman Masud Khan, ‘Is Pakistan safe for women?’ (*The News*, 4 Nov 2020) <<https://www.thenews.com.pk/print/738639-is-pakistan-safe-for-women>> last accessed 5 Feb 2021.

¹³ ‘50% women in Pakistan face violence’ (*The Express Tribune*, 12 Dec 2019) <<https://tribune.com.pk/story/2115944/50-women-pakistan-face-violence>> last accessed 5 Feb 2021.

associated with involving law enforcement agencies in domestic matters,¹⁴ the societal and systemic difficulties involved in reporting cases of sexual abuse,¹⁵ as well as the cultural acceptance of minor forms of violence perpetrated against women,¹⁶ the aforesaid figure may very well be a true representation of the reality and prevalence of such cases.

Similar to the definition of abuse, violence against women can take many forms, with the most notable of such examples being domestic violence.¹⁷ Other forms of violence perpetuated against women include acid throwing / attacks, burning, female genitalia mutilation, sexual assault, rape, and honour killings.¹⁸

The afore mentioned examples are not stated merely for the sake of having a complete definition of the term ‘violence’, which arguably should be much wider, but are rather based on the increasing number of such incidents being reported, making such terms common parlance when speaking on this subject.¹⁹ Such incidents have, of course, not gone unnoticed by the relevant state instruments, and, again, a number of intervening measures have been taken in

¹⁴ Enrique Gracia and others, 'Acceptability of Family Violence: Underlying Ties Between Intimate Partner Violence and Child Abuse' (2017) 35 *Journal of Interpersonal Violence* 3217 – 3236.

¹⁵ Beenish Zia, 'Reporting rape' (*Dawn*, 23 September 2020) <<https://www.dawn.com/news/1581169/reporting-rape>> last accessed 5 Feb 2021. See also, Sarah Childress, 'The Stigma of Reporting a Rape in Pakistan' (*FRONTLINE*, 28 May 2013) <<https://www.pbs.org/wgbh/frontline/article/the-stigma-of-reporting-a-rape-in-pakistan/>> last accessed 5 Feb 2021.

¹⁶ Raza Khan, 'Lightly beating' wife permissible, says CII's proposed women protection bill' (*Dawn*, 26 May 2016) <<https://www.dawn.com/news/1260803/lightly-beating-wife-permissible-says-cii-proposed-women-protection-bill>> last accessed 5 Feb 2021.

¹⁷ S. Khan, 'Violence against women on the rise in Pakistan' (*Deutsche Welle*, 23 Sep 2019) <<https://www.dw.com/en/violence-against-women-on-the-rise-in-pakistan/a-50550672>> last accessed 5 Feb 2021. See also, Shehryar Warraich, 'Locked down and vulnerable' (*The News*, 28 June 2020) <<https://www.thenews.com.pk/tns/detail/678152-locked-down-and-vulnerable>> last accessed 5 Feb 2021.

¹⁸ UN Women, 'Ending Violence against Women and Girls Programming Essentials' (June 2013) <<https://www.endvawnow.org/uploads/modules/pdf/1372349234.pdf>> last accessed 6 Feb 2021.

¹⁹ While the author can go at length to cite the many incidents of violence against women, and although many of such incidents may have already received wide media coverage, keeping in mind the sensitivity of such issues and out of respect for the victims and their families, the author will refrain from reproducing any names or any other identifying features of such incidents, in the event any such person is also the reader.

the form of awareness campaigns,²⁰ legislative proposals and enactment of new laws,²¹ and landmark cases on subjects concerning women.²²

Impact of Abuse and Violence

To understand the impact of abuse and violence as a whole, one needs to first understand the dynamics of an individual in a society. It is a point worth noting that societal norms are established by individual acceptance and repeated practises.²³ Accordingly, when incidents of violence and abuse become prevalent in a society, societal attitudes become rather lax and moral turpitude soon follows.

Although there is general outrage whenever crimes of any nature against women or children are reported, and while one would like to think that a significant part, if not the majority, of the population still regards such actions as reprehensible, the situation on the ground may not be so black and white.²⁴

Economic repressiveness, lack of education and awareness, misinterpretation of religious commands, non-acceptance of the State's authority and outdated cultural values are only a few factors one may take into account, to understand the existence and prevalence of violence in our society.²⁵ If archaic values affording little to no respect to women or children, who often due to their dependency on the primary bread earners are considered as subservient, are ingrained in an individual as a result of any of the aforesaid factors, it is unlikely

²⁰ Myra Imran, 'Helpline & 16 days of activism campaign against GBV launched' (*The News*, 26 Nov 2020) <<https://www.thenews.com.pk/print/749372-helpline-16-days-of-activism-campaign-against-gbv-launched>> last accessed 6 Feb 2021.

²¹ Criminal Law (Second Amendment) Act 2011 (Acid Control and Acid Crime Act); Criminal Law (Third Amendment) Act 2011 (Anti-Women Practices Act); Criminal Laws Amendment (Offences related to Honor Killing) Act 2016; Criminal Law (Amendment) (Offences relating to Rape) Act 2016; and the Domestic Violence (Prevention and Protection) Bill 2020, to name a few.

²² *Sadaf Aziz etc v Federation of Pakistan etc* (LHC, 4 Jan 2021)

<<https://sys.lhc.gov.pk/appjudgments/2020LHC3407.pdf>> last accessed 6 Feb 2021.

²³ WHO, 'Changing cultural and social norms that support violence' (2009) <https://www.who.int/violence_injury_prevention/violence/norms.pdf> last accessed 6 Feb 2021.

²⁴ Muhammad Nadeem and Muhammad Irfan Malik, 'The Role of Social Norm in Acceptability Attitude of Women Toward Intimate Partner Violence in Punjab, Pakistan' (2019) *Journal of Interpersonal Violence* 1-19.

²⁵ Ayesha Qaisrani, Sadaf Liaquat and Elishma Noel Khokhar, 'Socio-economic and Cultural Factors of Violence against Women in Pakistan' (2016) Sustainable Development Policy Institute Working Paper 158 <[https://sdpi.org/sdpiweb/publications/files/Socio-economic&Cultural-Factors-of-Violence-against-Women-in-Pakistan\(W-158\).pdf](https://sdpi.org/sdpiweb/publications/files/Socio-economic&Cultural-Factors-of-Violence-against-Women-in-Pakistan(W-158).pdf)> last accessed 6 Feb 2021.

that such an individual would be capable of recognising the fallacy of their ways when using unlawful force as a means of control. When practices like these become prevalent, even if they are in minor ways, the collective mind of the society becomes more accepting of such behaviours, and the cycle continues. Notwithstanding the above, given this area is still very much unexplored,²⁶ it is imperative that further research studies be conducted on this subject.

In addition to the foregoing, a further discussion is also required on the impact of violence and abuse on the psyche of the victim. While the physiological effects of harm on a woman or a child can be easily witnessed by the naked eye, and consequently be treated if adequate medical facilities are present, the psychological effects of any aggression exerted, and trauma inflicted require an in-depth impact-analysis and understanding.

Mental health is a developing field in Pakistan.²⁷ With the increasing number of individuals suffering from mental illnesses, it is now, generally, understood that actions not only have a physical effect but can also have an emotional effect on the other person. Naturally, it is common to see symptoms of depression, manic behaviour, post-traumatic stress disorder, anxiety etc.,²⁸ in victims or survivors of abuse, specifically sexual abuse, and violence.

Depression is generally considered taboo.²⁹ Most individuals are either unaware of the concept of mental well-being or are unable to articulate their condition due to lack of professional help. The situation is worse when it comes to children, since without adult guidance and acceptance, most children are left with no option but to repress their trauma, which in most cases is a subconscious decision.³⁰ It should not, therefore, come as a surprise that without a proper

²⁶ Imran Ahmad Sajid, Naushad Ali Khan and Sumera Farid, 'Violence Against Women in Pakistan: Constraints in Data Collection' (2010) 2(2) *Pakistan Journal of Criminology* 93-110.

²⁷ Javed Afzal and others, 'Mental Healthcare in Pakistan' (2020) 34 *Taiwanese Journal of Psychiatry* (Taipei), 6-14 <https://e-tjp.org/temp/TaiwanJPsychiatry3416-6574232_181542.pdf> last accessed 7 Feb 2021.

