GENDER-BASED VIOLENCE COURT

HANDBOOK AND TRAINING MANUAL FOR PROSECUTORS



ADB

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This training manual contains the presentations corresponding to each module of the Gender-Based Violence Court: Handbook and Training Manual for Prosecutors. Additionally, it provides ready reference to the international treaties, human rights instruments, national laws, and global and domestic jurisprudence discussed in all the module presentations.

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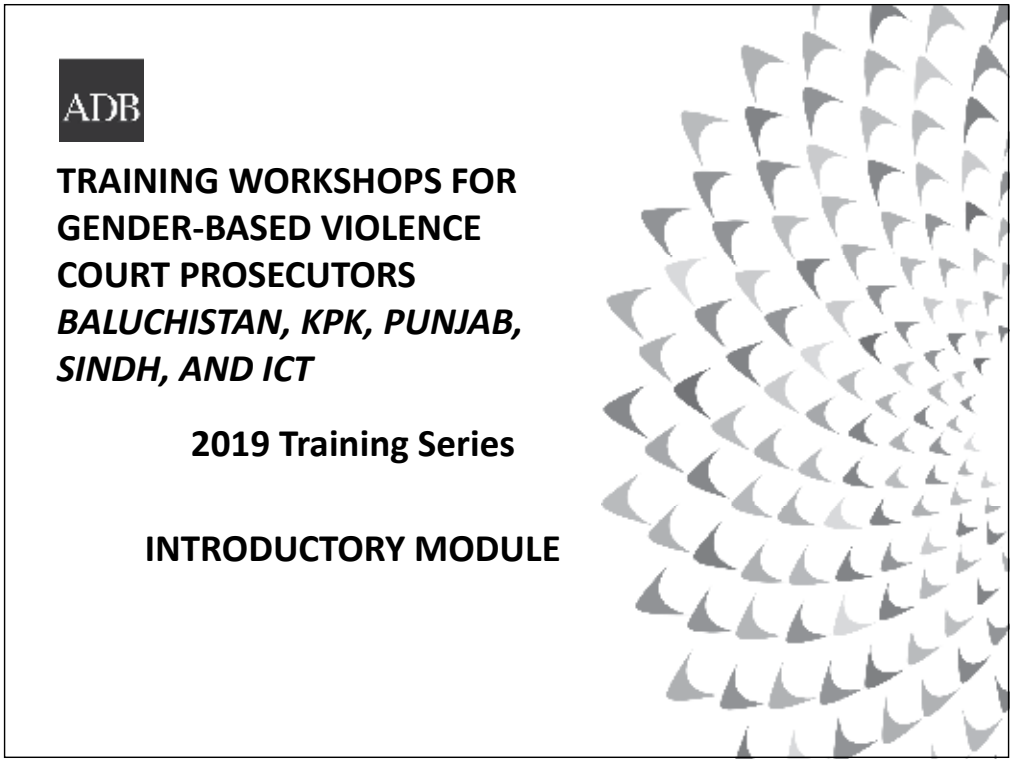
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MODULE PRESENTATIONS



INTRODUCTORY MODULE



Why GBV courts?

Let's start with the presumption that the law is neutral.

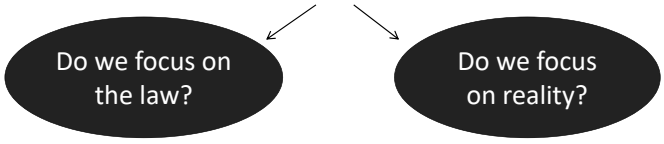
Following that, the presumption must also be that the courts are equally accessible to everyone.

1

Presumption 1: The law is neutral

"The law in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread" - A France

Is the law neutral?



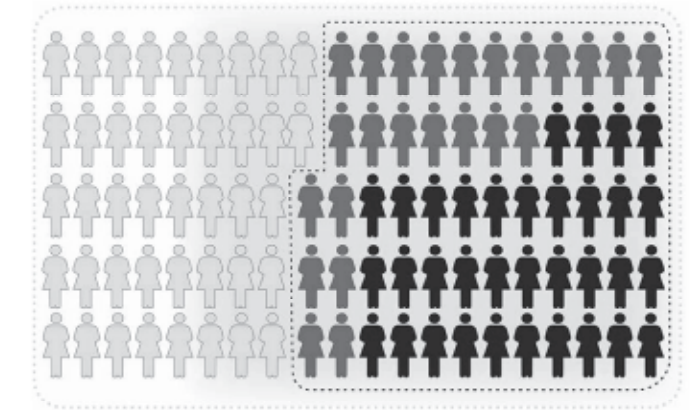
The argument that we focus on neutral law is inherently problematic.

2

Let's focus on reality: Gender-based violence

- **Data on prevalence: World Health Organization (global)**
  - One in three women experience physical or sexual violence, mostly by intimate partners.
  - 30% of women who have been in a relationship report that they have experienced violence by their intimate partner
  - 38% of murders of women are committed by an intimate male partner

3



Data on Prevalence: Global

Global Study of Homicide: Gender related killings of women and girls UNODC (2018)

4

Focus on reality: GBV (Pakistan)

- Overwhelming majority of violent deaths of women were at the hands of /intimate partners/male family members – e.g. choosing spouse, suspected indiscretions (erroneously deemed 'honour killing'), seeking divorce (HRCP)
- Women were also killed or acid attacked by rejected suitors
- 4 out of 10 people in Pakistan justified honour killings of women (Pew Research Center 2014)
- "Honour" killing – 82% (2017) & 95% (2014) victims were women (HRCP)
- Acid attacks – 70% victims were women (NCSW). Punishments only in a handful of cases (HRCP, 2015)
- About 12% of reported sexual violence victims were filmed by their perpetrators to further harass the victims (HRCP 2015 Report)
- Only 51% of women in Pakistan feel they are safe in their communities
- 56 women were reported killed for giving birth to girls (HRCP 2013)

5

Presumption 2: Everyone has equal access to the justice

Punjab, the most populous province in Pakistan.

- In 2016, out of 2,353 rape cases before the courts, only 100 cases resulted in convictions with 2,183 cases resulting in acquittals and 70 cases were consigned to record.
- That makes a conviction rate of 4.25%.
- Did not include the majority of cases that were withdrawn before court listings for one reason or another

Islamabad

- Between the years 2008 – 2012, of 103 rape cases, there was 0% conviction. [Senate starred question No. 62, 11 Dec. 2013]

(Available data from Sindh etc) ?

6

Wilayah (alliance) of men and women

وَٱلْمُؤْمِنُونَ وَٱلْمُؤْمِنَٰتُ بَعْضُهُمْ أَوْلِيَآءُ بَعْضٍ ۚ يَأْمُرُونَ بِٱلْمَعْرُوفِ
وَيَنْهَوْنَ عَنِ ٱلْمُنكَرِ وَيُقِيمُونَ ٱلصَّلَوٰةَ وَيُؤْتُونَ ٱلزَّكَوٰةَ وَيُطِيعُونَ ٱللَّهَ
وَرَسُولَهُۥٓ ۚ أُو۟لَٰٓئِكَ سَيَرْحَمُهُمُ ٱللَّهُ ۗ إِنَّ ٱللَّهَ عَزِيزٌ حَكِيمٌ ﴿٧١﴾

- 71. The Believers, men and women, are protectors; One of another: they enjoin what is just, and forbid what is evil: they observe regular prayers, practise regular charity, and obey God and His Apostle. On them will God pour His mercy: for God Is exalted in power, wise. (Al Qur'an Verse IX:71) (At Tauba)
- The term *awliya* means alliance, mutual assistance and mutual reinforcement. This *wilayah* unites men and women, each as a protector of the other.

7

ARE WE DISCHARGING OUR DUTIES

TO PROTECT ONE ANOTHER – MEN AND WOMEN?

Compliance with duty or neglect of duty?

Are perpetrators made accountable or
do they enjoy impunity?

8

Why GBV courts?

- The findings by the United Nations indicate that, "[e]xperiences of complainants/survivors with court personnel in regular courts suggests that such personnel frequently do not have the necessary gender-sensitivity or comprehensive understanding of the various laws that apply to violence against women cases; may not be sensitive to women's human rights; and may be overburdened with other cases, resulting in delays and increased costs to the complainant/survivor. Specialized courts … have been effective in many instances as they provide a stronger possibility that court and judicial officials will be specialized and gender-sensitive regarding violence against women, and often include procedures to expedite cases ..." U.N. Handbook for Legislation on Violence Against Women, UN Department of Economic and Social Affairs, 2010.

9

Countries with specialised GBV courts

- Asia: Afghanistan, Nepal
- South America: Brazil, Chile, El Salvador, Uruguay, Venezuela
- Europe: Spain, United Kingdom
- Africa: Liberia, Morocco
- North America: 208 domestic violence courts in the US (Dept of Justice, US 2010 report).

10

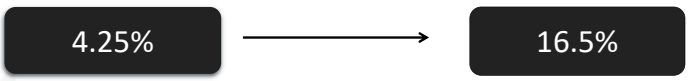
Discharging duty as *awliya*

- GBV court has proven to help in our discharging the duties as awliya, men and women, each protecting one another.
- GBV courts require special
  - specialised judges
    - gender-sensitivity
    - comprehensive understanding of the various laws
    - sensitive to women's human rights
  - special courts
    - the set up of the GBV court followed closely the procedure and guidelines set out by the Supreme Court under the *Salman Akram Raja v. Govt. of Punjab* (2013 SCMR 203).
    - appropriate court procedures – the Court's Guidelines and Practice Notes will be discussed in Modules 6, 7 and 8
    - efficient case management
    - conducive court environment

11

Experience of Punjab GBV Court

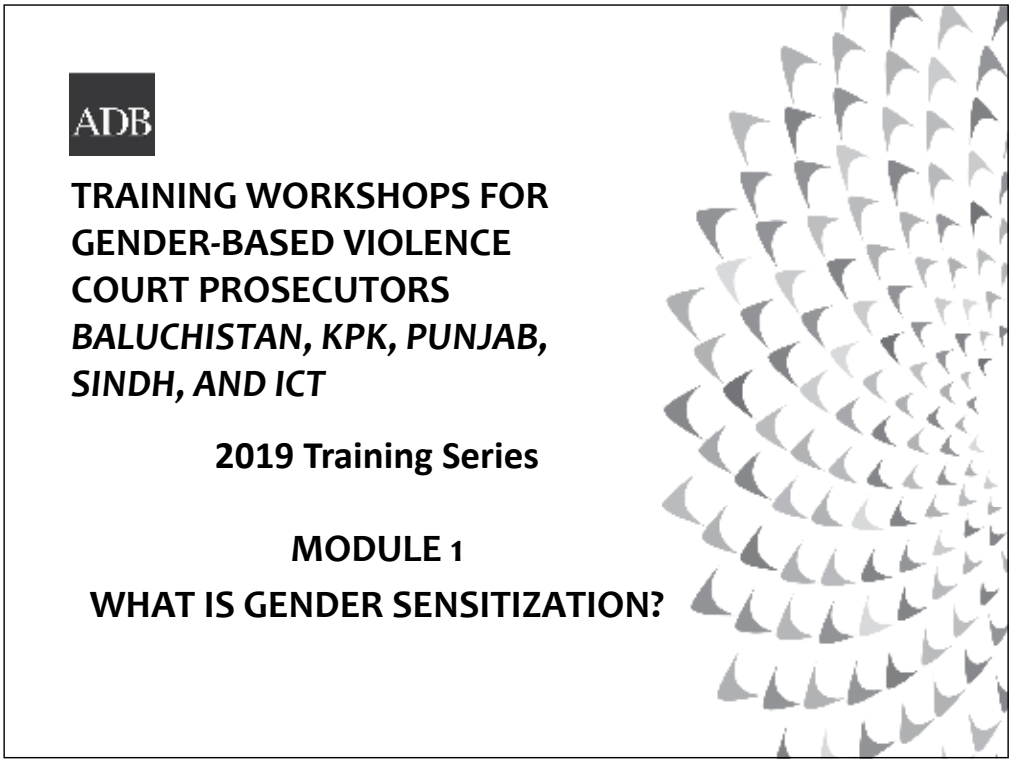
- Cases in GBV Court were expeditiously handled and the conviction rate rose from 4.25% to 16.5%, an admirable improvement toward achieving global standards.



12


Thank you!
13

Module 1:
WHAT IS GENDER SENSITIZATION?



Objectives of the Session

TOPIC 1: Discuss what gender sensitization means

TOPIC 2: Understand the meaning of sex, gender, gender roles, gender stereotyping

TOPIC 3: Understand why gender stereotyping is an issue

TOPIC 4: Discuss why we have these gendered views

TOPIC 5: Understand unconscious or implicit bias and the effect on judicial and prosecutorial decision-making

TOPIC 6: Discuss ways to address and reduce unconscious bias

2 activities to assist understanding and discussion

The Session will be interactive and encourage participation and discussion throughout

1

TOPIC 1: Gender Sensitization - Starting From Where We Are

ACTIVITY 1

- A card will be handed out to each of you
- You will be asked to tick the box to indicate whether you regard the word as being a characteristic, job or an object associated with being a woman or a man
- The cards will be collected without identifying who answered the question and we can discuss the content of the cards collectively
- This will be a simple activity taking 20 minutes

2

What is Gender Sensitization?

- Gender sensitization is a process
- How we categorize or generalize about people based on their sex
- How we assume characteristics about people based on their sex
- How we have beliefs/myths/views about men and women
- It is not anti-male.
- Gender sensitization requires personal reflection about:
  - **why** do we have these beliefs/myths/views?
  - **where** do they come from?
  - **how** are these views are perpetuated?
  - **what** we can do to eliminate these simplistic assumptions?

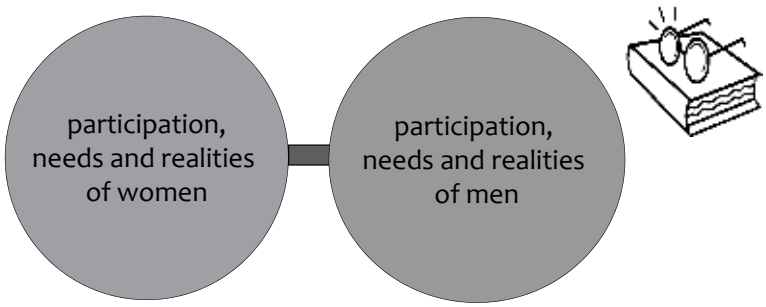
3

Gender Sensitization and Equality

- Gender equality is about the equal valuing of women and men in society
- Recognising the similarities and differences between women and men
- We need equal and respectful partnerships between men and women
- Research worldwide shows that men in society are more valued than women
- Gender sensitization and equality requires us to use a gender lens

4

Think of a gender lens as putting on spectacles



Our sight or vision is the combination of what each eye sees

5

Sex of a Person

- Biological differences between men and women
- Functional differences between women and men due to reproductive potential
- Determined by genes
- The terms "men" and "women" or "male" and "female" are biological terms
- The sex of a person is unchangeable (with rare exceptions)

6

Gender of a Person

- Gender refers to the culturally or socially constructed roles ascribed to men and women
- Gender = biological sex + cultural or sociological factors in society
- Gender identifies the social relations between men and women
- The terms "masculine" and "feminine" refer to the gender of a person
- Unlike the sex of a person, as gender is cultural and social it can be changed

7

Gender Stereotyping

- = ascribing behaviours or characteristics to a person simply because they are male and female, rather than who they are
- = assuming characteristics about a person based on beliefs or myths about men and women
- = making simplistic generalizations about a person based on traditional or cultural characteristics

8

TRADITIONAL GENDER STEREOTYPES	
FEMININE	MASCULINE
Not aggressive	Aggressive
Dependent	Independent
Easily influenced	Not easily influenced
Submissive	Dominant
Passive	Active
Home- oriented	Worldly
Easily hurt emotionally	Not easily hurt emotionally
Indecisive	Decisive
Talkative	Not at all talkative
Gentle	Tough
Sensitive to other's feelings	Less sensitive to other's feelings
Very desirous of security	Not very desirous of security
Cries a lot	Rarely cries
Emotional	Logical
Verbal	Analytical
Kind	Cruel
Tactful	Blunt
Nurturing	Not Nurturing

9

Gender Identity

- Gender identity refers to a person's private subjective sense of their own sex
- Most people identify themselves as either male or female
- Some people identify themselves as being transgender
- Persons who identify as transgender are also ascribed gender roles and are gender stereotyped
- Transgender persons are often less valued and lack equality in comparison with either males or females

10

Sex Role and Gender Role

Sex Role

- A role or function resulting from biological functions because the person is male or female
- Eg., pregnancy and breastfeeding are female sex roles because only females can give birth to children

Gender Role

- A role or function ascribed by society as being appropriate for a male or female
- Often has little to do with the biological sex role
- Eg.,childminding is not a biological function of women
- men and women are equally capable of childminding

11

Gender Roles and Gender Stereotypes

Gender Roles and Gender Stereotypes are linked

SEX → GENDER STEREOTYPE → GENDER ROLE

12

Gender Roles – Production and Reproduction

PRODUCTION ROLE

- Producing goods or services which are ascribed economic value
- Considered a male role attracting money or wages
- Public or visible role
- When men do work around the house they tend to do the same types of jobs which are done by men in the labour market

REPRODUCTION ROLE

- Undertaking child-rearing and housekeeping which are not ascribed an economic value
- Considered a female role and is unpaid in the home
- Private and less visible role
- When women are employed in the labour market, they tend to do work or provide services which replicate their reproductive role

13

What Does This Picture Depict?

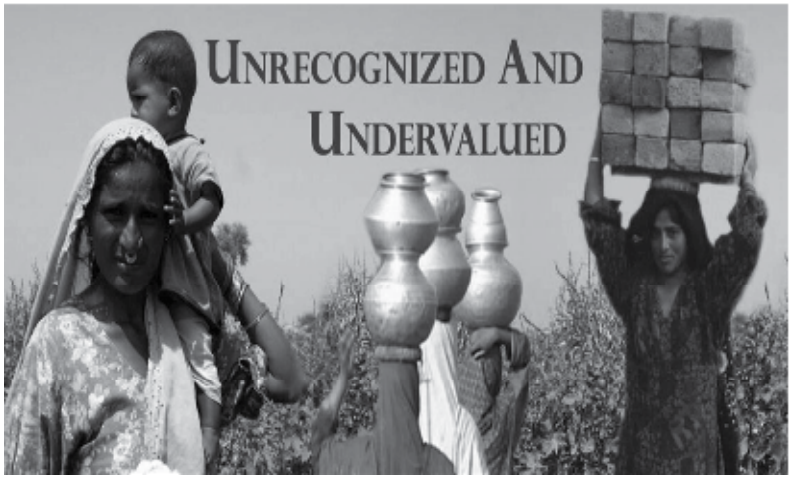


14

Topic 3: Why are Gender Roles an Issue?

- Gender roles are commonly wrongly regarded as being sex roles
- If roles are regarded as sex roles they are unchangeable
- Wrong attribution of gender role results in women continually being undervalued in the home, in society and in the workforce
- Correctly identifying gender roles enables changes to be made in society and redress discrimination and inequality

15



16

Topic 4: Why Do We Have These Gendered Views?

- **Childhood experiences?**
- **Education at school?**
- **Religion?**
- **Mass Media?**
- **Language?**
- **Other?**

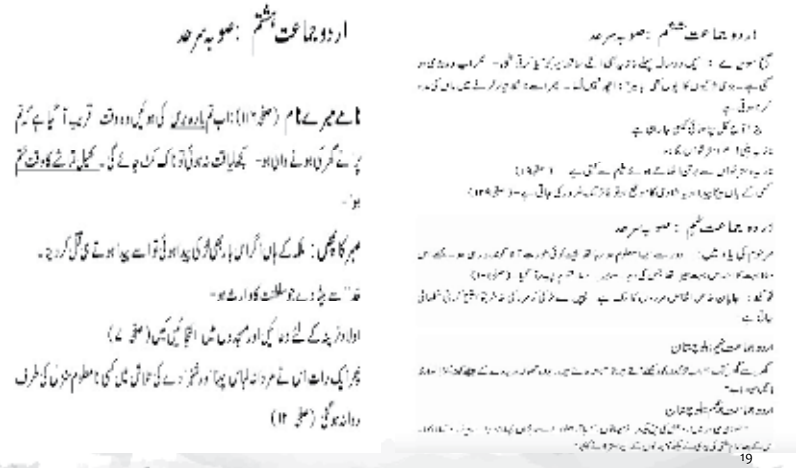
17

Childhood

- Treating boys and girls differently from birth
- Dressing them differently
- Giving them a different choice of toys
- Reinforcing by speaking about a "strong boy" and a "pretty girl"
- Telling boys that they should not cry
- Requiring girls to help their mothers with housework and the boys to play sport
- Spending more time with boys

18

Education Books at School



19

Education Subjects and Teaching

- Subjects available at school
- Girls doing history, language, arts and boys doing maths and sciences
- Electives available to girls include home economics, cooking and sewing
- Electives for boys include carpentry and computer studies
- Gender content in text books
- Gender images in textbooks and visual aids
- Islamic books used in teaching may be gender specific

20

What Do These Pictures Show?





21

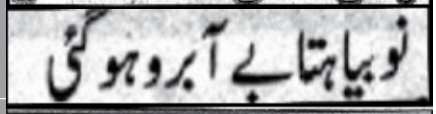
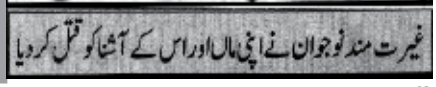
Religious Teaching and Cultural Practices

Normative teachings of Islam and diverse cultural practices among Muslims in Pakistan

- Cultural and community influences (local and foreign) on the practice of Islam and the roles ascribed to men and women in Pakistan
- Personal understanding and interpretation of Qur'an and the Sunnah
- Lack of debate and innovation in religion in a male-dominated society
- Role of leading women in Islam is not highlighted hence no advancement

22

The Media Portrayals

Victim of gang rape sold for the fourteenth time.	
Twenty people subject two sisters to violence and parade them naked in public.	
A young woman publicly beats up a bearded old man.	
Brother beats sister to a pulp.	
Newly wed bride is violated.	
Youth kills his sister and his mother for the sake of honor.	

23

Everyday Language and Court Language

- Language is the most subtle but most pervasive form of reinforcing gender stereotypes
- Sexist language reinforces how we perceive gender
- Gender sensitive use of language in the Court is important for the victim, society and to discourage criminals.
- *State of Punjab v Gurmit Singh & Ors*, 1996 AIR 1393

24

Gender Sensitive Language in Court

Activity 2

- You will be divided into 4 groups and you will be given papers which have 4 cases
- Each group will **discuss 1 of the cases** and answer the questions (10 mins)
- A representative from each group will report back on the group answers (2 mins) for each group
- A short general discussion will follow
- The total activity is to take 30 minutes

25

Language Commonly Used in the Courtroom

Current usage	Preferable alternative
Lady Doctor	Doctor
Female lawyer	Lawyer
Male nurse	Nurse
Male secretary	Secretary
Working mother	Wage earner
Lady Justices	Justices

26

TOPIC 5: What is Unconscious or Implicit Bias?

- Scientific evidence reveals that as humans we make unconscious people preferences or biases about people
- Our brains are hardwired to rapidly categorize people instinctively using obvious and visible categories:

gender, age, size, physical-attractiveness, disability, accent, social background	social orientation, nationality, religion, education and even a job title

These affect how we engage with people and make decisions about them

27

Unconscious or Implicit Bias

- Judges and Prosecutors perceive themselves as being "fair" and "independent" of bias
- Without further personal enquiry, potential "blind spots" may go unrecognized
- Research shows we value, support and defend those who are most like ourselves
- Judges and prosecutors need to unpack their attitudes about people and cultural values so as to avoid unconscious bias

28

Risk Factors for Judges and Prosecutors

- Emotional states
- Ambiguity
- Distracted or pressured decision-making circumstances
- Resultant low-effort thinking and reasoning

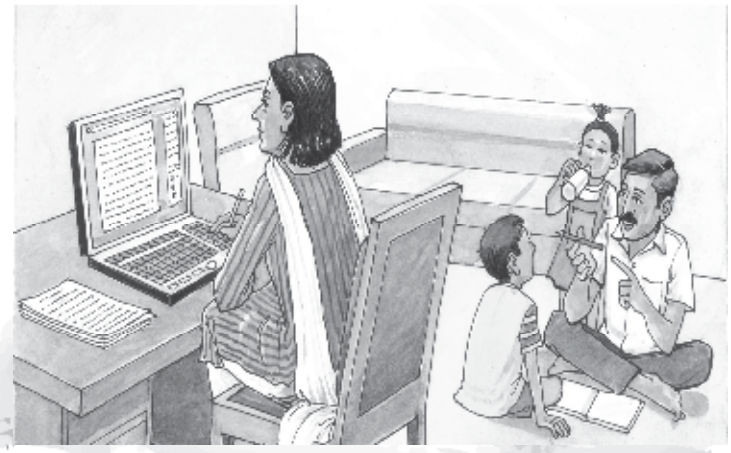
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Topic 6: How Can Unconscious Bias Be Reduced

- Take notes
- Set out reasoning for decision
  - in a judgement (Judges)
  - in the file brief (Prosecutors)
- Seek feedback and assistance from peers
- Regularly engage in training sessions
- Regularly question personal assumptions and beliefs
- Slow down decision-making process where possible

30

What Does This Picture Say About Gender Roles?



31

Final Comment

- This whole session has itself been a process of gender sensitization
- Reflecting on our individual personal views about gender, culture and society
- Gender sensitization requires modification and change
- As Nelson Mandela said:

"change your thoughts and you change your world"

32


Thank you!
33

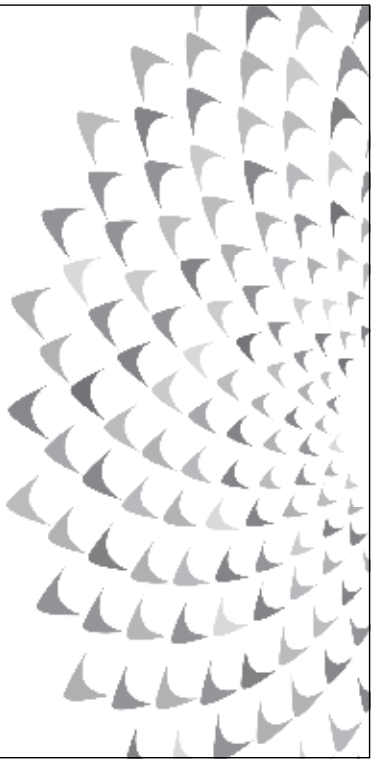
Module 2:
GENDER-BASED VIOLENCE

ADB

TRAINING WORKSHOPS FOR GENDER-BASED VIOLENCE COURT PROSECUTORS ***BALUCHISTAN, KPK, PUNJAB, SINDH, AND ICT***

2019 Training Series

MODULE 2
GENDER-BASED VIOLENCE




Objectives of Session
1. Definition of gender-based violence
2. Causes and impact of violence against women
3. Gender-based violence is a constitutional issue and violation of human rights
4. State obligation to eliminate violence against women
• Under constitutional law
• Under international law
5. Role of the court, prosecutors and the authorities
1
ADB


WHAT IS GBV?
2
ADB

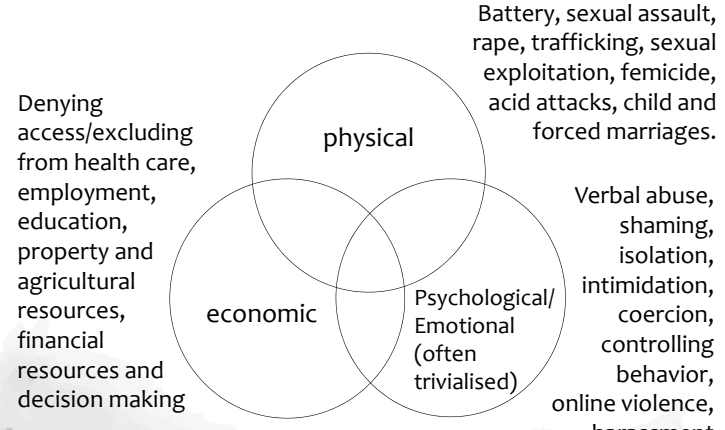
What is GBV?

- Gender-based violence against women
  - "Violence against women" is an act of gender-based violence that results in, or is likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.
  - Gender-based violence against women is violence directed at a woman because she is a woman or that affects women disproportionately.
- GBV includes all sexual violence against women, girls, men and boys

3

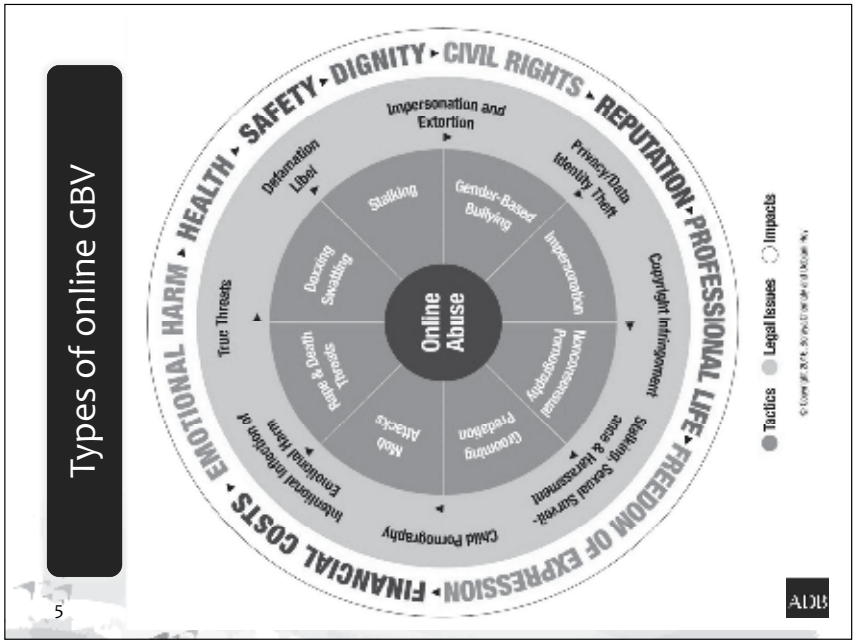
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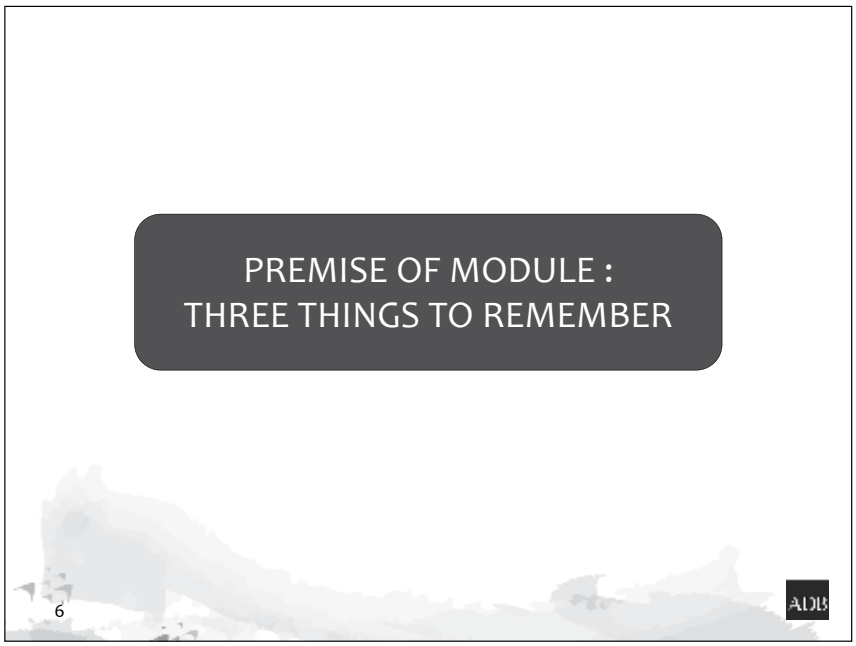
Types of GBV



4

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Types of online GBV
EMOTIONAL HARM • HEALTH • SAFETY • DIGNITY • CIVIL RIGHTS • REPUTATION • PROFESSIONAL LIFE • FREEDOM OF EXPRESSION • FINANCIAL COSTS
Online Abuse
Impersonation and Extortion
Privacy/Data Identity Theft
Copyright Infringement
Sexting, Sexual Surveillance & Harassment
Child Pornography
Grooming Predation
Mob Attacks
Threats of Rape & Death
True Threats
Doxxing Swatting
Defamation Libel
Stalking
Gender-Based Bullying
Impersonation
Nonconsensual Pornography
Intellectual Infringement of Embodied Harm
Tactics
Legal Issues
Impacts
ADB
5


PREMISE OF MODULE :
THREE THINGS TO REMEMBER
ADB
6

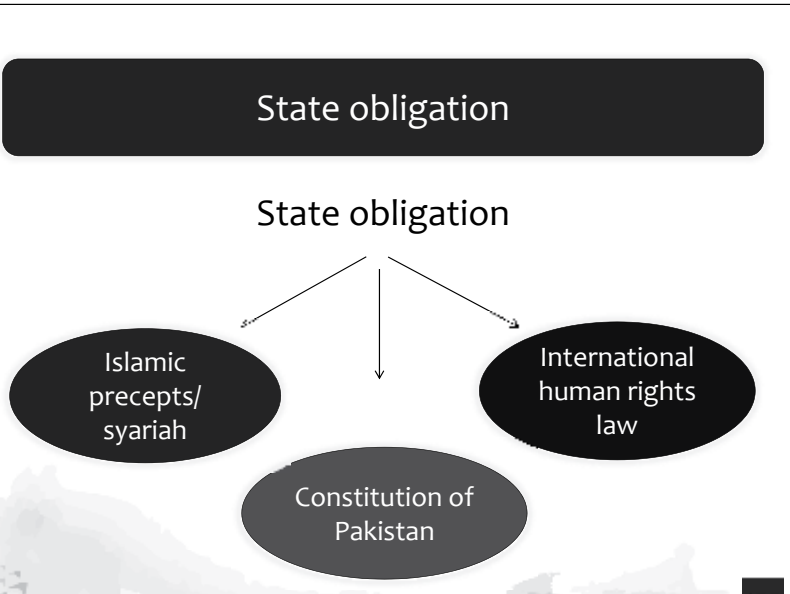
1. Prohibition of violence is an obligation of the State

- Confronting violence is and must be the primary duty of the nation State. The prohibition of violence and is imperative.
- "The avoidance and prevention of violence constitute the basic purpose of lawmaking. The rule is so fundamental that "if a legal system did not have them, there would be no point in having any other rules at all." [Hart]

7

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State obligation



8

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State obligation – 5Ps

- This obligates States to exercise due diligence in 5 areas to –
  - prevent violations before it happens
  - protect victims/survivors and prevent recurrence
  - prosecute and investigate violations
  - punish perpetrators so as deter others, prevent recidivism and rehabilitate perpetrators;
  - provide reparation to victims/survivors that meet their needs and enable them to start a life free from violence;

9

ADB

2. Role of judges and prosecutors

وَلْتَكُن مِّنكُمْ أُمَّةٌ يَدْعُونَ إِلَى ٱلْخَيْرِ وَيَأْمُرُونَ بِٱلْمَعْرُوفِ وَيَنْهَوْنَ عَنِ ٱلْمُنكَرِ ۚ وَأُو۟لَٰٓئِكَ هُمُ ٱلْمُفْلِحُونَ ﴿١٠٤﴾

- 104. Let there arise out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong: They are the ones to attain felicity. [Al' Imran Verse III:104]
- Islamic principle of promoting/enjoining good and avoiding/prohibiting harm (*amar makruf nahi mungkar*)

10

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3. Law as a Catalyst for Change

- "Law is a dynamic process. It has to be in tune with the ever changing needs and values of a society. … it is this dimension of law that makes it a catalyst of social change. ...
- Over the years, what is a socially acceptable emotional homicidal response has arguably changed. "
[Muhammad Siddique PLD 2002 Lahore 444]

11

ADB

Cultural rights

- Culture is the site of many of our values and judgments that are good. It is also the site of many of our prejudices and social practices.
- No tradition is sacred, no convention indispensable, and no precedent worth emulation if it does not stand the test of the fundamentals of a civil society generally expressed through the law and the Constitution.
[Muhammad Siddique PLD 2002 Lahore 444]
- Not all cultural practices are protected under international human rights law. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.
(CEDAW, UNESCO Universal Declaration on Cultural Diversity Art. 4)

12

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GENDER-BASED VIOLENCE

13

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Acceptance, normalisation and complicity

Prevention, prohibition and intervention



14

ADB

Normalisation of VAW is a reflection of –

- Community attitudes towards gender roles, sexuality, family violence and sexual assault and victim-blaming.
  - For example, both males and females believe that rape results from men not being able to control themselves or from women's behaviour.
- Cultural perceptions that support male authority over women and stigmatise victims/survivors.
  - For example, both males and females believe that domestic violence can be excused or tolerated.
- Trivialization or minimisation of the seriousness of gender-based violence e.g. "it was only a slap".

15

ADB

- "Violence against women throughout the life cycle derives essentially from cultural patterns, in particular the harmful effects of certain traditional or customary practices and all acts of extremism linked to race, sex, language or religion that perpetuate the lower status accorded to women in the family, the workplace, the community and society".
  (Beijing Declaration and Platform for Action.)
- The most common motivation for rape (70-80%) was related to sexual entitlement – men's belief that they had a right to sex, regardless of consent. The second most frequently reported motivation was related to entertainment seeking followed by anger or punishment.
  (Study by UNDP & UN Women)
- Impunity: Regulatory mechanisms with regards to violence occurring amongst men are enforced but perpetrators of violence against women, particularly domestic violence and rape are rarely punished.

16

ADB

Impact and harm of GBV

- Impact: Normalization of GBV.
- "When all women, regardless of their background, fear the threat of male violence (and modify their behavior so as to avoid it), this violence is not some private affair but a societal practice -- with a point. … Where violence against women is common, every woman is victimized by the reality of this practice, insofar as where she lives, what she does, what activities she undertakes, and what her family life is like, are all affected either by the threat of such violence, or by the fact of it."

17

ADB

Understanding the culture of victim-blaming

- Creates excuses where the woman is transformed from victim/survivor into perpetrator who violates cultural values.
  - Not only are perpetrators of violence against women, particularly domestic violence and rape rarely punished but instead women are punished as transgressors of culture and male honour (e.g. rape victims/survivors are stigmatised or killed)
  - Alternatively women are punished for male transgressions to redeem the honour of the family (e.g. swarra, vani)

18

ADB

Personal responsibility not victim-blaming

- Al-Fadl ibn 'Abbas rode behind the Prophet as his companion rider on the back of his she-camel on the Day of Sacrifice (*yawm al-nahr*) and al-Fadl was a handsome man. The Prophet (صلى الله عليه وسلم) stopped to give the people verdicts. In the meantime, a beautiful woman from the tribe of Khath'am came, asking the verdict of Allah's Messenger (صلى الله عليه وسلم). Al-Fadl started looking at her as her beauty attracted him. The Prophet (صلى الله عليه وسلم) looked behind while al-Fadl was looking at her; so the Prophet held out his hand backwards and caught the chin of al-Fadl and turned his face to the other side in order that he should not gaze at her, [to the end of] the hadith.
- Al-Fadl himself narrated: "So I was looking at her. So the Prophet (صلى الله عليه وسلم) looked at me, and he turned my face away from her face. Then I looked again, so he turned my face away from her face; until he did that three times, and I hadn't stopped.

19 ADJS

Intimate partner violence and sexual violence

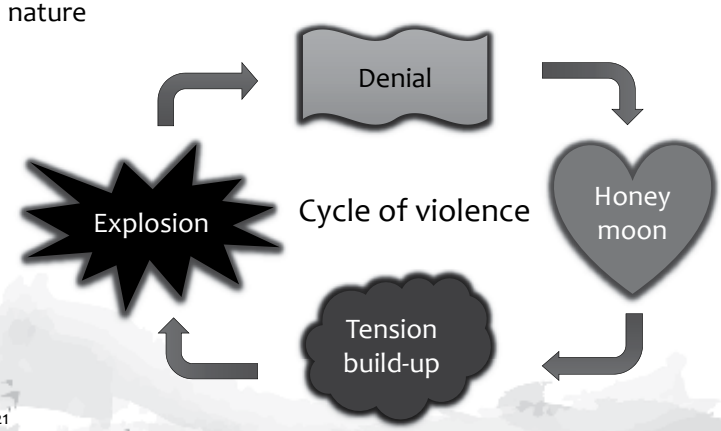
A report released by the World Health Organisation, the London School of Hygiene and Tropical Medicine and the South African Medical Research Council found that

- "overall, 35% of women worldwide have experienced either physical and/or sexual intimate partner violence or non-partner sexual violence." Q: How much is 35%?
- Women victims/survivors of intimate partner physical and sexual violence are "16% more likely to have a low-birth-weight baby. They are more than twice as likely to have an abortion, almost twice as likely to experience depression, and, in some regions, are 1.5 times more likely to acquire HIV, as compared to women who have not experienced partner violence".

20 ADJS

Cycle of violence

Any legal treatment of domestic violence must understand the nature of domestic violence and capture its repetitive nature



21

ADB

Domestic violence

- Battered women syndrome: Psychological disorder of women subjected to long-term abuse.
- In battered women syndrome, a woman may believe that she deserves to be abused or that she is unable to escape the violence. This is a learned behaviour due to the repetitive violence. It is a form of post-traumatic stress disorder (PTSD).
- Battered women may suffer from the same intense symptoms that comprise the post-traumatic stress disorder identified in victims of official torture [UNSR Torture]
- Not a "private matter" - Opuz v Turkey: The perpetrators' rights to privacy and family could not supersede victims' human rights to life and to physical and mental integrity - incompatible with the State's positive obligations to secure the enjoyment of the applicants' rights.

22

ADB

GBV may constitute torture

UN Special Rapporteur on Torture and CAT Committee:

- Domestic violence (in the form of intimate partner violence), female genital mutilation and human trafficking are forms of torture or cruel, inhuman and degrading treatment
- Different types of so-called traditional practices (such as dowry-related violence, widow-burning, etc.), violence in the name of honour, sexual violence and harassment, as well as slavery-like practices often of a sexual nature may also constitute torture or cruel, inhuman and degrading treatment

23

ADB

GBV … a form of torture and inhuman treatment

- States should be held accountable for complicity in violence against women, whenever they create and implement discriminatory laws that may trap women in abusive circumstances. State responsibility may also be engaged if domestic laws fail to provide adequate protection against any form of torture and ill-treatment in the home. [SR Torture]
- This includes laws that restrict women's right to divorce or inheritance, or that prevent them from gaining custody of their children, receiving financial compensation or owning property, all serve to make women dependent upon men and limit their ability to leave a violent situation. [SR Torture]

24

ADB

Economic violence

- The hallmark of property in Islamic jurisprudence is underlined by the notion of dual ownership. Islamic legal theory insists that ownership of everything belongs to God.

وَلِلَّهِ مَا فِي ٱلسَّمَٰوَٰتِ وَمَا فِي ٱلۡأَرۡضِۚ وَلَقَدۡ وَصَّيۡنَا ٱلَّذِينَ أُوتُواْ ٱلۡكِتَٰبَ
مِن قَبۡلِكُمۡ وَإِيَّاكُمۡ أَنِ ٱتَّقُواْ ٱللَّهَۚ وَإِن تَكۡفُرُواْ فَإِنَّ لِلَّهِ مَا فِي ٱلسَّمَٰوَٰتِ
وَمَا فِي ٱلۡأَرۡضِۚ وَكَانَ ٱللَّهُ غَنِيّٗا حَمِيدٗا ١٣١

- Unto Allah belongeth whatsoever is in the heavens and whatsoever is in the earth. And We charged those who received the Scripture before you, and (We charge) you, that ye keep your duty toward Allah. And if ye disbelieve, lo! unto Allah belongeth whatsoever is in the heavens and whatsoever is in the earth, and Allah is ever Absolute, Owner of Praise. (An Nisa'a IV:131)
- Sunnah: "regard the life and property of every Muslim as a sacred trust".

25 ADB

Human rights to property

- The Universal Declaration of Human Rights provides in articles 17 and 25 –
  - "17(1) Everyone has the right to own property alone as well as in association with others."
  - 25(1) Everyone has the right to a standard of living adequate for the health and well-being and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."
- "Rights to land, housing and property are essential to women's equality and wellbeing." OHCHR

26 ADB

Information communication technology related GBV: Online GBV – Isn't it like other GBV?

- ICT GBV or online GBV are acts "committed, abetted or aggravated" in part or fully through the use of ICTV
- Shares commonalities with off line GBV.
- It is another means of committing GBV. Online harassment, stalking, means to silence women's voices.
- Trivialised – no physical damage or loss
  - 70% of the surveyed women posited that they were afraid of their pictures being posted online (Digital Rights Foundation)
  - 40% of the women reported that they had been stalked or harassed through messaging apps (Digital Rights Foundation)
- Continuum of online and offline GBV. Rights protected offline must be protected online. (Kohistan video case)
  - posting of images, sharing on social media (Qandeel Baloch: Killed because "[s]he was doing videos on facebook".)

27

ADB

Online GBV: Actors, duty bearers and stakeholders

- Actors and duty bearers
  - Primary perpetrator
  - Secondary perpetrator – intent, negligence
    - E.g. child pornography, defamation
  - Data collectors – massive data, use and control, unauthorised access
  - Digital intermediaries – hosting defence, active role, preventive measures
  - The State
- Stakeholders – State, digital intermediaries, technical community, civil society and academia

HOW TO HOLD THEM ACCOUNTABLE?

28

ADB

Online GBV: Harm and aggregated harm

- Ease of transmission – easy and rapid dissemination of information and content, provide multiple platforms, and comprise vast networks
- Aggregated harm - millions who wittingly or unwittingly enlist to participate in and re-perpetrate violence
- *United States v. Sayer* - fear and danger the perpetrator caused through anonymous third parties, the permanent nature of intimate details posted online, and ongoing obsession with her
- *Yasir Lateef v. the State* - Accused hacked into the victim's Facebook account and uploaded her personal pictures online without her consent. The court condemned the actions as "obnoxious and filthy in nature and noted that the victim had been "disgraced in the eyes of general public and her family". Persistent and accessible
- ICTV can be committed at any time from any place

29

ADB

Online GBV: Issues

- Public forum, private space
- Legitimate expectation that his or her private life would be protected
  - public and personal data
  - traditional requirement – disclosure offensive.
    Q: What if disclosure itself is not offensive. Need to rethink?
  - big data (Cambridge Analytica)
- Non consensual dissemination of images and data
  - rethink consent: to whom, for what purpose, conditional,
  - Rethink who owns image, who owns distribution
- Anonymity and encryption
- Digital environment
  - New social mores - computer mediated communication, encourage self-disclosure, disinhibition effect

30

ADB

Prevention of Electronic Crimes Act 2016

- **S. 20**. Offences against dignity of a natural person. (1) Whoever intentionally and publicly exhibits or displays or transmits any information through any information system, which he knows to be false, and intimidates or harms the reputation or privacy of a natural person.
- **S. 21**. Offences against modesty of a natural person: address the exploitation of sexual imagery without consent. Regulates sexually explicit content, be it digital photographs or videos, taken or distributed without consent. - includes splicing a photo, dissemination of intimate images, sextortion.
- **S. 22**. Child pornography – produces, offers, make available, transmit or procures for himself or others
- **S. 24**: Cyberstalking: (1) A person commits the offence of cyber stalking – with intent to coerce, intimidate of harass

31

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GENDER EQUALITY

32

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The Constitution of Pakistan

- Article 25 - Equality of citizens.—
  - (i) All citizens are equal before law and are entitled to equal protection of law.
  - (ii) There shall be no discrimination on the basis of sex
  - (iii) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.
- Article 35. Protection of family etc.—

  The state shall protect the marriage, the family, the mother and the child.
- Article 37 - Promotion of social justice and eradication of social evils. —
  - The State shall … (a) make provision for ensuring that children and women are not employed in vocations unsuited to their age or sex, and for maternity benefits for women in employment …

33

ADB

GBV is a Constitutional Issue

- **India:** The right to be protected from sexual harassment and sexual assault is, therefore, guaranteed by the Constitution and is one of the pillars on which the very construct of gender justice stands.' '[F]ailure in discharging this public duty renders it [the State] accountable for the lapse.' Verma Committee
- **South Africa**: Domestic violence compels constitutional concern in yet another important respect. To the extent that it is systemic, pervasive and overwhelmingly gender-specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form… The non-sexist society promised in the foundational clauses of the Constitution and the right to equality and non-discrimination guaranteed by section 9, are undermined when spouse-batterers enjoy impunity." R. Baloyi, South Africa

34

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Role of District/Sessions Court

- The district judiciary is crucial as it is usually the point of first contact with the courts. 90% litigation is pending in the subordinate courts with only 10% cases are in the superior.
- The district and sessions courts play a critical role in enforcing constitutional safeguards whether they be substantive or procedural safeguards. For example, due process, equal protection of the law, prohibition of torture.