²⁸ Muhammad Tahir Khalily, 'Mental health problems in Pakistani society as a consequence of violence and trauma: a case for better integration of care' (2011) 11 *International Journal of Integrated Care* 1-7 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3225239/pdf/ijic2011-2011128.pdf>> last accessed 7 Feb 2021.

²⁹ Maheen Nisar and others, 'Perceptions Pertaining to Clinical Depression In Karachi, Pakistan (2019) *Cureus* 1-12.

³⁰ Saba Walayat and Mussaffa Butt, 'Parental Acceptance-Rejection, Childhood Trauma, Emotion Regulation, and Psychological Adjustment as The Risk Factors of Psychopathic Tendencies in Adolescents of Pakistan' (2017) 7 *International Journal of Business and Social Research* 9-24.

recognition of the need for having a functioning mental health care response and system, specifically for victims of abuse and violence, societal improvement and development will continue to be a far-fetched dream.

Pakistan's Legislative Framework

Pakistan does indeed have a robust legal framework designed to protect and promote the rights of women and children in Pakistan. Following the 18th amendment,³¹ the subject of criminal law and social welfare, *inter alia*, have been devolved to the provincial level, which is to say that the Federal Government, and each Provincial Government, is required to enact their separate laws on the subject of women and child rights, unless the Federal Government and one or more of the Provincial Governments decide to act in concert. Consequently, while a number of laws governing women and child rights are limited in their application to their specific region, some laws are applicable at the national level.³²

While a number of such laws have already been produced in the previous sections,³³ emphasis shall now be placed on the main objectives of the relevant Acts.

From a child rights perspective, the relevant federal and provincial laws have been designed to prevent and combat all forms of abuses that may be perpetrated against children. The Islamabad Capital Territory (ICT) Child Protection Act 2018, and similar provincial legislation on this subject, for example, provide for the protection and care of at-risk children. Furthermore, the aforesaid laws also provide for the establishment of a child protection institution or unit, to ensure that such children without access to adequate housing or medical facilities can be provided the necessary rehabilitative care.

Other legislative instruments, for example, deal with the right to free and compulsory education as provided pursuant to Article 25-A of the Constitution of Islamic Republic of Pakistan 1973,³⁴ as well as prohibiting employment of

³¹ Constitution (Eighteenth Amendment) Act 2010.

³² An example of such legislative instruments being the Zainab Alert Response and Recovery Act 2020.

³³ See (n 6) and (n 21).

³⁴ See the Right to Free and Compulsory Education Act 2012 (Federal); Sindh Right of Children to Free and Compulsory Education Act 2013; the Balochistan Compulsory Education Act 2014; the Punjab Free and Compulsory Education Act 2014; and the Khyber Pakhtunkhwa Free Compulsory Primary and Secondary Education Act 2017.

children, i.e., persons below the age of fourteen (14), or fifteen (15) in case of Punjab only, in the workplace.³⁵

In relation to the rights and protections granted to women in Pakistan, while amendments have been made in the Criminal Procedure Code of 1898 and the Pakistan Penal Code of 1860 penalising the various forms of violence perpetrated against women,³⁶ with respect to matters concerning domestic violence, the law only governs certain regions. The relevant laws protecting women against domestic violence have only been enacted at the provincial levels in Sindh,³⁷ Balochistan,³⁸ and Punjab,³⁹ with the federal region and Khyber Pakhtunkhwa yet to pass their respective bills. While such a gap is duly noted, and the relevant regions should show haste in enacting their respective laws on this subject, emphasis should also be placed on the substance of such laws wherein the relevant rights and protections should not be stripped for the sake of appeasing certain groups.⁴⁰

In addition to the presence of necessary laws, each region also has governmental institutions designated for the promotion and protection of the rights of women and children. Such institutions include namely the National Commission for Child Welfare and Development (NCCWD);⁴¹ National Commission on the Rights of Child (NCRC);⁴² National Commission on the Status of Women (NCSW);⁴³ and relevant Provincial Commissions on the Status of Women.⁴⁴

In addition to the above, as part of the core United Nations Conventions, Pakistan has also ratified the United Nations Convention on the Rights of the

³⁵ See the Employment of Children Act 1991; the Sindh Prohibition of Employment of Children Act 2017; the Punjab Restriction on Employment of Children Act 2016; and the Khyber Pakhtunkhwa Prohibition of Employment of Children Act 2015.

³⁶ (n 21).

³⁷ The Domestic Violence (Prevention and Protection) Act 2013.

³⁸ The Balochistan Domestic Violence (Prevention and Protection) Act 2014.

³⁹ The Punjab Protection of Women against Violence Act 2016.

⁴⁰ Waseem Ahmad Shah, 'View from the courtroom: KP domestic violence bill a diluted version of previous drafts' (*Dawn*, 11 January 2021) <<https://www.dawn.com/news/1600820>> last accessed 7 Feb 2021.

⁴¹ Established on 16 December 1979 by way of Government resolution effective from 1st January 1980, amended from time to time, the NCCWD now comes under the purview of the Ministry of Human Rights.

⁴² See the National Commission on the Rights of Child Act 2017.

⁴³ See the National Commission on the Status of Women Act 2012.

⁴⁴ See the Punjab Commission on the Status of Women Act 2014; the Sindh Commission on the Status of Women Act 2015; the Khyber Pakhtunkhwa Commission on the Status of Women Act 2016; and the Balochistan Commission on the Status of Women Act 2017.

Child (UNCRC),⁴⁵ as well as acceded to the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁴⁶

The reason for stating, albeit briefly, the aforesaid laws, institutions and international commitments is not to make a redundant list of applicable legal provisions, but to rather emphasise the point that a foundational groundwork for the protection of women and children has already been laid down by the Government of Pakistan, a point much too misunderstood by the masses. The issues, thus lie, as stated above, in a lack of implementation coupled with societal reluctance to change.

This is not to say that the law is perfect, a point that shall be elaborated in the next section, but that basic provisions having the force of law are present in the Pakistani legislature. Furthermore, steps have also been taken in establishing relevant institutions with the sole mandate of working towards the development and protection of this vulnerable segment. Such steps, however, can only go so far if more pressing and intrinsic issues are not dealt with correctly.

Gap Analysis

As stated in the aforesaid section, while most laws have defined the relevant parameters of abuse and violence, and accordingly, also provide for strict penal provisions, there are areas where further improvement is sought.

One such area relates to the confidentiality and identity protection of victims. Far too often the media channels rush to report the very explicit details of an incident involving child abuse or violence against women, further desensitizing the public, and breaching upon the privacy of the victim and their family.⁴⁷

To curb such mishandling and the associated breach of privacy, section 14 of the Ethical Code of Practise, formulated pursuant to the Press Council of Pakistan Ordinance 2002, prohibits the publishing of names and identifying features of children, juveniles and women in cases involving sexual offences. Similar restrictions are also found in section 8 of the Electronic Media (Programmes and Advertisements) Code of Conduct 2015 in relation to electronic media. Furthermore, pursuant to the Criminal Law (Amendment)

⁴⁵ The UNCRC was signed by the Islamic Republic of Pakistan on 20 September 1990 and was ratified on 12 November 1990.

⁴⁶ The CEDAW was acceded by the Islamic Republic of Pakistan on 12 March 1996.

⁴⁷ Waseem Ahmad Shah, 'View From The Courtroom: Confidentiality about victim's identity in child abuse cases essential' (*Dawn*, 30 Dec 2019) <<https://www.dawn.com/news/1525185>> last accessed 7 Feb 2021.

(Offences relating to Rape) Act 2016, it is now also a criminal offence pursuant to section 376A of the Pakistan Penal Code of 1860 to disclose the identity of a victim of rape.

While the aforesaid legislative steps are highly appreciable, further emphasis should also be placed on enacting laws prohibiting and penalising all forms of disclosure, whether by media outlets or private citizens, of any information relating to a victim of violence, abuse, sexual assault, and similarly heinous crimes. Furthermore, there is a dire need to define standard operating procedures for law enforcement agencies and media channels, clearly laying out guidelines for seeking permission before any contact can be made with an alleged victim. Providing explicit rules and procedural requirements to avoid subjecting any such victim to an offensive line of questioning or ridicule, when dealing with cases of a violent or sexual nature should be considered as the basic minimum etiquettes to be adopted.

Further steps can also include specific training institutes and capacity building initiatives for law enforcement agencies, regulatory bodies, and media personnel on the ethics of reporting and victim identity protection.

While it is an established principle of law that justice must not only be done but must also be seen to be done,⁴⁸ it can be argued that for cases of special nature, say for example if a victim is of a certain age or demeanour or if the alleged crime has had such an impact on a victim that it is difficult for them to step into the public, private chambers or special courts can be established where such cases can be tried without the presence of the general public.

In addition to the afore mentioned recommendations, certain amendments can also be proposed in existing legislation. In light of the foregoing discussion on the psychological impact of abuse and violence, the current laws should require mandatory psychological evaluation by a trained professional. Furthermore, much like the child-care plan in the ICT Child Protection Act 2018,⁴⁹ additional provisions with respect to rehabilitative measures and compensation funds in cases involving violence against women, especially by family members, should be built-in in the relevant laws.

Moreover, keeping in view the ground reality of these crimes and their long-lasting impacts on the victims, given the large number of women and children in abusive homes or situations will have no other option but to rely on the State

⁴⁸ *R v Sussex Justices, ex parte McCarthy* [1923] All ER Rep 233.

⁴⁹ ICT Child Protection Act 2018, s 14.

assistance, it is also important that an adequate number of shelter homes and protection centres, with sufficient medical personnel and academic and vocational trainers also be made available in each region.

Another facet where intervention is also required is education. While discussing the many potential reasons for the prevalence of violence and abuse, lack of education and awareness has also been cited. Although basic education is undoubtedly helpful, the important thing to note is that a significant part of the population⁵⁰ is never exposed to more nuanced specificities such as consent, sex, education, gender dynamics, and mental health.

While societal change and breaking of stereotypes does not happen overnight, the impact of educating the masses on the afore said subjects will almost surely bear fruit in the long run.

Women in Positions of Power

Representation of women in important places should not be for the sake of optics. It is important to acknowledge first, however, that women have observed and been in similar experiences as those of their fellow women, which results in their inherently gender-sensitized attitude and perspective, naturally being better able to understand and articulate the incidents of abuse and violence.⁵¹ As a result, it should not come as a surprise that certain decision-making powers, ideally, or a say in the decision-making process, practically, should rest with the women of our society.

Accordingly, it is important to analyse how women in positions of power in the different branches of government can have a positive impact on the current state of abuse and violence.

Legislature

Briefly speaking, the legislative branch, that is the Parliament comprising the National Assembly and Senate, at the Federal level, and the Provincial Assemblies, at the Provincial level, are the law-making bodies. With the

⁵⁰ Ashfaque Ahmed Talpur and Asif Raza Khowaja, 'Awareness and attitude towards sex health education and sexual health services among youngsters in rural and urban settings of Sindh, Pakistan' (2012) 62(7) *Journal of the Pakistan Medical Association* 708-712.

⁵¹ Glenda Strachan, Arosha Adikaram and Pavithra Kailasapathy, 'Gender (In) Equality In South Asia: Problems, Prospects And Pathways' (2015) 2 *South Asian Journal of Human Resources Management* 1-11.

exception of ordinances, all primary legislative instruments are enacted through the parliamentary process.

To ensure that the law adequately covers the gaps, as discussed above, in relation to provision of care, rehabilitative measures and establishment of relevant institutions, it is important that those with an inherent understanding of such issues are active members of such institutions where legislative business is held. This, however, is just one aspect of decision making.

The ground reality is that due to the constant power struggle between the ruling party and the opposition party, most decisions are politically motivated rather than based on humanitarian grounds. Consequently, while 69 out of the 342 members of the National Assembly of Pakistan are women,⁵² political differences and a lack of understanding of such issues have hindered the enactment of substantively protective and rehabilitative laws.

Nevertheless, despite such issues, the presence of more women in the Parliament can only lead to more gender-friendly legislation. This point is further supported by the fact that women in Parliament regularly outperform their male counterparts when it comes to contribution to parliamentary business.

In the most recent report published by Trust for Democratic Education & Accountability (TDEA) and Free & Fair Election Network (FAFEN),⁵³ it was noted that women parliamentarians contributed 28% of the parliamentary agenda for the period 2020 – 21, which involved, *inter alia*, sponsoring 33% private members' bills, 30% resolutions and 56% calling attention notices. This, of course, is not a one-off instance of competency by women parliamentarians, as similar, if not better, figures have been noted in previous years.⁵⁴

The purpose of the above is to highlight the fact that, despite women's under representation in the Parliament, women in law-making roles have time and again proven their worth, and one should not, therefore, underestimate the

⁵² Further information available on the National Assembly of Pakistan's website <http://www.na.gov.pk/en/mna_list_w2.php?list=women> last accessed 7 Feb 2021.

⁵³ TDEA–FAFEN, 'Women Parliamentarians Performance 2020 – 2021' <https://fafen.org/wp-content/uploads/2021/03/FAFEN-Women-Parliamentarians-Performance-Report-2020-2021-1_compressed.pdf> last accessed 23 May 2021.

⁵⁴ For example, women parliamentarians made 39% contribution to parliamentary business from 2017 – 2018 (See FAFEN's report titled 'A Tribute to Women Legislators, National Assembly & Senate of Pakistan, 2017 – 2018), and 33% contribution to parliamentary business from 2018 – 2020 (see TDEA–FAFEN's report titled 'Women Parliamentarians Performance 2018 – 2019' and TDEA–FAFEN's report titled 'Women Parliamentarians Performance 2019 – 2020').

impact women can have in bringing about positive legislative change in relation to the rights and protections granted to women and children.

Executive

The executive branch of the Government comprises, most notably, the Cabinet, the Chief Ministers, the Prime Minister, and the President of the Islamic Republic of Pakistan. In addition to the aforesaid, at the ministerial level, the administrative functions of each ministry are fulfilled by civil servants appointed through the Central Superior Services (CSS) exams or the Provincial Civil Service (PCS) exams.

The executive also plays an extremely vital role in the functioning of the many core responsibilities of the Government. Whereas the legislature lays down the legal framework, the implementation of such laws rests with the executive institutions, such as the relevant ministries, law enforcement agencies and concerned commissions and departments.

While there has been a growing trend of successful female candidates in the much-coveted CSS examination,⁵⁵ which is undoubtedly praiseworthy, such success, however, is attributable to the academic prowess of the relevant female candidates and not as a result of preferential treatment or quota-based allocation. Accordingly, further incentives and policy measures are also required to ensure that more female officials are present as part of the executive branch and are also able to proactively implement the relevant legal provisions in existence.

Judiciary

The judicial branch of the government comprises the subordinate courts, high courts, and the Supreme Court of Pakistan, and its members include the judges appointed to render judgments in relevant cases.

One can argue the point that the main function of the judicial branch is not the disposal of cases but rather interpretation of the law in a manner which achieves its main purpose. While judges are supposed to impart their judgment impartially, disregarding any personal motives or inclinations, in reality, the presence of women in the highest judicial positions will be a monumental step in ensuring that in cases of abuse and violence, the female perspective is

⁵⁵ Abdul Ghani, '12 female candidates from Sindh bag top positions in CSS 2017' (*Daily Times*, 29 June 2018) <<https://dailytimes.com.pk/259915/12-female-candidates-from-sindh-bag-top-positions-in-css-2017/>> last accessed 7 Feb 2021. See also, 'Meet Shanza Faiq, the woman who topped 2018 CSS exams' (*Samaa*, 4 June 2019) <<https://www.samaa.tv/news/2019/06/meet-shanza-faiq-the-woman-who-topped-2018-css-exams/>> last accessed 7 Feb 2021.

adequately taken into account. The most notable example of this is the recent judgement by Justice Aisha A. Malik declaring the two-finger test as being illegal, unconstitutional, and offensive to the dignity of the female victim.⁵⁶

It is worth pointing out that women at present still constitute a minority of the judiciary in Pakistan.⁵⁷ However, much like their significance in other relevant roles, their importance at the highest judicial levels cannot be understated. Despite the societal stereotypes concerning women's decision-making abilities, the presence of women in the judiciary has been appreciated for their ability to settle family matters and their incorruptibility.⁵⁸

It would appear that the very biases which people have harboured against women turn out to be their very strengths in decision-making and dispute resolution. If the aforesaid is to be any indication, then reasons to have more women in the judiciary should be rather obvious.