(Faqir Hussain,
The Role of District Judiciary in Protection of Human Rights, FJA)

35

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Major Instruments on Women's Human Rights

Prohibition of Discrimination Against Women:

Universal Declaration of Human Rights (UDHR):

- **Article 1 -** All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience
- **Article 2** - Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex …
- **Article 3** - Everyone has the right to life, liberty and security of person.
- **Article 7** - All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

36

ADB

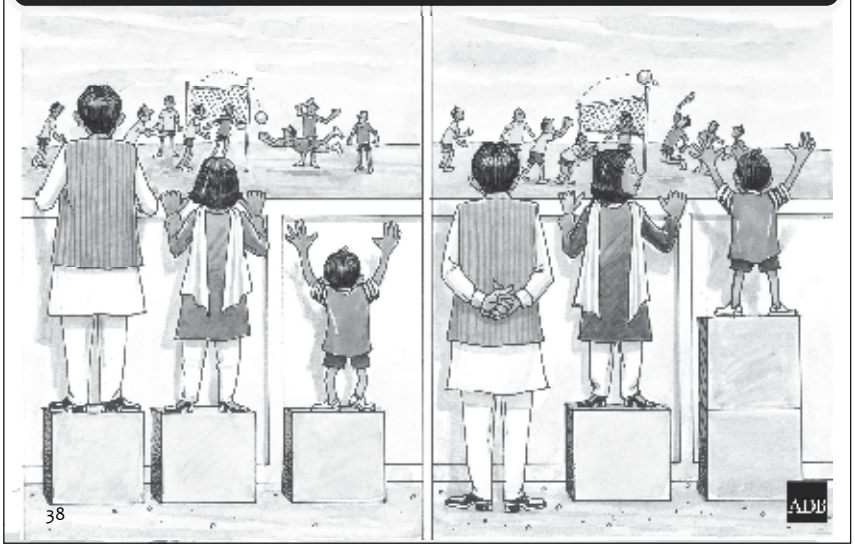
GBV violates human rights & fundamental freedoms

- GBV impairs or nullifies women's human rights and fundamental freedoms including –
  - Right to life;
  - Right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment;
  - Right to liberty and security;
  - Right to equal protection of the law;
  - Right to equality in the family;
  - Right to highest standard attainable in physical and mental health;
  - Right to just and favorable conditions of work;
  - Right to education.

37

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Equal treatment does not always result in equality



38

ADB

Doctrine of Equality

- **Formal equality**
  - Treats men and women as the same, uses male standard and women are to measure up to this standard
  - But what if equal treatment yields disparate results?
- **Protectionist equality**
  - Women's weakness requires them to be protected from or unsuitable for certain activities otherwise available to men
  - Considers women's weakness as justification for unequal treatment
- **Substantive equality (CEDAW model)**
  - Recognizes difference and affirms equality between men and women
  - Women not be subjected to detrimental treatment due to their gender
  - Focuses on equality of opportunity, equality of access and equality of results or outcomes

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ADB

Discrimination

- **Direct discrimination**

  Direct discrimination occurs when someone is treated less favourably than another for prohibited reasons or protected characteristic .
- **Indirect discrimination**

  At times what appears to be a neutral policy or criterion, actually results in discrimination because certain rules or policies are such that it is difficult if not impossible for women to comply with unless such policies or criterion are inherently required and reasonable adjustments cannot be made.
- **Structural Discrimination:**
  - Laws, policies, culture or customary practices may socially and legally entrench gender stereotypes and become unquestioned norms and standards.
  - Requires change of mindset

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ADB

CEDAW, ICCPR (art 26), IESCR (art 2)

- CEDAW is the second most ratified human rights convention in the world (189 countries). Pakistan acceded 12 March 1996.
- Articles 2 and 5 obligate the State to adopt a policy to eliminate all forms of discrimination against women
  - adopt appropriate legislative and other measures prohibiting discrimination against women;
  - take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices;
  - 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.

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Pakistan's Role in Developing International Women's Human Rights

- **1954:** UNGA called on governments to abolish laws customs and practices "inconsistent with the Universal Declaration of Human Rights".
- **1960:** Move by States, experts and NGOs for global concept of women's human rights under one instrument.
- **1963:** 22 countries requested CSW to draft a **Declaration on the elimination of all forms of discrimination against women**, namely, **Afghanistan, Algeria**, Argentina, Austria, **Cameroon,** Chile, Columbia, Czechoslovakia, **Gabon, Guinea, Indonesia, Iran, Mali**, Mexico, **Mongolia, Morocco, Pakistan,** Panama, **the Philippines**, Poland, **Togo** and Venezuela. (*U.N. General Assembly A/5606 15 November 1963*)
- **1967:** The **Declaration on the Elimination of All Forms of Discrimination Against Women** by the UNGA on March 2, 1967. (A/RES/22/2263)

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Application by Courts

- **Can Pakistani Courts draw on International Law without Legislative Instrument?**

"We are of the view that nations must march with the international community and the municipal law must respect rules of international law, even as nations respect international opinion; the community of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with the Acts of the Parliament."

M/s Najib Zarab Ltd v. the Government of Pakistan (PLD 1993 Karachi 93)

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ADB

How Courts Give Effect to International Norms

Ways employed by courts to give effect to international norms –

- Through interpretive presumptions.
- Relying on international norms in constitutional interpretation;
- Ensuring conformity of domestic statutes with international law (even if the relevant international treaty has not been incorporated into law domestically); and

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ADB

Application of CEDAW by Domestic Courts

- **Humeira Mehmood:** Case of zina filed by father against his married daughter. The judge drew attention to CEDAW art 16 on right of woman to family life on the basis of equality with men (PLD 1999 Lah 494)
- **Mst. Sarwar Jan v Abdul Rehman:** Application for divorce bywife on basis of cruel and inhuman behaviour of husband. The Court referred approvingly to CEDAW and Cairo Declaration of Human Rights (NLR 2004 SD 129)
- **Suo Moto No. 1K of 2006:** Application by foreign husband for citizenship. The court drew on the Constitution, Islamic law and international human rights law i.e. UDH, CEDAW and Convention on Nationality of Married Women (PLD 2008 FSC 1)

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ADB

Application of CEDAW by Domestic Courts

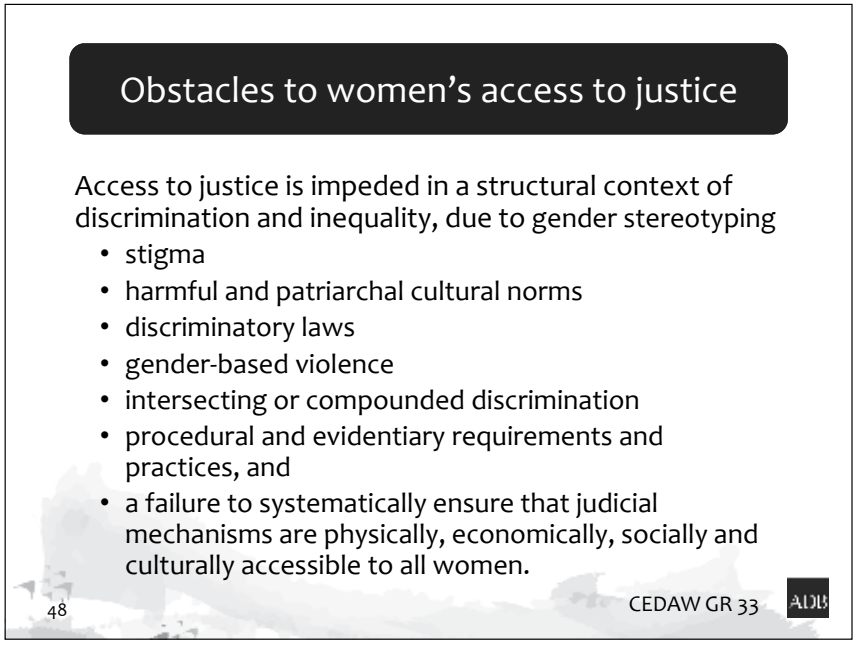
- The Court was also conscious of the protection given to the marriage and the institutions of family under the Constitution of Islamic Republic of Pakistan and CEDAW
- Using mischief rule, the Court held that as the petitioners thought they were validly married, the condition precedent for the alleged offence prima facie does not exist.
- The prosecution prima facie reflects not only malice in fact but also male in law.

***Mst Saima Vs The State PLD* 2003 Lah. 747,**
Tassaduq Hussain Jilani J.

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CONCLUSION
47
ADB


Obstacles to women's access to justice
Access to justice is impeded in a structural context of discrimination and inequality, due to gender stereotyping
• stigma
• harmful and patriarchal cultural norms
• discriminatory laws
• gender-based violence
• intersecting or compounded discrimination
• procedural and evidentiary requirements and practices, and
• a failure to systematically ensure that judicial mechanisms are physically, economically, socially and culturally accessible to all women.
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CEDAW GR 33
ADB

Duty to uphold constitutional morality

- The Constitution has its own morality which is anchored in the language of rights and equality. It is the duty of the court to uphold constitutional morality and be the catalyst in societal mindset change.
- Everyone has a right to recognition everywhere as a person before the law. This is high time to change mindset of society and to realise that a person of diverse gender identity shall also enjoy legal capacity in all aspects of life. (MIAN Asia v Fed. Of Pakistan, 2017 – case in relation to transgender rights)

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ADB

Duty to provide effective remedy

Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) acknowledges the right to effective remedy

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted."

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ADB

Role of judges and prosecutors to take effective action

- [The] general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts. [Maria da Penha]
- The State response was found to be "manifestly inadequate" to the gravity of the offences in question. The domestic judicial decisions in this case revealed a lack of efficacy and a certain degree of tolerance, and had no noticeable preventive or deterrent effect. [Opuz v Turkey]

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ADB

Role of judges and prosecutors in protecting the right to life

مِنْ أَجْلِ ذَٰلِكَ كَتَبْنَا عَلَىٰ بَنِيٓ إِسْرَٰٓءِيلَ أَنَّهُۥ مَن قَتَلَ نَفْسًۢا بِغَيْرِ نَفْسٍ أَوْ
فَسَادٍ فِى ٱلْأَرْضِ فَكَأَنَّمَا قَتَلَ ٱلنَّاسَ جَمِيعًا وَمَنْ أَحْيَاهَا فَكَأَنَّمَآ أَحْيَا ٱلنَّاسَ
جَمِيعًا ۚ وَلَقَدْ جَآءَتْهُمْ رُسُلُنَا بِٱلْبَيِّنَٰتِ ثُمَّ إِنَّ كَثِيرًا مِّنْهُم بَعْدَ ذَٰلِكَ فِى
ٱلْأَرْضِ لَمُسْرِفُونَ ﴿٣٢﴾

…that whosoever killeth a human being for other than manslaughter or corruption in the earth, it shall be as if he had killed all mankind, and whosoever saveth the life of one, it shall be as if he had saved the life of all mankind.

[Al-Maidah, verse 5:32, translation Pickthall]

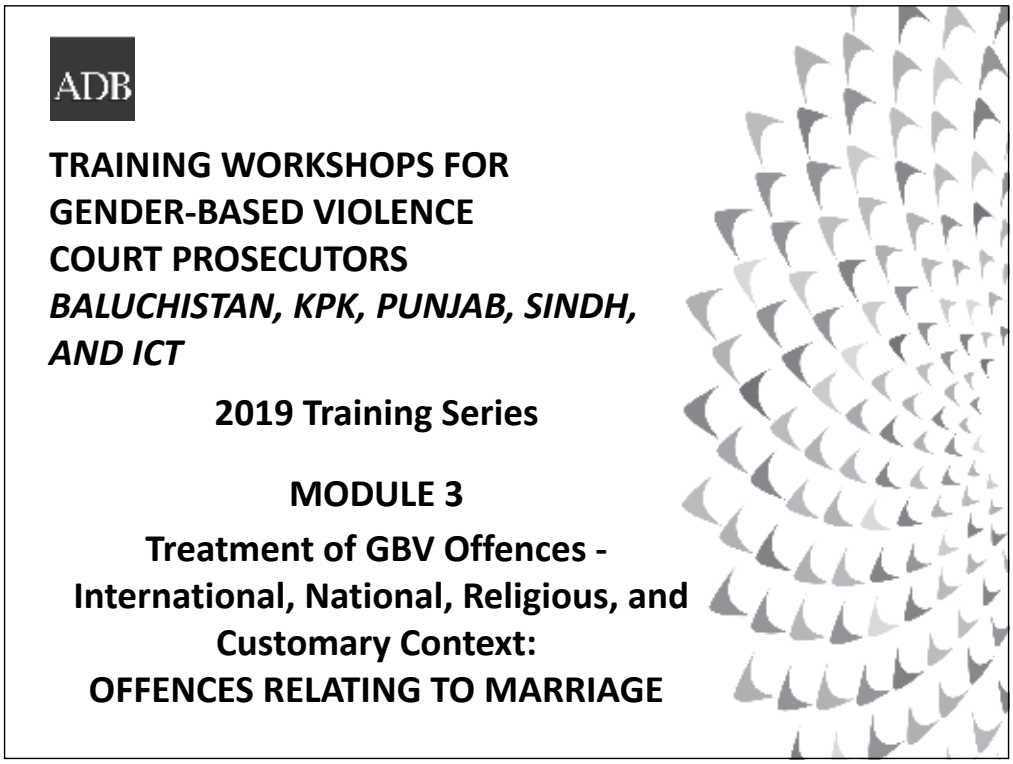
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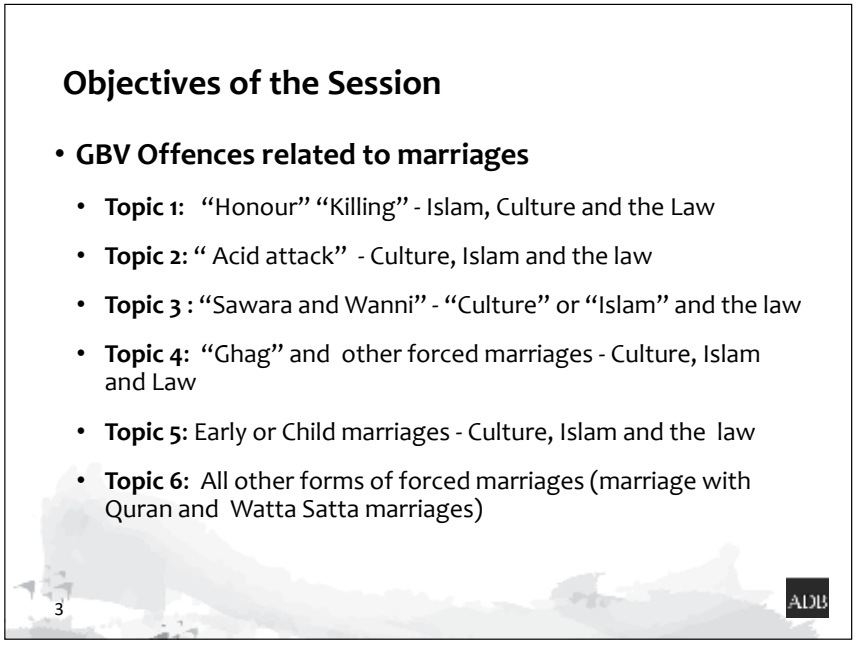

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ADB

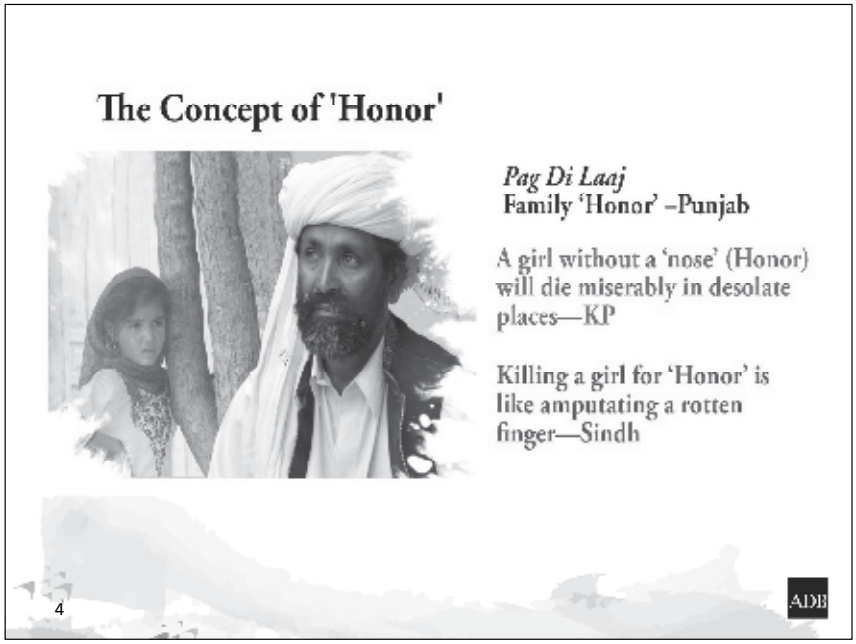
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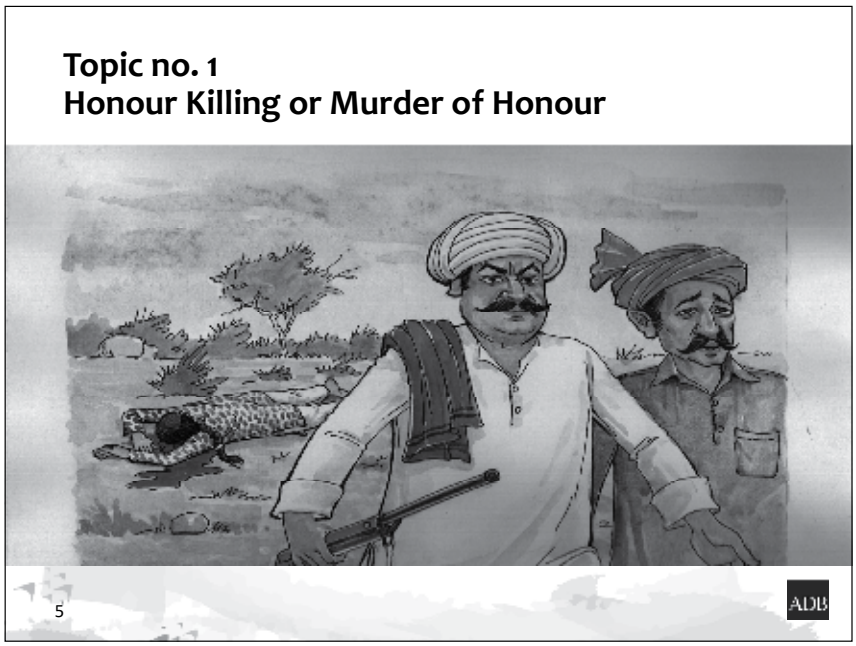
TREATMENT OF GBV OFFENCES - INTERNATIONAL, NATIONAL, RELIGIOUS, AND CUSTOMARY CONTEXT: OFFENCES RELATING TO MARRIAGE




ACTIVITY
ADB
2


Objectives of the Session
• GBV Offences related to marriages
• Topic 1: "Honour" "Killing" - Islam, Culture and the Law
• Topic 2: " Acid attack" - Culture, Islam and the law
• Topic 3 : "Sawara and Wanni" - "Culture" or "Islam" and the law
• Topic 4: "Ghag" and other forced marriages - Culture, Islam and Law
• Topic 5: Early or Child marriages - Culture, Islam and the law
• Topic 6: All other forms of forced marriages (marriage with Quran and Watta Satta marriages)
ADB
3


The Concept of 'Honor'
Pag Di Laaj
Family 'Honor' –Punjab
A girl without a 'nose' (Honor) will die miserably in desolate places—KP
Killing a girl for 'Honor' is like amputating a rotten finger—Sindh
4
ADB


Topic no. 1
Honour Killing or Murder of Honour
5
ADB

Topic no. 1 – Honour Killing - Facts

- It's estimated that 5,000 women are murdered globally each year in the name of honor. In India, approximately 1,000 women are victims of honor killings every year. In Pakistan, figure is closer to 1,100- (**Global Citizen)**
- Honor killings have been reported not only in Middle East and South Asia, but also in UK, US, Sweden, Germany, France, Italy, Turkey, and Uganda. (**Global Citizen)**
- The **Aurat Foundation's** annual report of 2016 showed 7,852 cases of violence against women and 70 per cent increase in honour killings in the year 2016.
- The jirga had issued the orders to kill 13-year-old Naghma after it emerged that she had allegedly attempted to run away with two young men. (**Dawn)**

6

Topic no. 1 – Honour-Killing – Quranic verses

وَمَن يَقْتُلْ مُؤْمِنًا مُتَعَمِّدًا فَجَزَاؤُهُ جَهَنَّمُ خَالِدًا فِيهَا وَغَضِبَ اللَّهُ عَلَيْهِ وَلَعَنَهُ وَأَعَدَّ لَهُ عَذَابًا عَظِيمًا

But whoever kills a believer intentionally - his recompense is Hell, wherein he will abide eternally, and Allah has become angry with him and has cursed him and has prepared for him a great punishment.

(Surah-An Nisa 4:93)

مِنْ أَجْلِ ذٰلِكَ كَتَبْنَا عَلَى بَنِى إِسْرَءِيلَ أَنَّهُ مَن قَتَلَ نَفْساً بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِى الأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعاً وَمَنْ أَحْيَـهَا
فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعاً

"Because of that, We ordained for the Children of Israel that if anyone killed a person not in retaliation of murder, or (and) to spread mischief in the land – it would be as if he killed all mankind, and if anyone saved a life, it would be as if he saved the life of all mankind."

(Surah Al Maidah 5:32)

7

Topic no. 1 – Honor-Killing - Relevant Law

International Law

- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

National Laws

Constitution of Pakistan, 1973

- Article.9 Security of a Person
- Article.14 Inviolability of dignity of man

The Pakistan Penal Code, 1860

- Sec. 299(ee) Fasad-fil-arz
- Sec. 299 (ii) Offences committed in the name or on the pretext of honor
- Sec. 302 Punishment of qatl-i-amd
- Sec. 305 Wali
- Sec 309 Waiver *Afw* of Qisas in qati-i-amd
- Sec. 310 Compounding of qisas in qatl-i-amd
- Sec. 311 Tazir after Wavier or compounding of right of qisas in qatl-e-amd
- Sec 324 Attempt to commit Qatl-e-amd
- Sec. 338 E Wavier or compounding of offences (2nd proviso)

8 8 ADB

Topic no. 1 – Honor-Killing - Relevant Law

The Code of Criminal Procedure, 1898

- Sec. 154 Information in cognizable cases
- Sec. 161 Examination of Witnesses by Police
- Sec. 345(2) Compounding Offences

The Anti-Terrorism Act, 1997

- Sec. 6(2)(b) Terrorism
- Sec. 7 Punishment for acts of terrorism

9 ADB

Topic no. 1 – Honour Killing – Case law

- **M. Akram Khan Vs. The State - PLD 2001 SC 96**

  (Nobody has any right nor can anybody be allowed to take the law in his own hands to take the life of anybody in the name of Ghairat. Neither the law of the land nor religion permits the so called honor killing which amounts to murder. Such Act violates FR as enshrined under art 9)

- **Mohammad Siddique Vs. The State – PLD 2002 Lah. 444**

  (No pardon when premeditated, intentional murder no proof of sudden and grave provocation)

- **Khadim Hussain Vs. The State - PLD 2012 Baluchistan 179**

  (Bail denied- Can not pardon/compromise in honor killing cases.)

10

ADB

Topic no. 1 – Honour Killing – Case law

- **Gul Ahmad Vs. The State - PLD 2012 Baluchistan 22**

(Anti terrorism Jurisdiction- in Siyahkari case killing 3 innocent people)

- **Ghulam Yasin Vs. State - PLD 2017 Lah 103**

(Compounding of offences- honor killing-Mere fact that the legal heirs of the deceased had pardoned the accused was not sufficient to entitle him to grant of bail, as the offence alleged against him was against the state as well as the society - amended in PPC 302)

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ADB

Acid Attacks



" I refused a boy's marriage proposal.
That was when he threw acid on me.
A tribal gathering was called with all
of my uncles and the perpetrator present.
He however, swore upon the Holy Quran
that he had not harmed me.
We were forced to accept his word."

Zainab (17) South Punjab

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ADB

Topic no. 2 – Acid attack - Statistics

- **Between 150 and 400 cases of acid attacks are reported in Pakistan** every year. As many as 80 per cent of the victims are women, and almost 70 per cent are below 18. Such attacks are not used to kill the victim but to cause disfigurement, and can often cause blindness, hearing loss and physical and mental pain. **(Dawn, October 18th, 2015)**
- As many as 98 per cent of the cases filed by acid attack victims are never decided due to existence of various loopholes in the law, lack of proper investigation or prosecution. (**According to legal Expert- Dawn)**

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ADB

Topic no. 2 – Acid attack - WHY ACID ATTACKS?

- Cripple for life - teach her a lesson for her refusal or disobedience
- Punish her for her transgression and restore the social power balance
- Restoring the honour of the family, revenge for rejecting marriage proposals
- Take away her beauty
- Disfigure/torture rather than kill

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ADB

Topic no. 2 – Acid attacks- Quranic verse

وَمَا لَكُمْ لَا تُقَاتِلُونَ فِي سَبِيلِ اللَّهِ وَالْمُسْتَضْعَفِينَ مِنَ الرِّجَالِ وَالنِّسَاءِ وَالْوِلْدَانِ الَّذِينَ يَقُولُونَ رَبَّنَا أَخْرِجْنَا مِنْ هَٰذِهِ الْقَرْيَةِ الظَّالِمِ أَهْلُهَا وَاجْعَل لَّنَا مِن لَّدُنكَ وَلِيًّا وَاجْعَل لَّنَا مِن لَّدُنكَ نَصِيرًا –

"And why should you not fight in the cause of God and on behalf of those, who being weak, are ill-treated and oppressed, men, women and children whose cry is, 'Our Lord! Rescue us from these oppressors, and raise for us, from You, one who will protect and help.'"

(Surah Nisa: 4:75)

Prophet Muhammad (P.B.U.H) said: "Only an honorable man treat women with honor and integrity. And only a mean, deceitful and dishonest man humiliates and insults women." Referring to physical abuse, he added: "Never hit your wives, they are your partners and sincere helpers." He exemplified this by never, ever, hitting a women or child. The Prophet guaranteed protection of the life, honor, and property of women. **(Sunnah)**

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ADB

Topic no. 2 – Acid Attack - Relevant Law

International Law:

- International Covenant on Civil and Political Rights – Art. 6 and 7
- CEDAW

National Law

The Constitution of Pakistan, 1973

- Article.9 Security of a Person
- Article.14 Inviolability of dignity of man

Pakistan Penal Code, 1860

- Sec. 336-A Hurt Caused by Coercive Substance
- Sec. 336-B Punishment for Hurt by Coercive Substance
- The Anti-Terrorism Act, 1997
- Sec. 6(2)(b) Terrorism
- Sec. 7 Punishment for acts of terrorism

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ADB

Topic no. 2 – Acid attacks - Indian Case Law

Laxmi Vs. Union Of India & Ors. – 2014 SCC 4 427

- Prepare a scheme for providing funds to acid victim and Victim Compensation Scheme got notified.
- Minimum compensation of Rs. 3,00,000-/-
- Full medical assistance and free medical treatment by private hospitals.
- Acid a poison and would not be easily available- Ban on sale of acid.
- First aid must be administered.
- No hospital/clinic can refuse treatment, in case of refusal victim can take legal action.

17

ADB

Topic no. 2 – Acid attack - Pakistani Trial Court Case

- Asmatullah threw acid on his ex-fiancée at her refusal to marry him. According to doctors, the attack disfigured the face of the 24-year-old and damaged her eyes. The trial court's judge, Sajjad Ahmad imposed a fine of Rs3.9 million on the convict which will be paid to the victim as compensation. The man had been sentenced to 25 years in jail on two counts under Anti-Terrorism Act, 1997, while another 10 years under Section 324 of the PPC.

(Dawn, November 16th, 2017)

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ADB

Topic no. 3 – Swara & Wani



19

ADB

Topic no. 3 – Swara & Wani - Quran and Sunnah

وَلَا تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَىٰ ۚ وَإِن تَدْعُ مُثْقَلَةٌ إِلَىٰ حِمْلِهَا لَا يُحْمَلْ مِنْهُ شَيْءٌ وَلَوْ كَانَ ذَا قُرْبَىٰ ۗ إِنَّمَا تُنذِرُ الَّذِينَ يَخْشَوْنَ رَبَّهُم بِالْغَيْبِ وَأَقَامُوا الصَّلَاةَ ۚ وَمَن تَزَكَّىٰ فَإِنَّمَا يَتَزَكَّىٰ لِنَفْسِهِ ۚ وَإِلَى اللَّهِ الْمَصِيرُ

And no bearer of burdens will bear the burden of another. And if a heavily laden soul calls [another] to [carry some of] its load, nothing of it will be carried, even if he should be a close relative. You can only warn those who fear their Lord unseen and have established prayer. And whoever purifies himself only purifies himself for [the benefit of] his soul. And to Allah is the [final] destination.

(Surah-i-Fatir- 35:18)

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُم مِّنْ أَنفُسِكُمْ أَزْوَاجًا لِّتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُم مَّوَدَّةً وَرَحْمَةً ۚ إِنَّ فِي ذَٰلِكَ لَآيَاتٍ لِّقَوْمٍ يَتَفَكَّرُونَ

Marriage is a partnership based on love and mercy.

(Surah Ar-Rum-30:21)

- The one who has 3 daughters or sisters, or 2 daughters or sisters and he brings them up properly and fears Allah(SWT) regarding their rights, then Paradise is made mandatory for him-Sunnah

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ADB

Topic no.3 – Swara & Wani - Quran and Sunnah

Essentials of a valid Marriage

- Ijab-o-Kabool
- Competency of Parties
- Consent of Both Parties
- 2 adult witnesses
- Mehr (money, property or any other asset given by bridegroom to the bride)

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ADB

Topic no. 3 – Swara – Relevant Law

International law

CEDAW

- Article 16 Eliminate discrimination against women in all matters relating to marriage

The Constitution of Islamic Republic of Pakistan, 1973

- Article 9 Right to Life
- Article 14 Dignity of Man
- Article 25 Equality of Citizens

The Muslim Family Laws Ordinance, 1961

- Sec. 5 Marriage requirements

The Pakistan Penal Code, 1860

- Sec. 310 A Punishment for badla-e-sulh, wanni or sawara

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ADB

Topic no. 3 – Swara & Wanni – Case law

- **Samar Minallah and others vs. Federation of Pakistan (CP 16 of 2004)**
- **M. Sultan vs. State - 2013 PCr.LJ 950 Pesh.**

  (Bail application of accused and co accused was dismissed with the observation that handing over a lady without her consent in such humiliating manner was not only against the fundamental right and liberty of human being but also against the importance and value of human being given by Allah to mankind)
- **Sargand vs. The State - 2014 MLD 1464 Pesh.**

  (Giving a female in marriage or other wise in badl –e- sulh - bail refusal of accused)
- **Lahore High Court** on 10 May, 2019 ordered recovery of 20 year old woman allegedly kidnapped for Vani- (Darra Adam Khel)

23

ADB

Topic no. 3 – Swara & Wani



24

ADB

Topic no. 3 – Swara & Wanni - Video



25

ADB

Ghag



A binding, public, declaration of right over a prospective bride made unilaterally against her consent.

Number of reported cases between 2017-2018
District Peshawar
14

KPK Elimination of Custom of Ghag Act 2013

26

Topic no. 4 – Ghag or Forced Marriage - Relevant Law

National Law
Pakistan Penal Code, 1860

- Chapter XX Other offences relating to Marriage
- Sec. 498 B Prohibition of Forced Marriages
- Sec. 493 A Cohabitation caused by a man deceitfully inducing a belief of lawful marriage
- Sec. 496 A Enticing or taking away or detaining with criminal intent a woman

KPK:
Elimination of Custom of Ghag Act, 2013

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ADB

Topic no. 4 – Ghag or Forced Marriage - Facts

According to Asian Human Rights Commission, 12 Ghag victims have committed suicide in the year 2015 after being disheartened by lack of justice in FATA.

http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-040-2016/

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ADB

Topic no. 5 – Early or Child marriages



29

ADB

Topic no. 5 - Early or Child marriages - Statistics

- **15 million girls a year** are married before the age of 18 (**WHO**)
- 1 in 3 girls in the developing world is married before the age of 18 including Pakistan. Pakistan has the highest numbers of child marriage in the world. **(WHO)**
- Pregnancy and childbirth complications are the **leading cause of death for 15 to 19 year old girls globally**. **(WHO 2017)**
- Where girls survive childbirth, **increased risk of post pregnancy-related complications**. 65% of all cases of obstetric fistula occur in girls under the age of 18. **(WHO 2008)**
- For child brides, the risk of domestic violence, early pregnancy and martial rape increases at an alarming rate. Owing to child marriages, large number of girls drop out of school and then have very few economic and employment opportunities. **(UNICEF)**

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Topic no. 5 - Early or Child marriages - Facts

Muslim countries that have declared 18 years as minimum age for marriage for both boys and girls include:

- Bangladesh, Egypt, Turkey, Morocco, Oman, United Arab Emirates (UAE), and Saudi Arabia
- Algeria has 19 years as minimum age for marriage
- Pakistan with 439 cases, ranked the highest among top four 'focus' countries in 2017, followed by Bangladesh, Somalia and India. **(UK's Forced Marriage Unit)**
- If there is **no reduction** in the practice of child marriage, **1.2 billion women alive in 2050** will have married in childhood **(WHO)**
- More than 140 million underage girls will be married between 2011 to 2020 in Pakistan. **(According to news reports)**

31

Topic no. 5 –
Early or Child marriages - Quranic verse

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُم مِّنْ أَنفُسِكُمْ أَزْوَاجًا لِّتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُم مَّوَدَّةً وَرَحْمَةً ۚ إِنَّ فِي ذَٰلِكَ لَآيَاتٍ لِّقَوْمٍ يَتَفَكَّرُونَ

And of His signs is that He created for you from yourselves mates that you may find tranquility in them; and He placed between you affection and mercy. Indeed in that are signs for a people who give thought.

(Surah Ar- Rum 30:21)

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ADB

Topic no. 5 –
Early or Child Marriages - Relevant Law

International Law:

- CEDAW
- Convention on the Rights of the Child

National Law:

- The Child Marriage Restraint Act, 1929
- The Sindh Child Marriages Restraint Act, 2013

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ADB

Marriage to Quran



A form of marriage where a girl is made to surrender her share of inheritance and preserve the purity of family by getting married to Quran . It is practiced mostly in Sindh, especially within Syed families

498 C. Prohibition of marriage with the Holy Quran.

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ADB

Topic no. 6 – Marriage to Quran - Quranic Verse

وَخَلَقْنَاكُمْ أَزْوَاجًا– .And We created you in pairs
(Surah An-Naba- 78.8)

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ADB

Topic no. 6 – Marriage to Quran - Relevant Law

International Law:

- CEDAW

National Law:

Pakistan Penal Code, 1860

- 498 C Prohibition of marriage with the Holy Quran

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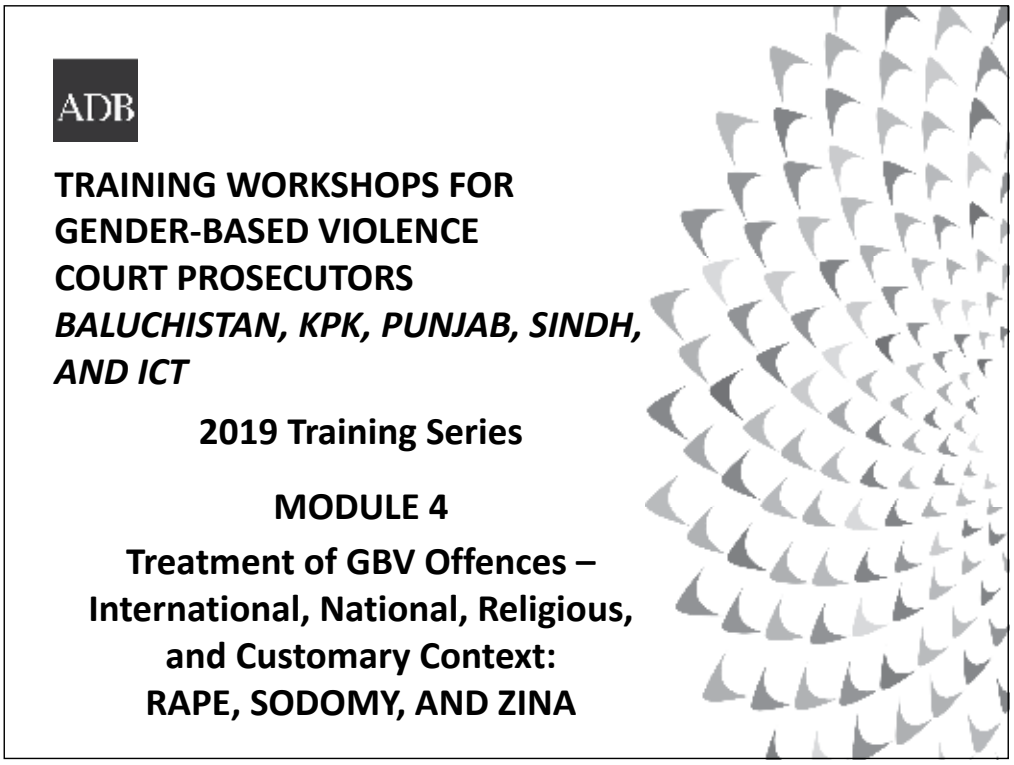
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Thank You.

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Module 4:

TREATMENT OF GBV OFFENCES – INTERNATIONAL, NATIONAL, RELIGIOUS, AND CUSTOMARY CONTEXT: RAPE, SODOMY, AND ZINA



Objective of module

1. To understand the crimes of sexual assault rape and sodomy
2. To gauge the appropriate medical intervention in rape cases
3. To understand zina and its evidentiary requirements

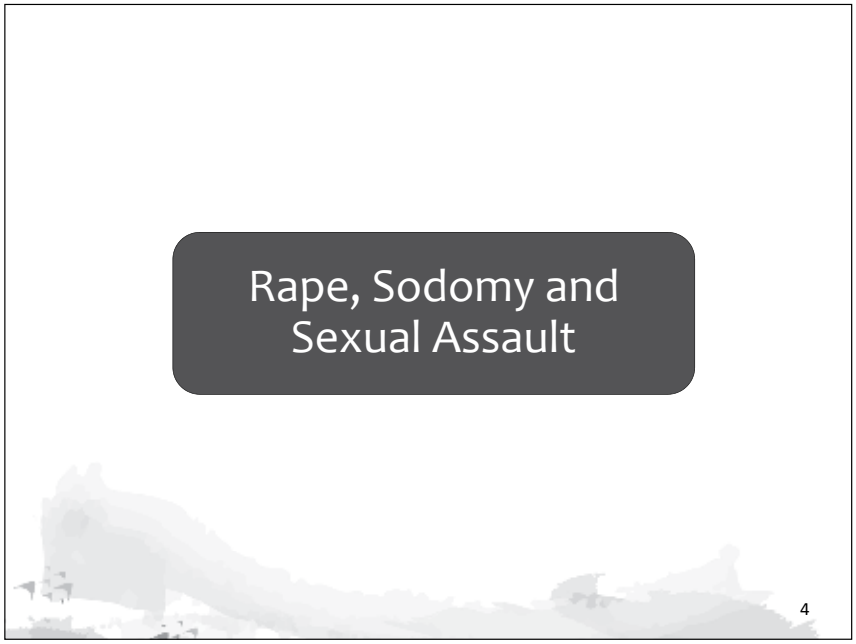
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Premises for understanding rape, sodomy and sexual assault

- Rape and sexual assault are not crimes of passion but an expression of power
- The offence of sexual assault should be defined so as to include all forms of non-consensual non-penetrative touching of a sexual nature.
- The primary interest of the law must be respect for victims' sexual integrity and autonomy
  - Rape is premised on non-consent of the victim. This makes it different from zina where consent is central.
- Whereas non-consent is not an essential element in sodomy. In some jurisdictions, non-consensual sodomy is a separate crime which carries a higher punishment.

3



Rape under Penal Code

Article 375

A man is said to commit rape who has sexual intercourse with a woman under

- circumstances falling under any of the five following descriptions –
  - (i) against her will;
  - (ii) without her consent;
  - (iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt;
  - (iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or
  - (v) with or without her consent when she is under sixteen years of age (generally referred to as 'statutory rape')

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Rape and Sexual Assault – EVAW Law

- Punishment for rape – PPC S. 375
  - Punishment for rape
  - 376 (1) Death or 10-25 years
  - 376 (1A) – rape/sodomy with hurt – death or life & fine
  - 376 (2) Gang rape – death or life imprisonment & fine
  - 376 (3) Rape of minor or person with physical or mental disability – death or life imprisonment & fine
  - 376 (4) Rape by public official taking advantage of position – death or life imprisonment & fine
  - 376A Disclosure of identity of victim – 3 years

6

- Sodomy –PPC S 377 Carnal intercourse against the order of nature
- Outrage of modesty and stripping
  - 354 Assault/force with intent to outrage of modesty
  - 354A Assault/force and stripping in public

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Against her will and without her consent

Two tracks

- Against her will means 'against her will' means the woman resisted and there was opposition.
  - This is generally abandoned (or recommended to be abandoned) in light of emphasis on consent (see Verma Committee report)
- Without her consent –requires positive consent
  - **Absence of consent** is pivotal in rape. Consent pertains only to the exact act to which the consent, if any, relates. For example, a woman may consent to kissing, patting or even intimate touching, but consent to these acts is not sufficient to prove consent in rape. Because of this, defining consent (and the factors that vitiate "consent") is crucial in GBV and must be addressed in all relevant law and cases.
- Sodomy is constituted irrespective of consent. Elsewhere, this provision has been interpreted to apply only to non-consensual sodomy (see Navtej Singh Johar - Indian SC)

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Ascertaining consent

- Unequivocal voluntary agreement, verbal or non-verbal, to participate in the specific act (see also Verma Committee)
- Consent cannot be presumed because the victim does not offer actual physical resistance to the act of penetration (see also Verma Committee)
- The accused when charged with sexual assault cannot argue he subjectively believed there was consent. (Canada)
- He must demonstrate that he believed there was consent because he took reasonable steps to ascertain consent to the specific sexual activity (Canada)
- A person consents if he or she agrees by choice and has the freedom and capacity to make that choice (England & Wales)

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Aggravated Rape

Specific provisions for aggravated rape with enhanced punishments

- Rape with grievous hurt [S.376(1A)]
- Gang rape [S.376(2)]
- Rape of a minor [S.376(3)]
- Rape of person with mental or physical disability [S.376(3)]
- Rape by public official including police officer, medical officer, jailor, taking advantage of his official position [S.376(4)]

Q: SHOULD CONSENT UNDER SS. 376 (4), EVEN IF GIVEN, BE DEEMED VITIATED/INVALID?

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Vitiating/invalid consent

'Consent' which is deemed under the law to have been vitiated/legally impaired (destroyed) for the purposes of rape.

- 'Consent' can be vitiated through fraud, impersonation, fear, coercion, and if the victim is below 16 years (S376)
- Q: Must fear of injury or death be of the victim alone? What if it was fear of injury or death to others, e.g. her children, siblings
- Q: Must the deception be only impersonation of husband? What if it was other kinds of deception?

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Examples of invalidity of 'consent'

- Malaysian Penal Code S375: With her consent, when her consent has been obtained by putting her in fear of death or hurt to herself or any other person, or obtained under a misconception of fact and the man knows or has reason to believe that the consent was given in consequence of such misconception
- with her consent, when the man knows that he is not her husband, and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married or to whom she would consent;
- with her consent, when, at the time of giving such consent, she is unable to understand the nature and consequences of that to which she gives consent;
- with her consent, when the consent is obtained by using his position of authority over her or because of professional relationship or other relationship of trust in relation to her.

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Proving rape

Traditionally the victim of rape was held to a higher proof than in other crimes. The law gradually evolved to change proof requirement of rape – essentially applying the general rules of evidence that apply in all other crimes

Four issues will be dealt with -

1. There is no necessity for corroborative evidence.
2. Evidence of victim's sexual history is irrelevant
3. Penetration, no matter how slight is sufficient to prove rape.
   - Tearing of the hymen is not necessary to prove rape
4. Victim to be examined by registered medical practitioner for forensic medical evidence (DNA)

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1. No necessity for corroborative evidence

- *Dayal Sahu (Indian SC)*: the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape.
- the complainant and her husband … could not be expected to know that they should rush to a doctor. In fact the complainant has deposed that she had taken bath and washed her clothes after the incident. The absence of any injuries on the person
- In this situation the non-production of a medical report would not be of much consequence if the other evidence on record is believable.
- *Barwada (Indian SC)*: that refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. This Court deprecated viewing evidence of such victim with the aid of spectacles fitted with lenses tinted with doubt, disbelief or suspicion

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2. Character attacks

- Traditionally perpetrators try to present their victims as immoral and unchaste through allegations of victims' past sexual history
- Character attacks were mounted, mainly on the argument that the victim was impure, so how could she be credible?
- Victims were humiliated and embarrassed at the police station and in courts i.e. they were re-victimised at the hands of law and law enforcers
- The law evolved to emphasise that character, morality and sexual history of victims are irrelevant –.
- **Evidence Act S151. Impeaching credit of witness**
- The credit of a witness may be impeached in the following ways by the adverse party or with the consent of the Court, by the party who calls him (4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character. (Repealed Am 2016)

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Disallowing evidence/questions

EVIDENCE ACT

- **146: Indecent and scandalous questions:** The Court may forbid any question or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court unless they relate to facts-in-issue, or to matters necessary to be known in order to determine whether or not the facts-in-issue existed.
- **148. Questions tended to insult or annoy:** The Court shall forbid any question which appears to it to be intended to insult or annoy, or which …, appears to the Court needlessly offensive in form.

PUNJAB WITNESS PROTECTION ACT 2016

- **12(3) Rules of cross-examination** The court shall forbid a question to the victim of a sexual offence relating to any sexual behavior of the victim on any previous occasion with the accused or any other person, unless such a question, in the opinion of the court, is a relevant fact in the case.

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3. Is tearing of the hymen necessary to prove rape? The short answer is 'no'. Evidence of torn hymen is not necessary to prove rape.

- S. 376: Penetration is sufficient to constitute sexual intercourse necessary for the offence of rape.
- *Ranjit Hazarika (Indian SC)*: The mere fact that no injury was found on the private parts of the prosecutrix or her hymen was found to be intact does not belie the statement of the prosecutrix as she nowhere stated that she bled per vagina as a result of the penetration … To constitute the offence of rape, penetration, however slight, is sufficient.
- *N.K (Indian SC)*:"A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for a finding in favour of acquittal.

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Does an intact hymen prove no penetration has occurred? The short answer is 'no'.
Does a torn hymen prove that sexual intercourse had taken place? The short answer is 'no'.

- The hymen is not a flat piece of tissue covering the vagina, which is punctured during intercourse, otherwise there will be no outlet for menstrual blood
- Usually, the hymen looks like a fringe of tissue around the vaginal opening
- Some girls are born without a hymen, others have only a scanty fringe of tissue
- While hymens can be torn during sex or other physical activity, they don't "break."
- Torn areas can bleed, but it doesn't always happen

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- Doctors should not, on the basis of the medical examination conclude whether rape had occurred or not. [Verma Committee]
- The size of the vaginal introitus has no bearing on a case of sexual assault, and therefore a test to ascertain the laxity of the vaginal muscles which is commonly referred to as the two-finger test must not be conducted. On the basis of this test observations/ conclusions such as 'habituated to sexual intercourse' should not be made and this is forbidden by law. [Verma Committee]
- The "finger test" is also conducted to note the distensibility of the hymen. However it is largely irrelevant because the hymen can be torn due to several reasons. An intact hymen does not rule out sexual assault, and a torn hymen does not prove previous sexual intercourse. [Verma Committee]

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No probative value of two-finger test

- The two-finger test was used mainly to discredit the victim, as a form of character attack to show that the victim was immoral.
  - E.g. The Lahore High Court in *Fahad Aziz v State* (2008) disregarded the victim's rape complaint as "she appeared to be a woman of easy virtue [and] indulged in sexual activities".
  - E.g. Lahore High Court accepted the testimony of the victim in *Amanullah v. State* (2009) as "vagina admitted two-finger tight fully and painfully which showed … she was not a woman of easy virtue and was not used to committing sexual intercourse".
- As it is no longer permissible to attack the character of a victim by reference to her alleged 'easy virtue', and the two-finger test has otherwise no forensic medical value in proving or disproving rape, the two-finger test, having no probative value, should be discontinued.

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4. Forensic Medical Evidence (of accused)

Criminal Procedure Code (Am Act 2016)

S.164A. For offences under sections 376, 377 & 377B, the accused shall be examined by a registered medical practitioner. The registered medical practitioner shall without delay examine him and prepare a report of the examination giving the following particulars –

- The name and address of the accused and person who accompanied the accused;
- Age of the accused;
- Material taken from his body for DNA profiling;
- Marks or injury on the body of the accused;
- Other material particulars with reasonable detail.
- The report shall state the reasons for each conclusion.
- The report will be sent to the investigation officer who shall forward it to the Magistrate through the public prosecutor.

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Forensic Medical Evidence (of victim)

Criminal Procedure Code (Am Act 2016)

S.164A. For offences under sections 376, 377 & 377B, the victim shall be examined by a registered medical practitioner (for rape, a female registered medical practitioner). The registered medical practitioner shall without delay examine her/him and prepare a report of the examination giving the following particulars –

- The name and address of the victim & accompanying person;
- Age of the victim;
- Material taken from her/his body for DNA profiling;
- Marks or injury on the body of the victim;
- Other material particulars with reasonable detail.
- The report shall state the reasons for each conclusion.
- The report will record the consent of the victim or guardian.
- The report will be sent to the investigation officer who shall forward it to the Magistrate.

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Forensic Medical - DNA testing

Criminal Procedure Code (Am Act 2016)

- For offences under sections 376, 377 & 377B, the victim or attempts, DNA samples, shall be collected from the victim, with her/his consent (or guardian) and from the accused.
- The DNA shall be sent to a forensic lab where it shall be properly examined and preserved.
- Confidentiality shall at all times be observed.

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Current procedure

Medico-legal Performa (Punjab) -

- Medico legal officer (MLO) takes consent in writing of victim, if adult, or guardian.
- History of victim is taken. First an external examination (head, lips, toes etc.) is carried out to check for bruises, abrasions etc. To include victim's psychological state (usually not done).
- Then Local examination is conducted:
  - 3 semen swabs (from thighs, external & internal vaginal area) – evidence for DNA sting (semen, blood, saliva); and
  - If hymen is seen to not be intact, MLO checks whether tears are old or fresh; where hymen is not intact/or where person habituated in sexual intercourse, two-finger test is conducted (to check for tears and blood stains).
- DNA test of victim (to check for own secretion and other persons) & perpetrator from:
  - samples from examination; blood stained clothes (marked, numbered and signed by MLO); evidence collected at the scene of crime.
  - DNA testing is conducted at the Punjab Forensic Science Lab. Before that, it was done at chemical labs in some hospitals.
- Evidence collected is sent to police

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So what sort of medical examination is to be performed? Good practice for forensic medical examination.

- A rape kit should be provided to medical examiners for purposes of collecting forensic medical evidence after rape.
- Immediate care
- History
- Head to toe examination
- Follow up care and preventive treatment for STI [RAINN https//www.rainn.org/articles/rape-kit]
- **At no point does the medical forensic examination involve a two-finger test. The two-fingered test is traumatic for victim/survivor. It has little or no evidential value and has no place in the judicial system.**

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Victim's Rights

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Legal representation of victim and non-disclosure of identity

- The victim of crimes perpetrated or attempted under sections 354A, 376, 377 and 377B has a right to legal representation have a right to legal representation.
- The police officer is obligated to advice her of this right .
- If the victim requires legal aid, the police officer shall provide her with list of lawyers maintained by Bar Council. [S161A CPC (2016 Am)]
- Presence of female police officer or female family member or other person of her choice (Ss. 154, 161 CPC)
- Non-disclosure of identity of victim (S.376A PPC)

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Court proceedings

- That her/his case shall be decided within 3 months [S.344A of CPC]
- Appeal shall be decided within 6 months [S. 417(5) of CPC]
- That her/his case shall be conducted in camera (court closed to the public) [S 352 (2) of CPC]
- That special measures including holding the trial via video link or usage of screens for the protection of the victim and witnesses. (S. 352 (3)]
- Non-publication of broadcast of proceedings [S. 352 (4)]
- See also *Punjab Witness Protection Act 2018* which provides protection in court e.g. special measures and out of court e.g. shelter, non-disclosure

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Prohibition of prosecution of rape victim

- A 2003 report by the National Commission on Status of Women (NCSW) estimated "80% of women" were incarcerated because "they had failed to prove rape charges and were consequently convicted of adultery".
  - see Safia Bibi v. State in PLD 1985 FSC 120 – acutely myopic domestic help reported rape (zina bil-jabr) home help alleging rape. She gave birth. She was sentenced under section 10(2) of the Zina Ordinance to 3 years imprisonment, 15 stripes, and imposed fine of Rs. 100. She was acquitted on appeal.
  - "The illegitimate child is not disowned by her and therefore is proof of zina". Furthermore "in accusing her brother-in-law of raping her, Ms. Zafran had confessed to her crime". Zafran Bibi's conviction was overturned on appeal. Zafran Bibi v. State in PLD 2002 FSC 1
- It is extremely important to ensure that victims/survivors of sexual crimes are not punished if the crime is not proven in order to encourage victims/survivors to come forward to report and avoid wrongful prosecution of victims of rape for zina.

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Prohibition of prosecution of victim

Offence of Zina (enforcement of Hudood) Ordinance 1979

- 5A. No case to be converted, lodged or registered under certain conditions
- No complaint of zina under s. 5 read with s. 203A of the CrPC and no case where an allegation of rape is made shall at any stage be converted into a complaint of fornication under s.496B of the PPC and no complaint of fornication shall at any stage be converted into a complaint of zina under s. 5 or an offence of similar nature under any other law for the time being in force.

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Zina offences under PC and Zina Ordinance

- **Penal Code** s. 496B. Fornication - A man or a woman not married to each other are said to commit fornication if they wilfully have sexual intercourse with each other. Punishment: 5 years & fine.
- 496C. False accusation – punishment 2 – 5 years & fine
- **Offence of Zina (Enforcement of Hodood) Ordinance** 1979 S. 4 A man and a woman are said to commit zina if they wilfully have sexual intercourse without being married to each other.
- **CrPC** s. 203A (1) No court shall take cognizance of the offence under s. 5 of the Zina Ordinance except on complaint lodged in the court of competent jurisdiction. (2) Proof by four adult male Muslim witnesses
- **Offence of Qazf (Enforcement of Hodood) Ordinance 1979** S. 3 False accusation – 80 stripes
- **CrPC** s. 203B. No court shall take cognizance of the offence under s. 6 of the Qazf Ordinance except on the complaint lodged in the court of competent jurisdiction.

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Requisite elements of zina

- Implicit in this understanding is the centrality of consent, namely that *zina* is to be defined as consensual sexual intercourse.
- Thus zina requires the presence of (a) a man and a woman, (b) who are not married to each other, (c) having sexual relations, (d) by consent and without amongst others, force, threats, coercion, abuse of authority and (e) the sexual act must have been consummated by penetration
- Only adult persons may be charged – defined as a man 18 years and above and a girl 16 years and above (Zina Ordinance)
- Q: why the difference for male and female despite Age of Majority Act?

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Zina

- There are five *hudud* offences, two of which are against sexual morality, namely *zina* [premarital or extramarital sex (fornication)] and *qazf* (unfounded allegation of *zina*)

ٱلزَّانِيَةُ وَٱلزَّانِى فَٱجْلِدُوا۟ كُلَّ وَٰحِدٍ مِّنْهُمَا مِا۟ئَةَ جَلْدَةٍ ۖ وَلَا تَأْخُذْكُم بِهِمَا
رَأْفَةٌ فِى دِينِ ٱللَّهِ إِن كُنتُمْ تُؤْمِنُونَ بِٱللَّهِ وَٱلْيَوْمِ ٱلْءَاخِرِ ۖ وَلْيَشْهَدْ عَذَابَهُمَا
طَآئِفَةٌ مِّنَ ٱلْمُؤْمِنِينَ ﴿٢﴾

- The woman and the man guilty of adultery or fornication,—
  Flog each of them with a hundred stripes:
  Let not compassion move you in their case, in a matter prescribed by God, if ye believe
  In God and the Last Day:
  And let a party of the Believers witness their punishment. (Verse XXIV:2)

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Proving zina

- Unless prosecution of zina is based on confession (single or multiple, depending on the schools), zina must be proven by the testimony of four adult and upright Muslims who have witnessed the act of penetration or 'ilaj'.

وَٱلَّذِينَ يَرْمُونَ ٱلْمُحْصَنَٰتِ ثُمَّ لَمْ يَأْتُوا۟ بِأَرْبَعَةِ شُهَدَآءَ فَٱجْلِدُوهُمْ
ثَمَٰنِينَ جَلْدَةً وَلَا تَقْبَلُوا۟ لَهُمْ شَهَٰدَةً أَبَدًا ۚ وَأُو۟لَٰٓئِكَ هُمُ ٱلْفَٰسِقُونَ

- And those who launch a charge against chaste women,
  And produce not four witnesses (To support their allegations),—
  Flog them with eighty stripes;
  And reject their evidence ever after: for such men are wicked transgressors;— (Verse XXIV:4)

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Regulation of permissible sexual conduct in public

- Given the burden of proof required, some have argued that zina was meant to regulate the permissible sexual conduct in public [why else would four adult upright Muslims be available to witness a sexual act] rather than in private.
- A jurist opined, "[I]t is a condition that the witnesses are four [...] because God the Exalted likes [the vices of] his servants to remain concealed, and this is realised by demanding four witnesses, since it is very rare for four people to observe this vice."

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Bearing false witness and spying

- The fact that zina requires such stringent proof is warning enough of the seriousness of making accusations of zina. In fact the Qur'anic admonishment of those who slandered against Aisha (ra) underlines the gravity of this accusation. The Qur'an sternly called out those who spread the slander of zina and not bring four witnesses as liars. (Al-Qur'an, An Nur 24:12-13)

لَّوْلَآ إِذْ سَمِعْتُمُوهُ ظَنَّ ٱلْمُؤْمِنُونَ وَٱلْمُؤْمِنَٰتُ بِأَنفُسِهِمْ خَيْرًا وَقَالُوا۟
هَٰذَآ إِفْكٌ مُّبِينٌ ﴿١٢﴾

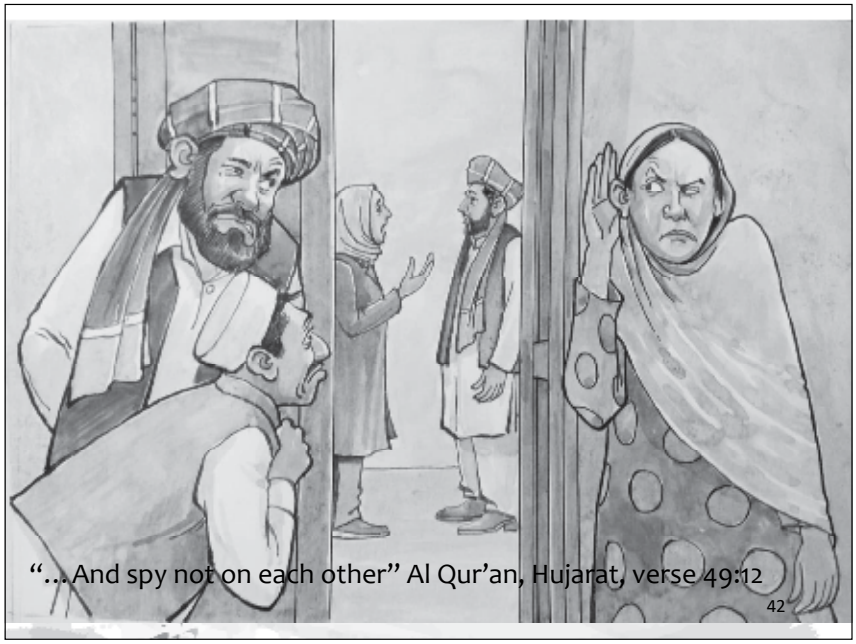
لَّوْلَا جَآءُو عَلَيْهِ بِأَرْبَعَةِ شُهَدَآءَ ۚ فَإِذْ لَمْ يَأْتُوا۟ بِٱلشُّهَدَآءِ فَأُو۟لَٰٓئِكَ عِندَ ٱللَّهِ
هُمُ ٱلْكَٰذِبُونَ ﴿١٣﴾

40

Bearing false witness and spying

- Why did not the believers, men and women, when ye heard it, think good of their own folk, and say: It is a manifest untruth ?
- Why did they not produce four witnesses? Since they produce not witnesses, they verily are liars in the sight of Allah. (An'Nur verse 24:12-13)
- Furthermore, both the Qur'an and the Prophet (saw) warned against spying, suspicion and bearing false witness. The Qur'an also regards privacy as a fundamental right and protects the sanctity and privacy of the home. No person is to enter another's home without issuing greetings.

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يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُواْ ٱجْتَنِبُواْ كَثِيرًا مِّنَ ٱلظَّنِّ إِنَّ
بَعْضَ ٱلظَّنِّ إِثْمٌ وَلَا تَجَسَّسُواْ وَلَا يَغْتَب بَّعْضُكُم بَعْضًا أَيُحِبُّ
أَحَدُكُمْ أَن يَأْكُلَ لَحْمَ أَخِيهِ مَيْتًا فَكَرِهْتُمُوهُ وَٱتَّقُواْ ٱللَّهَ إِنَّ ٱللَّهَ
تَوَّابٌ رَّحِيمٌ ﴿١٢﴾

"O ye who believe!
Avoid suspicion as much (as possible): for suspicion in some cases is a sin:

And spy not on each other, Nor speak ill of each other Behind their backs.

Would any of you like to eat the flesh of his dead brother?

Nay, ye would abhor it…

But fear God: For God is Oft-Returning, Most Merciful." (Hujarat, verse 49:12)

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Bearing false witness and spying

- The Prophet (saw) also said, "Beware of suspicion, for suspicion is the falsest of speech."
- "Shall I not tell you of the most serious of the major sins?" We said: "Of course, O Messenger of Allah." He said: "Associating anything with Allah (SWT), and disobeying parents." He was reclining, but then he sat up and said: "And bearing false witness," and he kept repeating this until we wished that he would stop (i.e., so that he would not exhaust himself with his fervour)."

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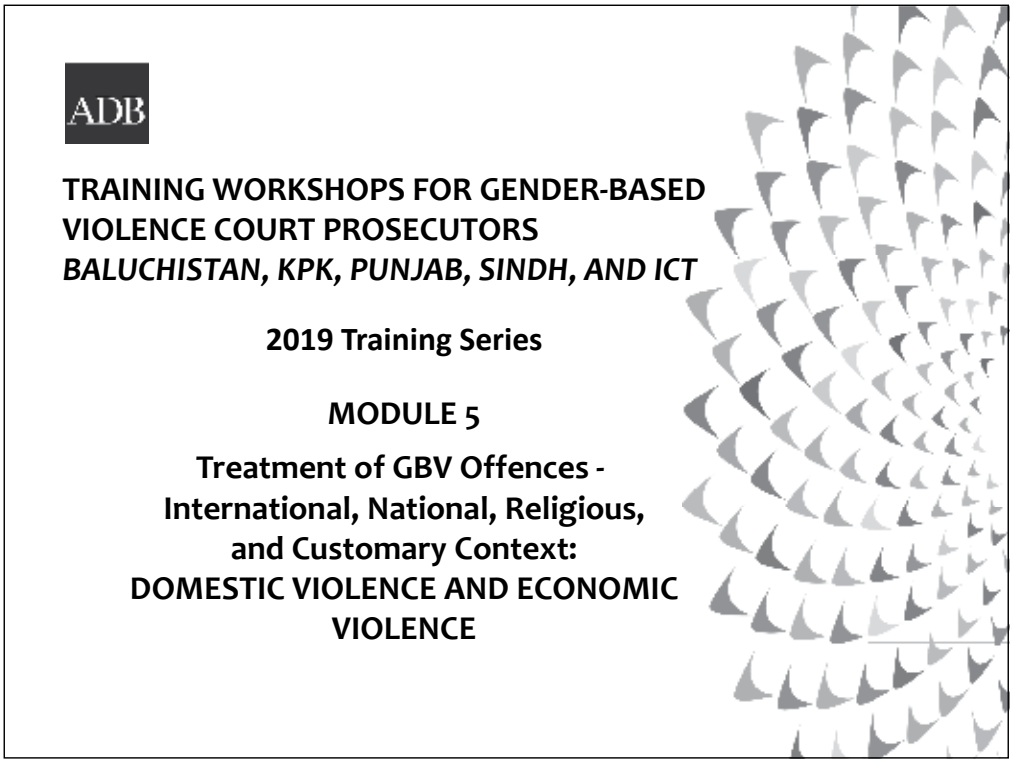
Activity

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Thank you!
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ADB

Module 5:

TREATMENT OF GBV OFFENCES – INTERNATIONAL, NATIONAL, RELIGIOUS, AND CUSTOMARY CONTEXT: DOMESTIC VIOLENCE AND ECONOMIC VIOLENCE



Objectives of the Session

To develop an understanding of the forms, causes, dynamics, as well as cultural, religious and legal contexts of Domestic Violence.

Domestic Violence:

- Physical violence
- Sexual violence
- Economic violence

This session is divided into two parts:

Part 1: Physical and Sexual Violence

Part 2: Economic Violence

2

ADB

Unpacking DMV

The following poem "**I GOT FLOWERS TODAY**" illustrates the dynamics of domestic violence vis-à-vis:

- Nature and Form.
- Escalation.
- Thought process.
- Perceived helplessness.
- Inability to walk away.
- From the point of view of the victim.

3

ADB

I GOT FLOWERS TODAY



By Paulette Kelly

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angel

4

ADB

I got flowers today!
It wasn't my birthday or any other special day.



We had our first argument last night;
And he said a lot of cruel things that really hurt;

I know that he is sorry and didn't mean to say the things he said;
Because he sent me flowers today.

5

ADB



I got flowers today!
It wasn't our anniversary or any other special day.
Last night, he threw me into a wall and started to choke me. It seemed like a nightmare.
I couldn't believe it was real.
I woke up this morning sore and bruised all over
I know he must be sorry;
Because he sent me flowers today.

6 ADB



I got flowers today.

It wasn't Mother's Day or any other special day.

Last night, he beat me up again.
And it was much more than all other times. If I leave him, what will I do? How will I take care of my kids?
What about money? I'm afraid of him and scared to leave.

But I know he must be sorry;

Because he sent me flowers today.

7 ADB



I got flowers today.

Today was a very special day.

It was the day of my funeral.

Last night he finally killed me. He beat me to death.

If only I had gathered enough courage and strength to leave him, I would not have gotten flowers today.

8

ADB

Activity

- Participants to be divided into Four Groups.
- Each Group will then be given a set of questions to ponder upon and answer.
- A representative from each group will report back on the group answers for each group.
- The facilitator to dilate further on the given responses.

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ADB

What is Domestic Violence?

- Domestic Violence refers to different forms of violence which take place within the family and the home.
- Domestic violence can occur in any [domestic] relationship and the victim can be either female or male.
- The term Intimate partner violence is now used to describe the abuse women suffer at the hands of their husbands/Partners.

Ehsan Sadiq. Violence against women.

10

ADB

Intimate Partner Violence: Global Statistics

- World Health Organization
- One in three women experience physical or sexual violence, mostly by intimate partners.
- 30% of women who have been in a relationship report that they have experienced violence by their intimate partner.
- 38% of murders of women are committed by an intimate male partner.
- Do you think the above figures capture the living reality of DMV in Pakistan keeping in view the culture of Shame and Silence?

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ADB

Forms of Domestic Violence

- **Physical abuse**. *(Slapping, punching, hitting, pulling hair, twisting limbs, choking, breaking bones, burning….acts of violence designed to control, hurt and harm)*
- **Emotional abuse**. *(Any act intended to degrade, humiliate and demean, privately/publicly. Threats to harm wife or children.)*
- **Economic abuse**. *(To be dealt in detail)*
- **Sexual abuse**. *(To force spouse to indulge in sexual acts against their will)*
- **Social abuse**. *(Enforced social isolation and control)*

Ehsan Sadiq. Violence against women.

12

ADB

Common Myths About Domestic Violence

- DMV is not a serious social problem.
- DMV is a lower socio-eco class issue.
- DMV's basic cause is woman's fault.
- Why don't women leave violent relationships.
- Violent men are socially misfit and crazy.
- Regret and remorse means a man has changed.
- Violence is due to temporary loss of temper.

Ehsan Sadiq. Violence against women.

13

ADB

Statistics vs. Common Myths

- 1994–1995 Survey 400 Choola accident deaths took place. The women's ages varied between 17 and 33 years.
- 90% married.
- 6 to 36 months of marriage.

Tasneem Ahmar. "Trial by Fire." *The Herald*. August 1995.

14

ADB

The Need for Protection Laws

- The need for protection laws is now widely recognized through out the world.
- The phenomenon of domestic violence illustrates that it is not enough to punish the perpetrator but rather to also ensure full protection of the rights of victims of domestic violence.
- In Pakistan, three provinces namely Sindh, Balochistan and Punjab have domestic violence/ protection of women laws. The bills for ICT and KPK faced resistance and were not passed by the respective assemblies.

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ADB

DMV - Legal Framework - Laws

- Article 35: Protection of family, etc.
  - 35. Protection of family etc. – The state shall protect the marriage, the family, the mother and the child. Article: 25 Equality of citizens
- Article 25: Equality of citizens.
  - (1) All citizens are equal before law and are entitled to equal protection of law.
  - (2) There shall be no discrimination on the basis of sex 1[****].
  - (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

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ADB

Laws on Domestic Violence/ Protection of Women

THE DOMESTIC VIOLENCE (PREVENTION AND PROTECTION) ACT, 2013 SINDH ACT NO. XX OF 2013.	THE BALOCHISTAN DOMESTIC VIOLENCE (PREVENTION AND PROTECTION) ACT 2014 (ACT NO. VII OF 2014)
THE PUNJAB PROTECTION OF WOMEN AGAINST VIOLENCE ACT 2016 (Act XVI of 2016)	KPK NIL Islamabad NIL

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ADB

Aggrieved Persons

Sindh: Any woman, child, or vulnerable person.	Balochistan: Woman, child, or any other vulnerable person.
Punjab: Female subjected to violence by a defendant.	

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ADB

Courts

Sindh Magistrate of the first class	Balochistan Magistrate of the first class
Punjab Family Courts under the family courts Act 1964	

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ADB

Subject Matter Jurisdiction

Sindh Psychological physical abuse. Assault, Cr Force, Cr Intimidation, mischief, harassment, hurt, stalking, sexual abuse, trespass wrongful confinement, economic abuse. Emotional abuse, threats, obsessive possessiveness.	Balochistan: Willful or negligent abandonment of the aggrieved person
Punjab: "violence" means any offence committed against the human body of the aggrieved person including abetment of an offence, domestic violence, sexual violence, psychological abuse, economic abuse, stalking or a cybercrime; Explanations.- In this clause: nd	(1) "economic abuse" means denial of food, clothing and shelter in a domestic relationship to the aggrieved person by the defendant in accordance with the defendant's income or taking away the income of the aggrieved person without her consent by the defendant; and

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ADB

Complaint

Sindh 7. (1) An aggrieved person or other person authorized by the aggrieved person in this behalf or informer may present a petition to the Court within whose jurisdiction -	Balochistan: An aggrieved person or other person authorized by the aggrieved person in this behalf
Punjab: An aggrieved person, or a person authorized by the aggrieved person or the Women Protection Officer	

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ADB

Procedure

Sindh: (2) The court shall fix the first date of hearing, which shall not exceed seven days from the date of the receipt of the petition by the court.	**Balochistan: The court shall fix the first date of hearing, which shall not exceed three days from the date of the receipt of the application by the courts.**
Punjab: The court shall proceed with the complaint under this Act and the court shall fix the first date of hearing which shall not be beyond seven days from the date of the receipt of the complaint by the court.	

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ADB

Protection Orders

Sindh: Protection against eviction. Interim order Residence orders. Return of essential items ppty documents valuables. Monetary relief custody orders. Contempt [proceedings. Police assistance.	**Balochistan: Residence orders. Return of essential items ppty documents valuables. Monetary relief custody orders. Contempt [proceedings. Police assistance.**
Punjab: Residence orders. Return of essential items ppty documents valuables. Monetary relief custody orders. Contempt [proceedings. Police assistance.	

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ADB

GBV Court Cases and Protection

- All three protection and prevention laws primarily deal with protection orders and the trial of offences which carry minor penalties.
- A victim of abuse in need of protection who has also filed an FIR for an offence triable only by a GBV court, that victim would have to adopt a dual pathway wherein the trial will be held by the GBV court and the rest of the matters regarding protection would be handled by the designated courts.

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Intimate Partner Violence

- **Issues in Prosecuting Domestic Violence**
  - Private vs. Public;
  - Consists of several small incidences which when looked upon individually pose a challenge to effective prosecution.
- **Not a "private matter**". Opuz vs. Turkey: The perpetrator's right to privacy and family could not supersede victim's human rights to life and to physical and mental integrity - incompatible with the state's positive obligations to secure the enjoyment of the applicant's rights.

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International Initiatives to Combat Violence Against Women

- UN General Assembly in 1993 adopted resolution 48/104 (Decleration on the Elimination of Violence Against Women)
- The Declaration called upon states to do the following:
  - Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;
  - Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence;
  - Take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitize them to the needs of women;

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ADB

International Jurisprudence: CEDAW

- **TURKEY**: The State response [to domestic violence] was found to be "manifestly inadequate to the gravity of the offences in question. The domestic judicial decisions in this case revealed a lack of efficacy and a certain degree of tolerance, and had no noticeable preventive or deterrent effect.
- **HUNGARY**: Hungarian law did not provide for a restraining or protection order and there were no shelters equipped to accept A.T. together with her children, one of whom was severely brain damaged. CEDAW Committee - States may be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

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ADB

International Jurisprudence on State Accountability

- Brazil: The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women. … [The] general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts."
- Goekce v. Austria: Şahide Goekce had 3 temporary restraining orders but public prosecutor refused to arrest the husband. Goekce's husband fatally shot her in front of her children hours after she had made an emergency call to the police, but they failed to dispatch any officers. The Committee held that the due diligence standard as it relates to violence against women requires States to put women's rights to life, physical integrity, and mental integrity above a perpetrator's right to freedom of movement.

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ADB

Domestic Violence (Quran and Sunnah)

- وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً ۚ إِنَّ فِي ذَٰلِكَ لَآيَاتٍ لِقَوْمٍ يَتَفَكَّرُونَ
- And among His wonders is this: He creates for you mates out of your own kind, so that you might incline towards them, and He engenders love and tenderness between you: in this, behold, there are messages indeed for people who think!

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ADB

Sunnah

- Hadeeth Muslim, Book 009, Number 3526:

Fatima bint Qais reported that her husband divorced her with three pronouncements and Allah's Messenger made no provision for her lodging and maintenance allowance. She (further said): Allah's Messenger said to me: When your period of 'Idda is over, inform me. So I informed him. (By that time) Mu'awiya, Abu Jahm and Usama b. Zaid had given her the proposal of marriage. Allah's Messenger said: So far as Mu'awiya is concerned, he is a poor man without any property. So far as Abu Jahm is concerned, he is a great beater of women, but Usama b. Zaid. she pointed with her hand (that she did not approve of the idea of marrying) Usama. But Allah's Messenger said: Obedience to Allah and obedience to His Messenger is better for thee. She said: So I married him, and I became an object of envy.

[online reference: www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/muslim/009.smt.html#009.3526]

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ADB

- Narrated by al-Tirmidhi (3895) and Ibn Majaah (1977), also quoted in Imam Ghazzali's Ihya Ulum-Id-Din, Marriage section:
- "The best of you is the one who is best to his wife, and I am the best of you to my wives."
- [online reference: www.ghazali.org/works/marriage.htm]

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ADB

- Tafsir Ibn Kathir, chapter 68:
- Imam Ahmad recorded that `A'ishah said, "The Messenger of Allah never struck a servant of his with his hand, nor did he ever hit a woman. He never hit anything with his hand, except for when he was fighting Jihad in the cause of Allah

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- Bukhari, Volume 8, Book 73, Number 68:
- Narrated 'Abdullah bin Zam'a:
- The Prophet ……. said, "How does anyone of you beat his wife as he beats the stallion camel and then he may embrace (sleep with) her?"

33



Economic Violence: Deprivation of Right to Land and Inheritance

- Economic Violence is perpetuated in many forms;
- Preventing spouse from having a career/working.
- Wilfully ensuring economic dependency.
- Non Maintenance.
- Depriving women from lawful inheritance.

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ADB

Economic Violence: Deprivation of Right to Land and inheritance

- SC: Women relinquishing inheritance rights is not recognized under Islamic and Pakistani law and is opposed to public policy. [PLD 1990 SC 1]
- Survey commissioned by NCSW: 50.6% women do not receive shares; highest in Balochistan (100%) followed by Punjab (97%)
- Rights to land, housing and property are essential to women's equality and well being. OHCHR.

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ADB

Islam and Economic Rights of Women

- **Earnings**: To men is allotted what they earn, and to women what they earn. (Quran 4:32)
- **Ownership**: The right to own and dispose her property.
- **Dower**: Mehr that a woman receives at the time of marriage is her exclusive property
- **Maintenance**: A wife s right to be maintained is a well established right in Shariah and law
- **Inheritance**: interestingly out of the nine categories introduced by Islam in the reformation of the law of inheritance as practiced by the Arabs SIX are women.

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ADB

Economic Violence and Relevant Law

- Muslim Family Laws Ordinance 1961 Sec 9: Maintenance.
- Muslim family Laws Ordinance 1961 Sec 10: Dower.
- Pakistan Penal Code:
  - 498-A: Prohibition of depriving woman from inheriting property.
  - Penalty extends from 5 to 10 years or fine of 1 million rupees or both.

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ADB


ADB
Thank you.

Module 6:

GENDER SENSITIZED CONDUCT OF GBV OFFENCES: WOMEN AND TRANSGENDER PERSPECTIVE



Objectives of the Session

- Topic 1 Discuss challenges for women and also transgender people coming to Court and giving evidence
- Topic 2 Gender stereotyping in GBV cases
- Topic 3 Assessing credibility of victims in GBV cases
- Topic 4 A new approach to practices in the GBV Courts (Guidelines and Practice Notes)
- Topic 5 Questioning of victims in GBV cases
- The session will be interactive with practical exercises

1

Topic 1 Challenges for Women and Transgender persons in GBV cases

Before women and transgender victims come to the courts they have often already experienced distressing circumstances including justice system processes

2

What do these pictures show?





3

Arriving at the Court

- The court precinct can be very busy
- Accused persons being brought from the jails to attend court
- Families of the accused persons
- Other victims, witnesses and lawyers in other cases
- Very confusing and intimidating for victims
- They do not know where to go and safely sit in a place where they will not be harassed or intimidated by the proximity of the accused and/or the accused's family

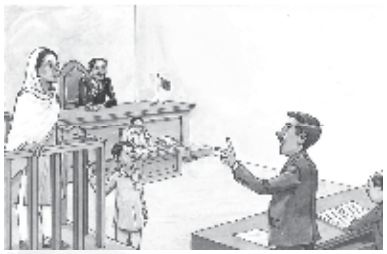
4

Appearing in Court

- Just appearing in court is distressing for a victim
- For judges and prosecutors it is just a familiar workplace
- Court rooms are formal rooms in busy buildings
- Formal clothing is worn and unfamiliar legal language is spoken
- Proximity of counsel and the parties
- Only a couple of metres separate the victim and the accused.
- The combination of these features is distressing for victims of GBV

5

Giving Evidence



- Having to give evidence about traumatic events and intimate conduct before strangers
- Knowing that their conduct and reputation can be subjected to XXN
- Feeling that they and not the accused is on trial
- Knowing a judge will make a decision as to whether they should be believed

6

Recognising a Victim's Experience

"With all the attendant social consequences such a classification [being a rape victim] brings, many rape cases go naturally unreported, and those which manage to reach the authorities are routinely treated in a manner so demeaning to the victim's dignity that the psychological ordeal and injury is repeated again and again in the hands of inexperienced, untrained and oftentimes callous investigators and court room participants"

People v. Melivo, (G.R. No. 113029, Feb. 8, 1996) (Philippines)

7

ACTIVITY 1 - Quiz

- Each of you will be given a paper with quiz questions to be answered by indicating whether the proposition is true or false
- Tick the box which you consider is relevant (10 mins)
- Your answers will be collected and will remain anonymous
- The main purpose of the exercise is to enable you to reflect on your views on the topics
- Anonymous answers will be discussed as a group
- Total time 20 mins

8

Challenges for victims of GBV

- Earlier Modules have already discussed the multiple challenges for women victims
- Transgender persons and GBV could be the subject of a session on its own
- The following can only be a snap shot of the challenges they face in their lives and in the criminal justice system in Pakistan

9

Legal rights of transgender persons

- 2009 In Constitutional Petition No 43/ 2009 *Khaki v SSP (Operation) Rawalpindi* the SC Orders directed that transgender persons be given the right to register as a third gender on their CNIC's, to be on the electoral role, protect their inheritance and ensure their rights to education, life and employment (Orders dated 4 November, 20 November and 23 December 2009)

  See *Khaki and anor v SSP (Operation) Rawalpindi* SC 2013 SCMR 187
- 2012 a later case in Constitutional Petition No 43/2009 additionally sought to highlight the failure to ensure equal right to education and the SC on 25 September 2012 directed authorities to remedy the situation and again ensure equal rights for transgender persons in all walks of life

  See Khaki and anor v SSP (Operation) Rawalpindi SC PLD 2013 SC 188,
- 2017 *Transgender Persons (Protection of Rights) Act* 2017 was passed
- 2018 in the Human Right Case (Case No. 32005-P/2018, the Chief Justice of Pakistan when ruling on the issuance of CNIC's, issued directions in relation to a comprehensive policy for transgender communities
- 2018 *Mian Asai v Federation of Pakistan and ors* PLD 2018 Lahore 54 a transgender person was permitted to register his Guru on his CNIC as his parentage was unknown. See para 11 on fundamental rights
- August 2018 the *Transgender Persons Welfare Policy*, Punjab Social Protection Authority. Government of the Punjab, Pakistan was published

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Definition of transgender

- Is defined broadly in the Transgender Persons (Protection of Rights) Act 2017 s 2 (n)
- "Transgender Person" is a person who is:

  (i) Intersex (Khunsa) with mixture of male and female genital features or congenital ambiguities; or

  (ii) Eunuch assigned male at birth, but undergoes genital excision or castration; or

  (iii) a Transgender Man, Transgender Women, Khawaja Sira or any person whose Gender identity* and/or Gender expression differs from the social norms and cultural expectations based on the sex they were assigned at the time of their birth.

* Defined in the Act as "a person's presentation of his gender identity and the one that is perceived by others"

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Islamic history of transgender persons

- They find mention in hadith.
- Surah Noor Al Quran.
- Acted as intermediaries between men and women performing pilgrimage.
- They served as Security guards in the holiest sites of Makkah, Madinah, Najaf and Jerusalem.
- Fuqaha have dealt in detail with the principle of the hidden sex of a khuntha.
- The last hiring of guards for the holy places was in Madinah in 2001.

12

How many transgender persons live in Pakistan



- Census 2017 showed 10,000 transgender persons in Pakistan out of a population of 207 million. Widely recognized as an inaccurate indication.
- According to more recent studies and extrapolations based on total Pakistan population, the estimates are .6 million nationwide.

- Ref Punjab Social Protection Authority. Government of the Punjab, Pakistan 2018

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How transgender persons commonly live

- Only 30% attended primary school, 23% to secondary, 7% to higher secondary or college and 40% never went to school
- They are marginalised, excluded by their families, unable to get employment with limited ability to support themselves
- 82% have suffered from sexual abuse in their childhood
- Tend to live in secluded communities under the protection of a Guru
- A study published in 2018 of 189 transgender persons in Islamabad and Rawalpindi revealed:
  - 77.8% experienced physical violence
  - 91.5 % experienced Institutional discrimination (schools, hospitals, fired from job, denied housing etc.),
  - 38.6% had suicide ideation
  - 75.7% lived by begging
  - 39.2% were selling sex
- They also earn money from dancing and singing

Ref Punjab Social Protection Authority. Government of the Punjab, Pakistan 2018 and other references at end of slides

14

Harassment by the public and public authorities

- A review on harassment of transgender persons in 2018 found:
- public humiliation, derision, ridicule, marginalisation and exclusion is not limited to the streets but also experienced in schools, government offices and hospitals
- Harassment when going into public toilets, shopping for clothing and cosmetics
- Abusive treatment by law enforcement personnel is a common complaint

Ref Punjab Social Protection Authority. Government of the Punjab, Pakistan 2018 and other references at end of slides

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Harassment in the criminal justice system

Police

- Do not complain of GBV violence because they may expose themselves to prosecution under section 377 PPC and also offences such as public nuisance
- This can lead to blackmail and extortion
- Fear their family may find out about their gender identity
- Increased policing and police profiling just by standing, or walking in particular areas

Lawyers and judges

- Treated by lawyers, legal staff and judges with disdain and hostility
- Their appearance is stared and laughed at
- Negative remarks by lawyers including prosecutors during court proceedings
- Failure to reflect their name and gender identity of choice
- Procedural problems e.g., how to respond when having to add "son of/daughter of..." or husband of/wife of..."

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Under–reporting of offences

- In KP alone, 46 killings and 300 violent attacks on transgender persons were documented from January 2015 to July 2016
- In Punjab, 70 instances of domestic abuse of transgender persons were recorded in 2015
- A study in Kerala India found that 96% of transgender persons interviewed did not lay a complaint due fears of prosecution under IPC 377 and other offences
- A similar pattern is common across many countries and under-reporting is even greater than that of women for sexual offences

R. Tewksbury. *Effects of Sexual Assaults on men: Physical, Mental and Sexual Consequences* (2007) 24-25

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The need for change towards transgender persons recognised by courts

"Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change."

National Legal Services Authority v Union of India (2014) 5 SCC 438 para 1
See also Pakistani cases referred to earlier

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Topic 2 Stereotyping of Women and Transgender persons in GBV Cases

Stereotyping often occurs because of a lack of knowledge and understanding of the nature of domestic violence or sexual assault and its impact on how women and transgender persons may respond and behave:

- at the time of offence and
- when giving evidence in court

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Stereotyping of Women in GBV Cases

- Judges can have rigid views about what is appropriate conduct for women and take an adverse view of women who do not conform
- Assessing a woman's evidence by comparing her behaviour with how a man would respond
- A female witness should not be assessed against how "normal" women ought to behave but instead how this woman in this situation in all of her circumstances behaved.
- Stereotyping a woman's behaviour affects the assessment of her credibility

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Stereotyping of Transgender Persons in GBV Cases

- Judges can have rigid views about transgender persons which may be either favourably of unfavourably inclined towards them
- Often judges have limited personal experience and knowledge about transgender persons and assume that they all are the same
- Judges may lack confidence in assessing the evidence of a transgender and may tend to assess their evidence by reference to their apparent gender appearance
- A transgender witness should not be assessed by how a woman or man would be expected to behave but instead how this transgender person responded to the situation in all of the circumstances.
- Stereotyping transgender persons behaviour affects the assessment of their credibility

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Gender Stereotyping – commonly held views

Commonly held gender stereotyped views of judges on legal and factual issues include the following topics:

- Delay by victim in reporting rape
- Moral character of the complainant and virginity
- Actions of victim and whether they indicate consent to sexual assault/rape/forced sodomy
- Whether absence of visible injury negates sexual assault/rape/ forced rape
- Whether victims are unreliable and their oral evidence requires corroboration

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Delay by Victim in Reporting Rape

- *Mehboob Ahmad v The State* (1999 SCMR 1102)
- *Muhummad Umar v The State* (1999 PCr LJ 699)
- *People v Ilao* (G.R.Nos 152683-84, December 11, 2003)
- *People v Ilagan* (G.R.No 144595, August 6, 2003)
- Research indicates that men who are sexually assaulted are highly unlikely to report or seek services. It may be a year or longer when services may be sought, if at all

R. Tewksbury. Effects of Sexual Assaults on men: Physical, Mental and Sexual Consequences(2007)

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Relevance of Moral Character or Virginity of Victim

- *People v Ilao* (G.R.Nos 152683-84, December 11, 2003)
- *People v Jason Navarro, Solomon Navarro and Roberto Olila* (G.R. 137597, October 24, 2003)
- *People v Wilson Suaraez, et al.*(G.R.Nos 153573-76 April 15, 2005)
- *State of Punjab v Gurmit Singh & Ors*, 1996 AIR 1393
- Practice in UK and US: *Punjab Witness Protection Act 2016 : 12(3) Rules of cross-examination*

Noting *Qanun-e-Shahadat Order* S151(4) is repealed

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Whether absence of visible injury negates sexual assault, forced rape or forced sodomy

- *People v Ilao* (G.R.Nos 152683-84, December 11, 2003)
- *People v Ilagan* (G.R.No 144595, August 6, 2003)
- Mahraj Din v Emperor AIR 1927 Lah 222
- *The State v Shabbir alias Kaka s/o Moza Jhamke and Fozia Bibi*.Jazeela Aslam Addl Sessions Judge, Sheikhupura. FIR No 1499/10 October 4, 2012
- In relation to men who have been anally penetrated, a majority (63%) exhibit rectal injury and 45% other injuries – it is not all men
- R. Tewksbury. Effects of Sexual Assaults on men: Physical, Mental and Sexual Consequences(2007)

25

Whether women rape victims are unreliable – and their evidence must be corroborated

- *Amanullah v The State* PLD 2009 SC 542
- *Imran v The State* 2016 PCr LJ 1888 (Sindh)
- *The State v Muhammad Afzal S/O Ghulam Haide.* Amjad Ali Shah Addl Sessions Judge Narowal Case FIR No.109/2010 19.01.2012
- International commission of Jurists (2015), *Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice.*

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TOPIC 3 Assessing Credibility – Research

- Demeanour in court is a doubtful indicator of reliability
- Judges and lawyers are no better at assessing credibility than other people
- Witnesses may be reacting to the stress of the courtroom
- The appearance, behaviour and body language of a witness is influenced by many factors
- Persons with physical or cognitive disabilities have different presentations
- Quick "instinctive" reactions by judges leads to applying pre-conceived stereotypes

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Victims may respond differently



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Assessing Witnesses Fairly and Without Bias

- Take into account ALL of the evidence - direct, circumstantial and corroborative
- Carefully consider the likelihood or otherwise of particular evidence of a witness having happened
- Are any inconsistencies of a witness due to misunderstanding or the stress of giving evidence?
- Be able to give logical reasons as to why a particular assessment of a witness is made
- Reflect on whether the reasoning process is influenced by a stereotype or bias
- Take time to consider decisions and not make "snap" judgments about whether a witness is to be believed

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Topic 4 A new approach to practices in GBV Courts

Derived from standards and directions given by the Supreme Court
Salman Akram Raja v Government of Punjab
2013 SCMR 203

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First GBV Court set up in Lahore November 2017

Entrance to the court



Inside the court



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GBV court

Screen for "witness"



Position of closed circuit television



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GBV Court

Distances between judge lawyers and "accused"





33

LHC Guidelines applicable to all provinces

- No 223325 dated 17 October 2017
- Incorporated the directions in *Salman Akram Raja* and S 13 of the *Criminal Law (Amendment) (Offences related to Rape) Act* 2016 and international best practices.

34

Practice Notes for GBV Court

Practice Notes include:

- Female Support Officer
- Processes for settling the victim and witnesses
- Trial process provisions
- Protection orders
- Procedures when victim or other witnesses resile
- Procedures where victim does not attend court
- Courts power to ask questions and call witnesses

35

Practice Notes for discussion

It starts by making a witness feel comfortable *before* they give their evidence. This is increasingly seen as a very important role for a judge and a prosecutor.

- Settling of witnesses
- Trial process
- Courts power to ask questions

36

Activity 2

Open discussion on:

What are the potential challenges which may be faced when applying these Practice Notes?

37

Cross examination of victim by defence counsel to be in writing and asked by the judge.

- Potential responses to challenge:
  - This is best practice and recognises the vulnerability of GBV victims generally and particularly in an adversarial court system
  - Questions which challenge the accuracy of the evidence of victims can still be put in a way which victims can understand which is not unfair and offensive in content and manner
  - Defence counsel have not had the opportunity for training on questioning vulnerable witnesses of GBV: contrast training guidance for counsel in UK*
  - The damage is already done once the unfair question is asked or is asked in an unfair manner

Ministry of Justice UK: Achieving Best Evidence in Criminal cases: Guidance on interviewing victims and witnesses, and guidance on using special measures. March 2011 (see reference end of slides)

The Advocates Gateway UK (see reference at end of slides)

38

Important role of judges for a fair trial

> The difficulties encountered by complainants in sexual assault cases … has been a focus of concern for several decades. Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused. That role is perfectly consistent with the requirements of a fair trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance. … In a sexual assault matter, it is appropriate for the Court to consider the effect of cross-examination and of the trial experience upon a complainant when deciding whether cross-examination is unduly harassing, offensive or oppressive.
>
> **Ref *R v TA* (2003) 57 NSWLR 444, 446**

39

TOPIC 5 Content, Language and Manner of Questioning

Two Aspects

- Content of Questions
- Manner of questions

40

Content of Questions

- Many common law jurisdictions disallow "improper" questions of witnesses, which are questions which are unfair in the circumstances
- The court can control improper or unfair questions as part of its inherent power to regulate and control proceedings before them
- Need to take into account the mental intellectual or physical impairment, age, gender, language, personality, educational background, religion, maturity and understanding of a witness

THE OVERALL PURPOSE IS TO ENSURE A FAIR TRIAL FOR ALL PARTIES

Worldwide experience is that women are frequently exposed to unfair and inappropriate questions

41

Improper questions

- Qanun–E-Shahadat Order gives the court discretion:
  - S 146 to forbid questions or inquiries which are "indecent or scandalous"
  - S 148 to forbid questions which appear to "be intended to insult or annoy" or "needlessly offensive"
- In addition there is inherent power of judges to prohibit questions which use inappropriate language, or are misleading, confusing, or harassing
- Questions which are stereotyping and/or unfairly allude to a gender and that the victim is to blame
- Questions which demonstrate ignorance or a lack of awareness of the effect of violence against women and transgender persons
- Questions which expect that victims should meet a "standard" and that all should behave in the exactly same way in response to offences against them. Particularly an idealised "good woman"

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Manner of Questioning

- Regardless of content, improper questioning would prohibit questions which are asked in a bullying, aggressive, angry or loud voice
- Prohibit body language or aggressive eye contact which can be threatening
- Prohibit rapid fire questions which can upset a witness and feel pressured, intimidated or flustered
- Harassing questions, such as asking the same questions over and over again in the hope of wearing down a witness or getting a different answer

43

Best Practice for Questioning Vulnerable Witnesses

- Research which shows that the most reliable evidence from a vulnerable witness such as women the subject of GBV and children, is to allow them to "tell their story" in answer to "open questions", even when they are cross-examined.
- This takes account of suggestibility when asked questions by those in authority which is a tendency to answer "yes" to leading questions ("confirmatory bias")
- Many countries have guidelines to restrict questioning of vulnerable witnesses

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Thank you!