Conclusion

Hence, does the law fulfil its purpose of providing care to victims of abuse and violence in Pakistan? While it would be much too convenient to answer the aforesaid question with a yes or no, it would fail to take into account its many intricacies.

While the situation concerning violence and abuse against women and children in Pakistan is indeed worrisome, looking at it in the context of the current economic and social climate, such incidents are nothing but by-products of the decadence that has persisted over many years in Pakistan.

In relation to the prevalence of such crimes, focus must be shifted to the fundamental problems ailing our society. While it is easy to punish a single perpetrator, the fault usually lies at a societal level. In overcoming societal prejudices, an emphasis on basic education along with an understanding of sexual health, mental health and consent is also necessary.

While Pakistan does have a robust legislative framework in place for the protection and promotion of the rights of women and children, focus must now

⁵⁶ See (n 22).

⁵⁷ Ayesha Siddique Khan, 'Feminisation of law and judiciary in Pakistan' (*The Express Tribune*, 13 Sep 2020) <<https://tribune.com.pk/story/2263846/feminisation-of-law-and-judiciary-in-pakistan>> last accessed 7 Feb 2021.

⁵⁸ Livia Holden, 'Women Judges and Women's Rights in Pakistan' (2017) 7(4) *Oñati Socio-Legal Series* 752-769.

also be shifted to their effective implementation. For this, communal support and training of law enforcement agencies shall also be required.

There is, nevertheless, much room for improvement in laws and in institutions both. It is, therefore, also paramount to ensure that fairer representation of women in positions of power is ensured for fairer decision making and implementation of policy initiatives.

Of course, there is also the aspect of women empowerment which should not be ignored. The above debate has only presented the shortcomings of the law in its protective role and how its focus must also be shifted towards rehabilitation and growth. However, rehabilitation without ingraining a sense of empowerment is winning only half the battle. For long-term sustainable growth and change, the idea that a woman's worth is independent of societal and cultural norms and beliefs must not only be accepted but also encouraged.

Having increased representation in positions of power is indeed a positive step, however, empowerment of women should not only be for public display but shall also result in internalised changes. The idea that a woman requires protection and institutional support subconsciously portrays them as weak and helpless. By challenging this very notion, as well as understanding the inherent gender specific issues in patriarchal societies, exacerbated further due to misconceived religious and cultural values one can first begin to move towards a woman empowered society.

In addition to changing mindsets, further avenues can also be provided in the field of education, media, and business for further improvement in this area. It goes without saying that empowered women can only lead to empowered future generations.

Accordingly, to answer the afore mentioned question, while the law does fulfil its role of providing protection and care to victims of abuse and violence, it still has a few leaps to make before it can make a drastic impact. For long-term sustainable changes, however, precedence needs to be given to the empowerment of women in our society, the purpose of which is to ensure that any steps taken for their protection and welfare is only supplementary to the means and capabilities already available at their disposal.

International Forced Labour: A Gendered Perspective

*Bismillah Kiani

Abstract

With historic roots in Western colonialism and the transatlantic slave trade, discrimination based on identity and gender is not a new phenomenon. The latest estimates from the ILO reveal that women and girls are disproportionately victimized in forced labour and sexual exploitation, accounting for 71% of modern slaves (Global Estimates on Modern Slavery: Forced Labour and Forced Marriage, 2017). Females constitute 99% of forced sexual exploitation and 84% of victims of forced marriage. This structural phenomenon prevents females from bridging the poverty gap. Females are “adversely” incorporated in market activities based on their vulnerabilities. Their prioritization of short-term gains makes them vulnerable to exploitive practices and perpetuates the poverty trap. Therefore, the question arises: why does this phenomenon continue to persist, despite increasingly stringent national labour laws and international commitments such as the ILO Forced Labour Convention No.29? Accordingly, this paper will overview international legal agreements, and legal challenges towards eradicating forced labour. As both an ILO signatory and hotspot for bonded labour, this paper will specifically examine Pakistan’s legal labour protection and cases: Darshan Masih v. State, P.L.D. 1990 S.C. 513 and the Judgment of High Court of Sindh, Circuit Court, Hyderabad (2002). Investigating forced labour from a gendered lens becomes increasingly important in a COVID-19 context. Economic insecurity, coupled with mobility restrictions and gender inequality, makes women even more susceptible to hazardous work.

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Introduction

With historic roots in Western colonialism and the transatlantic slave trade, discrimination based on identity and gender is not a new phenomenon. The latest estimates from the ILO reveal that women and girls are disproportionately victimized in forced labour and sexual exploitation, accounting for 71% of modern slaves.¹ Females constitute 99% of forced sexual exploitation and 84% of victims of forced marriage. This structural phenomenon prevents females from bridging the poverty gap. Females are “adversely” incorporated in market activities based on their vulnerabilities. Their prioritization of short-term gains makes them vulnerable to exploitive practices, therefore perpetuating the poverty trap.

Subsequently, the appropriate question arises: Why does this phenomenon continue to persist, despite increasingly stringent national labour laws and international commitments such as the ILO Forced Labour Convention No.29? This paper will overview international legal agreements, and legal challenges towards eradicating forced labour. It will consider socioeconomic factors such as poverty, limited labour protections, restricted mobility, governance gaps and irresponsible sourcing practices. As both an ILO signatory and hotspot for bonded labour, this paper will specifically examine Pakistan’s legal labour protection and cases: *Darshan Masih v State* and the Judgment of High Court of Sindh, Circuit Court, Hyderabad (2002).² Investigating forced labour laws from a gendered lens becomes increasingly important in a COVID-19 context. Economic insecurity, coupled with mobility restrictions and gender inequality, makes women even more susceptible to hazardous work.

Part I: Forced Labour Overview

In early 2000, there was little concrete data on forced labour at national or global levels.³ The first ever global estimates were published by the ILO in 2005. The report finds that 152 million child labourers and 25 million children and adults are in forced labour.⁴ In Pakistan, the situation is exacerbated with an estimated 3 million individuals in modern slavery, and a government response rating of

¹ International Labour Organization, Walk Free Foundation, and International Organization for Migration, *Global Estimates on Modern Slavery: Forced Labour and Forced Marriage* (International Labor Organization and Walk Free Foundation 2017).

² *Darshan Masih v State* PLD (1990) SC 513.

³ ILO, *Profits and Poverty: The Economics of Forced Labour* (International Labour Organization 2014) 5.

⁴ (n 1).

“C” by the Global Slavery Index (GSI).⁵ The hidden nature of forced labour makes it difficult to identify, monitor and therefore legislate. The ILO has published a list of forced labour indicators and the Fair Labour Association lists additional indicative methods (Table 1).

Table 1. ILO Forced Labour Indicators and Fair Labour Additional Indicators.⁶

Forced Labour Indicators	
ILO Indicators	Fair Labour Association Additional Indicators
<ul style="list-style-type: none"> - Abuse of Vulnerability - Deception - Restriction of Movement - Isolation - Physical and sexual violence - Intimidation and Threats - Retention of Identity Documents - Withholding of Wages - Debt Bondage - Abusive Working Conditions - Excessive Overtime 	<ul style="list-style-type: none"> - Recruitment fees - Abduction or confinement during the recruitment process - Sale of the worker - Removal of rights or privileges (for example promotion) - Blackmail - Denunciation to authorities - Limited freedom of communication - Penalties - Induced or inflated indebtedness (e.g. when an employer provides housing, food etc. at inflated prices)

To note, a single indicator may not be sufficient, but several indicators together may conclusively demonstrate exploitive work conditions. The informality of these indicators makes it difficult to pinpoint exact cases of exploitive work. Nonetheless, with the United Nations' 2030 Agenda for Sustainable Development and the new multi-stakeholder initiative Alliance 8.7 “For a world without forced labour, modern slavery, human trafficking and child labour” demonstrates global momentum in this field.