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References

REFEERENCES ON ASSESSING CREDIBILITY

- P Ekman, M O'Sullivan and MG Frank, *A Few Can Catch a Liar* (1999) 10 *Psychological Science* 263;
- S Porter, M Woodworth and AR Birt, *Truth, Lies and Videotape: An Investigation of the Ability of Federal Parole Officers to Detect Deception* (2000) 24 *Law and Human Behaviour* 643;
- S Mann, A Vrij and R Bull, *Detecting True Lies: Police Officers' Ability to Detect Suspects' Lies* (2004) 89 *Journal of Applied Psychology* 137
- Re, L. "Oral v Written Evidence: the Myth of the impressive witness (1983) 57 Australian Law Journal 679
- Kirby, M.D."Judging: Reflections on the moment of decision (1999) 4 Judicial Review 189 (a former High Court Judge of Australia)

REFERENCES ON TRANSGENDER PERSONS

- H.B.U Shah et al, *Challenges faced by marginalised communities such as transgenders in Pakistan 2018 Pan American Medical Journal 30:96 doi:10.11.11604/pamj.2018.30.96.12818* http://www.panafrican-med-journal.com/content/article/30/96/full/
- Punjab Social Protection Authority. Government of the Punjab, Pakistan Transgender persons Welfare Policy. August 2018. http://www.supremecourt.gov.pk/web/user_files/File/Transgender_Persons_Welfare_Policy.pdf

46

References (continued)

- Unjust: How the Broken Criminal Justice System Fails Transgender People May 2016 http://www.lgbtmap.org/file/lgbt-criminal-justice.pdf
- "Unnatural offences": Obstacles to Justice in India Based on Sexual Orientation and Gender Identity. International Commission of Jurists. February 2017 https://www.icj.org/india-end-rampant-discrimination-in-the-justice-system-based-on-sexual-orientation-and-gender-identity/
- R. Tewksbury. *Effects of Sexual Assaults on men: Physical, Mental and Sexual Consequences* (2007) International Journal of Men's Health, Vol.6, No 1, Spring 2007. 22–35

REFERENCES ON BEST PRACTICE FOR QUESTIONING VULNERABLE WITNESSES

- Ministry of Justice UK: Achieving Best Evidence in Criminal cases: Guidance on interviewing victims and witnesses, and guidance on using special measures. March 2011 https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/best_evidence_in_criminal_proceedings.pdf
- The Advocates Gateway toolkits. https://www.theadvocatesgateway.org/

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Module 7:
GENDER SENSITIZED CONDUCT OF GBV OFFENCES: CHILDREN



Objectives of the Session

TOPIC 1 Sources of International Law

TOPIC 2 Children differ from adults

TOPIC 3 Characteristics of sex offences on children

TOPIC 4 How children tell

TOPIC 5 False assumptions and myths

TOPIC 7 Questioning of Child Witnesses

TOPIC 7 The GBV Court and the Practice Notes

Activities to assist understanding

2

What is your experience about children giving evidence

ACTIVITY 1

- Short general discussion about the following:
- What is your personal experience about children giving evidence?
- What are some of the issues and concerns about children giving evidence?
- What are some of the matters you think will need to be addressed when assessing their evidence?

3

TOPIC 1 Sources of International law

"In all actions concerning children, whether undertaken by... Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"

UN Economic and Social Council 2005/20: Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime (Referred to as "Guidelines on Justice")

4

Guidelines on Justice

The rights of accused offenders should be safeguarded, but every child has the right to have her/his best interests given primary consideration, including the right to protection and to a chance for harmonious development

Every child has the right to express her/his views, opinions and beliefs freely and in her/his own words and the right to contribute to the decisions affecting her/his life taken in any judicial processes

5

Overall Approach

It is not the child who needs to adapt to the justice system - the justice system should adapt to the needs of the child

6

Facts v. Assumptions and Stereotypes about Children

ACTIVITY 2

- Each of you will be given a paper with quiz questions to be answered by indicating whether in your view the proposition is true or false
- Tick the box which you consider is relevant (10 mins)
- Your answers will be collected and will remain anonymous
- Anonymous answers will be discussed as a group

Total time 20 mins

7

TOPIC 2 Children Differ from Adults

The main general differences are:

- Lack of power
- Comprehension and communication skills differ
- Adversely affected by inappropriate questions
- More vulnerable to GBV offences particularly sex abuse

8

Factors affecting lack of power, communication and vulnerability

- Family, social and environmental circumstances
- Socio- economic disadvantage, educational background
- Cultural background and language
- Gender issues (male, female and transgender)
- Intellectual, physical or mental health problems
- Cognitive limitations
- Effect of physical or sexual abuse or other trauma on children

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TOPIC 3 Characteristics of Sex Offences on Children

- Offender is usually known or related
- No eye witness to offence
- Often limited forensic evidence
- Proof of offences often dependent on:
  - the credibility of child
  - corroborative or circumstantial evidence
  - manner of questioning of child
  - expert evidence

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Characteristics of Child Sexual Abusers

- 40% of abusers are a family member
- 75% of abusers known to the child
- Abuse more common in families with other problems
- Repeated abuse more likely if the abuser is a relative
- Not limited by socio-economic group
- Grooming by offender of child
- Relationship of dependence, control or power
- Opportunistic behaviour of offender

11

Characteristics of Child GBV Victims

- Vulnerability varies by age, development and circumstances
- Isolated, lonely or street children are particularly vulnerable
- Children with intellectual disability more vulnerable

12

TOPIC 4 How Children Tell

- Statements may be accidental, deliberate, verbal or non-verbal
- Suspicion about offending may come from different sources
- Delay in reporting abuse is common
- Children give incremental disclosure and may not report all details of abuse at once
- Children may sometimes deny or retract statements even if there is independent evidence
- R.K.Oates (2007)

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Delay

Children may:

- Not understand that the behaviour is wrong or abnormal
- Be embarrassed, ashamed or self blame
- Be warned to "keep their mouth shut" or " keep our secret"
- Respond to treats, rewards or bribes to remain silent
- Fear consequences for themselves or family
- Believe family will be angry and fear abandonment
- Have loyalty conflicts
- Doubt they will be believed and that they will be blamed

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Disclosure

- Multiple abuse is less likely to be disclosed
- Less intrusive abuse is more likely to be disclosed The younger the child the less likelihood of disclosure
- Disclosure to friends most common form and increases with age

15

Incremental Disclosure

- Children do not report all details of abuse on the first occasion
- Additional information often comes later in other conversations, or with further questioning or even at trial
- Persons who do not know about this feature may conclude that the child is lying or making up later information and potentially reject the overall evidence of the child.

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Embellishments, omissions, contradictions, inconsistencies or improvements

- In relation to children, the court needs to be aware of their common delayed disclosure when applying the usual test, noting the focus on "truthfulness" and "credibility"

  … the court has to take into consideration whether the contradiction/ omissions had been of such magnitude that they may materially affect the prosecution case. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without affecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. However, where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness… it cannot be safe to rely upon such evidence."

Reference *Ijaz Hussain v The State and ors* 2017 YLR Note 6 [Lahore] para [15] see also *T.S. Sheikh v State of Gujarat* 2012 SCMR 1869 para [9]

17

Effect of Trauma on Children

- Affects them in multiple ways:
  - Whether, and if so, and how they tell what happened to them
  - Their behaviour after the event
  - How they give their evidence in court

18

Children exposed to domestic violence



19

Trauma effect varies by child age and circumstances but common responses to sexual abuse include:

- Secrecy/withdrawal
- A feeling of helplessness
- Accommodation to the abuse
- Nightmares
- Sleep disturbance
- Loss of appetite
- Regressive behavior
- Pseudo-mature behavior
- Acting out and anger
- Memory difficulties such as dates and times
- Fear of further abuse
- Depression and anxiety
- Running away from home
- Fear that a non-abusing parent is strong enough to protect them
- Drawings of enlarged sexual organs, or erection and/or ejaculation
- Knowledge of sexual matters beyond the age of the child

- See generally Trauma Guide Handout C of this Module

20

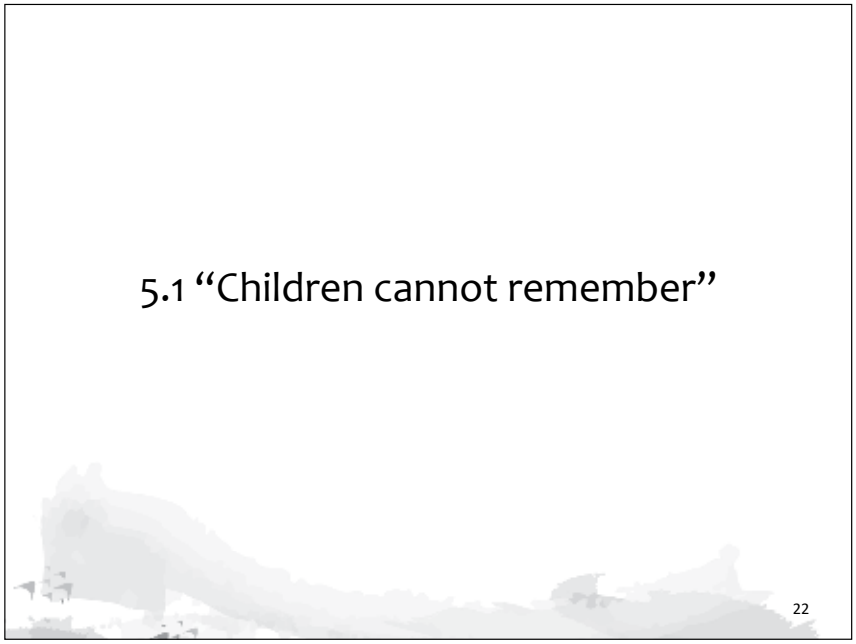
Topic 5 False assumptions and myths

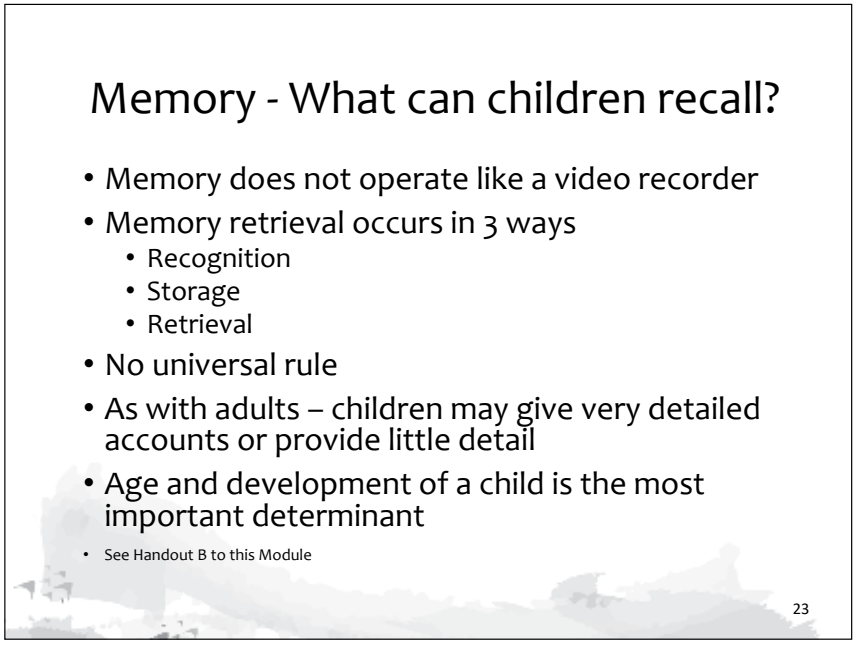
"Children cannot remember"

"Children fantasise and are suggestible"

"Children tell lies and are unreliable"

21


5.1 "Children cannot remember"
22


Memory - What can children recall?
• Memory does not operate like a video recorder
• Memory retrieval occurs in 3 ways
• Recognition
• Storage
• Retrieval
• No universal rule
• As with adults – children may give very detailed accounts or provide little detail
• Age and development of a child is the most important determinant
• See Handout B to this Module
23

Memory of Children - General Features

- Memory of children > 6 years of age compares favourably with adults
- Children > 3 years form detailed and lasting memories particularly if event is distinctive or highly emotional
- A child's memory ability develops and improves with age at the time of the event
- Repeated acts of abuse decrease a child's ability to remember specific details of each experience

24

Memory

- Each child witness will have strength and vulnerabilities - the same as adults
- A balanced view of strengths and vulnerabilities of children is required

Even very young children can remember and retrieve memory large amounts of information, especially when the events are personally experienced and highly meaningful

- Ref: S.J. Ceci and M.Bruck 403

25

5.2 "Children fantasize and are suggestible"

26

Fantasy and Suggestibility

In contrast to a widely held view that young children have difficulty distinguishing fact from fantasy and have unreliable memories, there is good evidence that children over six years are no more suggestible than adults and are as reliable as adults in their ability to recall events in which they were involved.

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Suggestibility

- Young children are at greater risk than adults if inappropriate questioning is used
- They may be influenced by information in directive or leading questions
- Two types of children's suggestibility :
  - tend to respond affirmatively to leading questions (called "yield") or
  - tend to be sensitive to negative feedback and may change (called "shift")

28

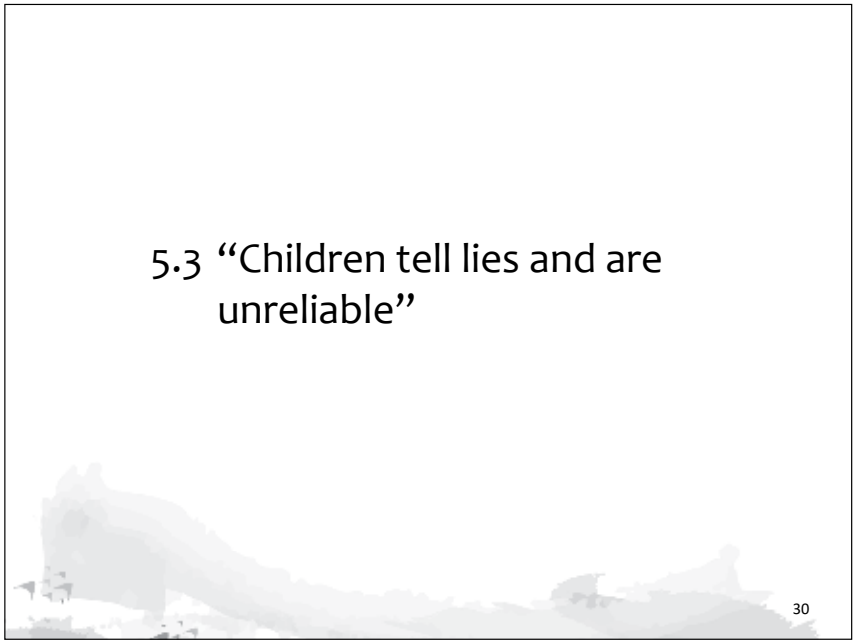
Suggestibility *(cont.)*

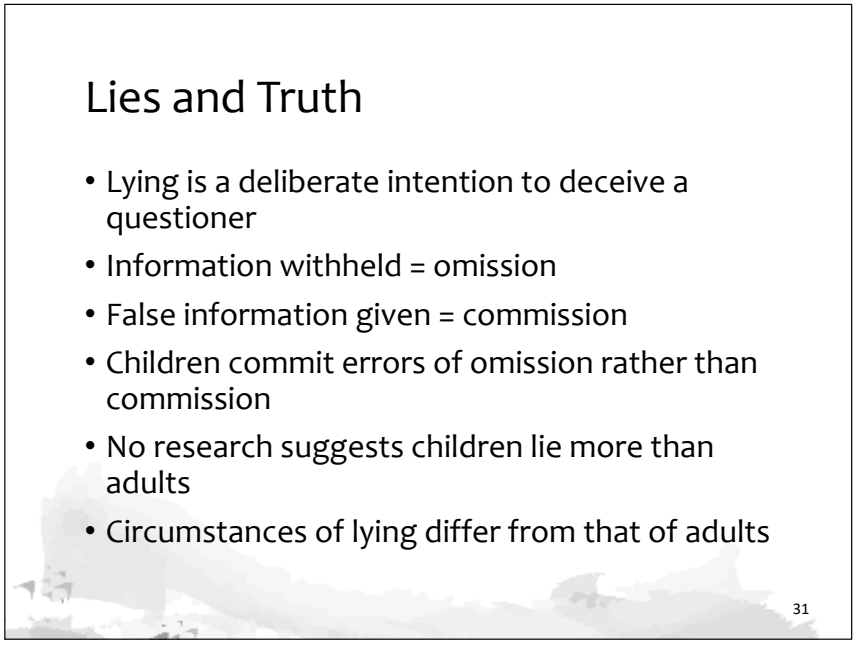
- Children with disabilities can be more vulnerable to suggestibility

BUT

- Children are fairly resistant to suggestions that they have been hurt when they have not
- It is more difficult to mislead children to report negative/abuse events than positive events

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5.3 "Children tell lies and are unreliable"
30


Lies and Truth
• Lying is a deliberate intention to deceive a questioner
• Information withheld = omission
• False information given = commission
• Children commit errors of omission rather than commission
• No research suggests children lie more than adults
• Circumstances of lying differ from that of adults
31

Omissions

- A common reason a child may lie by omission is a belief they must keep a secret
  - A younger child is less likely to keep a secret than an older child
  - An older child is more likely to keep secret, but will respond to direct questions
- Other motivations for omission are they same as reasons for delay in disclosure

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Corroboration

- Historically at common law the view held by judges, based only on their own "experience", was that it was unsafe to rely on the evidence of children and that corroboration of their evidence was mandatory.
- Then a modified approach was that corroboration of the evidence of children was not mandatory, but was a "rule of prudence" (see *The State v Farman Hussain* (PLD 1995 SC 1), cited in *Akhtar v The State* (2011 YLR 2011)
- Now that research about children is available, the common law approach is reflected in *R v Barker* [2010] EWCA Crim 4 (Materials)*
- The effect of current common law it is that a corroboration is not mandatory. It is not required simply because a witness is a child. Cogent reasons other than the fact that the witness is a child, need to be identified before corroboration is required. This places the situation of children and adults being the same and that children as a class are not stereotyped as always being unreliable, suggestible. It depends on each case and each child.

*It is also expressed in legislation such as in Australia (Evidence Act 1929 (SA) s 12A and Evidence Act (WA) 106 s 106D)

33

Credibility

There is no scientific basis for any presumption against a child's credibility as a witness.

"...the presumed gulf between eyewitness abilities of children and adults has been seriously exaggerated"

- ref Spencer and Flin p287

34

Summary on Evidence of Children

Children can and do give clear, credible accounts in court as to what they have **seen** and **heard** and as to **what has happened** to them.

A particular factor that tends to affect the reliability of children's evidence is

how they are questioned

35

Topic 6 Good Practice Questioning Children

36

Vocabulary and Communication

- Children differ in their language development
- At age 5 children's speech sounds a lot like adults but their understanding of language may differ
- Vocabulary and understanding increases with age
- Each child has a unique word pattern shaped by family, social circumstances, education and upbringing
- Children are reluctant to contradict an adult
- Children have cognitive limitations which differ from adults
- Research indicates common features of language development for children at certain ages

(see Handout B at pp 9-10)

37

Overview - Questioning of Children

- The most reliable information is obtained if it is:
  - done through an experienced and unbiased interviewer
  - using open-ended questions and not leading questions
  - this is very important for questioning of children by police, medical officers, as well as Supervising Magistrates and prosecutors

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Child Sensitive Questioning

- Relax the child and build rapport
- Encourage child to give a narrative about matters unrelated to the offence
- When asking them about the offence, ask what happened and allow them to say it in their own words
- Use open – ended questions such as who, what, where, why, when and how
- Their narrative can be followed up by questions which ask for further detail e.g. "can you tell me more about…"
- Use simple language with short sentences
- Follow a logical sequence either by chronology or topic
- Using some encouragers e.g. head nodding to indicate you are listening and a suitable tone of voice and manner – not overly sympathetic

39

Children Giving Evidence

- Children often tell their story in an unorganised way
- They assume everyday rules of conversation apply in court
- They may not understand the need for care and precision in giving evidence
- Children who are improperly questioned may tend to agree with the suggestion of the questioner
- Children of all ages like adults are less likely to admit they do not understand a question
- It is common for children under pressure to repeat the previous answer

40

Children Giving Evidence

- Language and formality of questioning in court is intimidating and see certain types of questions to be avoided (See Handout B pp. 11–14)
- Challenges for children when cross-examined
- Children have problems with leading questions which limits choice of answers to "yes" or "no"
- Closed questions are least accurate way to obtain reliable evidence of children <13 years old
- Children tend to answer questions even if they are ambiguous or they do not understand them

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Summary on Questioning of Children

- The purpose is to give the children the right to give their best evidence in court and to do so using their own words
- Recalling that at all times there is still a requirement to ensure that the best interests of the child is a primary consideration
- But at the same time without prejudice to the right of the accused to a fair trial and to put questions relating to their defence

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Topic 7 The GBV Court and Practice Notes

See Practice Notes being Handout C to Module 6

Noting paragraphs 16–24 and specifically paragraphs 46–51

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Role of Judge and Prosecutor

Prosecutor

- Before a child comes to court they should be assessed on the following matters
- Their ability to give evidence and what assistance they may need e.g.
  - their use of language,
  - communication skills,
  - communications aids,
  - need for counselling assistance,
  - security protection,
  - whether expert evidence is required
- Information should be provided to children about the process which occurs in court and the various ways they may give evidence and what support they may want. This may require viewing the court room
- Ensure questioning of them is age appropriate and complies with good practice

Judge

- Good practice in the UK and Australia includes meeting the children before they are questioned in the presence of the prosecutor and defence counsel
- Common good practice is for the court to have a pre-trial hearing to set the ground rules about the arrangements for the trial e.g.
  - setting hearing dates
  - fast tracking of child cases
  - minimising adjournments
  - discussion with lawyers about arrangements to facilitate the child's evidence
  - Discussing any communication aids that may be required

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Use of CCTV in other countries

Where child sits to give evidence in Western Australia



How child in United Kingdom gives evidence



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Female Support Officers

Female Support officers may have different roles including:

- showing the court room to the child before the trial date
- meet the child on arrival at the court for trial
- escort them to a waiting room
- ascertain whether they have any special needs on the day
- remain with them when give their evidence
- escort them out after the case
- obtain assistance of police officers if required for security

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Child Support Officers when giving evidence

Example from Australia with CCTV



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Concluding comments

- Ideas and approaches for improving children's access to justice, particularly in sexual offence cases, continues to evolve
- New problems arise which require new solutions
- Practice Notes may be improved
- A Bench Book could be developed (See example in Handout A)
- Principles remain the same- to ensure practices involving child victims are always child focused

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References

Major sources for this presentation :

- The Australasian Institute of Judicial Administration Incorporated (AIJA) *Bench Book for Children Giving Evidence in Australian Courts* Updated February 2015.

  https://aija.org.au/wp-content/uploads/2017/07/Child-Witness-BB-Update-2015.pdf

- Essays in Advocacy, Chapter 19 *"The Child and the Trial"* R.A Layton QC, University of Adelaide's Bar Smith Press, University of Adelaide South Australia 2012. www.adelaide.edu.au/press

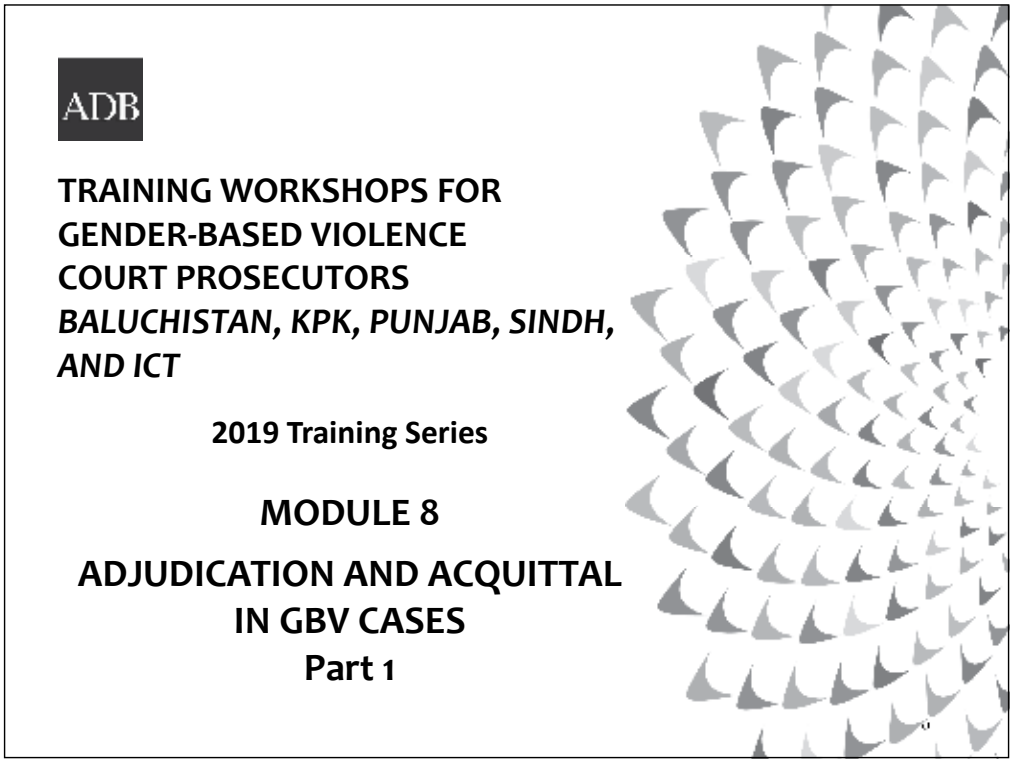
Other Sources:

- S. J. Ceci and M. Bruck, '*Suggestibility of the Child Witness: A Historical Review and Synthesis*' (1993) 113 *Psychological Bulletin* 403, 21 March 2009, 434.
- R. K. Oates, 'Problems and Prejudices for the Sexually Abused Child' (2007) 81 *Australian Law Journal* 313
- J.R.Spencer and R.H Finn (eds) 'The evidence of children: The law and psychology',London, Blackstone Press, 1990

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Thank you !
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Module 8:
ADJUDICATION AND ACQUITTAL IN GBV CASES
PART 1



Objectives

- Topic 1 Understanding punishment settlement and forgiveness
- Topic 2 State duty to prevent and respond to GBV
- Topic 3 Understanding Attrition and Resiling
- Topic 4 Why Attrition matters
- Topic 5 Data on Attrition and reasons
- Topic 6 Overview of best practices
- Topic 7 GBV Court Practice Notes
- Activity

1

Topic 1 Understanding Punishment, Settlement and Forgiveness

2

Crime, punishment and forgiveness

In *Syari'a*, modern jurists have identified three categories of offences in *fiqh*

Hodood *Jinayat* *Ta'zir*

offences of homicide and bodily harm

Qisas and *diyat* (Law of retaliation Lex talionis and compensation)

Awf (Waiver or forgiveness)

Compound (*badal-i-sulh*)

3

Punishment and forgiveness

وَكَتَبْنَا عَلَيْهِمْ فِيهَآ أَنَّ ٱلنَّفْسَ بِٱلنَّفْسِ وَٱلْعَيْنَ بِٱلْعَيْنِ وَٱلْأَنفَ
بِٱلْأَنفِ وَٱلْأُذُنَ بِٱلْأُذُنِ وَٱلسِّنَّ بِٱلسِّنِّ وَٱلْجُرُوحَ قِصَاصٌ ۚ فَمَن تَصَدَّقَ
بِهِۦ فَهُوَ كَفَّارَةٌ لَّهُۥ ۚ وَمَن لَّمْ يَحْكُم بِمَآ أَنزَلَ ٱللَّهُ فَأُو۟لَٰٓئِكَ هُمُ
ٱلظَّٰلِمُونَ ﴿٤٥﴾

And We prescribed for them therein: The life for the life, and the eye for the eye, and the nose for the nose, and the ear for the ear, and the tooth for the tooth, and for wounds retaliation. But whoso forgoeth it (in the way of charity) it shall be expiation for him. Whoso judgeth not by that which Allah hath revealed: such are wrong-doers." (Al-Qur'an Al-Maidah verse 5:45, Translation by M.M. Pickthall The Meaning of the Glorious Qur'ân)

4

Qisas punishment, compromise and forgiveness in causing death (Qatl)

Penal Code

- S.309 Waiver (*Awf*). Adult wali may at any time, without compensation, waive his right to *qisas* in murder cases except in cases of *fasal-fil-arz*.
- S. 310 Compounding of *qisas* (*Sulh*). An adult sane *wali* may compound his right to *qisas* which may be paid on demand or on a deferred date except in cases of fasal-fil-arz where s.311 shall apply. A female person cannot be given by way of *sulh*.
- S. 311 *Ta'zir* where all *wali* do not agree to waive or compound. The court (the State) may punish where not all wali agree to waive or compound or in cases of *fasal-fil-arz.*

5

Ta'zir punishment, compromise and forgiveness

- S.338E Penal Code: Waiver or compounding of offences – all offences under this chapter may be waived or compounded.
- S.345 Criminal Procedure Code: Compounding offences: The offences … may be compounded
  - See also *Zahid Rehman v the State* (PLD 2016 SC 77)
- S.345(5) When the accused has been convicted and an appeal pending, composition shall only be with leave of the court.
- S. 345(6) The composition shall have the effect of an acquittal of the accused.
  - *Chairman Agriculture Development Bank of Pakistan v Mumtaz Khan* (PLD 2010 SC 695)
  - *Suo Moto Case No. 3 of 2017* (SC)

6

Topic 2 State Duty to Prevent and Respond to GBV

7

Understanding public and private wrongs

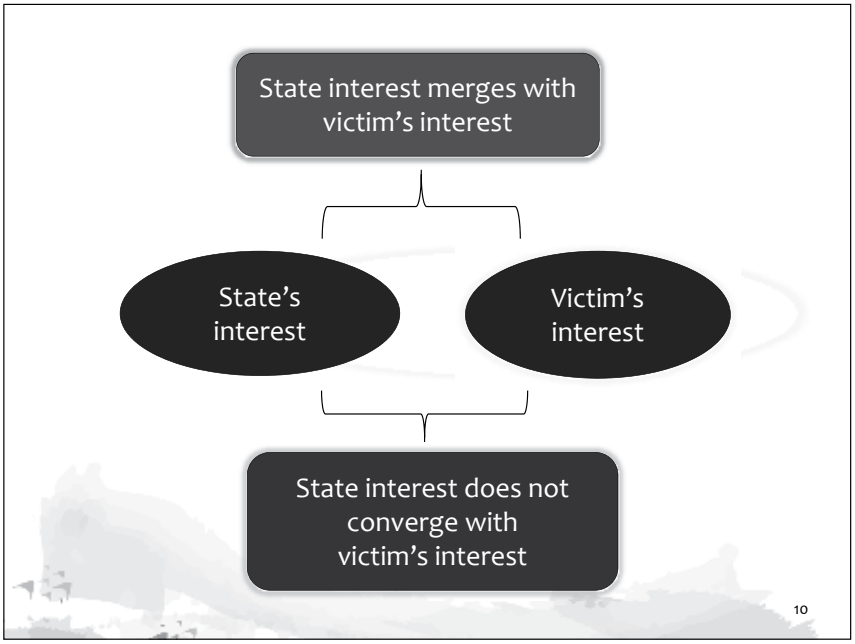
- Today, most States adopt dual processes:
  - the criminal justice process - offences for which the State assumes the obligation to prosecute and punish the perpetrator; and
  - the civil process – offences for which the victim assumes the responsibility to prosecute.
- Some offences may of course constitute both a crime (public offence) and civil offence (private injury).
- *Qisas* and *diya* focus on the rights of the victim and in the event of her death, the rights of her next of kin. It has a strong retributive focus in extracting retaliation or remitting punishment.
  - While the emphasis of the limitation of these rights to the victim or her next of kin, implies that these offences are often regarded as private prosecutions;
  - The severity of retaliation makes it similar to criminal punishments.

8

State Duty to Prevent GBV

- That leaves the question of State obligation.
- Under the concept of the modern State, the State assumes the duty to exercise due diligence to keep every member of society safe from harm. Punishment must have consequences for both the accused and society.
- Under the theory of punishment, the State has the obligation to ensure that punishment also has a strong deterrence effect (penology) that is, it deters both the accused and others.
  - Prevents recidivism (punishment is sufficient to ensure that the accused does not repeat his offence);
  - Rehabilitates the perpetrators (perpetrator is fit to rejoin society);
  - Deters others (puts others on notice - prevents and deters other would be perpetrators from committing similar crimes).

9



State interest and deterrence

Fasad-fil-arz – this refers to the State's interest in prohibiting and eliminating rottenness, depravation, corruption of society. Whether this interest is engaged is determined by –

- past conduct of the offender;
- whether he has previous conviction(s) [proven recidivist];
- brutal or shocking manner in which the crime was committed
  - which is outrageous to the public conscience;
  - considered potential danger to society.
    - E.g. Offence committed in the name or pretext of honour.

11

TOPIC 3 Understanding Attrition and Resiling

12

Meaning of attrition in GBV cases

- "Attrition" = cases where after a complaint is made, but it is withdrawn, or does not go to trial or there is no criminal conviction
- "Attrition rate" is the percentage of overall cases of that type
- The attrition rate for GBV cases is very high in comparison with other offences
- Mostly due to female victims withdrawing or disengaging from prosecution

13

Stages of attrition

- Attrition is looked at in 3 stages :
  (1) After a complaint and before it enters the court system
  (2) After it is in the court system and up to the trial date
  (3) After a trial proceeds, evidence is given but the accused is acquitted.

14

Reasons for attrition

- A Global phenomena
- Many interrelated and overlapping factors
- Reasons fall into two major categories:
  - Victim/survivor related factors
  - System related factors

15

Victim/survivor related factors

- General background - societal, cultural, religious and criminal justice system attitudes to victims
- The victim's personal background and circumstances including:
  - financial circumstances, housing and dependence on abuse
  - child responsibility status
  - knowledge about GBV
  - personal experiences and family circumstances including pressures or supports
- Noting that family members rather than victims/survivors are responsible for withdrawing cases: 47% at the police station and 52% of at court (source: Due Diligence Report)

16

Experiences of women in rape cases in Pakistan courts

DELAY

Cases of rape or gang rape can take 3–4 years before a verdict is reached in the courts

Traumatic Process The process is so traumatic for the rape survivor that families take a decision to avoid it altogether.

Conviction Rate

The conviction rate is extremely low, only 2–4%

Costs

Litigation is costly, and most rape survivors are from a lower socio-economic group and don't turn up to the courts.

(Source: Khan & Zaman 2012)

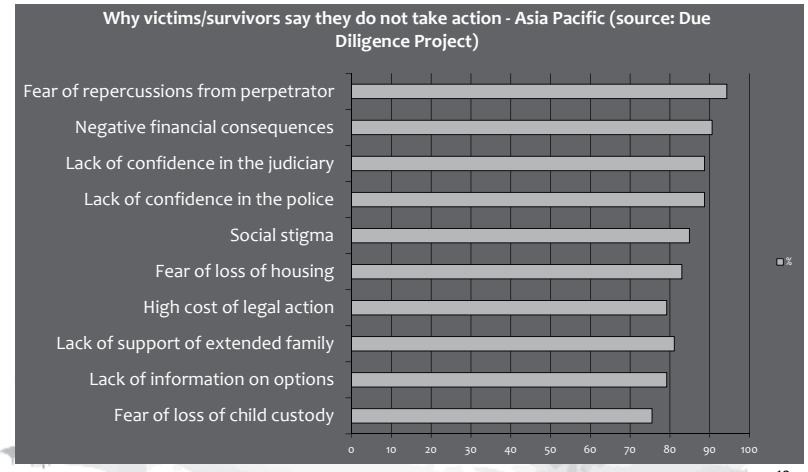
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System related factors

- Whether there is:
- Free victim support, legal advocacy and information
- Cooperation between all sectors in the criminal justice system (police, prosecution services and courts)
- Early responses to protect the victim and continuing e.g. court orders
- Efficacy and quality of collecting evidence independently of victim engagement
- Sensitive attitudes of professionals and providing information
- Delays occur at multiple points throughout the criminal justice process

18

International research of Country Regions - what survivors say



19

TOPIC 4 Why Attrition Matters

20

Why attrition matters

- GBV is a crime and a gross violation of women's human rights
- Attrition leads to offender impunity and the continuation of violence against women

21

Basic background to attrition in GBV offences

Noting that in GBV cases:

- most allegations do *not* require a warrant by police before arrest
- most GBV offences are *not bailable*
- *bailable* offences include some "hurts" (S 337 PCC) and "abduction of married women" (S 496A PCC)
- most GBV offences are *non-compoundable offences e.g.*, rape, gang rape, attempted murder, abduction of unmarried women, acid throwing and outrage of the modesty of women
- *compoundable offences* are murder (S 302 PCC) and hurts (S 337 PCC)

22

Judicial Views expressed by Punjab judges during a Needs Assessment conducted in 2017

23

Judicial views on resiling - Rape

- Number of false rape cases were high
- Most rape cases were 'compromised' with witnesses and complainants resiling from their statements
- 'Genuine' rape cases (e.g. vani, exchange and early marriages) were not brought to courts
- Male family members decided whether any case was to be filed, (both false and genuine cases) and also decided whether a case should be settled or withdrawn (either because of monetary compensation or fear of retribution)
- Judges generally allowed cases to be withdrawn when witnesses or complainants resiled, (even if there was other independent evidence)
- Dissatisfaction with the insufficiency of police evidence to support convictions

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Judicial views on resiling - sexual harassment and domestic violence

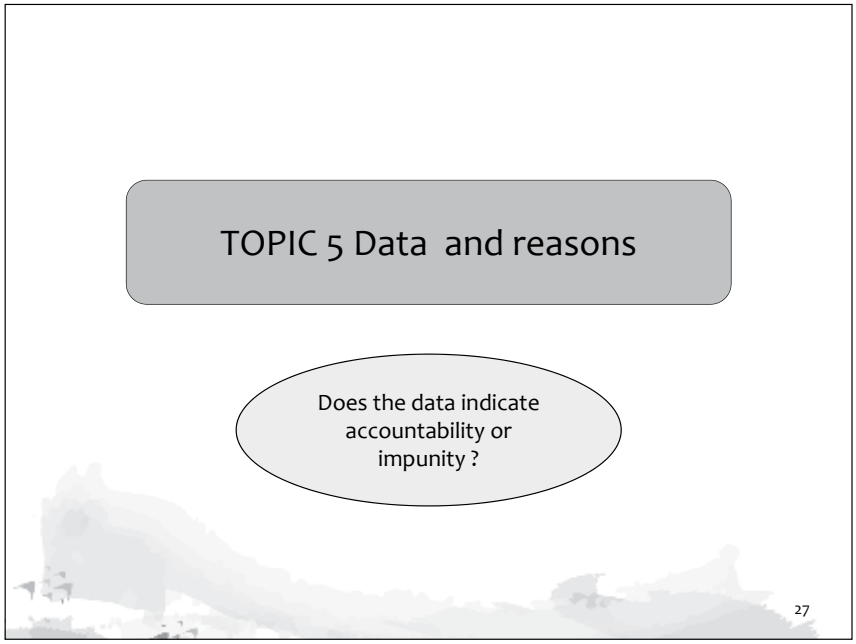
- Domestic violence cases are rarely reported
- Violence perpetrated by a husband would mostly not be perceived as a crime
- A victim's/survivor's family would probably pressure the domestic violence victim not to leave/seek divorce
- Sexual harassment and domestic violence cases do not come before the courts, except sometimes within a Family Court case

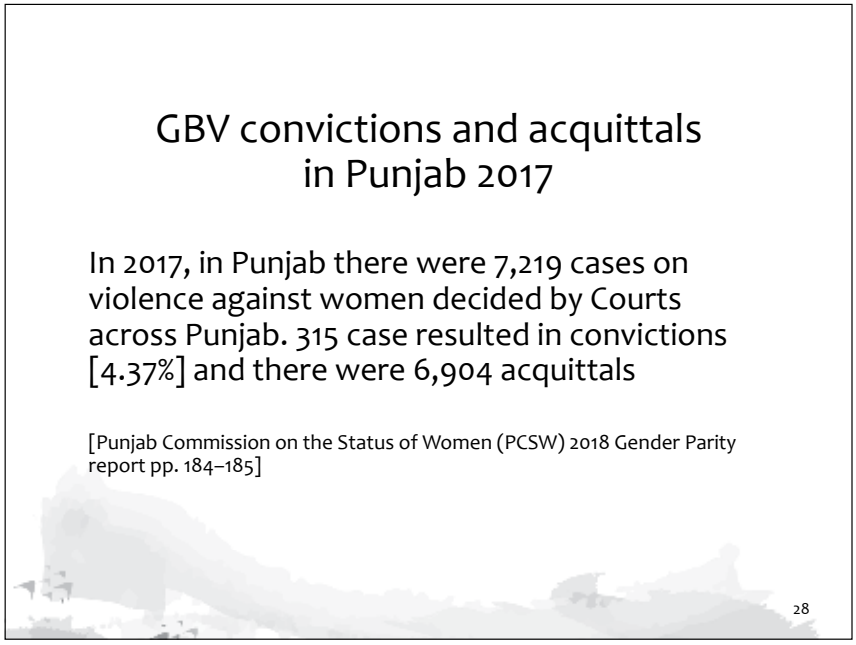
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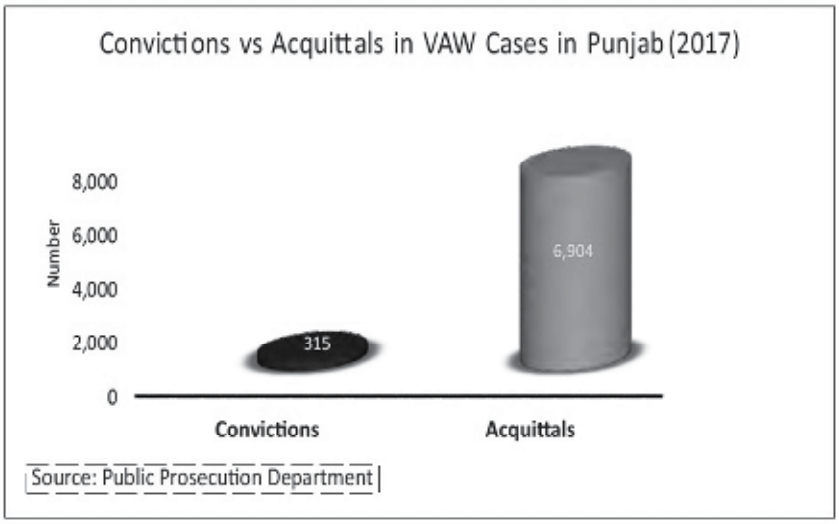
Judicial views on resiling - abduction of unmarried woman/girl

- Potential for abuse of court processes by family members who allege abduction of a girl/woman or may compel the girl/woman to file a case of abduction.
- Some judges took precautionary measures to ascertain if the complaints were genuine and to protect the safety of the girl/woman from retribution by her family.

26


TOPIC 5 Data and reasons
Does the data indicate accountability or impunity ?
27


GBV convictions and acquittals in Punjab 2017
In 2017, in Punjab there were 7,219 cases on violence against women decided by Courts across Punjab. 315 case resulted in convictions [4.37%] and there were 6,904 acquittals
[Punjab Commission on the Status of Women (PCSW) 2018 Gender Parity report pp. 184–185]
28



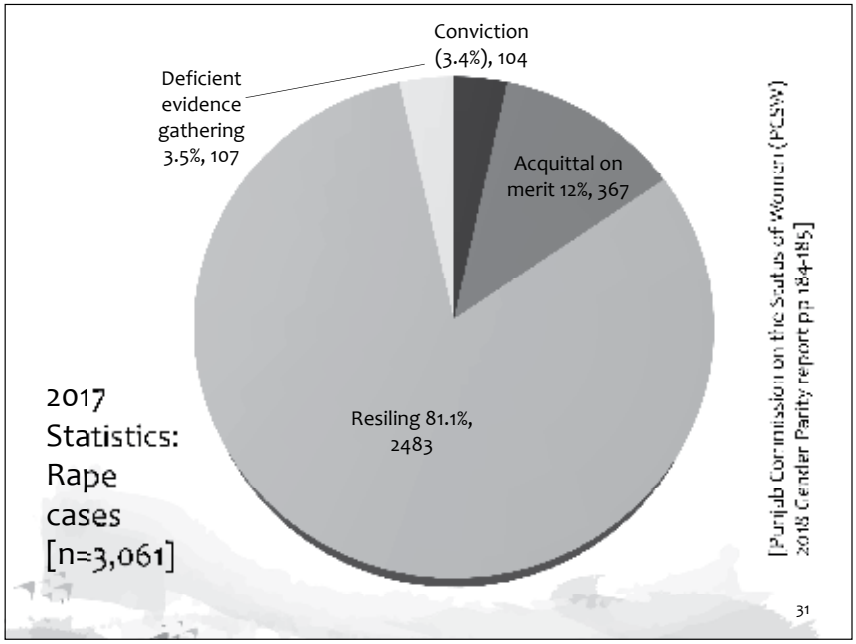
In addition there were 5,949 Consigned to Record: the highest numbers were for rape (1,806) and assault to outrage modesty of woman (1,165). Ref PCSW 2018 GPR

Rape convictions and acquittals in Punjab 2017

In 2017, in Punjab there were were 104 convictions for rape [3.51%] and 2957 acquittals for rape.