⁵ Walk Free Foundation, ‘Global Slavery Index’ (2018) <<https://www.globalslaveryindex.org/2018/data/country-data/pakistan/>> accessed 6 Feb 2021.

⁶ Special Action Programme to Combat Forced Labour, ‘Indicators of Forced Labour’ (ILO, 2012) <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_203832.pdf> last accessed 1 Aug 2021; Fair Labour Association ‘Assessing Forced Labor Risks in the Palm Oil Sector in Indonesia and Malaysia’ (2018) 10 <https://www.theconsumergoodsforum.com/wp-content/uploads/2018/11/201811-CGF-FLA-Palm-Oil-Report-Malaysia-and-Indonesia_web.pdf> last accessed 1 May 2021.

Furthermore, labour exploitation and unequal gender power relations are used as tactics to profit from females. As seen in Figure 2, women are the majority in private forced labour and dominate the sexual exploitation industry.

Figure 2. Forced Labour Percentage Distribution by sex and category.⁷



There is an abundance of literature that investigate more deeply the cross-sectional factor of gender and economic, social, education, and reproductive barriers. Oftentimes, women play multiple roles as mothers or caretakers at home, and wage earners outside of the home. This added stress of unpaid work is one of the reasons why Staritz and Guilherme Reis label global value chains as “gendered structures”.⁸ Men and women are employed in different stages of the value chains and concentrated in different sectors. This is due to three reasons: time constraints due to female reproductive responsibilities; women’s limited access to inputs such as credit, social networks, education, or trainings; and market and institutional gender discrimination.

⁷ International Labour Organization, Walk Free Foundation, and International Organization for Migration, *Global Estimates on Modern Slavery: Forced Labour and Forced Marriage* (International Labor Organization and Walk Free Foundation 2017).

⁸ Cornella Staritz and Jose Guilherme (eds.), *Global Value Chains, Economic Upgrading, and Gender* (The World Bank Gender Development Unit 2013) 3. <http://www.capturingthegains.org/pdf/GVC_Gender_Report_web.pdf> accessed 4 Feb 2021.

International Conventions

As outlined in the ILO Forced Labour Convention No.29, labour is "all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily".⁹ This refers to work or service in any industry or sector, including the informal economy. 'Voluntarily' is the worker's capacity to freely accept or exit a job with informed consent. The convention stipulates that member states must enforce forced labour as a penal (criminal) offence, therefore reinforcing the severity of this crime. The exceptions to forced labour include compulsory military service; normal civic obligation; prison labour; work in case of emergencies and minor communal service. Currently, 178 ILO members, including Pakistan, have ratified this convention.

The ILO Abolition of Forced Labour Convention explains the circumstances in which forced labour cannot be used:

- (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
- (b) as a method of mobilising and using labour for purposes of economic development;
- (c) as a means of labour discipline;
- (d) as a punishment for having participated in strikes;
- (e) as a means of racial, social, national or religious discrimination.¹⁰

The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) includes trafficking in persons for the purpose of labour and sexual exploitation in the definition of forced labour.¹¹ The UN

⁹ ILO Forced Labour Convention No.29, 1930.

¹⁰ ILO Abolition of Forced Labour Convention No.105, 1957, art. 1.

¹¹ ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations: Eradication of Forced Labour* (International Labour Conference, 96th Session, Report III Part 1B, 2007) para 77.

Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children¹², defines human trafficking as:

“The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”¹³

Both the Palermo and ILO protocols cover similar fields, with exception of organ removal, which is not covered under the ILO Convention No.29. However, while forced labour and human trafficking are closely linked, they are not the same. Victims of trafficking may become forced labourers, but not all forced labourers originate from trafficking. For instance, a person who is forced to work in their hometown is not a trafficking victim.¹⁴

Debt Bondage

The ILO estimates that of the 16 million forced labourers in the private economy, 51% were in debt bondage. This increases to 70% for adult labourers in the sectors of agriculture, domestic work, or manufacturing.¹⁵ According to the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, debt bondage is:

“The status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as

¹² Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children 2000.

¹³ Palermo Protocol, art. 3.

¹⁴ UNODC Commission on Crime Prevention and Criminal Justice, *The Vienna Forum to fight Human Trafficking Background Paper* (E/CN.15/2008/CRP.2, 2008).

¹⁵ ILO, IOM, & Walk Free Foundation, ‘Global Estimates on Modern Slavery: Forced Labour and Forced Marriage’ (2017) 11.

*reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.*¹⁶

The estimates above include both traditional debt bondage from feudal-landlord systems, and modern debt acquired from recruitment fees and agencies. In Pakistan, bonded labor is the main form of modern slavery, often in informal economy sectors such as agriculture, brick kilns, carpet weaving, construction, domestic work, glass-bangle making, mining and tanneries.

The most common pattern in Pakistan is for a landlord or employer to give a loan to labourers for future work, on the understanding that this advance payment (peshgi) will be paid back by providing labour. In reality, these payments are difficult to meet. Employers use several tactics to enslave individuals in a debt cycle trap. Employers can limit the fundamental human right of freedom of movement for peasants who live on their land in exchange for crop or revenue (haris), thus preventing their ability to seek work elsewhere.¹⁷ In rural areas, limited cheap credit forced employees to borrow for their employers when external shocks (urgent medical expenses) arise. Heads of households are trapped in a poverty cycle, often dragging their entire families to meet production quotas. Often, as seen in the brick-kiln industry, the debt is transferred between generations.

Criticisms

The ILO definition has been useful for policy implementation in public and private sectors; however, there are two limitations to this definition: its simplicity and exclusion of economic coercion. First, the ILO definition succinctly distinguishes forced labour victims and voluntary workers. In practices, studies reveal this boundary is porous and transient. Genevieve LeBaron's empirical investigation on workers in tea and cocoa supply chains reveals that worker experience and condition were overlapping.¹⁸ She found that individuals often move between forced and severely exploitive labour throughout their lives, making it difficult to track. Contrary to misconceptions,

¹⁶ United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956.

¹⁷ Maliha H. Hussein et al., *Bonded labour in Agriculture: A rapid assessment in Sindh and Balochistan, Pakistan* (2004) ILO Working Paper 26.

¹⁸ Genevieve LeBaron, *Combatting Modern Slavery: Why Labour Governance is Failing and What We Can Do About It* (Polity Press 2020) 43.

the life of a forced labourer is not commonly characterized by a kidnapping, manipulation, or deceit; rather, a simple contract or exchange of money. Thus, making it is difficult for researchers to pinpoint when an individual goes from regular abuse to forced labour. These transitions can be triggered by external shocks, such as sick dependants, failing health or increased economic burden. For example, a worker may borrow money from an employer who charges exorbitant interest rates, pushing the person from voluntary work to bonded labour. The ILO's definition fails to recognize the nuances of different degrees of forced labour. The oversimplification may result in legislation that inadequately addresses the practical situation of workers.