[Punjab Commission on the Status of Women (PCSW) 2018 Gender Parity report pp. 184–185]

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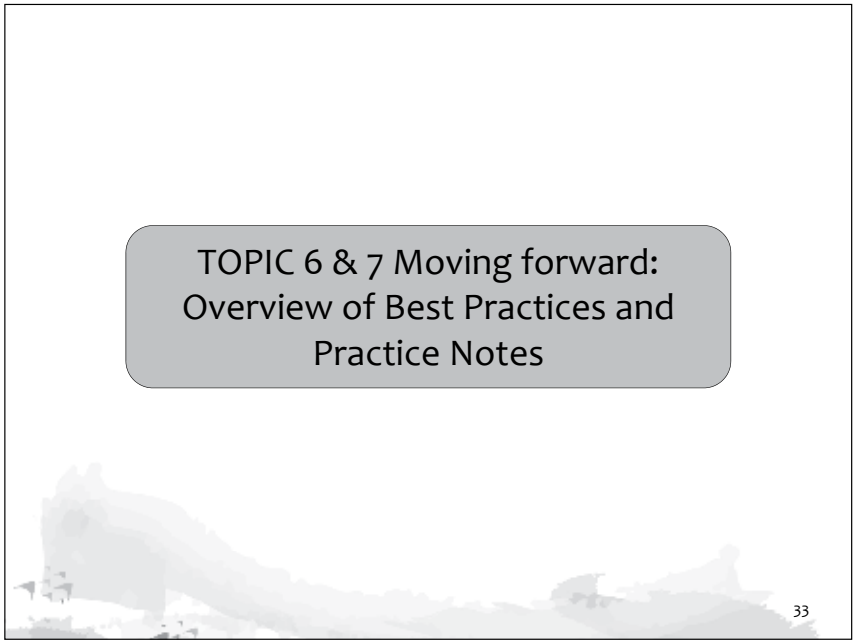


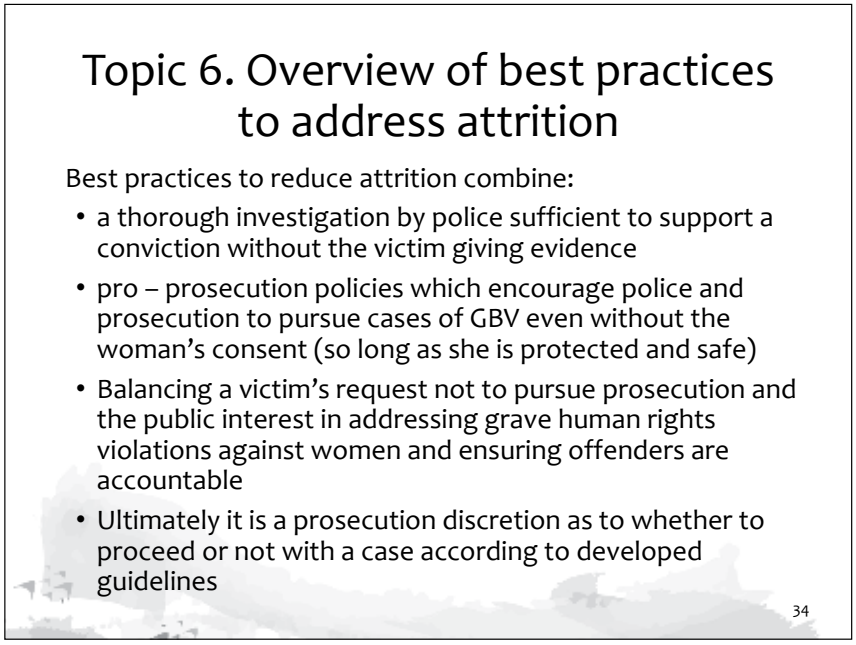
Reasons for low conviction rates*

- Women's unwillingness to pursue trial due to fear of being re-traumatised
- Prosecutors only take cases they can win
- Rape cases are mired with myths and stereotypes about race, class, gender and character of rape victims/survivors
- Lack of protection from retaliation
- Weak judicial procedures
- Out of court settlements and compromises due to weak procedures and fear

* [Punjab Commission on the Status of Women (PCSW) 2018 Gender Parity report]

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TOPIC 6 & 7 Moving forward:
Overview of Best Practices and
Practice Notes
33


Topic 6. Overview of best practices to address attrition
Best practices to reduce attrition combine:
• a thorough investigation by police sufficient to support a conviction without the victim giving evidence
• pro – prosecution policies which encourage police and prosecution to pursue cases of GBV even without the woman's consent (so long as she is protected and safe)
• Balancing a victim's request not to pursue prosecution and the public interest in addressing grave human rights violations against women and ensuring offenders are accountable
• Ultimately it is a prosecution discretion as to whether to proceed or not with a case according to developed guidelines
34

Topic 7 GBV Court Practice Notes

- Resiling – Practice Notes paragraphs 42 and 52
- Directions to police to investigate and report (see Handout A)
- Commonly used examples of resiling statements for discussion (see Handout B)

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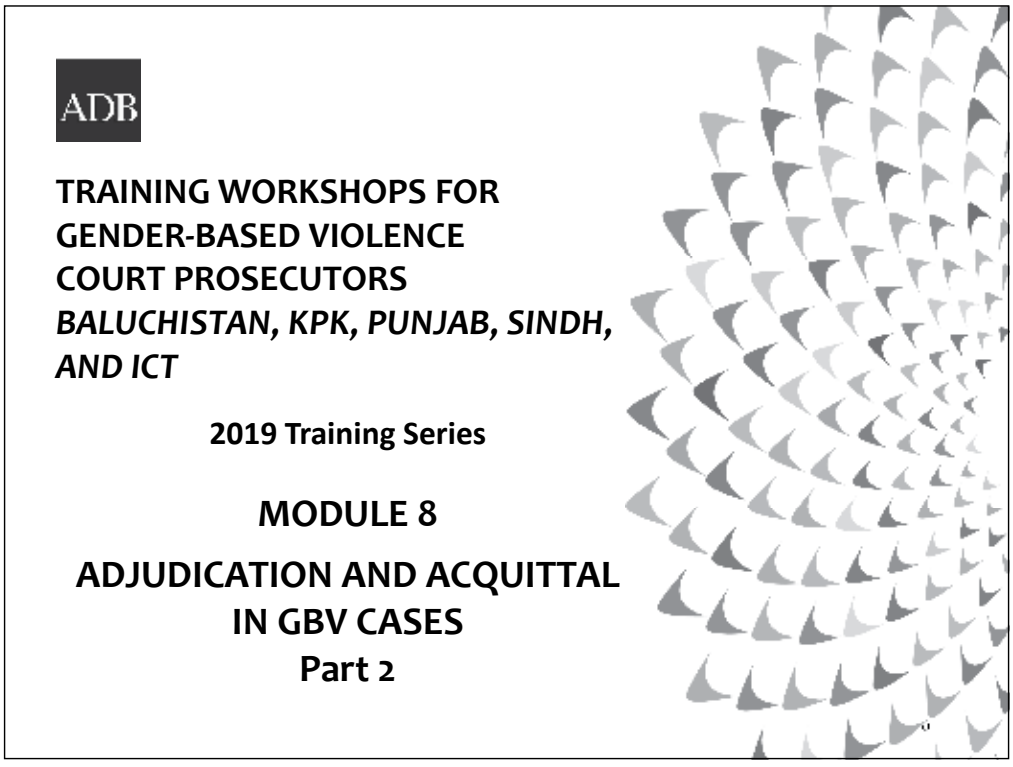
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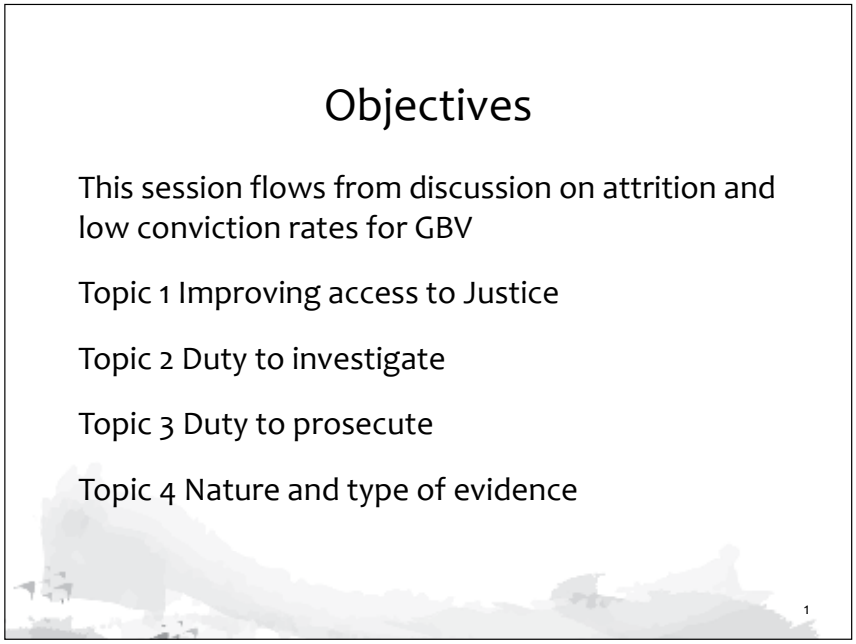
- Divide into 3 Groups
- 1 hypothetical case for each group
- Each group to discuss and report back to plenary for further discussion

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Thank you !
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Module 8:
ADJUDICATION AND ACQUITTAL IN GBV CASES
PART 2




Objectives
This session flows from discussion on attrition and low conviction rates for GBV
Topic 1 Improving access to Justice
Topic 2 Duty to investigate
Topic 3 Duty to prosecute
Topic 4 Nature and type of evidence
1


Topic 1 Improving Access to Justice
2

Improving Access to Justice

- Access to justice includes the ability of citizens to seek and obtain remedies to address their grievances through institutions of justice in full compliance with human rights standards
- It encompasses legal protection, timely adjudication and stringent law enforcement
- It includes strengthening the judicial systems and take affirmative measures to reduce recidivism and increase convictions
- Research has shown that reporting of crimes against women increases where officials are more sensitive to the particular needs of female survivors of violence

3

Topic 2 Duty to Investigate

4

Duty of the State to investigate

- Resiling and attrition of GBV cases is often directly related to a failure of effective investigation
- There is an obligation of the State to act with due diligence to investigate GBV offences under for example CEDAW General Recommendations 19 and 28
- States should meet their positive duty to investigate and not dismiss a case for lack of evidence without conducting a thorough investigation (*M.C. v Bulgaria* ECHR Application no 39272/98)
- Primary actors with responsibilities to investigate are police, Special Magistrates, prosecutors and also judges

5

Police

- Police are the first actors required to provide effective, prompt, impartial and thorough investigation. See also directions given in *Salman Akram Raja v The Government of Punjab* (2013 SCMR 203)
- Police officers may be exposed to criminal prosecution (criminal negligence) for failure to investigate with due diligence [Human Rights Case No. 42389-P of 2013]
- Good practice would include the use of specially trained police to handle GBV cases in a gender sensitive fashion
- See example of the Lahore High Court setting up a GBV Cell within police investigations (Handout A)
- Police to also work in conjunction with the Special Magistrate and the prosecutor

6

Prosecutors

Good Practice requires:

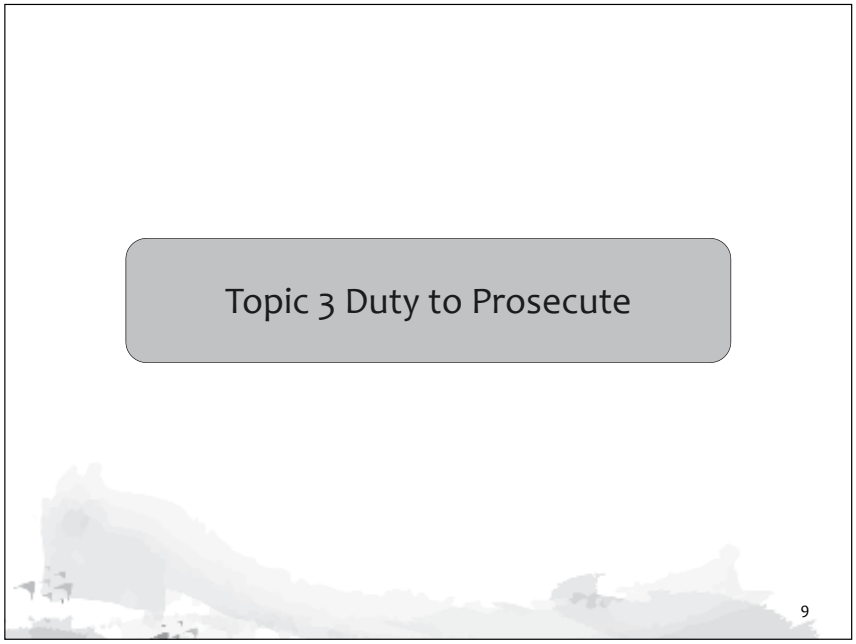
- Only specialized prosecutors or prosecutors who have received training to deal with GBV cases should take cases in the GBV Court.
- Training will give prosecutors a better understanding of the needs of victims/survivors and avoid stereotyping and bias
- Prosecutors should ensure that cases come before the courts as soon as possible and are progressed to completion in a timely fashion
- The entire prosecutorial process should be as non-traumatic for victims/survivors as possible

7

Trial Court

- The court also has a role in relation to the state's duty to investigate
- The court should not turn a "blind eye" as to whether the police and prosecution have undertaken their obligations - e.g., the directions in *Salman Akram Raja v The Government of Punjab* (2013 SCMR 203)
- Each Judge has a role to ensure that justice is done in all matters which come before them starting from the time when the charge is framed in accordance with S 242 Cr.P.C
- If obligations to investigate have not been taken:
  - the court can adjourn and /or make appropriate orders;
  - and/or draw attention of deficiencies to the appropriate authority

8



Duty of the State to prosecute

- There is an obligation of the State to act with due diligence to prosecute GBV offences which is similar to the Obligation to prosecute
- To ensure effective prosecution "without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings."
- According to the Special Rapporteur, one criteria in determining whether a State complied with its obligation is the number of cases prosecuted and the types of judgments handed down in these cases. (see reference at end of slides)

10

Trial Court

- In relation to the types of judgments handed down, in *Vertido v. Philippines*, the applicant alleged that she suffered "revictimization by the State party after she was raped;" first, by the acquittal of the accused which "violated her right to non-discrimination" and second, by the failure to "ensure that women are protected against discrimination by public authorities including the judiciary."
- The Committee went on to say that "the compliance of the State party's due diligence obligation to banish gender stereotypes . . . needs to be assessed in the light of the level of gender sensitivity applied in the judicial handling of the … case."

11

Prosecutor

- The decision whether or not to prosecute is very important and rests with the Prosecutor General within the Public Prosecution Department (or a prosecutor as delegated)
- A Prosecutor is independent and no other person or body, including the Government, can tell a prosecutor to prosecute or not to prosecute any particular case
- Best practice includes the Public Prosecution Department having Guidelines and Codes of Conduct to help make sure that decisions are fair and consistent
- Best practice also includes taking into account an evidential test as well as a public interest test

12

Prosecutor *(continued)*

- The public interest test includes having regard to interests of the victim, the accused and the wider community in deciding whether or not to prosecute
- In relation to the evidential test, best practice often includes that a prosecutor may lawfully direct a police officer to collect additional evidence, or follow a line of enquiry, or provide additional information about the collection of evidence, or provide information about witnesses.

13

Topic 4 Nature and Type of Evidence

14

Evidence

- One of the concerns worldwide is that GBV offences and particularly domestic violence offences against women are not taken seriously enough and they are under-investigated
- It is not just an issue of resources, but an attitudinal response to these offences
- First of all at the police investigation level.
- Second at the prosecutorial level
- Third at the judicial level
- The court in every case should have the evidence which is reasonably available to ensure that the the State's duty is fulfilled, the victim rights are protected and the offender is punished.

15

Evidence frequently overlooked

- International best practice is using the exceptions to the hearsay rule in order to prove a case against the defendant
- For example:
  - use of the common law exception of "res gestae" which is set out in QSO s19 Illustration (a)
  - use of the common law exception to allow a state-ment about existing mental, emotional, or physical condition to prove the truth of the statement which is reflected in QSO s 27 Explanation 1 Illustration (k)
- Also the use of similar facts in QSO s 28

See Handout B with the relevant sections

16

A Check List or Toolkit for the types of evidence which may be relevant in domestic violence case can assist in the process

See Handout C in the materials

17

Prosecutors

- The ultimate role of the prosecutors is scrutinize the lawfulness and propriety of investigations and ensure that all relevant reasonably available evidence has been collected and presented to the Court
- A comprehensive investigation can reduce reliance on the victim's testimony alone and increase the likelihood of a successful prosecution
- Prosecutors need to work with the police to identify and gather all of the relevant evidence in relation to the complaint and the offence.
- Both the victim and the accused are the beneficiaries of a proper investigation as the evidence may either prove the guilt of the accused or show that the accused is innocent

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Prosecutors *(continued)*

- Studies have found a positive association between the longer prosecutors spent with victims preparing the case and successful prosecutions
- The determination which a prosecutor shows in pursuing a comprehensive investigation, is a powerful predictor of prosecutorial success

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Trial Court Judges

- Good practice is to appropriately utilise their powers to ask questions, call and re-call witnesses, and order production of documents or other things.
- Sections 540 CrP.C and 161 QSO
- See Practice Notes paragraphs 53–56
- This does not mean that judges take over the carriage of the trial but rather ensure the ultimate goal - that justice is done in the case with all reasonably available evidence which is fair and for the benefit of all the parties.

20

Thank you !

21

References

- Special Rapporteur on Violence against Women, its Causes and Consequences, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women: Violence against women in the family*, note 5¶ 25, U.N.Doc. E/CN.4/1999/68 (March 10, 1999) (*prepared by* Radhika Coomaraswamy).
- Human Rights Foundation (2011), The Due Diligence Obligations to Prevent Violence against Women: *The Case of Pakistan*. Legal Report, New York
- Vertido v. Philippines, Committee on the Elimination of Discrimination Against Women, ¶ 3.1, U.N. Doc. CEDAW/C/46/D/18/2008 (2010)

22

MATERIALS ACCOMPANYING THE MODULE PRESENTATIONS



Module 1:
WHAT IS GENDER SENSITIZATION?

A. Module Activities

- **Activity 1: Characteristics, Objects and Occupations**

The words below* are to be categorised as being a characteristic, occupation or object associated with a woman/female or man/male.

Bus driver	Kite	Secretary
Toy car	Childbirth	Tea set
Court clerk	Bicycle	Vagina
Breastfeeding	Nurse	Computer games
Soccer ball	Penis	Domestic helper
Professor	Doll	Fashion designer
Menstruation	IT specialist	Manager
Childcare	Super hero	Strategic thinking
Flirtatious	Shopping	Gardening
Washing	Cooking	Brave

* To be made into individual cards

- **Activity 2: Case Extracts for Discussion**

The extracts below are from appealed court cases. The purpose of this activity is for each group to discuss the language used by the judges in one case as allocated to the group and answer the questions below. (10 minutes) Each group is to nominate a person to be the reporter on the group discussion and the answers. (2 minutes per group)

Case 1

"[S]he was also aware that by testifying, she made public a painful and humiliating secret, which others would have simply kept to themselves forever, jeopardi zed her chances of marriage or foreclosed the possibility of a blissful married life as her husband may not fully realize the excru-ciatingly painful experience which would haunt her."

Questions for discussion:

- What messages are conveyed by the language in this judgment about women generally, female victims, males generally?

- Does the judgment language demonstrate gender stereotyping? How?
- Do you consider that this is gender sensitive language?

Case 2

"[S]he thereby jeopardized her chances to marriage, as even a compassionate man may be reluctant to marry her because her traumatic experience may be a psychological and emotional impediment to a blissful union. Moreover, such a revelation divided her family and brought it shame and humiliation."

Questions for discussion:

- What additional message is conveyed by the language in this judgment about men and women generally and responses to rape against women?
- Do you consider that the language in the last sentence demonstrates gender stereotyping? How?
- If in fact the rape survivor's family did have that reaction to the rape case, how should the judge have dealt with this in the judgment?

Case 3

"[T]he contention that the complainant was only 14 years old at the time of commission of the offense (December 12, 1980) and therefore, not capable of making false statements against her abuser would have been true two generations ago but not anymore these days when teenagers are sex-conscious, outgoing, frank and aggressive."

Questions for discussion:

- What message about the credibility of teenagers is being conveyed by the language in this judgement?
- Do you consider that the language conveys genders stereotyping of teenagers?
- Do you consider that the language suggests victims who are sex conscious, outgoing frank and aggressive should not be believed in relation to a rape complaint?
- Do you consider that the language creates the perception that chastity or sexual naïveté are important factors in deciding to believe a rape complainant?
- What do you consider this message would send to the community and in particular to teenagers?

Case 4

The Court considered an appeal from the conviction of the accused pursuant PPC ss 324 and 336 and s7(b) A.T.A for Attempt to commit qatl-i- amd, itlaf-i-salahayyat-ivdw and act of terrorism. The accused and another threw acid on the face, eyes, chest and other body parts (shoulder, arm, abdomen, eye and leg) of a woman which resulted in "superficial to deep burns" on her body and permanent blindness in her right eye. The court dismissed the appeal and concluded with the following:

> "16. Before parting with this judgment, the Court expresses its regret disquietude on happening of such like unfortunate incidents by the malefactors having no equanimity whereas, human being are ever best creature of Almighty Allah and **to disfigure or disfeature the most beautiful part of a woman, i.e., face** permits punish ability to a maleficent but may be regarded as sin the schadenfreude had visioned incessant plight and pity of the hapless

victim till death. Oh! What I yelling and moaning, anyhow, Allah Almighty has absolute powers to dispense the real and ultimate justice." (Emphasis added)

Questions for discussion:

- What message do you consider the words are conveying about women?
- Do you think the same message would be appropriate if the victim had been a man?
- How do you think the court could better have conveyed a final message about the impact and outcome of the injuries sustained by the victim?

B. Case Law

Language is the most pervasive form of reinforcing gender stereotypes.

▶ ***STATE OF PUNJAB V. GURMIT SINGH & ORS***
1996 AIR 1393
16 January 1996
Dr. Anand, J (Supreme Court of India)

Facts:

This case involves the abduction and rape of a female minor, who is under 16 years of age. The respondents were acquitted of the charge of abduction and rape. Hence the appeal under Section 14 of the Terrorist Affected Areas (Special Courts) Act, 1984.

Issue:

Whether or not the accused are guilty beyond reasonable doubt of the crimes of abduction and rape.

Decision:

Yes. In deciding the case, the Supreme Court castigated the trial court for casting a stigma on the character of the rape victim, as follows:

> "The trial court not only erroneously disbelieved the prosecutrix, but quite uncharitably and unjustifiably even characterized her as a girl "of loose morals" or "such type of a girl". What has shocked our judicial conscience all the more is the inference drawn by thecourt, based on no evidence and not even on a denied suggestion, to the effect:
>
> > "The more probability is that (prosecutrix) was a girl of loose character. She wanted to dupe her parents that she resided for one night at the house of her maternal uncle, but for the reasons best known to her she does not do so and she preferred to give company to some persons."
>
> We must express our strong disapproval of the approach of the trial court and its casting a stigma on the character of the prosecutrix. The observations lack sobriety expected of a Judge. Such like stigmas have the potential of not only discouraging an even otherwise reductant victim of sexual assault to bring forth [a] complaint for trial of criminals, thereby making the society to suffer by letting the criminal escape even a trial. The courts are expected to use self-restraint while recording such findings which have larger repercussions so far as the future

of the victim of the sex crime is concerned and even wider implications on the society as a whole-where the victim of crime is discouraged- the criminal encouraged and in turn crime gets rewarded! Even in cases, unlike the present case, where there is some acceptable material on the record to show that the victim was habituated to sexual intercourse, no such inference like the victim being a girl of "loose moral character" is permissible to be drawn from that circumstance alone. Even if the prosecutrix, in a given case, has been promiscuous in her sexual behavior earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone had everyone. No stigma, like the one as cast in the present case should be cast against such a witness by the Courts, for after all it is the accused and not the victim of sex crime who is on trial in the Court.

As a result of the aforesaid discussion, we find that the prosecutrix has made a truthful statement and the prosecution has established the case against the respondents beyond every reasonable doubt."

Activity 2: Examples of language used from cases for discussion.

▶ ***PEOPLE V. MATRIMONIO***
G.R. Nos. 82223-24
November 13, 1992
(Supreme Court of the Philippines)

Facts:

The complainant charged her father, Manuel Matrimonio, with the crime of the rape, which was allegedly committed on two different occasions. She became pregnant after the first occasion of rape. At the time she was raped, the complainant was fourteen years old. She said that she had no choice but yield her body and honor on both occasions because he had threatened to kill her, her mother and her siblings. It was only after the second incident that she decided to reveal his bestial deeds.

In his defense, the accused admitted having sexual intercourse with the complainant but denied that he forced or coerced her into giving in to his advances. He claimed that there was no sufficient resistance put up by the complainant, as "there must be physical struggle taking her power to the utmost." He stated that they were in fact living as husband and wife for about one year, in the same household as the complainant's mother who is also the accused's common law wife.

Issue:

Whether or not the accused is guilty of the crime of rape.

Decision:

Yes. The prosecution's evidence proved beyond reasonable doubt that the appellant intimidated the complainant into consummating the sexual acts with him on both occasions. He conveniently availed of two (2) forms of intimidation: threats and his overpowering moral influence. With respect to the first incident, he craftily threatened her during the initial stage by telling her not to shout or else she would be killed; he also threatened the lives of her mother, sister and brothers to force her to yield her honor and privacy when he was already on top of her. To an innocent girl who

was then barely fourteen (14) years old, the threat engendered in her a well-grounded fear that if she dared resist or frustrate the bestial desires of the appellant, she, her siblings and her mother would be killed. Intimidation is addressed to the mind of the victim and is, therefore, subjective. It must be viewed in the light of the victim's perception and judgment at the time of the commission of the crime and not by any hard and fast rule. We have said before that the workings of the human mind when placed under emotional stress are unpredictable and people react differently. In such a given situation, some may shout; some may faint; and some may be shocked into insensibility; while others may openly welcome the intrusion. The test for its sufficiency under Article 335 of the Revised Penal Code is whether it produces a reasonable fear in the victim that if she resists or does not yield to the bestial demands of the accused, that which the latter threatened to do would happen to her, or those dear to her — in this case, her mother, sister and brothers. Where such degree of intimidation exists, and the victim in cowed into submission as a result thereof, thereby rendering resistance futile, it would be extremely unreasonable to expect the victim to resist with all her might and strength. And even if some degree of resistance would nevertheless be futile, offering none at all cannot amount to consent to the sexual assault. For rape to exist, it is not necessary that the force or intimidation employed in accomplishing it be so great or of such character as could not be resisted; it is only necessary that the force or intimidation be sufficient to consummate the purpose which the accused had in mind. This is especially true in the case of a young, innocent and immature girl like the complainant, who could not have been expected to act with equanimity of disposition and with nerves of steel; or to act like an adult or mature and experienced woman who would know what to do under the circumstances; or to have the courage and intelligence to disregard the threat.

In a rape committed by a father against his own daughter, the former's moral ascendancy and influence over the latter substitutes for violence or intimidation. That ascendancy or influence necessarily flows from the father's parental authority, which the Constitution and the laws recognize, support and enhance, as well as from the children's duty to obey and observe reverence and respect towards their parents. Such reverence and respect are deeply ingrained in the minds of Filipino children and are recognized by law. Abuse of both by a father can subjugate his daughter's will, thereby forcing her to do whatever he wants.

The complainant certainly realized that by her accusations, her father would be deprived of his liberty and thrown into prison to serve a long sentence. She was also aware that by testifying, she made public a painful and humiliating secret which others would have simply kept to themselves forever, jeopardized her chances of marriage or foreclosed the possibility of a blissful married life as her husband may not fully understand the excruciatingly painful experience which would haunt her. She further realized too well that her denunciations against her own father would only bring down on her and her family shame and humiliation. These considerations indicate that Rowena was telling the truth and was not inspired by any other motive than to obtain justice for the grievous wrong committed against her, to have the same punished, to have the full force of the law take its course against her father and, hopefully, even if it would seem impossible, to reform the latter.

▶ ***PEOPLE V. AGBAYANI***
G.R. No. 122770
January 16, 1998
(Supreme Court of the Philippines)

Facts:

In September 1993, the accused was charged by two of his six daughters with the crime of rape. The case was, however, provisionally dismissed after the complainants desisted from pursuing the same in May 1994. The accused was thus released from jail. Thereafter, he began living with four of his six daughters in a rented room.

The complainant, who was not one of the two daughters who filed the previous rape complaint, alleged that on the evening of July 19, 1994, she was sleeping on the floor of the room with her father, the accused Eduardo Agbayani, when was awakened from her sleep by hands caressing her breast and vagina. She turned to discover that it was her father who was then molesting her. Frightened, she asked why he was doing this to her, when he had just gotten out of prison. The accused however allegedly threatened to kill her, and proceeded to rape her.

The complainant subsequently charged her father with the crime of the rape. At the time she was raped, the complainant was fourteen years old.

In his defense, the accused said he could not have raped the complainant because on the day the rape allegedly occurred, he was visiting his eldest daughter in another locality.

Issue:

Whether or not the accused is guilty of the crime of rape.

Decision:

Yes. The Court was fully satisfied that the complainant told the truth that she was raped by her father. Her story was made even more credible by the simplicity and candidness of her answers, as well as by the fact that it came from an innocent girl writhing in emotional and moral shock and anguish. She must have been torn between the desire to seek justice and the fear that a revelation of her ordeal might mean the imposition of capital punishment on her father. By testifying in court, she made public a painful and humiliating secret, which others may have simply kept to themselves for the rest of their lives. She thereby jeopardized her chances of marriage, as even a compassionate man may be reluctant to marry her because her traumatic experience may be psychological and emotional impediment to a blissful union. Moreover, such a revelation divided her family and brought it shame and humiliation.

If the complainant did testify regardless of these consequences and even allowed the examination of her private parts, she did so inspired by no other motive than to obtain justice and release from the psychological and emotional burdens the painful experience had foisted upon her. It was then improbable that she fabricated a story of defloration and falsely charged her own father with a heinous crime.

What appellant claims to be improbabilities in the testimony of the complainant are more apparent than real. The presence of her sisters in the small room did not at all make impossible the commission of rape. The evil in man has no conscience. The beast in him bears no respect for

time and place; it drives him to commit rape anywhere even in places where people congregate such as in parks, along the roadside within school premises, and inside a house where there are other occupants. In People v. Opena, rape was committed in a room occupied also by other persons. In the instant case, the complainant's other companions in the room when she was molested by the accused were young girls who were all asleep.

That the victim was unable to resist or shout for help can easily be explained by the fact that appellant threatened to kill her. Whether he was armed was of no moment. That threat alone coming from her father, a person who wielded such moral ascendancy, was enough to render her incapable of resisting or asking for help.

Where such intimidation existed and the victim was cowed into submission as a result thereof, thereby rendering resistance futile, it would be the height of unreasonableness to expect the victim to resist with all her might and strength. If resistance would nevertheless be futile because of intimidation, then offering none at all does not mean consent to the assault so as to make the victim's submission to the sexual act voluntary.

In any event, in a rape committed by a father against his own daughter, as in this case, the formers moral ascendancy or influence over the latter substitutes for violence or intimidation. Likewise, it must not be forgotten that at her tender age of 14 years, the complainant could not be expected to act with the equanimity of disposition and with nerves of steel, or to act like a mature and experienced woman who would know what to do under the circumstances, or to have courage and intelligence to disregard the threat. Even in cases of rape of mature women, this Court recognized their different and unpredictable reactions. Some may shout; some may faint; and some may be shocked into insensibility.

Neither does the fact that the complainant continued to live with her father in the same rented room disprove the rape. While she was hurt physically, psychologically and emotionally, yet the thought must have been irresistible and compelling that her assailant was her own father, who was both a father and mother to her since her mother was in Saudi Arabia and who provided her with the daily wherewithal to keep her alive. Besides, a less harsh life outside was uncertain. Instances are not few when daughters raped by their fathers stayed with the latter and kept in the deepest recesses of their hearts the evil deed even if the memory thereof haunted them forever.

▶ ***PEOPLE V. FLORES***
G.R. No. L-60665
October 26, 1983
(Supreme Court of the Philippines)

Facts:

About 12:00 noon of December 12, 1980, the complainant, 14-year old Edna Flores who was living with her father and stepmother, went to the house of her cousin Abad Flores to get some 'kamias' fruits to be used for cooking. The house of Abad Flores was some five houses away from theirs. Arriving at the yard of Abad Flores, Edna saw accused-appellant, Cirilo Flores, and she asked him for some kamias fruits. The latter answered that he did not have any. Nonetheless, Edna went to see and gather kamias fruits herself. At that juncture, she alleged that Cirilo held her by the arms, covered her mouth with one hand, held her neck with the other and forcibly dragged her towards a shed. Once inside the shed, she alleged that Cirilo forced her to lie down on the ground floor and raped her. Thereafter, Cirito slapped Edna on the face and warned her that she would suffer more and even kill her if she will reveal the incident to her parents.

Edna stated that she put on her panties and went home crying without the kamias. Afraid to report what had happened to her, upon reaching home, when her stepmother Felisa asked about the kamias, she was no longer crying.

Edna became pregnant and because she could no longer hide her condition, on August 18, 1981, she was forced to tell her father what Cirilo Flores had said to her. When asked why she did not tell him earlier, Edna replied that she did not want him to be involved in a fight.

Issue:

Whether or not the accused is guilty of the crime of rape.

Decision:

No. The Court noted significant facts from the evidence of the prosecution which raise serious doubts at its veracity. By complainant's own admission, appellant was not armed at all when she was allegedly dragged towards the shed, few meters away from the workshop of Abad Flores. How easily could she have shouted to arouse the attention of the people therein had she wanted to. The fact that she did nothing at all before, during and after the alleged rape strongly negates commission thereof. Besides, complainant's conduct immediately after the alleged abuse on her chastity, is very revealing. She went home to tell her stepmother that there was no kamias and the latter did not notice anything unusual about her. Days passed into weeks, weeks into months and according to Edna she kept her harrowing experience to herself because of fear that Cirilo would make good his threat to kill her. It was only in August 1981, or after eight and a half months, when she took the courage to tell her father about the alleged rape.

The silence of the alleged rape victim for eight and a half months rendered doubtful the truth of her charge. In fact, if complainant in the case at bar did not become pregnant she would not reveal the incident at all to anyone.

It is argued, however, that on December 12, 1980, Edna was only 14 years old, a country lass and a sixth grader, and therefore, was not capable of making false statements against her abuser. The contention would be true two generations ago but not anymore these days when teenagers are sex conscious, outgoing, frank and aggressive.

▶ ***ABDUL SATTAR V. THE STATE***
2016 PCr LJ 122
Criminal Appeal No.400-J of 2011, heard on 28 May 2015
Mazhar Iqbal Sidhu, J (Lahore High Court)

Facts:

The accused, with the help of another person, allegedly threw acid on the face, eyes, chest and other body parts (shoulder, arm, abdomen, eye and leg) of a woman, which resulted in "superficial to deep burns" on her body and permanent blindness in her right eye. He was tried and convicted by the lower court under sections 324/336/34, P.P.C read with section 7 of the Anti-Terrorism Act, 1997.

The accused denies the claim and alleges that a false claim was filed because of property issues.

Issue:

Whether or not the accused's guilt was proven beyond reasonable doubt.

Decision:

Yes. The medical evidence fully supported the account of the occurrence. The two witnesses, the victim and her mother, were consistent in their statement qua culpability of the accused. Moreover, the bottle of acid had been recovered from the accused during the investigation. The Court concluded with the following:

"Before parting with this judgment, the Court expresses its regret disquietude on happening of such like unfortunate incidents by the malefactors having no equanimity whereas, human being are ever best creature of Almighty Allah and to disfigure or disfeature the most beautiful part of a woman, i.e., face, permits punishability to a maleficent but may be regarded as sin the schadenfreude had visioned incessant plight and pity of the hapless victim till death. Oh! What a yelling and moaning, anyhow, Allah Almighty has absolute powers to dispense the real and ultimate justice."

C. Handouts

- **Report Summary: Helping Courts Address Implicit Bias – Strategies to Reduce the Influence of Implicit Bias**

- **Report Summary: Helping Courts Address Implicit Bias – Strategies to Reduce the Influence of Implicit Bias**



Helping Courts Address Implicit Bias

Strategies to Reduce the Influence of Implicit Bias*

NCSC National Center for State Courts www.ncsc.org

Race & Ethnic Fairness in the Courts

Compared to the science on the existence of implicit bias and its potential influence on behavior, the science on ways to mitigate implicit bias is relatively young and often does not address specific applied contexts such as judicial decision making. Yet, it is important for strategies to be concrete and applicable to an individual's work to be effective; instructions to simply avoid biased outcomes or respond in an egalitarian manner are too vague to be helpful (Dasgupta, 2009). To address this gap in concrete strategies applicable to court audiences, the authors reviewed the science on general strategies to address implicit bias and considered their potential relevance for judges and court professionals. They also convened a small group discussion with judges and judicial educators (referred to as the Judicial Focus Group) to discuss potential strategies. This document summarizes the results of these efforts. Part 1 identifies and describes conditions that exacerbate the effects of implicit bias on decisions and actions. Part 2 identifies and describes seven general research-based strategies that may help attenuate implicit bias or mitigate the influence of implicit bias on decisions and actions. Part 2 provides a brief summary of empirical findings that support the seven strategies and offers concrete suggestions, both research-based and extrapolated from existing research, to implement each strategy.[1] Some of the suggestions in Part 2 focus on individual actions to minimize the influence of implicit bias, and others focus on organizational efforts to (a) eliminate situational or systemic factors that may engender implicit bias and (b) promote a more egalitarian court culture. The authors provide the tables as a resource for addressing implicit bias with the understanding that the information should be reviewed and revised as new research and lessons from the field expand current knowledge.

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- **Report Summary: Helping Courts Address Implicit Bias – Strategies to Reduce the Influence of Implicit Bias** *(continued)*



Helping Courts Address Implicit Bias

Part 1. Combating Implicit Bias in the Courts: Understanding Risk Factors

The following conditions increase the likelihood that implicit bias may influence one's thoughts and actions.

Risk factor: Certain emotional states

Certain emotional states (anger, disgust) can exacerbate implicit bias in judgments of stigmatized group members, even if the source of the negative emotion has nothing to do with the current situation or with the issue of social groups or stereotypes more broadly (e.g., DeSteno, Dasgupta, Bartlett, & Cajdric, 2004; Dasgupta, DeSteno, Williams, & Hunsinger, 2009). Happiness may also produce more stereotypic judgments, though this can be consciously controlled if the person is motivated to do so (Bodenhausen, Kramer, & Susser, 1994).

Risk factor: Ambiguity

When the basis for judgment is somewhat vague (e.g., situations that call for discretion; cases that involve the application of new, unfamiliar laws), biased judgments are more likely. Without more explicit, concrete criteria for decision making, individuals tend to disambiguate the situation using whatever information is most easily accessible—including stereotypes (e.g., Dovidio & Gaertner, 2000; Johnson, Whitestone, Jackson, & Gatto, 1995).



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Risk factor: Salient social categories

A decision maker may be more likely to think in terms of race and use racial stereotypes because race often is a salient, i.e., easily-accessible, attribute (Macrae, Bodenhausen, & Milne, 1995; Mitchell, Nosek, & Banaji, 2003). However, when decision makers become conscious of the potential for prejudice, they often attempt to correct for it; in these cases, judges, court staff, and jurors would be less likely to exhibit bias (Sommers & Ellsworth, 2001).

Risk factor: Low-effort cognitive processing

When individuals engage in low-effort information processing, they rely on stereotypes and produce more stereotype-consistent judgments than when engaged in more deliberative, effortful processing (Bodenhausen, 1990). As a result, low-effort decision makers tend to develop inferences or expectations about a person early on in the information-gathering process. These expectations then guide subsequent information processing: Attention and subsequent recall are biased in favor of stereotype-confirming evidence and produce biased judgment (Bodenhausen & Wyer, 1985; Darley & Gross, 1983). Expectations can also affect social interaction between the decision maker (e.g., judge) and the stereotyped target (e.g., defendant), causing the decision maker to behave in ways that inadvertently elicit stereotype-confirming behavior from the other person (Word, Zanna, & Cooper, 1973).

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Risk factor: Distracted or pressured decision-making circumstances

Tiring (e.g., long hours, fatigue), stressful (e.g., heavy, backlogged, or very diverse caseloads; loud construction noise; threats to physical safety; popular or political pressure about a particular decision; emergency or crisis situations), or otherwise distracting circumstances can adversely affect judicial performance (e.g., Eells & Showalter, 1994; Hartley & Adams, 1974; Keinan, 1987). Specifically, situations that involve time pressure (e.g., van Knippenberg, Dijksterhuis, & Vermeulen, 1999), that force a decision maker to form complex judgments relatively quickly (e.g., Bodenhausen & Lichtenstein, 1987), or in which the decision maker is distracted and cannot fully attend to incoming information (e.g., Gilbert & Hixon, 1991; Sherman, Lee, Bessennof, & Frost, 1998) all limit the ability to fully process case information. Decision makers who are rushed, stressed, distracted, or pressured are more likely to apply stereotypes – recalling facts in ways biased by stereotypes and making more stereotypic judgments – than decision makers whose cognitive abilities are not similarly constrained.

Risk factor: Lack of feedback

When organizations fail to provide feedback that holds decision makers accountable for their judgments and actions, individuals are less likely to remain vigilant for possible bias in their own decision-making processes (Neuberg & Fiske, 1987; Tetlock, 1983).



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Part 2. Combating Implicit Bias in the Courts: Seeking Change

The following strategies show promise in reducing the effects of implicit bias on behavior.

Strategy 1: Raise awareness of implicit bias

Individuals can only work to correct for sources of bias that they are aware exist (Wilson & Brekke, 1994). Simply knowing about implicit bias and its potentially harmful effects on judgment and behavior may prompt individuals to pursue corrective action (cf. Green, Carney, Pallin, Ngo, Raymond, Iezzoni, & Banaji, 2007). Although awareness of implicit bias in and of itself is not sufficient to ensure that effective debiasing efforts take place (Kim, 2003), it is a crucial starting point that may prompt individuals to seek out and implement the types of strategies listed throughout this document.

What can the individual do?

1. **Seek out information on implicit bias**. Judges and court staff could attend implicit bias training sessions. Those who choose to participate in these sessions should ensure that they fully understand what implicit bias is and how it manifests in every day decisions and behavior by asking questions, taking the IAT, and/or reading about the scientific literature as a follow-up to the seminar.

- **Report Summary: Helping Courts Address Implicit Bias – Strategies to Reduce the Influence of Implicit Bias** *(continued)*



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What can the organization do?

1. **Provide training on implicit bias**. Courts could develop an implicit bias training program that presents participants not only with information about what implicit bias is and how it works, but that also includes information on specific, concrete strategies participants could use in their professional work to mitigate the effects of implicit bias. Judicial educators could present information about some of the other strategies listed in this report, or they could engage participants in a critical thinking activity designed to help them develop and/or tailor their own strategies. The Judicial Focus Group (JFG) thought that this type of training would be more effective if the program contained the following:

   a. **A facilitator judge to help conduct the training or sit on the panel**. If the court conducts a training program or hosts a panel on implicit bias as part of a symposium on judicial ethics, the JFG indicated that judges would add credibility to the session. Judges typically respond well when one of "their own" speaks out in support of an issue or position. The judge's presence could help make the session less threatening to participating judges and could help couch the discussion in terms of what can be done to make better decisions.

   b. **Many diverse examples of implicit bias in professional judgment and behavior**. The JFG felt that training should provide illustrative examples of implicit bias that span several professional disciplines (e.g., NBA officials, medical treatment decisions, hiring decisions) to show how pervasive the phenomenon is.



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c. **Experiential learning techniques**. The JFG suggested that small group exercises and other experiential learning techniques could help make information more personally relevant, which could provide a valuable frame of reference for those who are expected to resist the idea of implicit bias. Brain teaser exercises may be used to introduce the topic and demonstrate its broad application beyond race to gender, class, age, weight, and other stigmatized social categories.

Note: The JFG also encouraged a focus on implicit bias training for judges *before* they take the bench by making this training a component of new judge orientation. This way, future implicit bias training and requirements will simply be a part of "business as usual" and will incur less resistance.

Strategy 2: Seek to identify and consciously acknowledge real group and individual differences

The popular "color blind" approach to egalitarianism (i.e., avoiding or ignoring race; lack of awareness of and sensitivity to differences between social groups) fails as an implicit bias intervention strategy. "Color blindness" actually produces greater implicit bias than strategies that acknowledge race (Apfelbaum, Sommers, & Norton, 2008). Cultivating greater awareness of and sensitivity to group and individual differences appears to be a more effective tactic: Training seminars that acknowledge and promote an appreciation of group differences and multi-cultural viewpoints can help reduce implicit bias (Rudman, Ashmore, & Gary, 2001; Richeson & Nussbaum, 2004).

Diversity training seminars can serve as a starting point from which court culture itself can change. When respected court leadership actively supports the multiculturalism approach, those egalitarian goals can influence others (Aarts,

- **Report Summary: Helping Courts Address Implicit Bias – Strategies to Reduce the Influence of Implicit Bias** *(continued)*



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Gollwitzer, & Hassin, 2004). Moreover, when an individual (e.g., new employee) discovers that peers in the court community are more egalitarian, the individual's beliefs become less implicitly biased (Sechrist & Stangor, 2001). Thus, a system-wide effort to cultivate a workplace environment that supports egalitarian norms is important in reducing individual-level implicit bias. Note, however, that mandatory training or other imposed pressure to comply with egalitarian standards may elicit hostility and resistance from some types of individuals, failing to reduce implicit bias (Plant & Devine, 2001).

In addition to considering and acknowledging group differences, individuals should purposely compare and individuate stigmatized group members. By defining individuals in multiple ways other than in terms of race, implicit bias may be reduced (e.g., Djikic, Langer, & Stapleton, 2008; Lebrecht, Pierce, Tarr, & Tanaka, 2009; Corcoran, Hundhammer, & Mussweiler, 2009).

What can the individual do?

1. **Seek out and elect to participate in diversity training seminars**. Judges and court staff could seek out and participate in diversity training seminars that promote an appreciation of group differences and multicultural viewpoints. Exposure to the multiculturalism approach, particularly routine exposure, will help individuals develop the greater social awareness needed to overcome implicit biases.

2. **Seek out the company of other professionals who demonstrate egalitarian goals**. Surrounding oneself with others who are committed to greater egalitarianism will help positively influence one's own implicit beliefs and behaviors in the long run.



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3. **Invest extra effort into identifying the unique attributes of stigmatized group members**. Judges and court staff could think about how the stigmatized group members they encounter are *different* from others – particularly from other members of the same social/racial group. This type of individuating exercise will help reduce one's reliance on social or racial stereotypes when evaluating or interacting with another person.

What can the organization do?

1. **Provide routine diversity training**. Offer educational credits for voluntary judicial participation in elective diversity or multiculturalism seminars. Levinson (2007) also suggests that this could be a valuable process for jurors. Recruit a judge to help conduct the training or sit on the panel. In this training, lead by example. Any highly esteemed judge could serve as a role model in this context to promote egalitarian goals.

2. **Target leadership in the jurisdiction first.** Egalitarian behavior demonstrated by judicial leaders can serve to encourage greater adherence to egalitarian goals throughout the court community. The Judicial Focus Group argued that systemic change only occurs with buy-in from leadership—an essential step toward improved egalitarianism.

Note: See Strategy 7 for more suggestions on what an organization can do to cultivate more egalitarian norms in the court community.

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Strategy 3: Routinely check thought processes and decisions for possible bias

Individuals interested in minimizing the impact of implicit bias on their own judgment and behaviors should actively engage in more thoughtful, deliberative information processing. When sufficient effort is exerted to limit the effects of implicit biases on judgment, attempts to consciously control implicit bias can be successful (Payne, 2005; Stewart & Payne, 2008).

To do this, however, individuals must possess a certain degree of self-awareness. They must be mindful of their decision-making processes rather than just the results of decision making (Seamone, 2006) to eliminate distractions, to minimize emotional decision making, and to objectively and deliberatively consider the facts at hand instead of relying on schemas, stereotypes, and/or intuition (see risk factors in Part 1).

Instructions on how to correct for implicit bias may be effective at mitigating the influence of implicit bias on judgment if the instructions implement research-based techniques. Instructions should detail a clear, specific, concrete strategy that individuals can use to debias judgment instead of, for example, simply warning individuals to protect their decisions from implicit bias (e.g., Mendoza, Gollwitzer, & Amodio, 2010; Kim, 2003). For example, instructions could help mitigate implicit bias by asking judges or jurors to engage in mental perspective-taking exercises (i.e., imagine themselves in the other person's shoes; Galinsky & Moskowitz, 2000).

As discussed in Strategy 2, however, some seemingly intuitive strategies for counteracting bias can, in actuality, produce some unintended negative consequences. Instructions to simply suppress existing stereotypes (e.g., adopt the "color blindness" approach) have been known to produce a "rebound effect" that



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may increase implicit bias (Macrae, Bodenhausen, Milne, & Jetten, 1994). Others also perceive individuals instructed to implement the "color blindness" approach as more biased (Apfelbaum, Sommers, & Norton, 2008). For these reasons, decision makers should apply tested intervention techniques that are supported by empirical research rather than relying on intuitive guesses about how to mitigate implicit bias.

What can the individual do?

1. **Use decision-support tools**. Legal scholars have proposed several decision-support tools to promote greater deliberative (as opposed to intuitive) thinking (Guthrie, Rachlinski, & Wistrich, 2007). These tools, while untested, would primarily serve as vehicles for research-based decision-making approaches and self-checking exercises that demonstrably mitigate the impact of implicit bias. The Judicial Focus Group (JFG) also supported the use of such tools, which include:

   a. **Note-taking**. Judges and jurors should take notes as the case progresses so that they are not forced to rely on memory (which is easily biased; see Part 1 and Levinson, 2007) when reviewing the evidence and forming a decision.

   b. **Articulate your reasoning process** (e.g., opinion writing). By prompting decision makers to document the reasoning behind a decision in some way before announcing it, judges and jurors may review their reasoning processes with a critical eye for implicit bias before publicly committing to a decision. Techniques or tools that help decision makers think through their decision more clearly and ensure that it is based on sound reasoning before committing to it publicly will protect them from rationalizing decisions post hoc (also see Strategy 6 on instituting feedback mechanisms). Sharing this reasoning up front with the public can also positively affect public perceptions of fairness.

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c. **Checklists or bench cards**. The JFG suggested the use of checklists or bench cards that list some "best practice" questions or exercises (e.g., perspective-taking, cloaking). These tools could prompt decision makers to more systematically reflect on and scrutinize the reasoning behind any decision for traces of possible bias. Note that this strategy should be used only after the decision maker has received implicit bias and diversity training, and should be offered for voluntary use. If untrained judges rely on these tools, their efforts to correct for bias may be sporadic and restricted to isolated cases. If resistant judges are compelled to use these tools, checklists as a forced procedure could backfire and actually increase biases in these types of individuals.

What can the organization do?

1. **Develop guidelines that offer concrete strategies on how to correct for implicit bias**. Courts could develop and present guidelines to decision makers on how to check for and correct for implicit bias. These guidelines should specify an explicit, concrete strategy for doing so that has been empirically shown to reduce the effects of implicit bias on judgment and behavior. Some research-based strategies could include instructions that walk people through a perspective-taking exercise (Galinsky & Moskowitz, 2000) or a cloaking exercise (i.e., checking decisions for bias by imagining how one would evaluate the stigmatized group member if he or she belonged to a different, non-stigmatized social group), or that direct people to adopt specific implementation intentions to control for potential bias in specific instances (e.g., if-then plans such as *if: encounter a stigmatized group member, then: think counter-stereotypic thoughts*; see Mendoza, Gollwitzer, & Amodio, 2010). It should NOT instruct a person to ignore or suppress stereotypes and/or implicit biases or offer any other intervention technique that is not supported by empirical literature on implicit bias.



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2. **Institute formal protocols or develop decision-support tools for guidance**. Courts could establish "best practice" protocols or self-checking procedures (e.g., perspective-taking, cloaking; see above) to help judges identify and override implicit bias. The judiciary could also develop protocols to help minimize situational ambiguity (see Part 1 for more on situational ambiguity and Strategy 5 for further discussion about strategies that may be used to reduce ambiguity).

Strategy 4: Identify distractions and sources of stress in the decision-making environment and remove or reduce them

Decision makers need enough time and cognitive resources to thoroughly process case information to avoid relying on intuitive reasoning processes that can result in biased judgments (see Part 1).

What can the individual do?

1. **Allow for more time on cases in which implicit bias may be a concern.** The Judicial Focus Group (JFG) suggested that judges prepare more in advance of hearings in which disadvantaged group members are involved (as attorneys, defendants/litigants, victims, key witnesses). If possible, judges could slow down their decision-making process by spending more time reviewing the facts of the case before committing to a decision. If implicit bias is suspected, judges could reconvene and review case material outside of the court environment to reduce time pressure.