In addition, the ILO does not acknowledge the role of economic coercion as a driver for forced labour. Instead, it consigns coercion as acts perpetrated by specific actors such as the employer, organization or government:

“An external constraint or indirect coercion interfering with a worker’s freedom to “offer himself voluntarily” may result not only from an act of the authorities ... but also from an employer’s practice ... However, the employer or the State are not accountable for all external constraints or indirect coercion existing in practice: for example, the need to work in order to earn one’s living.¹⁹”

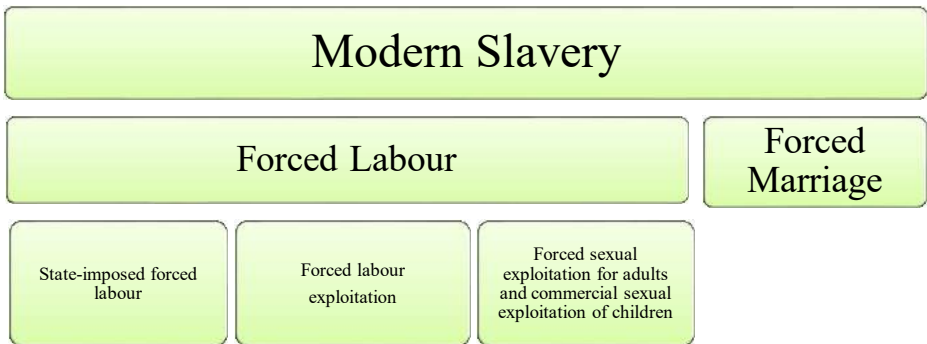
This approach fails to interpret systemic forced labour that occurs in large numbers in specific regions or business sectors. While physical, psychological, and financial factors are recognized as acceptable forms of coercion into involuntary labour, economic necessity is not.²⁰ Contrary to public conceptions, forced labourers have agency to exit or enter the market. However, when their options are limited to low wages in poor working conditions versus starvation, their freedom of movement is severely restricted. Fear of starvation or destitution prevents workers from exiting their labour situation, despite earning substantially lower than the poverty line. Thus, economic pressure is an important dynamic that influences a worker's decision to remain in abusive conditions.

¹⁹ ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations: Eradication of Forced Labour* (International Labour Conference, 96th Session, Report III Part 1B, 2007) 20-21.

²⁰ Genevieve LeBaron et al., ‘Confronting root causes: Forced labour in global supply chains’ (2018) *Open Democracy and SPERI* <<https://core.ac.uk/download/pdf/145637779.pdf>> last accessed 1 May 2021.

Furthermore, another commonly used term is “modern slavery”, an umbrella term to capture forced labour, human trafficking, forced sexual exploitation; worst forms of child labour; and organ removal.²¹ The ILO, IOM and Walk Free foundation chose to employ this definition in their recent report on ‘Global Estimates on Poverty’. As seen in Figure 1, they subcategorize forced labour and forced marriage as the two main groupings.

Figure 1. Categorization of Modern Slavery.²²



Alliance 8.7 also chooses to use this term in their objectives: “Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking ...”.²³ The recent UK legislation was also titled Modern Slavery Act (2015) in line with this international trend. While the Modern Slavery Act was seen as “world-leading” in its initial phases, critics have argued the limitations of an enforcement-based approach. Instead, advocating for a victims-based approach.²⁴

This paper chooses to avoid using the term modern slavery because of its’ ambiguity. While useful as an advocacy tool, there is no, legally nor globally agreed upon, definition for modern slavery, therefore, producing

²¹ ILO, *Profits and Poverty: The Economics of Forced Labour* (International Labour Organization 2014) 3.

²² International Labour Organization, Walk Free Foundation, and International Organization for Migration, *Global Estimates on Modern Slavery: Forced Labour and Forced Marriage* (International Labor Organization and Walk Free Foundation 2017) 17.

²³ Alliance 8.7. (2018) <<https://www.alliance87.org/target-8-7/>> last accessed 1 May 2021.

²⁴ Virginia Mantouvalou V, 'The UK Modern Slavery Act 2015 Three Years On' (2018) 81(6) *Modern Law Review* 1017-1045.

generalizations. Furthermore, it is an emotive term which has caused debate amongst both academics and legal scholars because exploitive work is a range.²⁵

Not all children exposed to hazardous work are “slaves”. Not all workers who are paid unfairly are considered forced. The term risks excluding the larger population of individuals who are influenced by more routine and moderate forced labour techniques. Finally, the terminology implies potential imperialistic and shaming of developing countries, such as Pakistan, with a large number of “modern” slaves.

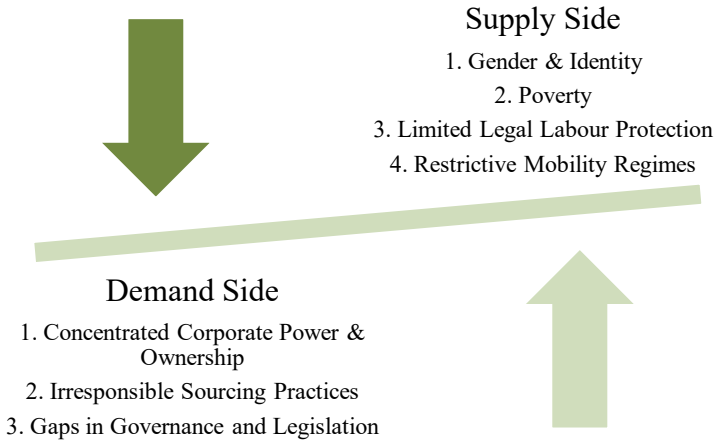
Part II: Socioeconomic factors - Supply and Demand Side

Supply Side

Despite numerous international conventions and organizations committed to eradicating forced labour, this practice continues to persist. The appropriate question is then, “What factors make forced labour attractive?”. Supply and demand side theories reveals motivations from both sides through and economic, political, and legal lens. The supply side explains the contributing factors that produces an environment susceptible to exploitive work. The demand side rationalizes the pressures from within the market that creates space for forced labour. This form of analysis validates that forced labour is not a consequence of unethical or greedy individuals, but a structural phenomenon: the supply of exploitable workers and the demand for this type of labour. Below, this paper will briefly assess how the supply and demand side factors of poverty bolsters gender disparities in forced labour.

²⁵ Michael Dottridge, ‘Eight Reasons why we shouldn’t use the term ‘Modern Slavery’’ (*Opendemocracy*, 17 Oct 2017) <<https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/eight-reasons-why-we-shouldn-t-use-term-modern-slavery/>> last accessed 1 Feb 2021.

Figure 3. Supply and Demand Factors of Forced Labour.²⁶



Poverty

Previous dominant orthodoxies explain poverty as a “residual”, a consequence of economic exclusion from the market.²⁷ It was held that it could be rectified through greater inclusion in market activity. However, this type of rational disqualifies the power structures underpinning poverty. In contrast, “adverse selection” argues that poor people are not excluded from market but are included with “adverse terms” that perpetuates poverty and vulnerability. It is a cyclical relationship: poverty shapes people’s exposure to exploitation while exploitation prevents them from escaping poverty. Geoff Wood explains:

“[poor people] are obliged to manage [their] vulnerability through investing in and maintaining forms of social capital which produce desirable short-term, immediate outcomes and practical needs while postponing and putting at permanent risk more desirable forms of social capital which offer the strategic

²⁶ Genevieve LeBaron et al., ‘Confronting root causes: Forced labour in global supply chains’ (2018) *Open Democracy and SPERI* <<https://core.ac.uk/download/pdf/145637779.pdf>> last accessed 1 May 2021.

²⁷ Nicola Phillips, ‘Informality, global production networks and the dynamics of ‘adverse incorporation’ (2011) 11 *Global Networks* 390.

*prospect of supporting needs and maintaining rights in the longer term.*²⁸”

In Phillips, Bhaskaran, Nathan and Upendranadh’s work, they contend that child involvement in exploitive global economic activity perpetuates chronic poverty.²⁹ Their investigation looks at the garment industry in Delhi, India, well known as the location of clothing retailer Gap’s exposed child labour scandal in 2007. Relating back to Woods earlier quote, this case illustrates that these children are prioritizing the “desirable short-term” outcome: the ability to eat tomorrow. However, the cyclical nature of adverse incorporation means it will be difficult for them to escape this poverty trap. With no access to school or skill upgrading, they are forgoing decent work in the future. For girls, who already experience illiteracy issues in much of the developing world, these factors compound together.

In Phillips and Sakamoto’s investigation into the labour force in Brazil’s cattle sector, they encountered adverse selection.³⁰ From 21,000 people, the majority of forced labour incidences were not the extreme poor (below \$1.25 per day), but rather the “working poor”. This is partially because agricultural employers were seeking young fit men, and not chronically malnourished. Poverty is not a uniform class and should not be treated as one. Poverty in the developed world is often associated with unemployment (exclusion theory), however extreme poverty is still a problem for employed individuals.