2. **Clear your mind and focus on the task at hand.** Judges should become adept at putting distractions aside and focusing completely on the case and evidence at hand. Meditation courses may help judges develop or refine these skills (Kang & Banaji, 2006; Seamone, 2006).

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What can the organization do?

1. **Conduct an organizational review**. An organizational review could help the court determine whether and how the court fosters bias. Part of this review should include a critical assessment of the burden on judges and other decision makers. Some stressors that could adversely affect judicial performance include time pressure (as a result of heavy caseloads, complex cases, or dockets with a broad array of case types), fatigue (as a result of long hours, threats to physical safety, or other emergency or crisis situations), and distractions (as a result of multi-tasking, overburdened workloads, or even loud construction noise that day). Courts could modify procedures to allow judges sufficient time to consider each case by, for example, reorganizing the court calendar to reduce the typical caseload for each judge, minimizing the necessity for spur-of-the-moment decisions, or permitting the judge to issue tentative decisions or reconvene if further deliberation is necessary (e.g., see Guthrie, Rachlinski, & Wistrich, 2007).

Strategy 5: Identify sources of ambiguity in the decision-making context and establish more concrete standards before engaging in the decision-making process

Situational ambiguity may arise for cases in which the formal criteria for judgment are somewhat vague (e.g., laws, procedures that involve some degree of discretion on behalf of the decision maker). These especially include (but are not limited to) cases that involve the interpretation of newly established laws or case types that are unfamiliar or less familiar to the decision maker. In these cases, decision makers should preemptively commit to specific decision-making criteria (e.g., the importance of various types of evidence to the decision) *before* hearing a case or reviewing evidence to minimize the opportunity for implicit



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bias (Uhlmann & Cohen, 2005). Establishing this structure before entering the decision-making context will help prevent constructing criteria after the fact in ways biased by implicit stereotypes but rationalized by specific types of evidence (e.g., placing greater weight on stereotype-consistent evidence in a case against a black defendant than one would in a case against a white defendant).

What can the individual do?

1. **Preemptively commit to more specific decision-making criteria**. Before entering into a decision-making context characterized by ambiguity or that permits greater discretion, judges and jurors could establish their own informal structure or follow suggested protocol (if instituted) to help create more objective structure in the decision-making process. Commit to these decision-making criteria before reviewing case-specific information to minimize the impact of implicit bias on the reasoning process.

What can the organization do?

1. **Institute formal protocol to help decision makers**. The court could establish and institute formal protocols that decision makers could follow to help them identify sources of ambiguity and that offer suggestions on how to reduce these types of ambiguity in the decision-making context.

2. **Specialization**. The Judicial Focus Group (JFG) discussed the possibility that case decisions by judges with special expertise in that particular area of law may be less prone to implicit bias than decisions made by judges without such expertise. They reasoned that without familiarity, there is greater ambiguity and uncertainty in decision making. However, the JFG also discussed how this could be a double-edged sword: Specialist judges may be

- **Report Summary: Helping Courts Address Implicit Bias – Strategies to Reduce the Influence of Implicit Bias** *(continued)*



Helping Courts Address Implicit Bias

on autopilot with familiar case types and may not be engaged in the kind of deliberative thinking that helps reduce the impact of implicit bias on judgment. To prevent "autopilot" stereotyping, specialist judges in particular should commit to thinking deliberatively (see Strategy 3 for some suggestions on how to check decisions and thought processes for possible bias).

Strategy 6: Institute feedback mechanisms

Providing egalitarian consensus information (i.e., information that others in the court hold egalitarian beliefs rather than adhere to stereotypic beliefs) and other feedback mechanisms can be powerful tools in promoting more egalitarian attitudes and behavior in the court community (Sechrist & Stangor, 2001). To encourage individual effort in addressing personal implicit biases, court administration may opt to provide judges and other court professionals with relevant performance feedback. As part of this process, court administration should consider the type of judicial decision-making data currently available or easily obtained that would offer judges meaningful but nonthreatening feedback on demonstrated biases. Transparent feedback from regular or intermittent peer reviews that raise personal awareness of biases could prompt those with egalitarian motives to do more to prevent implicit bias in future decisions and actions (e.g., Son Hing, Li, & Zanna, 2002). This feedback should include concrete suggestions on how to improve performance (cf. Mendoza, Gollwitzer, & Amodio, 2010; Kim, 2003) and could also involve recognition of those individuals who display exceptional fairness as positive reinforcement.

Helping Courts Address Implicit Bias

Feedback tends to work best when it (a) comes from a legitimate, respected authority, (b) addresses the person's decision-making process rather than simply the decision *outcome*, and (c) when provided *before* the person commits to a decision rather than *afterwards*, when he or she has already committed to a particular course of action (see Lerner & Tetlock, 1999, for a review). Note, however, that feedback mechanisms which apply coercive pressure to comply with egalitarian standards can elicit hostility from some types of individuals and fail to mitigate implicit bias (e.g., Plant & Devine, 2001). By inciting hostility, these imposed standards may even be counterproductive to egalitarian goals, generating backlash in the form of increased explicit and implicit prejudice (Legault, Gutsell, & Inzlicht, 2011).

What can the individual do?

1. **Actively seek feedback from others**. Judges can seek out their own informal "checks and balances" by organizing or participating in sentencing round tables, or by consulting with a skilled mentor or senior judge for objective feedback on how to handle a challenging case or difficult situation.

2. **Actively seek feedback from others regarding past performance**. With an open mind, judges and court staff could talk to colleagues, supervisors, or others to request performance feedback. This information could be helpful in determining whether a person's current efforts to control or reduce implicit bias are effective or could be improved.

3. **Articulate your reasoning process**. To ensure sound reasoning in every case, judges could choose to document or articulate the underlying logic of their decisions. Not only does this exercise afford judges the opportunity to critically review their decision-making processes in each case, but taking it a step further—making this reasoning transparent in court—can have positive effects on public perceptions of fairness (see *Articulate your reasoning* process in Strategy 3, above).

- **Report Summary: Helping Courts Address Implicit Bias – Strategies to Reduce the Influence of Implicit Bias** *(continued)*



Helping Courts Address Implicit Bias

What can the organization do?

1. **Adopt a peer-review process**. Judges could benefit from additional feedback about possible bias in their judicial performance. The court could arrange to have judges observe and provide feedback to one another on a rotating schedule. Guthrie, Rachlinski, and Wistrich (2007) offered a more formal approach: Every 2-3 years, an experienced team of reviewers (comprised of peer judges) could visit the court and for each judge at that court, the team would review the transcripts, rulings, and other material for a few past cases. The team would then provide each judge with performance feedback and suggestions, if necessary, for improvement. The team should be trained to deliver this feedback in a constructive, non-threatening way.

2. **Develop a bench-bar committee**. The Judicial Focus Group (JFG) also suggested that courts develop a bench-bar committee, which could oversee an informal internal grievance process that receives anonymous complaints about judicial performance in the area of racial and ethnic fairness. Similar to the peer review process mentioned above, this committee (or a select group of trained peer or mentor judges) could review a sample of past cases or observe workplace behavior and offer feedback and guidance to the judge.

3. **Hold sentencing round tables**. The JFG suggested that judges convene a sentencing round table to review hypothetical cases involving implicit bias. Prior to the round table, the judges review the hypothetical cases and arrive prepared to discuss the sentencing decision they would issue in each case. When they convene, all judges reveal their decisions and discuss their reasoning frankly and candidly. This process can help judges think more deliberatively about the possibility of implicit biases entering their decisions and offers a forum for judges to obtain feedback from peers.



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Strategy 7: Increase exposure to stigmatized group members and counter-stereotypes and reduce exposure to stereotypes

Increased contact with counter-stereotypes—specifically, increased exposure to stigmatized group members that contradict the social stereotype—can help individuals negate stereotypes, affirm counter-stereotypes, and "unlearn" the associations that underlie implicit bias. "Exposure" can include imagining counter-stereotypes (Blair, Ma, & Lenton, 2001), incidentally observing counter-stereotypes in the environment (Dasgupta & Greenwald, 2001; Olson & Fazio, 2006), engaging with counter-stereotypic role models (Dasgupta & Asgari, 2004; Dasgupta & Rivera, 2008) or extensive practice making counter-stereotypic associations (Kawakami, Dovidio, Moll, Hermsen, & Russin, 2000).

For individuals who seek greater contact with counter-stereotypic individuals, such contact is more effective when the counter-stereotype is of at least equal status in the workplace (see Pettigrew & Tropp, 2006). Moreover, positive and meaningful interactions work best: Cooperation is one of the most powerful forms of debiasing contact (e.g., Sherif, Harvey, White, Hood & Sherif, 1961).

In addition to greater contact with counter-stereotypes, this strategy also involves decreased exposure to stereotypes. Certain environmental cues can automatically trigger stereotype activation and implicit bias. Images and language that are a part of any signage, pamphlets, brochures, instructional manuals, background music, or any other verbal or visual communications in the court may inadvertently activate implicit biases because they convey stereotypic information (see Devine, 1989; Rudman & Lee, 2002; Anderson,

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Benjamin, & Bartholow, 1998; for examples of how such communications can prime stereotypic actions and judgments; see also Kang & Banaji, 2006). Identifying these communications and removing them or replacing them with non-stereotypic or counter-stereotypic information can help decrease the amount of daily exposure court employees and other legal professionals have with the types of social stereotypes that underlie implicit bias.

What can the individual do?

1. **Imagine counter-stereotypes or seek out images of admired exemplars**. To reduce the impact of implicit bias on judgment, judges and court staff could imagine or view images of admired or counter-stereotypic exemplars of the stereotyped social group (e.g., Martin Luther King, Jr.) before entering a decision-making scenario that could activate these social stereotypes. To accomplish this, researchers on implicit bias have suggested that people hang photos or program screen savers and desktop images of role models or others that challenge traditional racial stereotypes.

2. **Seek greater contact with counter-stereotypic role models**. Individuals who are motivated to become more egalitarian could also spend more time in the presence of people who are counter-stereotypic role models to reinforce counter-stereotypic associations in the brain and make traditional stereotypes less accessible for use.

3. **Practice making counter-stereotypic associations**. Individuals who are motivated to change their automatic reactions should practice making positive associations with minority groups, affirming counter-stereotypes, and negating stereotypes. Implicit biases may be "automatic," but corrective and debiasing strategies can also become automated with motivation and practice.



Helping Courts Address Implicit Bias

What can the organization do?

1. **Conduct an organizational review**. An organizational review could help the court determine whether and how the court fosters bias. Part of this review should include an assessment of court communications (visual and auditory) to identify all communications in the courthouse that convey stereotypic information. Change these communications to convey egalitarian norms and present examples of counter-stereotypes. These positive cues can serve as subtle reminders to judges and court staff that reinforce a culture of equality.

2. **Follow equal-opportunity and affirmative action (EOAA) hiring practices**. Members of stigmatized groups, when fairly represented in valued, authoritative roles (Richeson & Ambady, 2003), offer opportunities to foster positive intergroup relations and present other judges with readily accessible counter-stereotypes that they can draw upon to reduce implicit bias.

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[1] For more information on the empirical research supporting Tables 1 and 2, see Appendix G, Tables G-3 and G-4, in Casey, Warren, Cheesman, and Elek (2012).

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References

Aarts, H., Gollwitzer, P., & Hassin, R. (2004). Goal contagion: Perceiving is for pursuing. *Journal of Personality and Social Psychology*, *87*, 23-37.

Anderson, C., Benjamin, A., Bartholow, B. (1998). Does the gun pull the trigger? Automatic priming effects of weapon pictures and weapon names. *Psychological Science*, *9*, 308-314.

Apfelbaum, E., Sommers, S., & Norton, M. (2008). Seeing race and seeming racist? Evaluating strategic colorblindness in social interaction. *Journal of Personality and Social Psychology*, *95*, 918-932.

Blair, I., Ma, J., & Lenton, A. (2001). Imagining stereotypes away: The moderation of implicit stereotypes through mental imagery. *Journal of Personality and Social Psychology*, *81*, 828-841.

Bodenhausen, G. (1990). Stereotypes as judgmental heuristics: Evidence of circadian variations in discrimination. *Psychological Science*, *1*, 319-322.

Bodenhausen, G., Kramer, G., & Susser, K. (1994). Happiness and stereotypic thinking in social judgment. *Journal of Personality and Social Psychology*, *66*, 621-632.

Bodenhausen, G., & Lichtenstein, M., (1987). Social stereotypes and information-processing strategies: The impact of task complexity. *Journal of Personality and Social Psychology*, *52*, 871-880.

Bodenhausen, G., & Wyer, R. (1985). Effects of stereotypes in decision making and information processing strategies. *Journal of Personality and Social Psychology*, *46*, 267-282.

Casey, P. M., Warren, R. K., Cheesman, F. L., II, & Elek, J. K. (2012). *Helping courts address implicit bias: Resources for education*. Williamsburg, VA: National Center for State Courts.

Corcoran, K., Hundhammer, T., & Mussweiler, T. (2009). A tool for thought! When comparative thinking reduces stereotyping effects. *Journal of Experimental Social Psychology*, *45*, 1008-1011.

Darley, J., & Gross, P. (1983). A hypothesis-confirming bias in labeling effects. *Journal of Personality and Social Psychology*, *44*, 20-33.

Dasgupta, N. (2009). Mechanisms underlying the malleability of implicit prejudice and stereotypes: The role of automaticity and cognitive control. In T. Nelson (Ed). *Handbook of prejudice, stereotyping, and discrimination* (pp. 267-284). New York: Psychology Press.

Dasgupta, N. & Asgari, S. (2004). Seeing is believing: Exposure to counterstereotypic women leaders and its effect on the malleability of automatic gender stereotyping. *Journal of Experimental Social Psychology*, *40*, 642-658.

Helping Courts Address Implicit Bias

Dasgupta, N., DeSteno, D., Williams, L., & Hunsinger, M. (2009). Fanning the flames of prejudice: The influence of specific incidental emotions on implicit prejudice. *Emotion*, *9*, 585-591.

Dasgupta, N. & Greenwald, A. (2001). On the malleability of automatic attitudes: Combating automatic prejudice with images of admired and disliked individuals. *Journal of Personality and Social Psychology*, *81*, 800-814.

Dasgupta, N., & Rivera, L. (2008). When social context matters: The influence of long-term contact and short-term exposure to admired outgroup members on implicit attitudes and behavioral intentions. *Social Cognition*, *26*, 54-66.

DeSteno, D., Dasgupta, N., Bartlett, M., & Cajdric, A. (2004). Prejudice from thin air: The effect of emotion on automatic intergroup attitudes. *Psychological Science*, *15*, 319-324.

Devine, P. (1989). Stereotypes and prejudice: Their automatic and controlled components. *Journal of Personality and Social Psychology*, *56*, 5-18.

Djikic, M., Langer, E., & Stapleton, S. (2008). Reducing stereotyping through mindfulness: Effects on automatic stereotype-activated behaviors. *Journal of Adult Development*, *15*, 106-111.

Dovidio, J., & Gaertner, S. (2000). Aversive racism and selection decisions: 1989 and 1999. *Psychological Science*, *11*, 319-323.

Eells, T., & Showalter, C. (1994). Work-related stress in American trial judges. *Bulletin of the American Academy of Psychiatry & the Law*, *22*, 71-83.

Galinsky, A., & Moskowitz, G. (2000). Perspective-taking: Decreasing stereotype expression, stereotype accessibility, and in-group favoritism. *Journal of Personality and Social Psychology*, *78*, 702-724.

Gilbert, D., & Hixon, J. (1991). The trouble of thinking: Activation and application of stereotypic beliefs. *Journal of Personality and Social Psychology*, *60*, 509-517.

Green, A., Carney, D., Pallin, D., Ngo, L., Raymond, K., Iezzoni, L., & Banaji, M. (2007). Implicit bias among physicians and its prediction of thrombolysis decisions for black and white patients. *Journal of General Internal Medicine*, *22*, 1231-1238.

Guthrie, C., Rachlinski, J., & Wistrich, A. (2007). Blinking on the bench: How judges decide cases. *Cornell Law Review*, *93*, 101-141.

Hartley, L., & Adams, R. (1974). Effect of noise on the Stroop test. *Journal of Experimental Psychology*, *102*, 62-66.

Johnson, J. Whitestone, E., Jackson, L, & Gatto, L. (1995). Justice is still not colorblind: Differential racial effects of exposure to inadmissible evidence. *Personality and Social Psychology Bulletin*, *21*, 893-898.

Kang, J., & Banaji, M. (2006). Fair measures: A behavioral realist revision of 'affirmative action'. *California Law Review*, *94*, 1063-1118.

Kawakami, K., Dovidio, J., Moll, J., Hermsen, S., & Russin, A. (2000). Just say no (to stereotyping): Effects of training in the negation of stereotypic associations on stereotype activation. *Journal of Personality and Social Psychology*, *78*, 871-888.

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Helping Courts Address Implicit Bias

Keinan, G. (1987). Decision making under stress: Scanning of alternatives under controllable and uncontrollable threats. *Journal of Personality and Social Psychology*, *52*, 639-644.

Kim, D. (2003) Voluntary controllability of the implicit association test (IAT). *Social Psychology Quarterly*, *66*, 83-96.

Lebrecht, S., Pierce, L., Tarr, M. & Tanaka, J. (2009). Perceptual other-race training reduces implicit racial bias. *PLoS ONE*, 4, e4215.

Legault, L., Gutsell, J., & Inzlicht, M. (2011). Ironic effects of antiprejudice messages: How motivational interventions can reduce (but also increase) prejudice. *Psychological Science*, *22*, 1472-1477.

Lerner, J., & Tetlock, P. (1999). Accounting for the effects of accountability. *Psychological Bulletin*, *125*, 255-275.

Levinson, J. D. (2007). Forgotten racial equality: Implicit bias, decisionmaking, and misremembering. *Duke Law Journal*, *57*, 345-424.

Macrae, C., Bodehausen, G., & Milne, A. (1995). The dissection of selection in person perception: Inhibitory processes in social stereotyping. *Journal of Personality and Social Psychology*, *69*, 397-407.

Macrae, C., Bodenhausen, G., Milne, A., & Jetten, J. (1994). Out of mind but back in sight: Stereotypes on the rebound. *Journal of Personality and Social Psychology*, *67*, 808-817.

Mendoza, S., Gollwitzer, P., & Amodio, D. (2010). Reducing the expression of implicit stereotypes: Reflexive control through implementation intentions. *Personality and Social Psychology Bulletin*, *36*, 512-523.

Mitchell, J., Nosek, B., & Banaji, M. (2003). Contextual variations in implicit evaluation. *Journal of Experimental Psychology: General*, *132*, 455-469.

Neuberg, S., & Fiske, S. (1987). Motivational influences on impression formation: Outcome dependency, accuracy-driven attention, and individuating processes. *Journal of Personality and Social Psychology*, *53*, 431-444.

Olson, M. & Fazio, R. (2006). Reducing automatically activated racial prejudice through implicit evaluative conditioning. *Personality and Social Psychology Bulletin*, *32*, 421-433.

Payne, K. (2005). Conceptualizing control in social cognition: How executive functioning modulates the expression of automatic stereotyping. *Journal of Personality and Social Psychology*, *89*, 488-503.

Pettigrew, T., & Tropp, L. (2006). A meta-analytic test of intergroup contact theory. *Journal of Personality and Social Psychology*, *90*, 751-783.

Plant, A., & Devine, P. (2001). Responses to other-imposed pro-black pressure: Acceptance or backlash? *Journal of Experimental Social Psychology*, *37*, 486-501.

Richeson, J., & Ambady, N. (2003). Effects of situational power on automatic racial prejudice. *Journal of Experimental Social Psychology*, *39*, 177-183.

Helping Courts Address Implicit Bias

Richeson, J., & Nussbaum, R. (2004). The impact of multiculturalism versus color-blindness on racial bias. *Journal of Experimental Social Psychology*, *40*, 417-423.

Rudman, L., Ashmore, R., & Gary, M. (2001). "Unlearning" automatic biases: The malleability of implicit prejudice and stereotypes. *Journal of Personality and Social Psychology*, *81*, 856-868.

Rudman, L., & Lee, M. (2002). Implicit and explicit consequences of exposure to violent and misogynous rap music. *Group Processes and Intergroup Relations*, *5*, 133-150.

Seamone, E. R. (2006). Understanding the person beneath the robe: Practical methods for neutralizing harmful judicial biases. *Willamette Law Review*, *42*, 1-76.

Sechrist, G., & Stangor, C. (2001). Perceived consensus influences intergroup behavior and stereotype accessibility. *Journal of Personality and Social Psychology*, *80*, 645-654.

Sherif, M., Harvey, O., White, B., Hood, W., & Sherif, C. (1961). *Intergroup conflict and cooperation: The Robbers Cave experiment*. Norman: University of Oklahoma Book Exchange.

Sherman, J., Lee, A., Bessenoff, G., & Frost, L. (1998). Stereotype efficiency reconsidered: Encoding flexibility under cognitive load. *Journal of Personality and Social Psychology*, *75*, 589-606.

Sommers, S. & Ellsworth, P. (2001). White juror bias: An investigation of prejudice against black defendants in the American courtroom. *Psychology, Public Policy, and Law*, *7*, 201-229.

Son Hing, L., Li, W., & Zanna, M. (2002). Inducing hypocrisy to reduce prejudicial response among aversive racists. *Journal of Experimental Social Psychology*, *38*, 71-77.

Stewart, B., & Payne, B. (2008). Bringing automatic stereotyping under control: Implementation intentions as efficient means of thought control. *Personality and Social Psychology Bulletin, 34*, 1332-1335.

Tetlock, P. (1983). Accountability and complexity of thought. *Journal of Personality and Social Psychology*, *45*, 74-83.

Uhlmann, E., & Cohen, G. (2005). Constructed criteria: Redefining merit to justify discrimination. *Psychological Science, 16*, 474-480.

van Knippenberg, A., Dijksterhuis, A., & Vermeulen, D. (1999). Judgment and memory of a criminal act: The effects of stereotypes and cognitive load. *European Journal of Social Psychology*, *29*, 191-201.

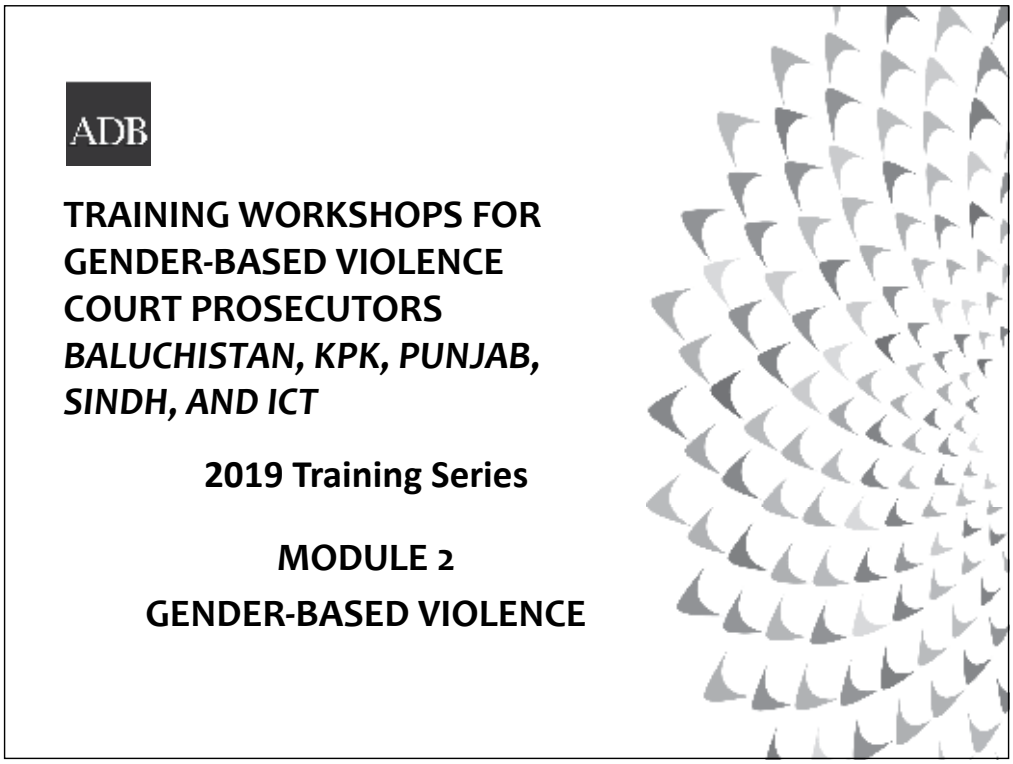
Wilson, T. D., & Brekke, N. (1994). Mental contamination and mental correction: Unwanted influences on judgments and evaluations. *Psychological Bulletin*, *116*, 117-142.

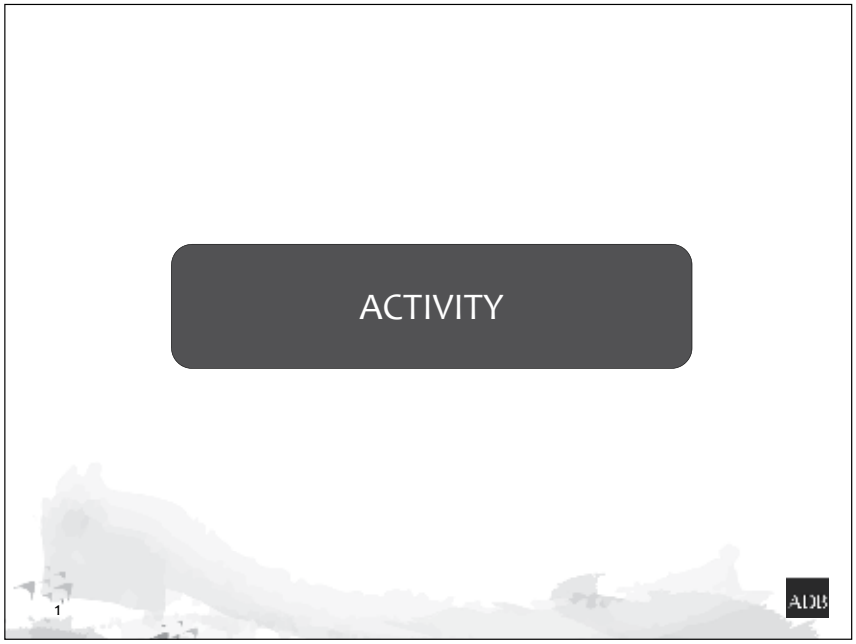
Word, C., Zanna, M., & Cooper, J. (1973). The nonverbal mediation of self-fulfilling prophecies in interracial interaction. *Journal of Experimental Social Psychology*, *10*, 102-120.

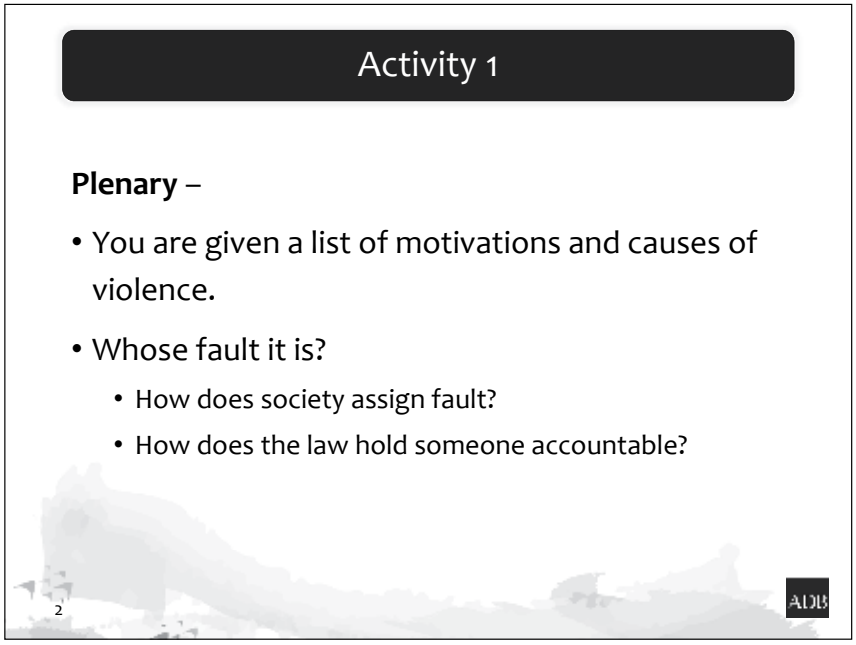
Module 2:
GENDER-BASED VIOLENCE

A. Module Activities

- **Activity 1: Causes of Gender-Based Violence (GBV)**




ACTIVITY
1
ADB


Activity 1
Plenary –
• You are given a list of motivations and causes of violence.
• Whose fault it is?
• How does society assign fault?
• How does the law hold someone accountable?
2
ADB

Causes of GBV?

- Refuses to obey father/husband?
- Insufficient dower/bridal gifts?
- Insists on going out at night?
- Wearing inappropriate clothes?
- Spends too much time chatting on facebook?
- Cannot control children – children too noisy?
- Home too dirty. Clothes not washed.
- Turns down romantic interest/marriage proposal?

3

ADB

- For each row, either the male or female descriptions/perceptions are shown. Participants are asked how society will perceive the same scenario if it pertained to the other gender.
- How are these related to GBV?

4

ADB

Causes of GBV? Gender-based societal perception

Male	Female
	She was rude. She refused to obey me.

5

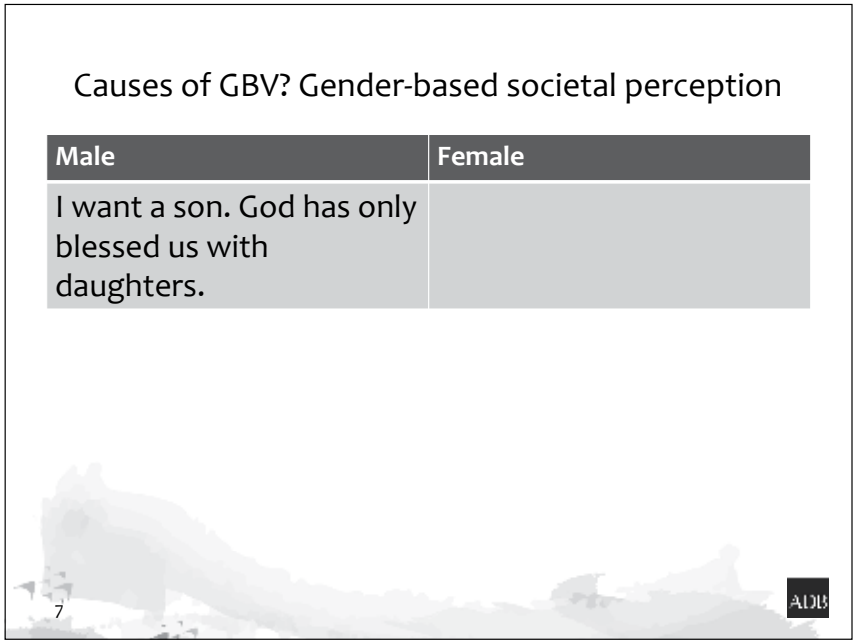
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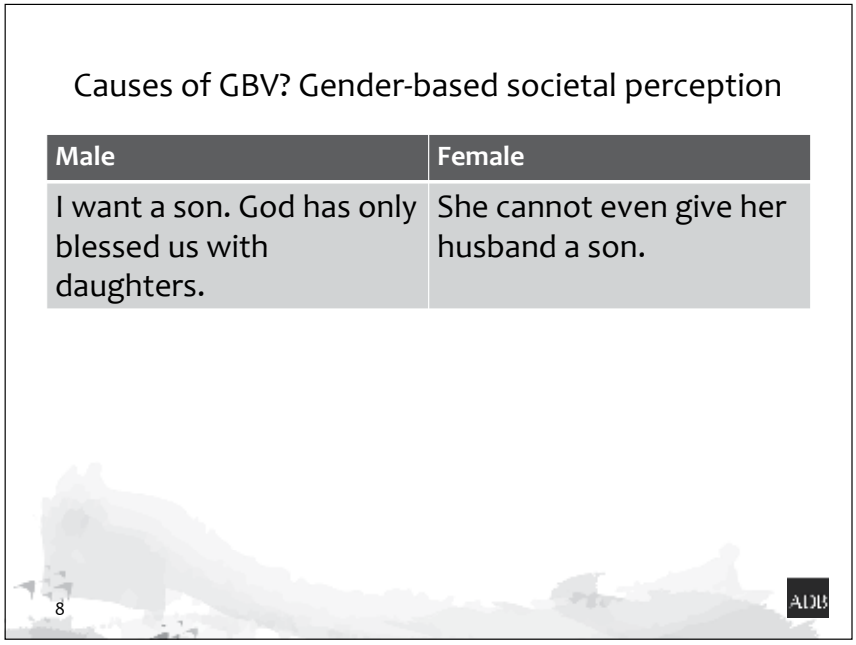
Causes of GBV? Gender-based societal perception

Male	Female
He had such a bad day. He was grumpy and tired. His family should understand.	She was rude and refused to obey me.

6

ADB


Causes of GBV? Gender-based societal perception
Male
Female
I want a son. God has only blessed us with daughters.
7
ADB


Causes of GBV? Gender-based societal perception
Male
Female
I want a son. God has only blessed us with daughters.
She cannot even give her husband a son.
8
ADB

Causes of GBV? Gender-based societal perception

Male	Female
He dresses well. He is handsome.	

9

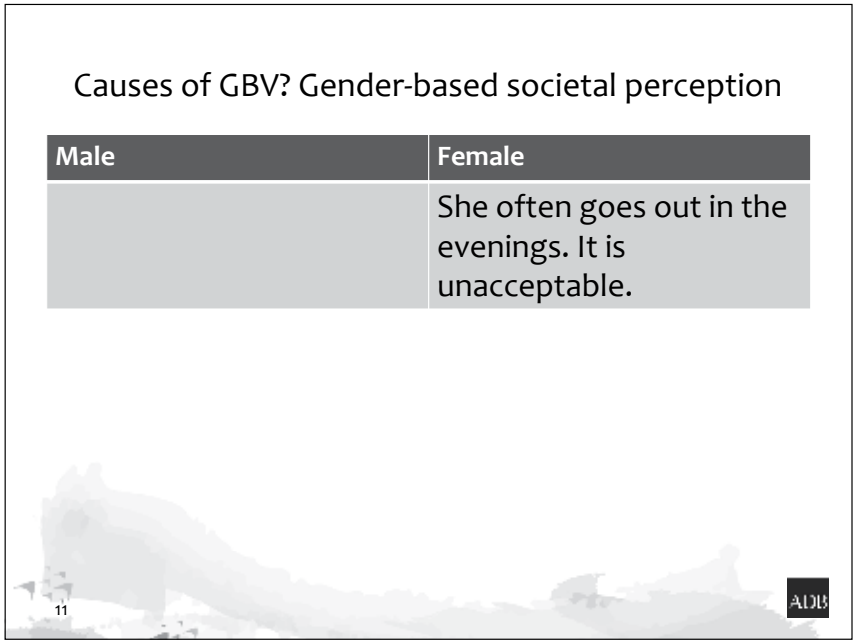
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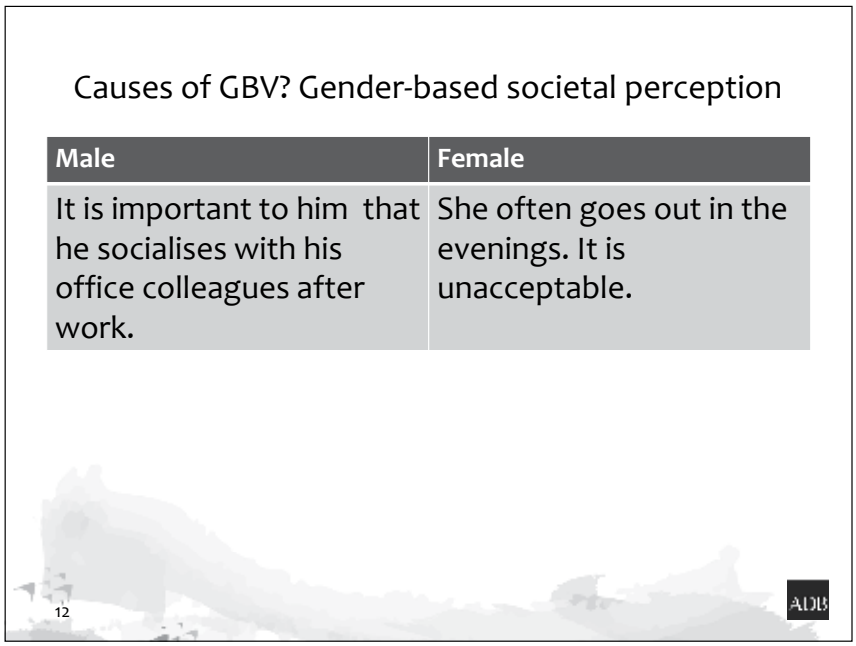
Causes of GBV? Gender-based societal perception

Male	Female
He dresses well. He is handsome.	She is showing off her beauty. She is shameless.

10

ADB


Causes of GBV? Gender-based societal perception
Male
Female
She often goes out in the evenings. It is unacceptable.
11
ADB


Causes of GBV? Gender-based societal perception
Male
Female
It is important to him that he socialises with his office colleagues after work.
She often goes out in the evenings. It is unacceptable.
12
ADB

Causes of GBV? Gender-based societal perception

Male	Female
He is knowledgeable, informative and is generous in sharing his knowledge.	

13

Causes of GBV? Gender-based societal perception

Male	Female
He is knowledgeable, informative and is generous in sharing his knowledge.	She is irritating and talks too much.

14

Causes of GBV? Gender-based societal perception

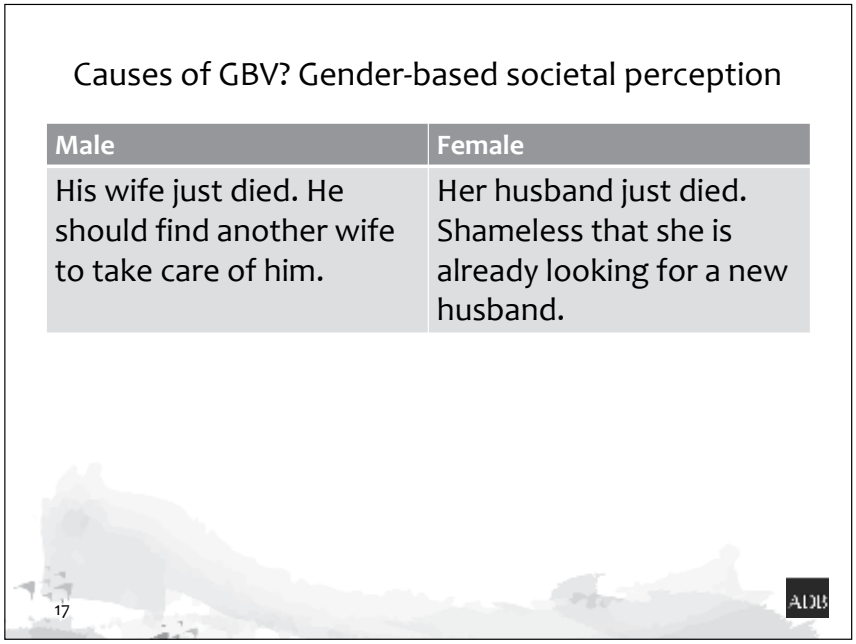
Male	Female
He had such a bad day. He was grumpy and tired. His family should understand.	She was rude. She refused to obey me.
I want a son. We only have daughters.	She cannot even give her husband a son.
He dresses well. He is handsome.	She is showing off her beauty. She is shameless.
It is important to him that he socialises with his office colleagues after work.	She often goes out in the evenings. It is unacceptable.
He is knowledgeable, informative and likes to share.	She is irritating and talks too much.

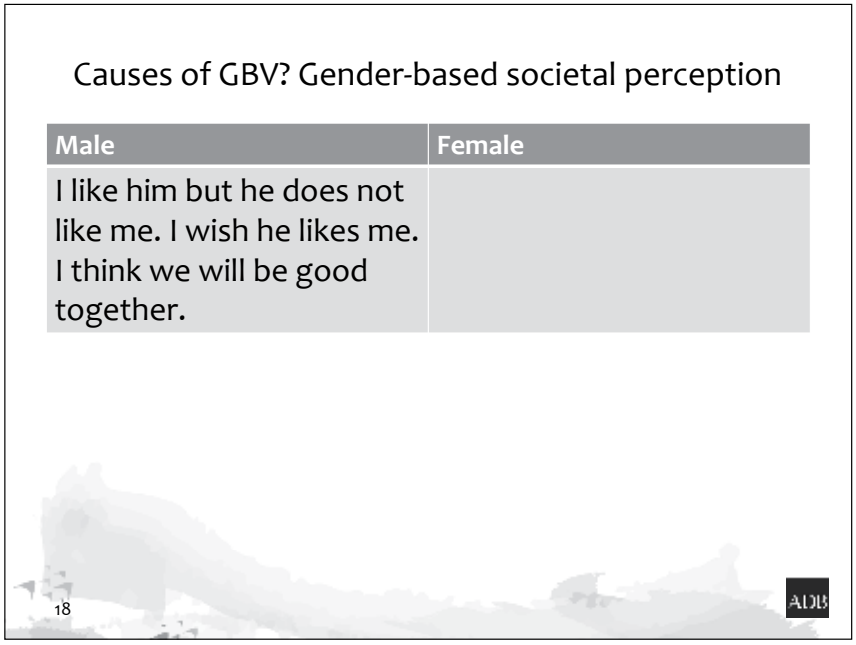
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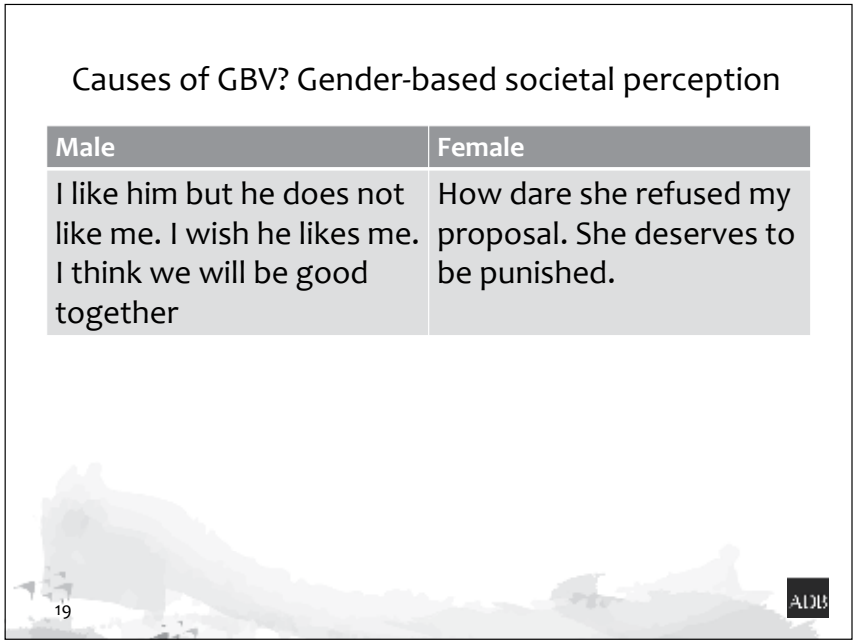
Causes of GBV? Gender-based societal perception

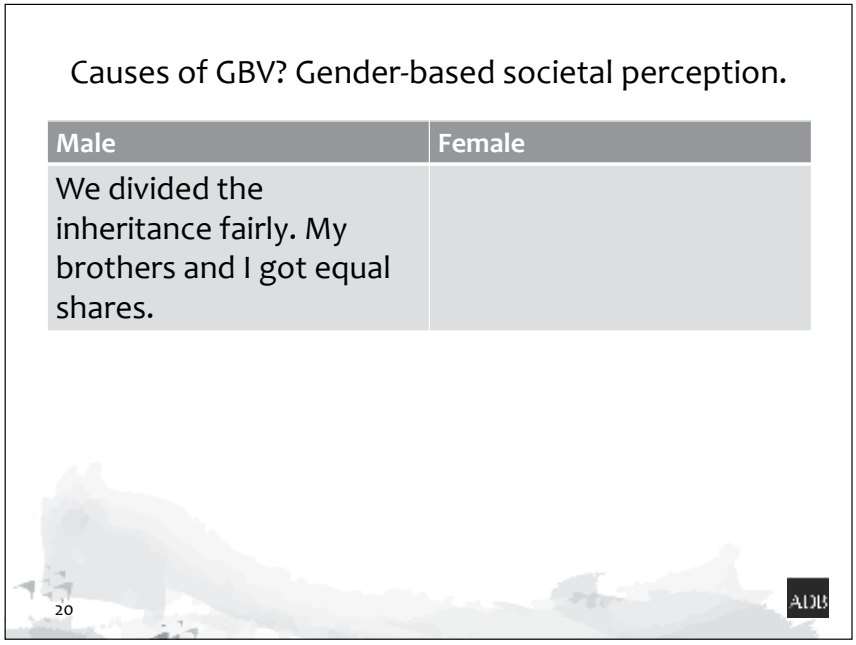
Male	Female
	Her husband just died. Shameless that she is already looking for a new husband.

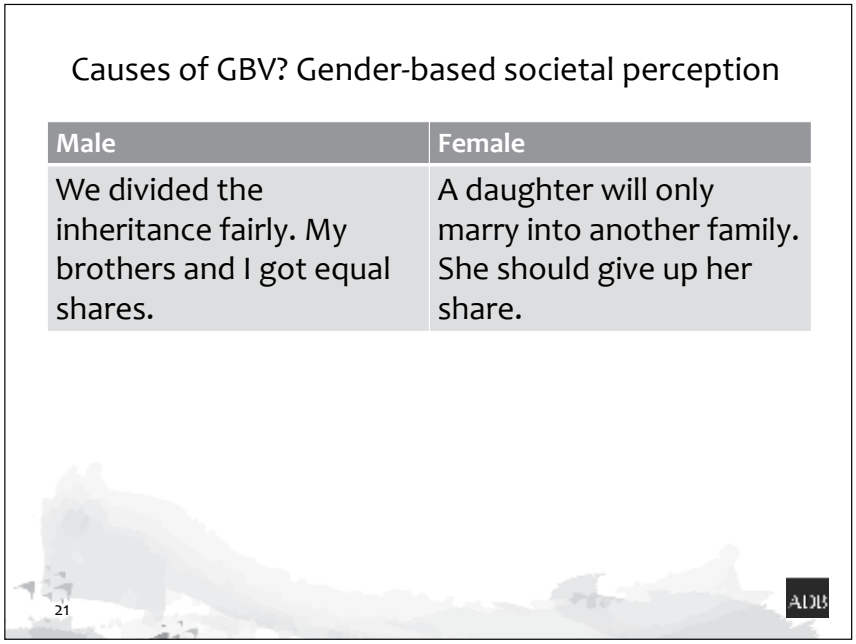
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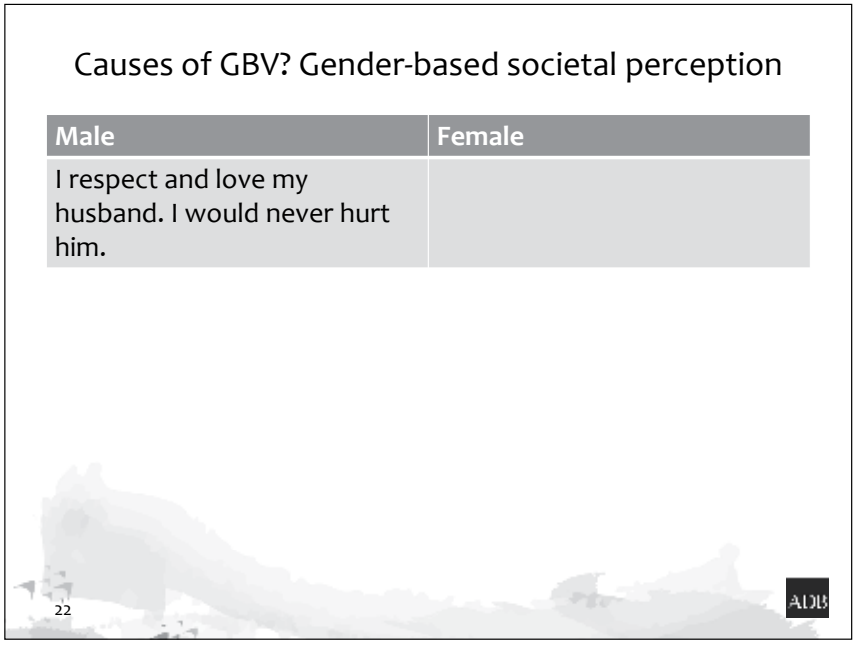

Causes of GBV? Gender-based societal perception
Male
Female
His wife just died. He should find another wife to take care of him.
Her husband just died. Shameless that she is already looking for a new husband.
17
ADB


Causes of GBV? Gender-based societal perception
Male
Female
I like him but he does not like me. I wish he likes me. I think we will be good together.
18
ADB


Causes of GBV? Gender-based societal perception
Male
Female
I like him but he does not like me. I wish he likes me. I think we will be good together
How dare she refused my proposal. She deserves to be punished.
19
ADB


Causes of GBV? Gender-based societal perception.
Male
Female
We divided the inheritance fairly. My brothers and I got equal shares.
20
ADB


Causes of GBV? Gender-based societal perception
Male
Female
We divided the inheritance fairly. My brothers and I got equal shares.
A daughter will only marry into another family. She should give up her share.
21
ADB


Causes of GBV? Gender-based societal perception
Male
Female
I respect and love my husband. I would never hurt him.
22
ADB

Causes of GBV? Gender-based societal perception

Male	Female
I respect and love my husband. I would never hurt him.	I respect and love my wife. But when she does not do what I want, I become so angry and beat her.