The relation between poverty and forced labour seems straightforward; however, income-based measuring of poverty is an unreliable method. Poverty is multi-dimensional: education; literacy; access to opportunities; social safety nets; social infrastructure; gender; decent work and wages are all factors.³¹ A holistic approach taking into account all of these aspects is necessary. Overall, poverty is polymorphous, there are multiple components that contribute to a person’s vulnerability to exploitive work.

²⁸ Geoffrey Wood, ‘Concepts and themes: Landscaping social development’ (2000) 9 *Social Development SCOPE Papers* 19.

²⁹ Nicola Phillips and others, ‘The Social foundations of global production networks: towards a global political economy of child labour’ (2014) 35 *Third World Quarterly*.

³⁰ Nicola Phillips & Leonardo Sakamoto, ‘Global Production Networks, Chronic Poverty and “Slave Labour” in Brazil’ (2012) 47 *Studies in Comparative International Development*.

³¹ Ibid.

Limited Labour Protection

Labour protection becomes challenging with the hidden and extensive nature of labour exploitation. With forced labour becoming more common in global value chains, overseas multinational companies offshore their exploitive practices to developing countries via intermediaries. The International Trade Union Confederation (ITUC) analysed the global supply chains of 50 Transnational corporation with a combined revenue of US\$3.4 trillion. They found that only 6% of their global supply chain workforces were directly employed (2016). Limited labour protection becomes further complicated as Corporate Social Responsibility (CSR) initiatives becomes a method for companies to manage their affairs in-house and prevent government-initiated legislations.

As company-led labour governance increased, government led initiatives and enforcement decreased. In the United States, it is very unlikely a company will be audited by the Department of Labour inspectors.³² While there are existing international and domestic laws, a lack of enforcement means governments are unsustainable against growing enterprises, and a vast informal economy. However, the rise of CSR and company volunteered ethical audits is not a substitute for state labour protections. The demand side factors explain how the concentrated corporate power and ownership contributes to this issue.

Restrictive Mobility Regimes

Restrictive mobility regimes are structured to perpetuate vulnerability to forced labour and abuse. When traditional methods of migration are unavailable, migrants often resort to precarious migration routes and methods. This may include the use of smugglers, or informal labour recruiters, who can use some of the coercive techniques discussed earlier, leading to debt-bonded work in cruel conditions. Both legal and illegal migrants face a unique situation. For instance, asylum seekers are denied access to the labour market and social protection until the declaration of their status.³³ In the United Kingdom Asylum Act 2002, the refusal to work for asylum seekers is a method to deter excessive applicants. However, lengthy legal processes leave asylum-seekers in a void. With limited government aid, they might be forced to enter informal work or abusive working conditions.

³² Genevieve LeBaron, *Combatting Modern Slavery: Why Labour Governance is Failing and What We Can Do About It* (Polity Press 2020) 47.

³³ Genevieve LeBaron et al., 'Confronting root causes: Forced labour in global supply chains' (2018) *Open Democracy and SPERI* <<https://core.ac.uk/download/pdf/145637779.pdf>> last accessed 1 May 2021.

Visa programmes are another mechanism that prevents freedom of movement and promotes dependence on the employer. Temporary or ‘tied’ visa programmes give migrants the right to enter a country for work, but only for one specific employer and location. Thus, if a problem arises with the current employer, workers will face deportation if they decide to change employment. This disproportionately empowers employers to take advantage of migrants. For example, many workers have indebted themselves to fund their travel and visa expenses. They could also be providing remittances to support their families back home. The cost of leaving would be too high for these workers, even if they are in exploitive working conditions. As such, this demonstrates that even legal power structures, viewed as fundamental instruments for maintaining order, can foster forced labour.

Demand Side

The demand side narrative observes the motivation for businesses to utilize forced labour from an economic and political perspective. Forced labour is a US\$150.2 billion profit-making business.³⁴ The figure below show that forced labour (not including forced sexual exploitation) accounts for US\$51.2 billion. Forced sexual exploitation accounts for US\$99 billion. The greatest profits are located in Asia-Pacific, due to the large number of victims in Asia, while Developed Economies have higher profits per victim.

³⁴ ILO, *Profits and Poverty: The Economics of Forced Labour* (International Labour Organization 2014).

Table 2. Estimated annual Profits from Forced Labour (US\$ Billion).³⁵

Region	Forced Sexual Exploitation	Domestic Work	Non-Domestic Labour	Total
Asia-Pacific	31.70	6.30	13.80	51.80
Latin America & the Caribbean	10.40	0.50	1.00	12.00
Africa	8.90	0.30	3.90	13.10
Middle East	7.50	0.40	0.60	8.50
Central & South-Eastern Europe & CIS	14.30	0.10	3.60	18.00
Developed Economies & EU	26.20	0.20	20.50	46.90
World	99.00	7.90	43.40	150.20

A key part to understanding MNC's motivation to sustain forced labour mechanisms, is the concentrated corporate power and ownership. For instance, activists create targeted campaigns against companies in an attempt to tarnish their reputation and sway consumer.³⁶ In the tea industry, this could mean targeting companies like Tazo, Lipton, PG Tips and Pure Leaf. However, this is an ineffective strategy since all these brands are owned by Unilever. The monopolization of the market makes it difficult for consumers boycotts to influence MNCs. Understanding the background power structure and motivations is key for effective policies and campaigns. As of 2020, companies like Walmart (US\$523 billion in revenues), Amazon (US\$280 billion), and Apple (US\$260 billion), can dominate global production patterns to suit their interests.

The role of intermediaries, shadow factories, and outsourcing means retailers are sometimes themselves unaware of forced labour in their supply chains. Nestlé, for example, has more than 165,000 direct supplies, sourcing ingredients

³⁵ Ibid.

³⁶ Genevieve LeBaron, *Combatting Modern Slavery: Why Labour Governance is Failing and What We Can Do About It* (Polity Press 2020).

from, “more than 13 million farmers across 86 countries around the world”.³⁷ This lends power to irresponsible sourcing practices such as unregistered production centers. MNCs view outsourcing as a crucial step for taking advantage of the profits of labour exploitation, without tarnishing their image. Through intermediaries or informal processes, MNCs can hide their complicity in mechanisms that perpetuate forced labour.

Gaps in Governance

Despite government and private measures, forced labour persists. Public and private organizations work together in a dichotomous approach to labour exploitation. Public government bodies provide regulatory framework but lack the resources for enforcement in GVCs. For instance, the Modern Slavery Act 2015 mandates companies with business in the UK, and an annual turnover of £36 million to report on their forced labour measures. However, the legislation provides no repercussions for non-compliance, and has not implemented substantive progress.

Companies seeking to reduce outside interference, resort to self-regulation through private auditors. Through CSR, firms are now both the cause and solution to modern forced labour. CSR helps uplift brand imaging, while also deterring government interference. By voluntarily agreeing to detect and assess abusive practices, companies are showing greater transparency. Conversely, private social auditors often focus on first-tier suppliers, neglecting the most vulnerable workers.³⁸ Private auditing can also lead to conflicts of interests: since retailers are paying for this service, they have discretion on the final reporting.

Part III: Case Study of Pakistan

Over 3 million individuals in Pakistan suffer from the systemic human rights abuse of forced labour exploitation.³⁹ An agglomeration of the above factors

³⁷ Nestle in the UK, *Modern Slavery and Human Trafficking Report 2017*, 4. <https://www.nestle.co.uk/sites/g/files/pydnoa461/files/asset-library/documents/aboutus/corporate-reporting/nestle-mod-slave-act-2017-17-april.pdf> last accessed 05 Feb 2021.

³⁸ Genevieve LeBaron, *The Global Business of Forced Labour: Report of Findings* (University of Sheffield, ESRC, SPERI, 2018) <<http://globalbusinessofforcedlabour.ac.uk/wp-content/uploads/2018/05/Report-of-Findings-Global-Business-of-Forced-Labour.pdf>> last accessed 1 May 2021.

³⁹ Walk Free Foundation, ‘Global Slavery Index’ (2018)

contribute to this high statistic, in addition to the unique caste-based discrimination (84% of free bonded labourers were Hindus) and low government spending in protection of poor population (less than 3% of the GDP).⁴⁰ International and domestic legislation must work in unison to tackle this issue. However, domestic legislation has not been effective. Landlords or employers can bribe officials to prevent their cases from being investigated or brought to courts.⁴¹ Intimidation or threat of violence has suppressed victims and non-governmental organizations from seeking legal protections.