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Causes of GBV? Gender-based societal perception

Male	Female
His wife just died. He should find another wife to take care of him.	Her husband just died. Shameless that she is already looking for a new husband.
I like him but he does not like me. I am sad.	How dare she refused my proposal. She deserves to be punished.
We divided the inheritance fairly. My brothers and I got equal shares.	A daughter will only marry into another family. She should give up her share.
I respect and love my husband. I would never hurt him.	As a husband, I have the right to beat my wife.

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B. Case Law

- **LAW AS A CATALYST FOR CHANGE/CULTURAL RIGHTS**

  - ***MUHAMMAD SIDDIQUE V. THE STATE***
    PLD 2002 Lahore 444
    Criminal Appeal No.170 of 2000, heard on 3 June 2007
    Tassaduq Hussain Jilani and Asif Saeed Khan Khosa, JJ (Lahore High Court)

    Facts:

    This case involved the triple murder by the father of the deceased girl who had married of her choice against the wishes of her parents. Her father allegedly killed her, her husband and their daughter of 6/7 months. The accused had registered the case against his daughter and her husband under Hudood law. The deceased husband and wife had been called by the accused through co-accused on the pretext that the former (accused) wanted to compromise the matter.

    Decision:

    In deciding that the accused was guilty of the crime, the Court stated the following:

    "We have given our anxious consideration to the prayer for appellant's acquittal on the basis of compromise and not that the appellant pre-planned the triple murder and carried out the

plan in a cold-blooded, calculated and brutal manner. There was no element of grave and sudden provocation. The only fault of appellant's adult daughter Mst. Salma was that she married someone of her own choice. There is no evidence that there was no marriage or that they were living a life of adultery. They had entered the sacred union of marriage and had given birth to a baby girl.

While examining the case this Court, with a tinge of dismay, took judicial notice of the fact that the act of the appellant is not a singular act of its kind. It is symptomatic of a culture and a certain behavior pattern which leads to violence when a daughter or a sister marries a person of her choice. Attempts are made to sanctify this behaviour in the name of "family honor". It is this perception and psyche which had led to hundreds of murders.

According to the report of the Human Rights Commission of Pakistan which has not been controverted by any State agency, over 1000 victims were of "honor killing" in the year 1999 and 888 in the single Province of Punjab in the year 1988. Similarly in Sindh, according to the statistical record maintained by the Crimes Branch of Sindh, it was 65 in 1980, 141 in 1999 and 121 in 2000. In the year 2001, at least 227 "honor killings" were reported in Punjab alone.

These killings are carried out with an evangelistic spirit. Little do these zealots know that there is nothing religious about it and nothing honorable either. It is male chauvinism and gender bias at their worst. These prejudices are not country specific, region specific or people specific. The roots are rather old and violence against women has been a recurrent phenomenon in human history. The Pre-Islamic Arab Society was no exception. Many cruel and inhuman practices were in vogue which were sought to be curbed by the advent of Islam. It is well-known that in those times, daughters used to be buried alive, it was strongly deprecated and a note of warning was conveyed in Holy Qur'an. In Sura No.81 (Al-Takwir), Verse 8, the Day of Judgment is portrayed in graphic detail when inter alia those innocent girls, who were buried alive or killed, would be asked to speak out against those who wronged them and the latter would have to account for that.

The tragedy of the triple murder is yet another tale of an old Saga; the characters are different yet plot is the same, the victims were accused of the same "crime" and even the method in madness remained the same i.e. the prosecutor, the Judge and the executioners all in one. Perhaps if the police had fairly investigated the case and the subordinate Courts had gone by the book by extending requisite protection, Salma and Saleem (deceased) would not have run away to Islamabad. This is a typical example of misuse and misapplication of Hudood Laws in the country. This abdication of authority by the State institutions made the couple run for its life and provided an opportunity to the appellant to call them over by way of deception. In utter disregard to the basic right of an adult woman to marry, to the institution of family, and motivated by self-conceived notion of "family honor", the appellant had started a tirade against them by having a criminal case registered. Baby girl was born out of the wedlock. The daughter left her home and hearth and even the city of her birth and started living in Islamabad in the fond dream of creating a "new home" and "new world" but the appellant's venom, it seems, never subsided. ...He thought a plan and a rather treacherous one of inviting them to his house. When they came, he brought out his gun and killed each one of them with repeated shots.

A murder in the name of honor is not merely the physical elimination of a man or a woman. It is at a socio-political plane a blow to the concept of a free dynamic and an egalitarian

society. In great majority of cases, behind it at play, is a certain mental outlook, and a creed which seeks to deprive equal rights to women i.e. inter alia the right to marry or the right to divorce which are recognized not only by our religion but have been protected in law and enshrined in the Constitution. Such murders, therefore, represent deviant behaviors which are violative of law, negatory of religious tenets and an affront to society. These crimes have a chain reaction. They feed and promote the very prejudices of which they are the outcome, both at the conscious and sub-conscious level to the detriment of our enlightened ideological moorings.

But are these social aberrations immutable? Is it and inexorable element of fate that the women should continue to be the victims of rage when it comes to the exercise of those fundamental rights which are recognized both in law and religion? NAY! No tradition is sacred, no convention is indispensable and no precedent worth emulation if it does not stand the test of the fundamentals of a civil society generally expressed through law and the Constitution. If humans were merely slaves of tradition or fate, they would still be living in caves eating, mating and fighting like other animals.

It is the mind and the ability to reason which distinguishes them from other living creatures. Human progress and evolution are the product of this ability. Law is part of this human odyssey and achievement. Law is a dynamic process. It has to be in tune with the ever-changing needs and values of a society failing which individuals suffer and social fabric breaks down. It is this dimension of law which makes it a catalyst of social change. Law, including the judge-made law, has to play its role in changing the inhuman social moors.

The offence which stands proved against the appellant has to have a judicial response which serves as a deterrent, so that such aberrations are effectively checked. Any other response may amount to appeasement or endorsement. A society which fails to effectively punish such offenders becomes privy to it. The steady increase in these kinds of murders is reflective of this collective inaction, of a kind of compromise with crime and if we may say so of a complicity of sorts. A justice system of crime and punishment, bereft of its purposive and deterrent elements loses its worth and credibility both. The individual, institutional and societal stakes, therefore, are high.

In these attending circumstances, we are of the considered view that the appellant does not deserve the indulgence of a compromise leading to acquittal. The sentences awarded to the appellant, therefore, do not call for interference."

• DOMESTIC VIOLENCE IS NOT A PRIVATE MATTER

▶ ***OPUZ V. TURKEY***
App. No. 33401/02
9 June 2009
(European Court of Human Rights)

Facts:[1]

The applicant and her mother had both been threatened, gravely assaulted and beaten by the applicant's husband on numerous occasions during the course of their marriage. The husband had even tried to overrun the two with his car, thereby gravely wounding the mother. The injuries sustained had been life-threatening. Several times the two women complained to the police about the husband's actions. Although he was prosecuted for some of the violence, the prison term of three months was later commuted to a fine. After his release the violence continued and eventually ended in the killing of the mother by the applicant's husband.

The applicant claimed that the injuries and anguish she had suffered as a result of the violence inflicted upon her by her husband had amounted to torture within the meaning of Article 3 of the European Convention on Human Rights (the right not to be subject to torture or cruel, inhumane or degrading treatment). She felt that the violence seemed as if it had been inflicted under state supervision as despite the ongoing violence and her repeated requests for help, the authorities had failed to protect her from her husband.

Issue:

Whether the authorities correctly asserted that the dispute concerned a "private matter."

Decision:

In the Court's opinion, [the local authorities] seem to have given exclusive weight to the need to refrain from interfering in what they perceived to be a "family matter". Moreover, there is no indication that the authorities considered the motives behind the withdrawal of the complaints. This is despite the applicant's mother's indication to the Diyarbakır Public Prosecutor that she and her daughter had withdrawn their complaints because of the death threats issued and pressure exerted on them by the applicant's husband. It is also striking that the victims withdrew their complaints when the husband was at liberty or following his release from custody.

As regards the Government's argument that any further interference by the national authorities would have amounted to a breach of the victims' rights under Article 8 of the Convention, the Court recalls its ruling in a similar case of domestic violence (see Bevacqua and S. v. Bulgaria, no. 71127/01, § 83, 12 June 2008), where it held that the authorities' view that no assistance was required as the dispute concerned a "private matter" was incompatible with their positive obligations to secure the enjoyment of the applicants' rights. Moreover, the Court reiterates that, in some instances, the national authorities' interference with the private or family life of the individuals might be necessary in order to protect the health and rights

[1] Facts taken from Equal Rights Trust: http://www.equalrightstrust.org/ertdocumentbank//opuz%20v%20turkey%20case%20summary%20erl%20edit.pdf and ECHR blog: http://echrblog.blogspot.com/2009/06/landmark-judgment-on-domestic-violence.html

of others or to prevent commission of criminal acts. The seriousness of the risk to the applicant's mother rendered such intervention by the authorities necessary in the present case.

However, the Court regrets to note that the criminal investigations in the instant case were strictly dependent on the pursuance of complaints by the applicant and her mother on account of the domestic law provisions in force at the relevant time; i.e. Articles 456 § 4, 457 and 460 of the now defunct Criminal Code, which prevented the prosecuting authorities to pursue the criminal investigations because the criminal acts in question had not resulted in sickness or unfitness for work for ten days or more. It observes that the application of the aforementioned provisions and the cumulative failure of the domestic authorities to pursue criminal proceedings against H.O. deprived the applicant's mother of the protection of her life and safety. In other words, the legislative framework then in force, particularly the minimum ten days' sickness unfitness requirement, fell short of the requirements inherent in the State's positive obligations to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for the victims. The Court thus considers that, bearing in mind the seriousness of the crimes committed the applicant's husband in the past, the prosecuting authorities should have been able to pursue the proceedings as a matter of public interest, regardless of the victims' withdrawal of complaints.

• ONLINE GENDER-BASED VIOLENCE: HARM AND AGGREGATED HARM

▶ *UNITED STATES V. SAYER*

No. 12–2489
May 2, 2014
(United States Court of Appeals, First Circuit)

Facts:

Sayer and the victim in this case, Jane Doe, had dated in Maine starting some time in 2004 until Jane Doe ended their relationship in January 2006. After their break-up, Sayer persistently stalked and harassed Jane Doe for over four years. Jane Doe acquired a protection order against him in state court.

Later, in the fall of 2008, Sayer started to use the internet to induce anonymous third parties to harass Jane Doe. Several unknown men came to Jane Doe's house in Maine one day in October 2008 claiming that they had met her online and were seeking "sexual entertainment." Jane Doe was "shock [ed]" and "terrified" by these "dangerous"-looking men and decided to stay with a friend because she no longer felt safe in her home. She later discovered an online ad in the "casual encounters" section of Craigslist, a classified advertisements website, that had pictures of her in lingerie that Sayer had taken while they were dating. The ad gave detailed directions to her home and described a list of sexual acts she was supposedly willing to perform. Jane Doe did not place these ads nor did she authorize Sayer to place them.

The unwanted visits from men seeking sex persisted for eight months until June 2009, when Jane Doe changed her name and moved to her aunt's house in Louisiana to escape from Sayer and this harassment. On August 25, 2009, an unknown man showed up at her home in Louisiana and addressed her by her new name. The man said he had met her online and was seeking a sexual encounter, having seen pictures of her on an adult pornography site. When Jane Doe later searched the internet, she found videos of herself and Sayer engaged

in consensual sexual acts from when they were dating on at least three pornography sites. Several of the websites included Jane Doe's name and then-current Louisiana address. One site encouraged viewers to write to Jane Doe and tell her what they thought of the videos.

Jane Doe contacted the police again in late September 2009 because someone had posted a fraudulent account in her name on Facebook, a social networking site, which included sexually explicit pictures of her. The false Facebook account was created on August 21, 2009 from 24 Marion Avenue in Biddeford, Maine, which had an unsecured wireless network; Sayer lived at 23 Marion Avenue. The police found videos of Jane Doe "engaged in sexually explicit activity" that had been posted to adult pornography sites.

On November 5, 2009, the police searched Sayer's home pursuant to a warrant. The police seized a Nikon digital camera during this search. Although Sayer had said there were no pictures of Jane Doe on it, a forensic analysis of the camera uncovered a picture of Jane Doe in a sexual position and another photo of her engaged in a sex act.

In December 2009, Jane Doe again contacted the police to report another fake profile that had been created under her name on MySpace, another social networking site. The profile had both her old and new names, her Louisiana address, and links to adult pornography sites hosting sex videos of Jane Doe. The fake MySpace account was associated with multiple IP addresses from unsecured wireless networks in Saco, Maine, near where Sayer lived.

Jane Doe returned to Maine the first week in November 2009 because the men that Sayer sent to her Louisiana home had scared her aunt and cousin, with whom she was staying. Sayer continued to harass Jane Doe after she returned to Maine. As a result of new fraudulent accounts Sayer posted in Jane Doe's name soliciting sex from strangers, as many as six different men per night showed up at her home in June 2010. The police searched Sayer's home again on July 1, 2010. Forensic analysis of a laptop computer they seized showed that Sayer had created "numerous fake profiles" through Yahoo! Messenger, an online chat service, using some variation of Jane Doe's name, between June and November 2009. All of the profiles had sexually suggestive or explicit pictures of Jane Doe and in many cases directed viewers to sex videos of her on adult pornography sites. In many instances, Sayer, posing as Jane Doe, chatted with men online and encouraged them to visit Jane Doe at her home in Louisiana.

Jane Doe said Sayer did not stop sending men to her home until he was arrested by state police in July 2010 for violating a protection order she had against him.

Sayer appeals, on constitutional grounds, from the district court's denial of his motion to dismiss the cyberstalking charge in the indictment.

Issue:

Sayer makes three constitutional arguments: (1) the cyberstalking statute is unconstitutional as applied to him because it imposes criminal sanctions on protected speech; (2) the statute is overbroad in violation of the First Amendment; and (3) the statute is unconstitutionally vague in violation of the Fifth Amendment.

Decision:

The Court did not find Sayer's constitutional challenge meritorious. It held:

"A. As–Applied First Amendment Challenge

Under § 2261A(2)(A), a defendant must first have the intent "to kill, injure, harass, or place [a victim] under surveillance with intent to kill, injure, harass, or intimidate, or cause substantial emotional distress." Second, the defendant must engage in a "course of conduct" that actually "causes substantial emotional distress or places [the victim] in reasonable fear of death or serious bodily injury." 18 U.S.C. § 2261A(2)(A). Sayer argues that because his course of conduct involved speech, or online communications, it cannot be proscribed in accord with the First Amendment. This argument is meritless.

"[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949). For example, in Giboney the Court held that enjoining otherwise lawful picketing activities did not violate the First Amendment where the sole purpose of that picketing was to force a company to enter an unlawful agreement restraining trade in violation of a state criminal statute. Speech integral to criminal conduct is now recognized as a "long-established category of unprotected speech." Sayer's online communications fall in this category.

Sayer does not claim that his acts of creating false online advertisements and accounts in Jane Doe's name or impersonating Jane Doe on the internet constitute legal conduct. In fact, he has admitted that his conduct, which deceptively enticed men to Jane Doe's home, put Jane Doe in danger and at risk of physical harm. To the extent his course of conduct targeting Jane Doe involved speech at all, his speech is not protected. Here, as in Giboney, it served only to implement Sayer's criminal purpose. See United States v.. Varani, 435 F.2d 758, 762 (6th Cir.1970) (explaining that, as in the crimes of perjury, bribery, extortion and threats, and conspiracy, "speech is not protected by the First Amendment when it is the very vehicle of the crime itself").

The Eighth Circuit rejected a similar First Amendment challenge to § 2261A(2)(A) in United States v. Petrovic, 701 F.3d 849 (8th Cir.2012). There, the defendant had created a website with links to images of his ex-wife "in the nude or engaging in sex acts" with him. Id. at 853. The defendant also sent sexually explicit pictures of his ex-wife to her work, her boss, and her relatives. Id. The court held that these "communications," which resulted in the defendant's § 2261A(2)(A) conviction, were integral to criminal conduct and unprotected under Giboney, as they carried out the defendant's extortionate threats to harass and humiliate his ex-wife if she terminated their sexual relationship. Id. at 855. As in Petrovic, Sayer points to no lawful purpose of the communications at issue here that would take them outside the Giboney exception. Nor can we surmise any on this record. Rather, his conduct lured potentially dangerous men to Jane Doe's doorstep, men whom Jane Doe was not free to ignore. As a result, § 2261A(2)(A) has been constitutionally applied to Sayer.

B. Facial Challenge

1. Overbreadth

Sayer asserts that § 2261A(2)(A) cannot be applied to anyone because it is overly broad under the First Amendment, even though the statute has been constitutionally applied to him.

Sayer argues that because the text of § 2261A(2)(A) encompasses speech that causes only substantial emotional distress, it proscribes protected expression that is merely annoying or insulting. His interpretation of § 2261A(2)(A) is unconvincing because it takes the term "substantial emotional distress" wholly out of context. The interstate stalking statute, which prohibits a course of conduct done with "intent to kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate, or cause substantial emotional distress" clearly targets conduct performed with serious criminal intent, not just speech that happens to cause annoyance or insult.

2. Void for Vagueness

Sayer also states that § 2261A is impermissibly vague under the Due Process Clause of the Fifth Amendment because it does not provide fair warning of the conduct it prohibits and creates a risk of arbitrary enforcement. This claim is waived, as Sayer merely repeats his overbreadth argument and does not develop a separate and distinct argument under the vagueness doctrine."

- ***YASIR LATEEF V. THE STATE***

2016 P. Cr. L J 1916
Criminal Miscellaneous No. 9559-B of 2016, decided on August 23, 2016
Atir Mahmood, J. (Lahore High Court)

Facts:

The petitioner is nominated in the FIR. He has been ascribed with hacking the Facebook account of the complainant and uploading her personal pictures on the internet without her permission. He also used her personal pictures abusively, which has allegedly caused damage to the reputation of the complainant in the vicinity. During the course of the investigation, he was found guilty of the offence alleged against him.

Before the court is a petition under section 497, Cr.P.C. for grant of post-arrest bail.

Issue:

Whether the petition for post-arrest bail should be granted.

Decision:

No. During the course of the investigation, the petitioner has been found guilty of the offence alleged against him. There is sufficient evidence available on record which is not only threatening but obnoxious and filthy in nature and prima facie connects the petitioner with the commission of the alleged offence. The offence alleged against the petitioner is heinous in nature as it ruins the entire life of the victim as being disgraced in the eyes of the general public and her family. Such practice and offences damage the fiber of society and are liable to be curbed very strongly by law-enforcement agencies.

Petitioner avers that as the punishment for the offence alleged against the petitioner has been provided as "imprisonment or fine", therefore his case is of further inquiry and he is entitled to concession of bail. Suffice it to say that the grant or refusal of concession of bail is a discretionary relief and the same cannot be agitated as a matter of right. Since there

is serious allegation of humiliating the privacy of the complainant and using her personal pictures abusively, the Court was not inclined to allow bail after arrest to the petitioner.

• GENDER-BASED VIOLENCE IS A CONSTITUTIONAL ISSUE

INDIA:
The right to be protected from sexual harassment and sexual assault is guaranteed by the Constitution and is one of the pillars on which the very construct of gender justice stands. Failure in discharging this public duty renders the State accountable for the lapse.'

▶ *THE VERMA COMMITTEE REPORT*

The Verma Committee was convened by the Indian government following public outcry against the brutal rape and murder of a young woman in New Delhi. Relevant excerpts from the Verma Committee Report (January 12, 2013) follow below:

- "The right to be protected from sexual harassment and sexual assault is, therefore, guaranteed by the Constitution, and is one of the pillars on which the very construct of gender justice stands."[2]

- "A fortiori, the duty of the State, therefore, is to provide a safe environment, at all times, for women, who constitute half the nation's population; and failure in discharging this public duty renders it accountable for the lapse. The State's role is not merely reactive to apprehend and punish the culprits for their crimes; its duty is also to prevent the commission of any crime to the best of its ability. Crimes against women are an egregious violation of several human rights demanding strict punishment with deterrence to prevent similar crimes in future by the likeminded."[3]

SOUTH AFRICA:
The state is under a series of constitutional mandates which include the obligation to deal with domestic violence.

▶ *THE STATE V. BALOYI*[4]
Case CCT 29/99
3 December 1999
(Constitutional Court of South Africa)

Facts:

The issue arose out of the conviction of an army officer (the appellant) in the Magistrate's court in Pretoria for breaching an interdict issued by a magistrate ordering him not to assault his wife or prevent her or their child from entering or leaving their home. The appellant was found guilty and sentenced to twelve months imprisonment, six suspended. He appealed

[2] Verma Committee Report, para. 4. The Report is available at http://www.thehindu.com/migration_catalog/article12284683.ece/BINARY/Justice%20Verma%20Committee%20Report%20on%20Amendments%20to%20Criminal%20Law
[3] Id, para. 7.
[4] Digest taken from the Constitutional Court's Explanatory Note. http://www.saflii.org/za/cases/ZACC/1999/19media.pdf

to the Transvaal High Court which declared that section 3(5) of the Prevention of Family Violence Act of 1993, was unconstitutional to the extent that it placed an onus on him to disprove his guilt. The court interpreted section 3(5) to impose such onus because it invoked the procedure of section 170 of the Criminal Procedure Act, which required accused persons who failed to appear after an adjournment to prove that their absence had not been wilful.

The High Court then sent its order of constitutional invalidity for confirmation by the Constitutional Court.

Issue:

Whether or not section 3(5) of the Prevention of Family Violence Act of 1993 is constitutional.

Decision:

Yes, it is constitutional.

Section 12(1) of the Constitution reads: "Everyone has the right to freedom and security of the person, which includes the right [...] to be free from all forms of violence from either public or private sources[.]" The specific inclusion of private sources emphasises that serious threats to security of the person arise from private sources. Read with section 7(2),[5] section 12(1) has to be understood as obliging the state directly to protect the right of everyone to be free from private or domestic violence. Indeed, the state is under a series of constitutional mandates which include the obligation to deal with domestic violence: to protect both the rights of everyone to enjoy freedom and security of the person[6] and to bodily and psychological integrity,[7] and the right to have their dignity respected and protected,[8] as well as the defensive rights of everyone not to be subjected to torture in any way[9] and not to be treated or punished in a cruel, inhuman or degrading way.[10]

Domestic violence was hidden and repetitive in character and had an immeasurable ripple effect in our society. It transgressed a constitutionally guaranteed right to be free from violence from either public or private sources. Because it was gender-specific, it both reflected and reinforced patriarchal domination, challenged the non-sexist foundations of the Constitution, and violated the right to equality. South Africa was also obliged by international law to take steps to combat domestic violence.

On the other hand, a person charged at an enquiry with an offence carrying possible imprisonment for twelve months, had to be considered an accused person. Such person was accordingly entitled to be presumed innocent unless proved guilty beyond a reasonable doubt. When faced with different possible interpretations of section 3(5), the Court should prefer the one which best balanced these competing constitutional concerns. In the present case this meant opting for the construction which interpreted section 3(5) as only invoking the procedure involved in section 170 of the Criminal Procedure Act, and not the reverse onus. On such interpretation there was no unconstitutionality. The High Court's order was accordingly not confirmed.

5 Section 7(2) reads: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."
6 Section 12(1).
7 Section 12(2).
8 Section 10.
9 Section 12(1)(d).
10 Section 12(1)(e).

In coming to this conclusion, the Court held that the overall purpose of an interdict was to protect the victim of domestic violence, uphold respect for the law and indicate that organized society would not sit idly by in the face of spousal abuse. In these circumstances, fairness to the complainant necessitated that the enquiry proceedings be summary, that is, that they be speedy and dispense with the normal process of charge and plea. Fairness to the accused, on the other hand, dictated that within the format of a summary enquiry, the presumption of innocence should apply.

• PAKISTANI COURTS CAN DRAW ON INTERNATIONAL LAW WITHOUT LEGISLATIVE INSTRUMENT

▶ ***M/S NAJIB ZARAB LTD V. THE GOVERNMENT OF PAKISTAN***
PLD 1993 Karachi 93
C. P. No. D-529 of 1990, heard on 9 September 1992
Syed Haider Ali Pirzada and Shaukat Hussain Zubedi, JJ (Karachi High Court)

Facts:

The petitioners in the course of their business placed orders for import of tyres of Indian origin and established Letters of Credit on 15-9-1988 for use and consumption in Afghanistan. About 18 consignments of such tyres reached the Karachi port on various dates. The balance quantity of tyres is reported to be ready for shipment. All the said consignments were imported for use in Afghanistan and were notified as the goods in transit. The Customs Authorities at Karachi, however, refused clearance of the said consignments on the basis of a letter, dated 19 December 1989, whereby the transit facility in respect of tyres for which letters of credit opened on or before 15-12-1988 but had subsequently been amended, was discontinued. The letter dated 19-12-1989 was apparently issued in order to give effect to an earlier letter dated 14-1-1989 of the Central Board of Revenue, purportedly issued in order to stop smuggling back to Pakistan of tyres and tubes going to Afghanistan in transit, which is to the detriment of the Government of Pakistan. The petitioners thus filed a petition to quash the letters/orders dated 14-1-1989 and 19-12-1989.

At the core of the dispute is the Afghan Transit Trade Agreement, executed between Pakistan and Afghanistan, for regulation of traffic in transit. There is a reservation enabling the imposition of such restrictions as are necessary for the purpose of protecting public morals, human, animal and plant life or health, and for the security of its own territory. There is also an express reservation for the protection of public morals.

Issue:

Whether or not the imposition of restriction on tyres and, trucks would be for the purpose of protecting public morals and/or for the security of Pakistan's territory.

Decision:

The Supreme Court, in order to come to its conclusion, examined (i) whether international is, of its own force, drawn into the law of the land without the aid of municipal law, and (ii) secondly, whether, one so drawn, it overwrites municipal law in case of conflict. It held that nations must march with the international community and the municipal law must respect rules of international law, even as nations respect international opinion. The comity of nations

requires that rules of international law may be accommodated in the municipal law even without e legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and integrity of the Republic and the supremacy of the constituted Legislature in making laws, may not be subjected to external rules except to the extent legitimately accepted by the constituted Legislatures themselves. The doctrine of incorporation also recognizes the position that the rules of international law should be incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations and municipal law must prevail in case of conflict. Courts cannot say "yes" if Parliament has said "no" to a principle of international lay. National Courts will endorse international law but not if it conflicts with national law. National Courts being organs of the National State and not organs of international law, must perforce apply national law if international law conflicts with it. But the Courts are under an obligation within the legitimate limits, so to interpret the municipal statute as to avoid confrontation with the comity of nations or the well-established principles of international law. But if conflict was inevitable, the latter must yield.

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The 1965 Convention on Transit Trade of Land-locked States is the Convention on the subject, and as both Pakistan and Afghanistan have signed the convention, it may be useful to refer to it in some detail. The Convention was the result of a Resolution of the United Nations General Assembly which, "recognizing the need of land-locked countries for adequate transit facilities in promoting international trade", invited "the Governments of Member States to give full recognition to the needs of Land-locked Members States in the matter of transit trade and, therefore, to accord them adequate facilities in terms of international law and practice in this regard..."

xxx

The Afghan Transit Agreement's scheme, sequence, and even language indicate that it is based on the Convention on Transit Trade of Land-locked countries. The provisions relating to import, transit and the free and unhampered flow of goods refer to the import from Pakistan to Afghanistan and to transit and the free and unhampered flow of goods in the course of trade between the two countries. Even so, express reservation is made to each of the countries to impose restrictions for certain purposes as may be necessary for the protection of public morals, human, animal or plant life or health and for the security of its own territory.

xxx

Section 129 of the Customs Act states:

Transit of goods across Pakistan to a foreign territory.--- Where any goods are entered for transit across Pakistan to a destination outside Pakistan, the appropriate officer may, subject to the provisions of the rules, allow [such] goods to be so transmitted without payment of the duties which would otherwise be chargeable on such goods."

xxx

The grievance of respondents seems to have been that the goods are being imported under the guise of import to Afghanistan, and these were finding their way back across the Afghanistan-Pakistan border into Pakistan territory to the gross prejudice of the Government.

xxx

If we accept the contentions of the respondents, that would mean all goods which are prohibited in Pakistan but are not prohibited in Pakistan could not have transit as such in Pakistan. That, in our opinion, would not be a reasonable construction to make specially keeping in view the background of the treaty. If the grievance of the respondents was, as it seems to have been, that the tyres and tubes after entering Afghanistan illegally reentered Pakistan and are mixed up with other tyres and tubes, other remedies might be open to the respondents.

Similarly, if the allegations of the respondents are that the tyres and tubes which were meant for transit were stolen and surreptitiously mixed up with the Pakistan goods, then other civil and criminal remedies might be open to the respondents but not by invoking sections of Customs Act as respondents did in this case. The provisions of the Customs Act and the Import and Export Control Order dealt with a different kind of situation, i.e. after being imported into Pakistan and imported in Afghanistan. The provisions of the Customs Act do not deal with goods in transit which were not really imported into Pakistan.

• PAKISTANI CASES APPLYING CEDAW

▶ *SAIMA, ET AL. V. THE STATE*

2003 PLD 747
Criminal Miscellaneous No.3978-B of 2003, decided on 21st July, 2003.
Tassaduq Hussain Jilani, J (Lahore High Court)

Facts:

Complainant is the mother of Petitioner No. 1. Her daughter and the rest of the petitioners were charged under sections 420/468/ 471, P.P.C. read with sections 10/7/9 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979. In their defense, petitioner nos. 1 and 2 stated that they are legally married and that therefore no offense was committed. On the other hand, the complainant averred that the marriage was fake, since Father Rev. Daniel Yunus (petitioner no. 3) of the Methodist Church of Pakistan had no licence to perform the Nikah in terms of the Christian Marriages Act, 1872. She presented the opinion given by the Bible Society that the marriage performed by petitioner No.3 is not a marriage in the eyes of law.

Petitioners seek confirmation of pre-arrest bail granted to them.

Issue:

Whether petitioners Nos. 1 and 2 were committing an offence within the mischief clause of section 10 of Ordinance VII of 1979.

Decision:

No. Rev. Daniel Younas was appointed as Deacon via a letter of appointment issued by the Methodist Church of Pakistan. The letter specifically authorized him to solemnize matrimony

and administer baptism. Rev. Younas solemnized the marriage in that capacity. The letter from the Bible Society is merely an opinion by a body which is engaged in publication of the Holy Bible and does not have any authorization to pronounce opinion/verdicts on issues of the kind. In any event, marriage primarily is a union between two sui juris individuals and the nonperformance of rituals would not invalidate the marriage particularly when Rev. Younas has placed on record the requisite authorized.

Section 6(d) of the Ordinance states that a person is said to commit Zinabil-Jabr if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married, "with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is 'given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married."

Here, petitioners Nos. 1 and 2 were of the view that they are validly married. Hence the condition precedent for the offence alleged prima facie does not exist. The Court is also conscious of the protection given to the marriage and the institutions of family under the Constitution of Islamic Republic of Pakistan[11] and the U.N. Convention on Elimination of all Forms of Discrimination Against Women.[12] The prosecution launched against the petitioners prima facie reflects not only malice in fact but also male in law.

- ***MST HUMAIRA MEHMOOD V. THE STATE***[13]
  PLD 1999 Lah 494
  18 February 1999
  Tassaduq Hussain Jilani, J (Lahore High Court)

Facts:

On 16 May 1997, a marriage ceremony (Nikah) was performed between Mehmood Butt and Mst. Humaira. Both parties consented to the marriage. The marriage was officially registered on the same day. After disclosing her marriage to her parents, who did not agree with her choice of husband, Mst Humaira was beaten severely and confined to hospital for one month. Nikah Khawan, who conducted the marriage ceremony, claimed that he was threatened by the police and told to deny that he had performed the ceremony. On 28 October 1998, the police received a report from Mst. Humaira's family that Mehmood Butt and his brother had abducted a young woman named "Rabia". The investigation was later cancelled on the basis that no such abduction had ever taken place. In November 1998, Mehmood Butt and Mst. Humaira fled to the Edhi Centre, a women's shelter in Karachi. On 30 November1998, Mst. Humaira was forcibly arrested at the shelter and removed by the police who were accompanied by her brother, although no charges had been laid againsther. She was later released.

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11 The Court referred to Article 35, which enjoins the State to protect the marriage and the family.

12 The Court referred to Article 16 of CEDAW, which states:

"States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and ... ... and in particular shall ensure, on a basis of equality of men and women:--

(a) the same right to enter into marriage;

(b) the same right freely to choose a spouse and to enter into marriage only with their free and full consent;

(c) the same rights and responsibilities during marriage and at its dissolution."

13 Digest from: PLD, A Digest of Case Law on Human Rights of Women (Asia Pacific) (2006). Available at SSRN: https://ssrn.com/abstract=2690179

On 25 December 1998, charges were laid against Mehmood Butt and his mother for the alleged abduction of Mst. Humaira from Fortress Stadium, Lahore on 29 October 1998, two months earlier. Mst. Humaira was also charged with breaking Hudood law by committing adultery (Zina). Mst. Humaira's family claimed that she had been previously married to Moazzam Ghayas by a ceremony on 14 March 1997. The marriage was not officially registered until 7 March 1998. A video tape of this ceremony, in which Mst. Humaira was weeping, was offered as evidence of its occurrence. On 29 January 1999, both Mehmood Butt and Mst. Humaira were arrested and publicly beaten by the police, despite police knowledge that "pre-arrest bail" had been granted in court.

In the first petition, Mst. Humaira argued that her initial marriage to Mehmood Butt was valid and her subsequent marriage to Moazzam Ghayas was invalid. She based that claim on two arguments. First, her marriage to Moazzam Ghayas could not be valid because she was already married to Mehmood Butt at the time of registration of the marriage to Moazzam Ghayas. She married Mehmood Butt of her own consent and various witnesses observed that it was a valid marriage. She claimed that the video evidence of her marriage to Moazzam Ghayas that attempted to place the ceremony prior to her marriage with Mehmood Butt was a false attempt to pre-date it. Second, the petitioner relied upon Muslim law to argue that marriage is not valid without consent. She argued that as she did not consent to the marriage with Mr. Moazzam Ghayas, it was invalid.

In the second petition, a human rights activist intervened to challenge police practice and to propel the courts to sanction their actions. She argued that the police had acted in allegiance with the family and in doing so had abused their powers. She cited the following incidents in support of her arguments. She argued that the abduction of Mst. Humaira by Mr. Mehmood Butt never took place. It was unlikely that Mr. Moazzam Ghayas would have waited two months to report the supposed abduction of his wife. It was unlikely that someone could abduct a person from a busy shopping centre in Fortress Centre, Lahore. Mst. Humaira also claimed she had not been abducted. She referred to the earlier report regarding the abduction of "Rabia" which the police had conceded was a false cover used to seek out and arrest Mst. Humaira and Mr. Mehmood Butt, and the arrest at Karachi of Mst. Humaira despite a 'pre-arrest bail' on record. The second petitioner argued that such actions cumulatively showed bad faith and maliciousness on the part of the police. Further, such actions were in breach of international instruments such as CEDAW.

The respondents, Moazzam Ghayas and Malik Abbas Khokar (the petitioner's father), argued that Mst. Hamaira had broken Hudood law, and at the same time, the law of god, which is beyond the scope of the Court.

The other respondent, the State, argued that the police did not go beyond their duty in their activities. The Court may not quash a case unless there is no evidence or the charges are malicious. In this case, the police were within their duty to investigate the abduction charges and to investigate any other offences that appeared to have occurred.

Issues:

The Court considered two writ petitions in this case. In the first petition it examined the meaning and role of consent in a valid marriage under Pakistani law. In the second petition, brought by a human rights activist, the Court considered whether the police in their investigations had acted male fides (in bad faith). It also considered whether courts have the

authority created by the Constitution of Pakistan 1973 ["the Constitution"] and CEDAW to sanction the actions of the police and whether it should do so in this instance.

Decision:

Both petitions were successful. In the first petition the Court held that a marriage without consent is invalid. It noted that if two people indicate they have a consensual marriage, there is a presumption of truth based on what they say, rather than what a third party might say. Further, the Court held that a marriage with a person who is already married is invalid. The Court found that because the marriage between Mst. Humaira and Mehmood Butt was valid, it could not uphold a case against Mst. Humaira for adultery.

In the second petition brought by a human rights activist, the Court stated that it does have the power to intervene in police action or to quash a case when there is evidence of bad faith on the part of the police. In this case, the Court found that there was ample evidence of bad faith by the police. Firstly, it cited the false case against "Rabia", and the arrest of Mst. Humaira despite police knowledge that "prearrest bail" had been granted. The Court also agreed with the petitioner that it was unlikely that a husband would wait two months to report the abduction of his wife. Secondly, the Court acknowledged the police's abusive treatment of Mst. Humaira and Mehmood Butt upon their arrest. Finally, it found that the threats by police to the person who performed the marriage ceremony between Mst. Humaira and Mehmood Butt were also evidence of bad faith on the part of the police.

The Court made a number of orders in response to its finding of bad faith. It convicted a police officer, who had lied in court, of the offence of obstructing the process of justice. The officer was sentenced to fifteen days in jail and a fine of 5000 rupees. The Court also ordered the Inspector General of Police to delegate a high-ranking officer to investigate and proceed against other police officials involved with this case. Finally, the Court ordered that the medical superintendent at the hospital in which Mst. Humaira was confined conduct an inquiry and proceed against any officials responsible for abusing Mst. Humaira.

The Court noted that its findings accorded with a number of international instruments that protect the rights of women. It noted that Pakistan is a signatory to CEDAW which enjoins member states to take all appropriate measures in relation to ensuring equality in matters of marriage and the right to consensual marriage (Article 16). The Court also referred to the Cairo Declaration on Human Rights in Islam 1990, which Pakistan had adopted. Articles 5 and 6 state that women have the right to enter marriage without any restrictions stemming from race, colour or nationality and that the State has a duty to facilitate marriage. Women have an equal right to human dignity with men, they also have their own civil entity and financial independence and the right to retain name and lineage.

▶ *SARWAR JAN V. ABDUR REHMAN*

2004 CLC 1785
29 October 2003
Syed Manzoor Hussain Gillani (Supreme Court of Azad Jammu & Kashmir)

Facts:

This case involved an application for divorce by the wife (appellant) on the basis of cruel and inhuman behavior of the husband. The trial court dismissed the suit as not proved.

Appellant filed an appeal against the trial court's decision. She contended that when it was proved and expressly made clear before the trial court that the spouses could not live within the limits ordained by the Almighty, it was obligatory upon the court to dissolve the marriage on the basis of Khula, even if the cruelty or other grounds as alleged by the appellant were not proved.

Issue:

Whether the marriage should be dissolved on the basis of Khula.

Decision:

Yes. As stated above, the appellant has throughout maintained that she cannot live with the respondent against whom she has developed severe hatred and disliking due to his inhumane and cruel treatment. Their wedlock is spread over fifteen years with four living and two dead children. In her pre- and post-trial statements, she has stood fast on her stand for separation. Even in her statement before the Court on 26-08-2003, in an effort to help them reach some reconciliation in view of the fifteen-year union with half a dozen children, she could not be brought around. With this background of the case, the argument of the respondent that she did not raise the plea of Khula before the trial court is misconceived. The above state of affairs itself makes out a case of Khula when her other pleas, i.e., torture, beating, etc. were not proved. The dissolution of marriage on the ground of Khula is a pure question of law, hence can be raised even before the Highest Court of appeal. It does not require any evidence or proof, as it is the statement of the wife alone which is the determinative factor.

In the case of Khansa Bint Khazam reported in Bukhari, the Holy Prophet (pbuh) stopped her marriage when she complained that she had refused to marry at the place she is being married by her father. In the case of Thabit Bin Qais reported in Bukhari, the Holy Prophet (pbuh) ordered him to divorce his wife when she complained that hat she cannot endure to live with him. She was asked to return the garden received from Thabit Bin Qais. In the case of Barrira and Mughith, the marriage was dissolved when Barrira simply complained that she does not like Mugith, even though the latter was weeping in love for his wife.

In all these cases, the Holy Prophet (pbuh) believed the bare statement of the wife and ordered the dissolution of the marriage, subject to the wife's reimbursement of all that they had taken from their husbands. Thus, aversion, disliking, hatred, incompatibility of temperaments, mental, intellectual, social, cultural or ideological disparity or conflict, which has the apprehension of distorting the family life and happiness, are sufficient grounds for the wife to seek Khula.

Assuming the animosity was created by the appellant, the Court has to judge the possibility of future relations of the spouses in an objective manner as to whether there is any chance of their reapproachment and happy marital life in the future, irrespective of the fact of who is at fault. Assuming that the wife is at fault and she does not want to live with the husband any more at any cost whatsoever, should she be made hostage of her fault? We should hate the sin not the sinner. We will be committing another fault if she is forced to live against her free will, or is kept tied in wedlock as long as husband's ego is not satisfied. It is not the spirit of Qur'an, Hadith or law laid down in the light Qur'an.

What emerges from above is that a wife has a right to obtain divorce from her husband and a Judge is obliged to order cancellation of the contract of marriage when the wife emphatically

asserts that she cannot keep the limits set by God. An equality is maintained between the spouses by allowing the wife this right through the intervention of the Court as against the absolute right of the husband to divorce the wife at any time and even without any reason. The wife is similarly empowered to get the marriage cancelled on any reason whatsoever, whether the husband is at fault or not. The unfettered powers of the husband are counterbalanced by the right of the wife to obtain dissolution through the Court subject to the condition that if the husband is not at fault, she is to compensate him and if he is found at fault she is not to pay anything. This right cannot be made hostage to husband's pleasure nor subjected to social or family bounds, except the satisfaction of the Court that in case marriage is not dissolved the spouses cannot maintain the limits of God Almighty. However, as against marriage, which is a contract between the spouses only, the dissolution of marriage has the apprehension of affecting the society and the State in case the spouses have minor children, that is why it is left to be decided by the Court. The wisdom behind subjecting the wife to seek dissolution through Court therefore appears to enable the Court to regulate the guardianship and maintenance problems of the minor children or suckling, who remain attached to the mother not to the father.

The appellant under the circumstances is the best judge of her sentiments and conscience. She alone can perceive and measure the quantum of love or hatred towards her husband. Besides having a social and family life, the spouses have a private, personal, mental and spiritual life as well, not exposed even to their children or parents. Spouses are termed as garments for each other in Verse No. 187 of Sura Al-Bagara. None of the two can be said to be living within the limits of God if their garments are torn. They have a mental and spiritual approach as well towards each other, which is most intimate communication. This communication creates a physical link between them. The innate love and hatred for each other is their subjective approach. One can advice, persuade, try to reconcile and even admonish them to behave and accept each other in the larger interest of family and children, but cannot compel and force them to accept each other. If a husband can with or without reason divorce the wife and bring fifteen tears of wedlock to an end, why should the wife be denied the relief which the Almighty has given to her and which of course is regulated in a most honourable and sacred manner by Qur'an.

States and Governments are under obligations not only under Qur'an and Sunnah but also under international conventions as well to ensure dignity and rights of women during marriage and at its dissolution. In the case reported as Humaira Mehmood v. the State PLD 1999 Lah 494 two conventions are reproduced as follows:-

> "Pakistan is a member of United Nations and is signatory to the "Convention on the Elimination of all Forms of Discrimination Against Women" which in its Article 16 enjoins all the member States as under:-
>
> (1) States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on the basis of equality of men and women:--
>
> (a) the same right to enter into marriage;
> (b) the same right freely to choose a spouse and to enter into marriage only with their free and full consent;
> (c) the same rights and responsibilities during marriage and at its dissolution.

> At a Conference attended by the representatives of all the Islamic countries including Pakistan, a Resolution was adapted which is known as Cairo Declaration of Human Rights in Islam dated 5th August 1990 (Encyclopedia of Human Rights by Edward Lawson, 2nd Edition at page 176). [It] stipulates as under:-
>
> Article 5. (a) The family is the foundation of society and marriage is the abais of its formation. Men and women have the right to marriage, and no restrictions stemming from race, colour or nationality shall prevent them from enjoying this right.
> (b) Society and the Slate shall remove all obstacles to marriage and shall facilitate marital procedure. They shall ensure family protection and welfare.
>
> Article 6 (a). Women is equal to man in human dignity and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence and the right to retain her name and lineage.

While interpreting the municipal law, we have to take into consideration the international conventions as well to which we are signatories. We will be going beyond, rather against these conventions, if the marital procedures are kept stiffened to the disadvantages of women thereby denying the dignity which Shariah and international covenants give them.

▶ ***SUO MOTO NO. 1K OF 2006***
PLD 2008 FSC 1
Haziqul Khairi, CJ (Federal Shariat Court)

Facts:

The Federal Shariat Court, in exercise of its powers under Article 203—D of the Constitution of Islamic Republic of Pakistani, took suo moto notice of a news item that under the Citizenship Act 1951, a married Pakistani woman was denied the right to get Pakistani citizenship for her foreign husband, while a married Pakistani man was entitled, under section 10[14] of the said Act to obtain Pakistan citizenship for his foreign wife.

Issue:

Whether gender discrimination in Section I0 of the Citizenship Act is discriminatory and unconstitutional.

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[14] Section 10 states:

"Married women. (1) Any woman who by reason of her marriage to a [British subject] before the first day of January, 1949, has acquired the status of a [British subject] shall, if her husband becomes a citizen of Pakistan, be a citizen of Pakistan.

(2) Subject to the provisions of sub-section (1) and sub-section (4), a woman who has been married to a citizen of Pakistan or to a person who but for his death would have been a citizen of Pakistan under section 3, 4 or 5, shall be entitled, on making application therefor to the Federal Government in the prescribed manner, and, if she is an alien, on, obtaining a certificate of domicile and taking the oath of allegiance in the form set out in the Schedule to this Act, to be registered as a citizen of Pakistan whether or not she has completed twenty-one years of her age and is of full capacity.

(3) Subject as aforesaid, a woman who has been married to a person who, but for his death, could have been a citizen of Pakistan under the provisions of sub-section (1) of section 6 (whether he migrated as provided in that sub-section or is deemed under the proviso to section 7 to have so migrated) shall be entitled as provided in sub-section (2) subject further, if she is an alien, to her obtaining the certificate and taking the oath therein mentioned.

(4) A person who has ceased to be a citizen of Pakistan under section 14 or who has been deprived of citizenship of Pakistan under this Act shall not be entitled to be registered as a citizen thereof under this Section but may be so registered with the previous consent of the Federal Government.