The Constitution of Pakistan outlines a range of labour rights provisions in Part II: Fundamental Rights and Principles of Policy. Article 11 of the Constitution prohibits all forms of slavery, forced labour and child labour:

“Slavery is nonexistent and forbidden and no law can be made to permit or facilitate its introduction in Pakistan in any form. All forms of forced labour and traffic in human beings are prohibited. Pakistan’s Constitution condemns all types of exploitation and makes the state responsible to bring all kinds of exploitation to an end and ensure fair opportunities to the people.”

Article 17 provides for a fundamental right to exercise the freedom of association and the right to form unions. Article 18 proscribes the right of its citizens to enter upon any lawful profession or occupation and to conduct any lawful trade or business. Article 25 lays down the right to equality before the law and prohibition of discrimination on the grounds of sex alone. Article 37(e) makes provision for securing just and humane conditions of work, ensuring that children and women are not employed in vocations unsuited to their age or sex, and for maternity benefits for women in employment.

As a signatory of the Universal Declaration of Human Rights (UDHR), Pakistan is also committed to the International Convention on Civil and Political Rights

<<https://www.globallslaveryindex.org/2018/data/country-data/pakistan/>> last accessed 6 Feb 2021.

⁴⁰ Zulfiqar Shah, *Long Behind Schedule: A Study on the Plight of Scheduled Caste Hindus in Pakistan* (International Dalit Solidarity Network 2008)

<<http://www.dalits.nl/pdf/LongBehindSchedule.pdf>>; Social Protection in Pakistan (*Sustainable Development Policy Institute*, 2013).

⁴¹ Krishna Prasad Upadhyaya, *Poverty, Discrimination and Slavery: The reality of bonded labour in India, Nepal and Pakistan* (Anti-Slavery International 2008).

(ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICESCR). The ICESCR obliges members to ensure citizens have rights without discrimination (Article 2); right to choose work (Article 6); right to just and safe working conditions, faire wages, decent living (Article 7); right to adequate living (Article 11).

Darshan Masih v State

Domestically, the issue of bonded labour first came to the courts under the landmark case of *Darshan Masih v State*.⁴² Under Chief Justice of Pakistan, Muhammad Afzal Zullah, this case solidified judicial activism in the realm of Public Interest Litigation (PIL). For the first time, the Supreme Court invoked *suo moto* powers on the basis of a telegram sent by a group of brick kiln bonded labourers who were hiding in fear of their security. Using Article 184(3) the court considered this a question of ‘public importance’ and ‘enforcement of any of the fundamental rights’ of the citizens. Citing the principles outlined in *Benazir Bhutto v Federation of Pakistan*, the traditional standing of *locus standi* were dispensed with in *Darshan*.⁴³ The absence of the term “aggrieved person” in Article 184(3) allowed the Supreme Court to take a liberal interpretation of standing in *Darshan*.⁴⁴ This paved the way for future cases in the area of PIL. The telegrams, addressed specifically to the Chief Justice was accepted for initiating proceedings, demonstrating procedural flexibility for upholding fundamental human rights.

The Supreme Court took the opportunity in *Darshan* to declare bonded labour as unconstitutional and direct the government to outline legislation to define forced labour. The Supreme Court case references bonded and forced labour interchangeable, however, it also recognized it is “necessary to define the expression forced labour with illustrations of its different forms, in such a manner so as to minimize any confusion about its real purport”.⁴⁵ Despite the above Constitutional guarantees and ratification of international conventions, no national legislation directly addressed this issue until the 1992 Bonded Labour System (Abolition) Act. This was a clear signal and acknowledgement of labour exploitation issues from the Pakistani government. The act made each offence cognizable, allowing for police action. It authorized imprisonment of 2

⁴² *Darshan* (n 2).

⁴³ PLD (1988) SC 416.

⁴⁴ Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan, and Bangladesh* (Kluwer Law International 2004).

⁴⁵ *Darshan* [545] (n 2).

to 5 years or fine of Rs. 50,000 or both to any person who compelled anyone to render bonded labour or extracted bonded labour under any guise or pretext. It also terminated any outstanding bonded debt and mandated return of seized property against bonded debt.

Success of this type of legislation depends on an efficient enforcement action plan. The Act mandated the creation of District Vigilance Committee (DVCs) for provincial governments. However, it was not until three years later, the Bonded Labour System (Abolition) Rules (1995) outlined the specific responsibilities and terms of references for the DVCs. However, they have not been successful in their formation and monitoring. While there is room for improvement on Pakistani legislation in this field, ineffective implementation and enforcement are the key culprits. Most bonded labour victims are released under the habeas corpus (unlawful detention) petitions, while convictions under the more appropriate Bonded Labour System Act is uncommon.⁴⁶

Judgment of High Court of Sindh, Circuit Court, Hyderabad 2002

An interesting legal differentiation of forced labour can be revealed from the verdict of the High Court of Sindh, Circuit Court, Hyderabad (2002). In 2000, 94 *haris* petitioned for release under Section 491 of the Code of Criminal Procedure, a *habeas corpus* provision. The plea called for landlords to release detained *haris* following disputes. While there was no evidence of physical detention, the petition claimed it was a mental restriction. Similar to restricting a child's movement by telling them they cannot wander beyond a certain area. The counsel argued the *haris* were virtual slaves. The question arises whether forced labour detention must manifest physically? The courts dismissed this argument, ruling that a "mental" detention was difficult to identify in practice and the dispute should be settled under the Sindh Tenancy Act 1950. However, the Court made no reference to the Bonded Labour System (Abolition) Act 1992 which would set the bonded labourers free and nullify an outstanding debt. This calls to question conflicts in interpretation, and the supremacy of law. Advocacy groups such as Anti-Slavery International recommends that the UNCHR request the Government of Pakistan to clarify that the Bonded Labour System (Abolition) Act 1992 takes precedence over the Sindh Tenancy Act.

⁴⁶ Zulfiqar Shah, *Effectiveness of Interventions for the Release and Rehabilitation of Bonded Labourers in Pakistan* (Pakistan Institute of Labour Education & Research 2008) 8.

Conclusion

“It wasn’t by choice. Husband’s illness, no money for medicine, deaths, children, desperation, household expenses and other problems forced me to take this route.... I’ve been working like this for a decade now. If I get sick or pregnant and am unable to work, they add those days lost to the advance I’ve taken. If I borrow another 500 rupees (\$3.1), they will write down 1,000 rupees (\$6.2).”

- Yasmin, a mother of four, working in a brick-kiln worker in Lahore, Pakistan.⁴⁷

The COVID-19 pandemic has increased economic insecurity. Gender inequalities and temporary school closures may increase children’s vulnerability to harmful work.⁴⁸ Females are more likely to face risks in the agriculture sector, domestic work, and sexual exploitation. Therefore, understanding the intricate relationship between labour exploitation and gender is urgent. This paper’s objective was to provide a comprehensive overview of the gender dynamic in forced labour. It tackled challenges in defining forced labour, modern slavery, and bonded labour. It explained why forced labour persists from a supply and demand side perspective. Poverty, identity and discrimination, limited labour protections and restrictive mobility regimes create a vulnerable workforce. While concentrate corporate power and ownership, irresponsible sourcing practices and governance gaps show that forced labour is a structural phenomenon. To provide context for how these theories are related in practice, this paper examined Pakistan’s unique situation. By examining how public interest litigation was pioneered in the landmark case of *Darshan Masih v State*, this sets the scene for forced labour legislation in Pakistan via the Bonded Labour System (Abolition) Act (1992).

⁴⁷ Faris Ghani, ‘the spiralling debt trapping Pakistan’s brick kiln workers’ *Al Jazeera* (Lahore, 21 Oct 2019).

<<https://www.aljazeera.com/features/2019/10/21/the-spiralling-debt-trapping-pakistans-brick-kiln-workers>> accessed 1 Feb 2021.

⁴⁸ ILO and UNICEF, ‘COVID and Child Labour: A Time of Crisis, A Time to Act’ (2020).