Decision:

Yes. The FSC found the discriminatory provision to be contrary to Islam and invalidated it. In addition, it drew on the Constitution and international human rights law, i.e. the Universal Declaration on Human Rights, CEDAW, and the Convention on Nationality of Married Women. The Court held:

> "...Pakistan is committed to the international ommunity to equal and indiscriminate treatment to its women and to enforce equal rights for them. Pakistan is a signatory to the Universal Declaration of Human Rights which inter alia proclaimed that "everyone has a right to nationality" and that "no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." Pakistan is also a signatory to the Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, as well as the Convention on Nationality of Married Women. In the words of Professor Oppenheim "Law of Nations or International Law is the name for the body of customary and treaty rules which are considered legally binding by civilized States in their intercourse with each other." Pakistan has also ratified these treaties in terms of Article 2 of the Vienna Convention according to which ratification means "the International act whereby a State establishes on the international plane its consent to be bound by a treaty."
>
> Holy Prophet (Peace be upon him) himself had made many treaties with States/tribes and fully adhered to [their] terms and conditions. However, treaties with the entire mankind such as above were not in the field in the days of Holy Prophet (Peace be upon him) of Islam which certainly stand at a higher pedestal than a treaty with a State, tribe or individual to which the Holy Prophet attached great sanctity and importance. The Holy Quran attaches utmost importance to treaties, covenants, pledges and promises and enjoins its followers to fully adhere to its terms and conditions. According Encyclopedia of Seerah Vol. I.:
>
> - "The Quran commands: "O you who believe! Fulfill all your obligations (and trusts)." (5:1).
> - "Excepting those unbelievers with whom you made treaties and who afterwards did not violate these in the least, nor did they give help to anyone against you; so you also should observe treaties with such people in accordance with their terms, for Allah loves pious people." (9:4).
> - "If you fear treachery from any group, throw back (their covenant) to them, so as to be on equal terms, for Allah loves not the treacherous." (8:58).
>
> xxx
>
> ...Islam is a universal religion. The last sermon of Holy Prophet is the first Charter of Human Rights wherein all human beings are equal. Mankind is one. Allah says in Holy Quran that "He created man and woman from a single being (7:189)" and for HIM "whoso doeth good work, whether male or female and he (or she) is a believer, such will enter paradise. (4:124)."
>
> [Thus,] section 10 of the Citizenship Act is discriminatory, negates gender equality and is in violation of Articles 2-A and 25 of the Constitution of Islamic Republic of Pakistan. It is also against the international commitments of Pakistan, and most importantly is repugnant to Holy Quran and Sunnah."

• DUTY TO UPHOLD CONSTITUTIONAL MORALITY

Everyone has a right to recognition everywhere as a person before the law. This is high time to change mindset of society and to realise that a person of diverse gender identity shall also enjoy legal capacity in all aspects of life.

▶ ***MIAN ASIA V. FEDERATION OF PAKISTAN***
W.P. No. 31581/2016
Abid Aziz Sheikh, J. (Lahore High Court)

Facts:

Petitioner Mian Asia, transgender, was previously issued a computerized national identity card (CNIC), which has the name "Muhammad Yousaf" as the father's name. Yousaf, the "guru" of the petitioner, passed away on 14.01.2005. Petitioner's CNIC had expired.

Petitioner applied for renewal of the CNIC, however, the renewal was declined by the respondents on the ground that petitioner could not provide the name of his father and name of his "guru" in the parent column is not acceptable.

Mian Asia argued that the CNIC card should not be denied to transgender persons who have been abandoned by their family and therefore are unaware of their parents' identity. Petitioner and many other transgenders were brought up by their "gurus", therefore, their names instead of unknown parents should be included in CNIC. Petitioner argued that the denial of the identification card violated the constitutional right to life, dignity, citizenship, equality, and non-discrimination. On the other hand, initially the stance taken by the respondents was that because petitioner and many other transgenders/eunuchs cannot provide name of their parents, therefore, they cannot be issued CNICs.

Issue:

Whether Mian Asia has a constitutional right to obtain a computerized national identity card.

Decision:

Yes. The Court referenced the colonial laws like the Criminal Tribes Act of 1871 and Section 377 of the Indian Penal Code, 1860 to recognise the history of ridicule and marginalisation faced by the transgender community. The Court held:

> "At the time of British Colonial rule, the Criminal Tribes Act, 1871 (Act) was introduced to declare eunuchs (transgenders), a criminal tribe. [...] The Act was not only to attack the dignity of transgenders community, degrading them in social echelons but also to eventually force them to adopt begging and other questionable professions. After British Colonial rule, the Act was repealed in August, 1949, however, the damage done to transgenders remained irreparable. The transgenders lost social respect and various stereotypes have been built to humiliate and discount the transgenders community.
>
> Finally in Year 2009, the august Supreme Court of Pakistan took up the matter in its original jurisdiction in Civil Petition No.43 of 2009 and directions were passed from time to time to recognize the dignity of transgenders and declaring them third gender entitled for equal protection under Article 25 of the Constitution of Islamic Republic

of Pakistan, 1973 (Constitution). The apex Court noted that transgenders have been neglected on account of gender disorders in their bodies. They have been denied the right of inheritance as they were neither sons nor daughters who could inherit under Islamic Law and sometime even families intentionally disinherit transgender children. To eliminate this gender-based illtreated discrimination against transgenders, the august Supreme Court in Dr. Muhammad Aslam Khaki and another vs. Senior Superintendent of Police (Operation), Rawalpindi and others (2013 SCMR 187) directed Provincial and Federal Governments to protect transgenders identification, right to inherit property, right to education and right to life which include employment and quality of life.

The matter again brought to the notice of honourable Supreme Court of Pakistan in Dr. Muhammad Aslam Khaki and others vs. SSP (Operations) Rawalpindi and others (PLD 2013 SC 188), when the transgenders were not issued National Identify Cards by NADRA. In compliance of directions issued by apex Court, the NADRA made arrangements to issue CNIC to transgenders and honourable Supreme Court in said judgment reiterated that transgenders be treated equally as other citizens.

With above background of the matter, this Court during these proceedings apprised NADRA authorities that transgenders/eunuchs being citizens of this country are also entitled [to the] same respect, dignity and fundamental rights as are available to the other segments of the society. This Court also apprised the policy makers that in case any transgender/eunuch is not able to provide name of his father, being abandoned by his family, it cannot be a sole ground not to issue him CNIC and to deprive him from his fundamental right of being a citizen of this country. In consequence of these proceedings, the concerned policy makers (NADRA) finally framed a policy dated 21.08.2017 (Policy) to issue CNICs to the transgenders/eunuchs with unknown parentage. [...]

Under the aforesaid policy, the transgenders/eunuchs with unknown parentage will be provided CNIC after fulfilling the procedure prescribed under the policy. The learned counsel for the petitioner submits that under the policy, the grievance of the petitioner has been redressed and he has already been issued CNIC. This Court appreciates the efforts of the policy makers to address this issue and redress the problem and grievance of the petitioner and many other transgenders/eunuchs. However because contents of the policy are not under challenge, therefore, any observation in this judgment will not immune the policy from future judicial review.

Gender identity is one of the most fundamental aspect of life which refer to a person intrinsic sense of being male, female or transgender. Everyone is entitled to enjoy all human rights without discrimination on the basis of gender identity. Everyone has the right to recognition everywhere as a person before the law. This is high time to change mindset of the society and to realize that a person of diverse gender identity shall also enjoy legal capacity in all aspects of life. The transgenders/eunuchs are as respectable and dignified citizens of this country as any other person and they are also entitled for all fundamental rights including right of education, property and right of life which include quality of life and livelihood. They cannot be deprived of their rights including right to obtain CNIC or citizenship for mere reason that they are transgenders/eunuchs and do not know the whereabouts of their parents, without any fault of their own. The public functionaries and policy makers are expected to be more sensitive toward restoring dignity of transgender community rather adding to their existing plight."

• ROLE OF JUDGES AND PROSECUTORS TO TAKE EFFECTIVE ACTION

The general and discriminatory judicial ineffectiveness creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.

▶ ***MARIA DA PENHA V. BRAZIL***
Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000)
April 16, 2001
(Inter-American Commission on Human Rights)

Facts:

The petition alleges that the Federative Republic of Brazil (hereinafter "Brazil" or "the State") condoned, for years during their marital cohabitation, domestic violence perpetrated in the city of Fortaleza, Ceará State, by Marco Antônio Heredia Viveiros against his wife at the time, Maria da Penha Maia Fernandes, culminating in attempted murder and further aggression in May and June 1983. As a result of this aggression, Maria da Penha has suffered from irreversible paraplegia and other ailments since 1983.

The petition maintains that the State has condoned this situation, since, for more than 15 years, it has failed to take the effective measures required to prosecute and punish the aggressor, despite repeated complaints. The petition alleges violation of Article 1(1) (Obligation to Respect Rights), 8 (a Fair Trial), 24 (Equal Protection), and 25 (Judicial Protection) of the American Convention, in relation to Articles II and XVIII of the American Declaration of the Rights and Duties of Man ("the Declaration"), as well as Articles 3, 4(a), (b), (c), (d), (e), (f), and (g), and 5 and 7 of the Convention of Belém do Pará.

Decision:

The impunity that the ex-husband of Mrs. Fernandes has enjoyed and continues to enjoy is at odds with the international commitment voluntarily assumed by the State when it ratified the Convention of Belém do Pará. The failure to prosecute and convict the perpetrator under these circumstances is an indication that the State condones the violence suffered by Maria da Penha, and this failure by the Brazilian courts to take action is exacerbating the direct consequences of the aggression by her ex-husband. Furthermore, as has been demonstrated earlier, that tolerance by the State organs is not limited to this case; rather, it is a pattern. The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women.

Given the fact that the violence suffered by Maria da Penha is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors, it is the view of the Commission that this case involves not only failure to fulfill the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices. That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.

The State response was found to be "manifestly inadequate" to the gravity of the offences in question. The domestic judicial decisions in this case revealed a lack of efficacy and a certain degree of tolerance, and had no noticeable preventive or deterrent effect.

- ***OPUZ V. TURKEY***
  App. No. 33401/02.
  9 June 2009
  (European Court of Human Rights)

Facts:[15]

The applicant and her mother had both been threatened, gravely assaulted and beaten by the applicant's husband ("H.O.") on numerous occasions during the course of their marriage. The husband had even tried to overrun the two with his car, thereby gravely wounding the mother. The injuries sustained had been life-threatening. Several times the two women complained to the police about the husband's actions. Although he was prosecuted for some of the violence, the prison term of three months was later commuted to a fine. After his release the violence continued and eventually ended in the killing of the mother by the applicant's husband.

The applicant claimed that the injuries and anguish she had suffered as a result of the violence inflicted upon her by her husband had amounted to torture within the meaning of Article 3 of the European Convention on Human Rights (the right not to be subject to torture or cruel, inhumane or degrading treatment). She felt that the violence seemed as if it had been inflicted under state supervision as despite the ongoing violence and her repeated requests for help, the authorities had failed to protect her from her husband.

Issue:

Whether the State could be held responsible, under Article 3, for the ill-treatment inflicted on persons by non-state actors.

Decision:

The obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.

The local authorities, namely the police and public prosecutors, did not remain totally passive. After each incident involving violence, the applicant was taken for medical examination and criminal proceedings were instituted against her husband. The police and prosecuting authorities questioned H.O. in relation to his criminal acts, placed him in detention on two occasions, indicted him for issuing death threats and inflicting actual bodily harm and, subsequent to his conviction for stabbing the applicant seven times, sentenced him to pay a fine.

[15] Facts taken from Equal Rights Trust: http://www.equalrightstrust.org/ertdocumentbank//opuz%20v%20turkey%20case%20summary%20erl%20edit.pdf and ECHR blog: http://echrblog.blogspot.com/2009/06/landmark-judgment-on-domestic-violence.html

However, none of these measures were sufficient to stop H.O. from perpetrating further violence. In this respect, the Government blamed the applicant for withdrawing her complaints and failing to cooperate with the authorities, which prevented the latter from continuing the criminal proceedings against H.O., pursuant to the domestic law provisions requiring the active involvement of the victim.

The Court reiterates its opinion in respect of the complaint under Article 2, namely that the legislative framework should have enabled the prosecuting authorities to pursue the criminal investigations against H.O. despite the withdrawal of complaints by the applicant on the basis that the violence committed by H.O. was sufficiently serious to warrant prosecution and that there was a constant threat to the applicant's physical integrity.

However, it cannot be said that the local authorities displayed the required diligence to prevent the recurrence of violent attacks against the applicant, since the applicant's husband perpetrated them without hindrance and with impunity to the detriment of the rights recognised by the Convention. By way of example, the Court notes that, following the first major incident, H.O. again beat the applicant severely, causing her injuries which were sufficient to endanger her life, but he was released pending trial "considering the nature of the offence and the fact that the applicant had regained full health". The proceedings were ultimately discontinued because the applicant withdrew her complaints. Again, although H.O. assaulted the applicant and her mother using a knife and caused them severe injuries, the prosecuting authorities terminated the proceedings without conducting any meaningful investigation. Likewise, H.O. ran his car into the applicant and her mother, this time causing injuries to the former and life-threatening injuries to the latter. He spent only 25 days in prison and received a fine for inflicting serious injuries on the applicant's mother. Finally, the Court was particularly struck by the Diyarbakır Magistrate's Court's decision to impose merely a small fine, which could be paid by installments, on H.O. as punishment for stabbing the applicant seven times.

Thus, the response to the conduct of the applicant's former husband was manifestly inadequate to the gravity of the offences in question. It therefore observes that the judicial decisions in this case reveal a lack of efficacy and a certain degree of tolerance, and had no noticeable preventive or deterrent effect on the conduct of H.O.

Module 3:
TREATMENT OF GBV OFFENCES - INTERNATIONAL, NATIONAL, RELIGIOUS, AND CUSTOMARY CONTEXT: OFFENCES RELATING TO MARRIAGE

A. Case Law

- **HONOR KILLING**

Compounding of offenses

- ***GHULAM YASIN V. THE STATE, ET AL.***
  PLD 2017 Lah 103
  Case No. Crl. Misc. No.25168-B of 2015
  Erum Sajad Gull, J (Lahore High Court)

Facts:
Ghulam Yasin, petitioner, allegedly murdered his 16/17 year old daughter. He is charged under Section 302 PPC. He seeks bail before arrest on the ground that the legal heirs of the deceased have pardoned him.

Issue:
Whether or not he is entitled to bail.

Decision:
No. Mere fact that the legal heirs of the deceased have pardoned the petitioner is not sufficient to entitle the petitioner to pre-arrest bail as the offence alleged against the petitioner is against the State as well as the society. Section 345 Cr.P.C.[16] has been amended by the Criminal Law (Amendment) Act 2004 (Act I of 2005) and now sub-section 2-A has been inserted in Section 345 Cr.P.C. Thus, if a murder has been committed in the name of honour, compromise cannot be allowed without certain conditions and approval of the trial court is mandatory.

[16] Section 345 Cr.P.C. "Compounding Offence. (1) The offences punishable under the sections of the Pakistan Penal Code specified in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table....
(2-A) Where an offence under Chapter XVI of the Pakistan Penal Code, 1860 (Act XLV of 1860) has been committed in the name or on the pretext of karokari, siyahkari or similar other customs or practices, such offence may be waived or compounded subject to such conditions as the Court may deem fit to impose with the consent of the parties having regard to the facts and circumstances of the case."

Bail before arrest is an extraordinary judicial relief which requires extraordinary circumstances and is granted to protect innocent persons from humiliation and disgrace. Such concession could not be granted to an accused against whom a prima facie murder case is made out.

Honor Killing: Anti-Terrorism

▶ ***SHER AHMED V. KHUDA-E-RAHIM***
2012 MLD 158
C.P. No.495 of 2011, decided on 13th October, 2011.
Muhammad Hashim Khan Kakar and Jamal Khan Mandokhail, JJ (Balochistan High Court)

Facts:

The respondent was charged under section 302 read together with section 34 of the PPC for the murder of Rehmatullah and Mst. Amina, on the allegation of siyahkari. Trial in absentia was conducted by the Special Judge, Suppression of Terrorist Activities (STA) Court under the Suppression of Terrorist Activities (Special Court) Act, 1975 ("Act of 1975"). Respondent Khuda-e-Rahim and his companions were convicted and sentenced to suffer life imprisonment with fine of Rs.100,000 (conviction order).

In 2010, or after a lapse of about 11 years, the respondent moved an application under section 5-A(7) of the Act of 1975 before a Sessions Judge, Kalat at Mastung. He sought the suspension of the conviction order, claiming that (i) the case record does not indicate that codal formalities as to trials in absentia (specifically, publication in three national daily newspapers) were complied with, and (ii) in any event, similar provisions regarding trial in absentia, as embodied in section 19(10) of the Anti-Terrorism Act, 1997 and section 8(4) of the Special Courts for Speedy Trials Act, 1987, were previously declared to be violative of Article 10 of the Constitution.

At this time, the Special STA Court had already been succeeded by the Anti-Terrorism Court established under section 13 of the Anti-Terrorism Act, 1997. The Act of 1975 was repealed vide Section 39(1) of the Anti-Terrorism Act, 1997, but the operation of the prior law was given due protection by section 39(2)[17] of the later law.

[17] "(2) Notwithstanding the repeal of the Suppression of Terrorist Activities (Special Courts) Act, 1975 (XV of 1975) and the amendment of the Anti-Terrorism Act, 1997 (XXVII of 1997), by the Anti-Terrorism (Amendment) Ordinance, 2001--

(a) every order, decision or judgment passed by any Anti-Terrorism Court constituted under this Act or Special Court constituted under the Suppression of Terrorist Activities (Special Courts) Act, 1975, or any Appellate Court before such repeal or amendment shall remain in force and operative and the repeal or amendment shall not affect the previous operation of the law or any thing duly done or suffered or punishment incurred;

(b) every case, appeal and legal proceedings whatsoever filed or pending before any Court under the Suppression of Terrorist Activities (Special Courts) Act, 1975, including the High Court and the Supreme Court shall continue to be proceeded with in accordance with law before the concerned Court of competent jurisdiction, including the Court established under this Act, and all orders passed, decisions made and judgments delivered whether in the past or which may be made delivered hereafter by such concerned Court whether original, appellate or revisional, shall be deemed to have been validly and competently made;

(c) all convictions made, punishments or sentences awarded by the Anti-Terrorism Court or Special Court or an Appellate Court before such repeal or amendment shall be executed as if the said Acts where in force;

(d) any investigation or inquiry under this Act or the Suppression of Terrorist Activities (Special Courts) Act, 1975 made or instituted before the commencement of the Anti-Terrorism (Amendment) Ordinance, 2001, shall continue to be made and proceeded with in accordance with law;

(e) all cases pending before the Anti-Terrorism Court or Special Court immediately before the commencement of the Anti-Terrorism (Amendment) Ordinance, 2001, if not covered by this Act or clauses (a) and (b) above, shall stand transferred to the respective Courts of Session of the area or such other Courts of competent jurisdiction where the cases were registered against the accused and such Courts shall proceed with the cases from the stage at which they were pending, without the necessity of recalling any witnesses; and

(f) the Court of Session or, as the case may be, any other Court to which a case has been transferred from the Anti-Terrorism Court or a Special Court under Clause (d) shall try it in accordance with the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), and the law applicable to such case."

The Sessions Judge set aside the conviction order and ordered a retrial on the basis of "patent illegalities in the trial [of the respondent] in absentia" (second order).

The petitioner, who is the maternal uncle of Rehmatullah, filed the instant petition, praying that the second order be set aside on the ground that the Sessions Judge, Kalat at Mastung lacks jurisdiction, either to pass the said order or to try the respondent.

Issue:

Whether the Sessions Judge, Kalat at Mastung, after the repeal of the Act of 1975, had the jurisdiction to entertain an application under section 5-A(7) of the Act of 1975 for setting aside the conviction order.

Decision:

No. According to Section 39(2) of the Anti-Terrorism Act, pending cases that do not constitute a terrorist act within the meaning of Anti-Terrorism Act, 1997, would be transferred and tried by the respective Courts of Session. On the other hand, cases that come within the definition of "terrorism" as provided in section 6 of the Anti-Terrorism Act, 1997 shall be tried by the Special Court.

The respondent had committed the murder of Rehmatullah and Mst. Amina on the allegation of siyahkari in a brutal manner by means of firing with Kalashinkov. The act of the respondent, as alleged, falls under section 6(g)[18] of the Anti-Terrorism Act, 1997. Thus, the case was exclusively triable by the Special Court constituted under section 3 of the Act of 1975 being a scheduled offence. In Muhammad Akram Khan v. the State, the Supreme Court held that nobody has any right nor can any body be allowed to take the law in his own hands to take the life of anybody in the name of "Ghairat". Neither the law of the land nor religion permits the so-called honour killing, which amounts to murder. This iniquitous and vile act is violative of fundamental rights enshrined in Article 9 of the Constitution of Islamic Republic of Pakistan, 1973, which provides that no person would be deprived of life or liberty, except in accordance with law.

Thus, since the case was instituted under the provisions of (repealed) Act of 1975, therefore, under the provisions of Anti-Terrorism Act, 1997, the only restriction, upon the Judge of the Anti-Terrorism Court, would be that in case the prosecution succeeded to establish its case against the accused, he shall be liable to punishment as authorized by the law, prevailing at the time, when the offence was committed.

The petition was accepted and the second order was set aside. The Sessions Judge was directed to transmit the main case, along with the application under section 5-A(7) of the Suppression of Terrorist Activities (Special Courts) Act, 1975, filed by the respondent, to the concerned Anti-Terrorism Court.

[18] Section 6(g): "Involves taking the law in own hand, award of any punishment by an organization, individual or group whatsoever, not recognized by the law, with a view to coerce, intimidate or terrorize public, individuals, groups, communities, Government officials and institutions, including Law Enforcement Agencies beyond the purview of the law of the land."

▶ *GUL MUHAMMAD V. THE STATE*

PLD 2012 Balochistan 22
A.T.A. Criminal Appeal No.6 of 2007 and A.T.A. Murder Reference No.1 of 2007, decided on 29 September 2011.
Muhammad Hashim Khan Kakar and Ghulam Mustafa Mengal, JJ (Balochistan High Court)

Facts:

Gul Muhammad (accused) is the husband of Momil, who in turn is the daughter of Alan (complainant). In his complaint, Alan stated that four to five months back, Gul Muhammad made allegation of siyahkari upon Momil and intended to commit her murder. At that time, Momil was with Alan. Because of Gul's actuations, Alan did not hand custody of his daughter to Gul. In response, Gul killed several of Alan's relatives.

The Special Judge of the Anti-Terrorism Court convicted and sentenced appellant Gul Muhammad under section 302(b) of the P.P.C. read with section 7(a) of the Anti Terrorism Act, 1997 to death as ta'zir with direction to pay compensation of Rs.100,000.

On appeal, the accused contends that the case is an "ordinary crime" that does not fall under section 6 of the Anti Terrorism Act, 1997.

Issue:

Whether the accused's acts fall outside the ambit of the Anti-Terrorism Act, and therefore the Anti-Terrorism Court had no jurisdiction over the offense.

Decision:

Yes, the act falls under Section 6 of the Anti-Terrorism Act and therefore the court had jurisdiction. A plain reading of Section 6(g) of the Anti-Terrorism Act leaves no room for any doubt that any offence where the offender takes the law in his own hands and awards punishment, falls within the purview of the law. Venue of commission of a crime, the time of occurrence, the motive and the fact whether or not the said crime had been witnesses by public at large are not the only determining factors for deciding the issue whether a case did or did not fall within the parameters of the Anti-Terrorism Act, 1997. The crucial question would be whether the said crime had or had not the effect of striking terror or creating a sense of fear and insecurity in the people or any section of the people. The appellant has committed the murder of three innocent people on the fake allegation of siyahkari, while taking the law in his own hands, which certainly would have created a sense of fear, panic and terror amongst the villagers.

The killing of an innocent wife, sister and other female relatives, on the allegation of siyahkari, has become a routine practice, rather a fashion, and it is high time we discouraged such unwarranted and shocking practice resulting in double murder in the name of so-called 'honour killing'. [...] It is true that, in the rural areas of Balochistan and especially in Naseerabad division, the people do not swallow such kind of insult, touching the honour of their women-folk and usually commit murder of alleged siyahkar in order to vindicate and rehabilitate the family honour, but it is equally true that no license can be granted to anyone to take the law of the land in his hands and start executing the culprits himself instead of taking them to the Courts of law. The murder based on Ghairat does not furnish a valid mitigating circumstance for awarding a lesser sentence. The killing of innocent people, specially the women on the

pretext of siyahkari is absolutely un-Islamic, illegal and unconstitutional. It is worth mentioning that the believers of Islam are not even allowed to divorce them, without establishing their accusation. We profess our love for Islam, but ignore clear Qur'anic injunctions regarding the rights of women.[19]

Lastly, as the Anti-Terrorism Act is a special law, the private complainant or the legal heirs have no right to compound the 'Scheduled Offence', as those offences are mainly against the State and not only against individuals. Moreover, the offences cannot be compounded automatically by the legal heirs, but it is always through the Court and the Court can decline the permission to compromise the offence by the legal heirs of victim.

Pardon is not allowed in cases of premeditated, intentional murder; no proof of sudden and grave provocation.

▶ ***MUHAMMAD SIDDIQUE V. THE STATE***
PLD 2002 Lahore 444
Criminal Appeal No.170 of 2000, heard on 3 June 2007
Tassaduq Hussain Jilani and Asif Saeed Khan Khosa, JJ (Lahore High Court)

Facts:

This case involved the triple murder by the father of the deceased girl who had married of her choice against the wishes of her parents. Her father allegedly killed her, her husband and their daughter of 6/7 months. The accused had registered the case against his daughter and her husband under Hudood law. The deceased husband and wife had been called by the accused through co-accused on the pretext that the former (accused) wanted to compromise the matter.

Decision:

In deciding that the accused was guilty of the crime, the Court stated the following:

"We have given our anxious consideration to the prayer for appellant's acquittal on the basis of compromise and not that the appellant pre-planned the triple murder and carried out the plan in a cold-blooded, calculated and brutal manner. There was no element of grave and sudden provocation. The only fault of appellant's adult daughter Mst. Salma was that she married someone of her own choice. There is no evidence that there was no marriage or that they were living a life of adultery. They had entered the sacred union of marriage and had given birth to a baby girl.

While examining the case this Court, with a tinge of dismay, took judicial notice of the fact that the act of the appellant is not a singular act of its kind. It is symptomatic of a culture

[19] The Court then states:

"The Holy Qur'an in Sura XXIV (NUUR) Verses 4 says:

"And those who launch A charge against chaste women And produce not four witnesses, (To support their allegation), ---Flog them with eight stripes; And reject their evidence Ever after: for such men Are wicked transgressors;---"

In this regard, it would also be advantageous to reproduce Hadith 837 Book 48 (Sahih Bukhari), which speaks as under:--

"Narrated Ibn Abbas: Hilal bin Umaiya accused his wife before the Prophet of committing illegal sexual intercourse with Sharik bin Sahma. ' The Prophet 'said, "Produce a proof, or else you would get the legal punishment (by being lashed) on your back. " Hilal said, "Oh Allah's Apostle! If anyone of us saw another man over his wife, would he go to search for a proof. " The Prophet went on saying, "Produce a proof or else you would get the legal punishment (by being lashed) on your back." The Prophet then mentioned the narration of Lian (as in the Holy Book). (Surat-al-Nur: 24)."

and a certain behavior pattern which leads to violence when a daughter or a sister marries a person of her choice. Attempts are made to sanctify this behaviour in the name of "family honor". It is this perception and psyche which had led to hundreds of murders.

According to the report of the Human Rights Commission of Pakistan which has not been controverted by any State agency, over 1000 victims were of "honor killing" in the year 1999 and 888 in the single Province of Punjab in the year 1988. Similarly in Sindh, according to the statistical record maintained by the Crimes Branch of Sindh, it was 65 in 1980, 141 in 1999 and 121 in 2000. In the year 2001, at least 227 "honor killings" were reported in Punjab alone.

These killings are carried out with an evangelistic spirit. Little do these zealots know that there is nothing religious about it and nothing honorable either. It is male chauvinism and gender bias at their worst. These prejudices are not country specific, region specific or people specific. The roots are rather old and violence against women has been a recurrent phenomenon in human history. The Pre-Islamic Arab Society was no exception. Many cruel and inhuman practices were in vogue which were sought to be curbed by the advent of Islam. It is well-known that in those times, daughters used to be buried alive, it was strongly deprecated and a note of warning was conveyed in Holy Qur'an. In Sura No.81 (Al-Takwir), Verse 8, the Day of Judgment is portrayed in graphic detail when inter alia those innocent girls, who were buried alive or killed, would be asked to speak out against those who wronged them and the latter would have to account for that.

The tragedy of the triple murder is yet another tale of an old Saga; the characters are different yet plot is the same, the victims were accused of the same "crime" and even the method in madness remained the same i.e. the prosecutor, the Judge and the executioners all in one. Perhaps if the police had fairly investigated the case and the subordinate Courts had gone by the book by extending requisite protection, Salma and Saleem (deceased) would not have run away to Islamabad. This is a typical example of misuse and misapplication of Hudood Laws in the country. This abdication of authority by the State institutions made the couple run for its life and provided an opportunity to the appellant to call them over by way of deception. In utter disregard to the basic right of an adult woman to marry, to the institution of family, and motivated by self-conceived notion of "family honor", the appellant had started a tirade against them by having a criminal case registered. Baby girl was born out of the wedlock. The daughter left her home and hearth and even the city of her birth and started living in Islamabad in the fond dream of creating a "new home" and "new world" but the appellant's venom, it seems, never subsided. ...He thought a plan and a rather treacherous one of inviting them to his house. When they came, he brought out his gun and killed each one of them with repeated shots.

A murder in the name of honor is not merely the physical elimination of a man or a woman. It is at a socio-political plane a blow to the concept of a free dynamic and an egalitarian society. In great majority of cases, behind it at play, is a certain mental outlook, and a creed which seeks to deprive equal rights to women i.e. inter alia the right to marry or the right to divorce which are recognized not only by our religion but have been protected in law and enshrined in the Constitution. Such murders, therefore, represent deviant behaviors which are violative of law, negatory of religious tenets and an affront to society. These crimes have a chain reaction. They feed and promote the very prejudices of which they are the outcome, both at the conscious and sub-conscious level to the detriment of our enlightened ideological moorings.

But are these social aberrations immutable? Is it and inexorable element of fate that the women should continue to be the victims of rage when it comes to the exercise of those fundamental rights which are recognized both in law and religion? NAY! No tradition is sacred, no convention is indispensable and no precedent worth emulation if it does not stand the test of the fundamentals of a civil society generally expressed through law and the Constitution. If humans were merely slaves of tradition or fate, they would still be living in caves eating, mating and fighting like other animals.

It is the mind and the ability to reason which distinguishes them from other living creatures. Human progress and evolution are the product of this ability. Law is part of this human odyssey and achievement. Law is a dynamic process. It has to be in tune with the ever-changing needs and values of a society failing which individuals suffer and social fabric breaks down. It is this dimension of law which makes it a catalyst of social change. Law, including the judge-made law, has to play its role in changing the inhuman social moors.

The offence which stands proved against the appellant has to have a judicial response which serves as a deterrent, so that such aberrations are effectively checked. Any other response may amount to appeasement or endorsement. A society which fails to effectively punish such offenders becomes privy to it. The steady increase in these kinds of murders is reflective of this collective inaction, of a kind of compromise with crime and if we may say so of a complicity of sorts. A justice system of crime and punishment, bereft of its purposive and deterrent elements loses its worth and credibility both. The individual, institutional and societal stakes, therefore, are high.

In these attending circumstances, we are of the considered view that the appellant does not deserve the indulgence of a compromise leading to acquittal. The sentences awarded to the appellant, therefore, do not call for interference."

Pardon or compromise is not allowed in honor killing cases.

- ***KHADIM HUSSAIN, ET AL. V. THE STATE***
  PLD 2012 Baluchistan 179
  Criminal Miscellaneous Application (Bail) No.143 of 2012, decided on 24 April 2012.
  Muhammad Hashim Khan Kakar, J (Balochistan High Court)

Facts:

Juma Khan and Mst. Bakhtawar were allegedly killed by the applicants, Khadim Hussain and Ghulam Sarwar. The accused are charged under Section 302 read with section 34 of the P.P.C. Their application for bail was denied.

The accused contend that: (i) the rival parties have compounded the offence and forgiven each other in the name of Almighty Allah; (ii) compromise had been effected, which was submitted before the trial Court along with bail application; (iii) the Additional Session Judge was not justified to refuse bail on the ground that the offence committed on the pretext of 'Ghairat' is not compoundable; and (iv) lastly, the applicants were entitled to bail, as according to the prosecution's own showing, the occurrence was the result of 'siyahkari'.

Issue:

Whether the application for bail was correctly denied.

Decision:

Yes. It is true that people do not swallow such kind of insult, touching the honour of their womenfolk and usually commit murder of alleged 'siyahkar' in order to vindicate and rehabilitate the family honour, but it is equally true that no one can be granted license to take law of the land in his own hands and start executing the culprits himself instead of taking them to the Courts of law. The murder based on `Ghairat' does not furnish a valid ground for bail. Killing of innocent people, especially women on the pretext of 'siyahkari', is absolutely un-Islamic, illegal and unconstitutional.

As to the effect of the compromise, a bare perusal of the provisions of law on the subject[20] (inserted by Criminal Law Amendment Act, 2004 (Act I of 2005) clearly demonstrate that the offences could be compounded by the permission of the Court. The amendment inserted in both the Sections through Criminal Law Amendment Act, 2004 made it obligatory that the offence committed in the name or on the pretext of 'siyahkari' and similar other customs or practices may be waived or compounded subject to such conditions as the Court deems fit to impose with the consent of the parties having regard to the facts and circumstances of the case. Despite compounding to ta'zir and waiver of 'qisas', the Court enjoys discretion to punish the accused persons, when the offence has been committed with brutality or on the pretext of 'siyahkari'. Compromise effected outside of the Court is of no value unless sanctioned by a Court as envisaged in column No.3 of section 345(2) of the Cr.P.C., and such sanction is based on sound and reasonable discretion and is not accorded as a matter of routine. The Court has to decide after taking into consideration all the attending circumstance of the case, whether in the given situation it should or should not grant permission for compounding the offence. The courts are also obliged to decide whether the case falls

[20] 338-E. Waiver or compounding of offence.---

(1) Subject to the provisions of this Chapter and section 345 of the Code of Criminal Procedure, 1898 (V of 1898), all offences under this Chapter may be waived or compounded and the provisions of sections 309 and 310 shall, mutatis mutandis, apply to the waiver or compounding of such offences:

Provided that, where an offence has been waived or compounded, the Court may, in its discretion having regard to the facts and circumstances of the case, acquit or award ta'zir to the offender according to the nature of the offence.

Provided further that where an offence under this Chapter has been committed in the name or on the pretext of honour, such offence may be waived or compounded subject to such conditions as the Court may deem fit to impose with the consent of the parties having regard to the facts and circumstances of the case.

(2) All questions relating to waiver or compounding of an offence or awarding of punishment under Section 310, whether before or after the passing of any sentence, shall be determined by trial Court:

Provided that where the sentence of qisas or any other sentence is waived or compounded during the pendency of an appeal, such questions may be determined by the appellate Court:

Provided further that where qatl-e-amd or any other offence under this Chapter has been committed as an honour crime, such offence shall not be waived or compounded without permission of the Court and subject to such conditions as the Court may deem fit having regard to the facts and circumstances of the case.

345. Compounding Offences.---

(1) The offences punishable under the sections of the Pakistan Penal Code specified in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table.

(2) The offences punishable under the sections of the Pakistan Penal Code specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in third column of that table.

(2-A) Where an offence under Chapter XVI of the Pakistan Penal Code, 1860 (Act XLV of 1860), has been committed in the name or on the pretext of karo kari, siyahkari or similar other customs or practices, such offence may be waived or compounded subject to such conditions as the Court may deem fit to impose with the consent of the parties having regard to the facts and circumstances of the case.

within the provisions of section 311, P.P.C. and whether the offender despite the compromise, deserves to be punished by way of ta'zir under the said provision of law.

Here, the alleged offence committed by the applicants, prima facie, falls within the preview of section 311, P.P.C., which [...] is not compoundable in nature. Brutal murders of innocent girls on the pretext of 'siyahkari' are mainly against the State and society and not against an individual. Moreover, the offences cannot be compounded automatically by the legal heirs, but it is always through the Court and the Court can decline the permission to compromise the offence by the legal heirs of victim(s), keeping in view the peculiar circumstances of the case.

No one has any right to take the law in his own hands and take the life of anybody in the name of 'Ghairat'. Neither the law of the land nor religion permits so-called honor killing, which amounts to murder. Such act violates fundamental rights as enshrined under Article 9 of the Constitution.

- ***MUHAMMAD AKRAM KHAN V. THE STATE***
  PLD 2001 SC 96
  Criminal Appeal No. 410 of 1994, decided on 20 September 2000
  Sh. Riaz Ahmed, Rana Bhagwandas, and Mian Muhammad Ajmal, JJ (Supreme Court)

Facts:

In a case of honor killing, the accused-appellant is accused of killing Niaz Muhammad (victim).

It appears that Muhammad Sadiq, a paternal cousin of the victim, was suspected of having illicit relations with the accused's sister. The accused heard about this from his co-villagers. In an earlier incident, Muhammad Sadiq was present near the accused's house, and the accused fired at him. The accused was sent to jail, but was released based on a compromise between the elders of both families. Nevertheless, he was informed by his co-villagers that Muhammad Sadiq was still allegedly in contact with his sister.

A few months later, the accused saw his sister talking with the victim, while standing in the wheat field. He thought that the victim had come at the instance of Muhammad Siddiq, to convey some message to the accused's sister or to abduct her for him. Accused then contended that he, under the impulse of "Ghairat" fired at the victim, because he caused grave and sudden provocation. The victim died from gun shot wounds.

The accused was found guilty by lower courts and sentenced to death.

Issue:

Whether "Ghairat" constitutes a legal defense.

Decision:

No. The defense taken by the appellant that he committed the offence under the impulse of "Ghairat" under grave and sudden provocation, has not been proved by him by any cogent evidence. After examining the prosecution case and defense's versions, we find that the prosecution has proved its case against the appellant beyond reasonable doubt through reliable

witnesses, who had no motive of their own to charge the appellant falsely. Mere relationship of the witnesses with the deceased would not render their testimony unreliable.

It appears that defense's plea was an afterthought, cooked up at the trial in an attempt to attack the prosecution's version of events. Legally and morally speaking, no body has any right nor can anybody be allowed to take the law in his own hands, to take the life of anybody in the name of "Ghairat". Neither the law of the land nor religion permits so-called honor killing, which amounts to murder (Qatl-i-Amd) simpliciter. Such iniquitous and vile act is violative of fundamental right as enshrined in Article 9 of the Constitution of Islamic Republic of Pakistan, which provides that no person, would be deprived of life or liberty except in accordance with law. Thus, any custom or usage in that respect is void under Article 8(1) of the Constitution. In this case, the plea of "Ghairat" cannot be deemed to be a mitigating circumstance as the motive was not directly against the deceased.

The appeal was dismissed and the death sentence confirmed.

• ACID ATTACKS

Redress given to victims

▶ ***LAXMI V. UNION OF INDIA & ORS***
Writ Petition (C) No. 129 of 2006, decided on 10 April 2015.
Madan B. Lokur, Uday Umesh Lalit, JJ. (Supreme Court of India)

Decision:

"The second and third prayers relate to the cost of treatment of the acid attack victims and application of Section 357C of the Code of Criminal Procedure, 1973, which was inserted by an Amendment Act in 2013 with effect from 03.02.2013.

[...] [We] are told today that the Victim Compensation Scheme has been notified in all States and Union Territories.

We have gone through the chart annexed along with the affidavit filed by the Ministry of Home Affairs and we find that despite the directions given by this Court in Laxmi vs. Union of India [(2014) 4 SCC 427], the minimum compensation of Rs.3,00,000/- (Rupees three lakhs only) per acid attack victim has not been fixed in some of the States/Union Territories. In our opinion, it will be appropriate if the Member Secretary of the State Legal Services Authority takes up the issue with the State Government so that the orders passed by this Court are complied with and a minimum of Rs.3,00,000/- (Rupees three lakhs only) is made available to each victim of acid attack.

[...] Insofar as the proper treatment, aftercare and rehabilitation of the victims of acid attack is concerned, the meeting convened on 14.03.2015 notes unanimously that full medical assistance should be provided to the victims of acid attack and that private hospitals should also provide free medical treatment to such victims. It is noted that there may perhaps be some reluctance on the part of some private hospitals to provide free medical treatment and, therefore, the concerned officers in the State Governments should take up the matter with the private hospitals so that they are also required to provide free medical treatment to the victims of acid attack.

First-aid must be administered to the victim and after stabilization, the victim/patient could be shifted to a specialized facility for further treatment, wherever required.

Action may be taken against hospital/clinic for refusal to treat victims of acid attacks and other crimes in contravention of the provisions of Section 357C of the Code of Criminal Procedure, 1973.

[...] [What] we understand by free medical treatment is not only provision of physical treatment to the victim of acid attack but also availability of medicines, bed and food in the concerned hospital.

We, therefore, issue a direction that the State Governments/Union Territories should seriously discuss and take up the matter with all the private hospitals in their respective State/ Union Territory to the effect that the private hospitals should not refuse treatment to victims of acid attack and that full treatment should be provided to such victims including medicines, food, bedding and reconstructive surgeries.

We also issue a direction that the hospital, where the victim of an acid attack is first treated, should give a certificate that the individual is a victim of an acid attack. This certificate may be utilized by the victim for treatment and reconstructive surgeries or any other scheme that the victim may be entitled to with the State Government or the Union Territory, as the case may be.

[...] With regard to the banning of sale of acid across the counter, we direct the Secretary in the Ministry of Home Affairs and Secretary in the Ministry of Health and Family Welfare to take up the matter with the State Governments/Union Territories to ensure that an appropriate notification to this effect is issued within a period of three months from today.

The final issue is with regard to the setting up of a Criminal Injuries Compensation Board. In the meeting held on 14.03.2015, the unanimous view was that since the District Legal Services Authority is already constituted in every district and is involved in providing appropriate assistance relating to acid attack victims, perhaps it may not be necessary to set up a separate Criminal Injuries Compensation Board. In other words, a multiplicity of authorities need not be created.

In our opinion, this view is quite reasonable. Therefore, in case of any compensation claim made by any acid attack victim, the matter will be taken up by the District Legal Services Authority, which will include the District Judge and such other co-opted persons who the District Judge feels will be of assistance, particularly the District Magistrate, the Superintendent of Police and the Civil Surgeon or the Chief Medical Officer of that District or their nominee. This body will function as the Criminal Injuries Compensation Board for all purposes.

A copy of this order be sent to learned counsel appearing for the Secretary in the Ministry of Home Affairs and the Secretary in the Ministry of Health and Family Welfare for onward transmission and compliance to the Chief Secretary or their counterparts in all the States and Union Territories.

The Chief Secretary will ensure that the order is sent to all the District Magistrates and due publicity is given to the order of this Court. A copy of this order should also be sent to the

Member Secretary of NALSA for onward transmission and compliance to the Member Secretary of the State Legal Services Authority in all the States and Union Territories. The Member Secretary of the State Legal Services Authority will ensure that it is forwarded to the Member Secretary of each District Legal Services Authority who will ensure that due publicity is given to the order of this Court."

• SWARA AND WANNI

The judiciary as a catalyst for social change

▶ ***SAMAR MINALLAH V. FEDERATION OF PAKISTAN***[21]
(Not published)
(Supreme Court of Pakistan)

"A Petition was filed under the article 184 (3) regarding Swara and Vanni when, in December 2005, the Supreme Court brought under challenge the unconstitutional, unlawful and un-Islamic custom of giving girls as compensation to end disputes. After its landmark orders to the police in Punjab and the KP on Dec. 16, 2005 to protect women and girls from Vanni marriages, the Supreme Court instructed the Inspector Generals of the police in all four provinces and in the Northern Areas to act against the settlement of disputes through these mostly-rural customs. The Chief Justice termed Jirgas a negation of the concept of civilized society. At another hearing in the Supreme Court, directions were given by the apex court to form special committees throughout Pakistan to provide legal assistance to the victims of Swara and Vanni. The committees have not only been formed, but have started assisting those who are referred to these committees. This concrete step is to have a lasting impact as it is a move towards acknowledgment of the prevalence of a human rights violation that, in the past was lost in silence and denial. Based on the premise that injustice in the form of Swara, Sang Chatti, Vanni or Khoon Baha/Irjaai is commonly perpetrated in our societies and the victims may not be in a position to have recourse to legal means to get justice, the Supreme Court gave an entirely new form to 'judicial activism'. It was through judicial activism that a petition that was initially filed to curb Swara, later helped in identifying other facets of the custom spread in various parts of the country. Victims of Vanni and Sang Chatti and their families not only started to resist this form of reconciliation, but many approached formal courts for intervention. This judicial activism led not just to a social change but transformed into a movement and a silent revolution in the minds of the civil society and media.

By freezing several Jirga verdicts, the apex court has sent a clear message to tribal chiefs that customs like Vanni and Swara that are being committed against the women should not be allowed to exist. For the first time, the real face of Swara, Vanni and Sang Chatti was seen and experienced in the courts where little girls and their fathers came to reach out for justice. Justice, that till recent past remained silent in such accepted norms, could finally be heard and seen driven by logic and ideals. The Honourable Supreme Court's proactive stance opened the doors for many women and children who were silently enduring the injustice that was being perpetrated upon them in the name of culture. During the period from December 2005 to June 30th, 2006, around sixty cases of Swara were recorded in the two districts of the KR In the month of May after the Honourable Supreme Court heard the appeal of Zarina

[21] Excerpt below from: Samar Minallah Khan. The Supreme Court of Pakistan and Compensation Marriages. http://ethnomedia.pk/pdf/Booklet.pdf

Bibi, a victim of Vanni, more than twelve cases of Vanni emerged only from District Bhakkar within two weeks time. Seven of these cases of Vanni resulted in intervention by the local media and police.

From Mianwali, five sisters given as Vanni reached out for judicial intervention when they experienced lack of apathy from other quarters. In June, 2006, the handing over of an eleven year old girl to a rival family in Swara was challenged in the Peshawar High Court. A writ petition was filed by two sisters, Sanad Bibi aged (eleven) and Shah Izzat Bibi aged (nine), with a prayer to the court that a Jirga decision in Barawal Banda in Upper Dir regarding the handing over one of them to the rival family in Swara be declared as illegal and unconstitutional. Bakht Meena aged (eight), was to serve as compensation for her brother's crime. The incident was reported by one of the villagers. Mardan Police took prompt action when they were reported that a Jirga in Bakhshali had resolved a dispute through a Swara deal. Saima aged (five), was to be given in marriage to Mohammad Ali aged (twenty five) for her father Hashmat's crime. Her father was involved in a 'Sharam' (honour crime) and the only way to free himself from the rage of the girl's family was to hide behind little Saima. The Jirga was overruled by the local administration in April 2006 in Bashkhali, Mardan. The Mardan Police, in June 2006, recovered five year old Rubina from the rival party's home. She had been handed over to the rival party as compensation for a moral crime committed by her brother. On May 31st 2006, on the demand of the Jirga members in Shikarpur Sindh, Mohammad Ramzan pledged to hand over his daughter Heer aged (nine) and one year old Kareema as compensation for eleven buffaloes within three days. The handing over of the girls was halted after the case was brought to the notice of the Honourable Supreme Court. In June 2006, in Buner, a two month old girl was taken to a Jirga where she was given in marriage to a one year old boy. The verbal solemnization was conducted by the imam of the mosque. Buner police later arrested the Jirga members and the imam. In the past few years since the Honourable Supreme Court has taken up the issue of Swara and Vanni, the police has ceased to treat this sensitive issue as a 'private' matter.

In 2012, The Supreme Court of Pakistan clubbed together the NCSW (National Commission on the Status of Women) Petition Against Jirgas and the 2004 Petition AgainstJirga and Compensation Marriages."

Jirga members accused of violating Section 310-A of Pakistan Penal Code[22] were not granted bail.

- ***SARGAND, ET AL. V. THE STATE THROUGH ADDITIONAL ADVOCATE GENERAL, ET AL.***
  2014 MLD 1464 Pesh.
  Criminal Miscellaneous Bail Application No.438-M of 2013, decided on 8 October 2013.
  Muhammad Daud Khan, J (Peshawar High Court)

Facts:

The statements of the complainant (Mst. Nazia) and her brother Umar Sadiq, as recorded by the Judicial Magistrate under section 164 Cr.P.C., showed the following:

[22] "310-A. Punishment for giving a female in marriage or otherwise in `badla-e-sulh', wanni or Swara: "Whoever gives a female in marriage or otherwise compels her to enter into marriage, `badla-e-sulh', wanni, or swara or any other custom or practice under any name, in consideration of setting a civil dispute or a criminal liability, shall be punished with imprisonment of either description for a term which may extend to seven years but shall not be less than three years and shall also be liable to fine of five hundred thousand rupees."

- In order to settle the dispute with regard to illicit relations between Sardar Ali, uncle of the complainant, and Mst. Jan Bakhta, wife of Khan Bacha, a "Jirga" was convened.
- The elders of the locality gave the hand of Mst. Nazia to Sardar Hussain as 'Swara' as per custom of the area, without the complainant's will and consent.

The petitioners (members of the jirga), claiming that they are innocent and have been falsely implicated in the case, prayed for their release on bail.

Issue:

Whether or not the accused should be released on bail.

Decision:

No. At the time of the decision of the 'jirga' members, section 310-A has already been inserted in the Pakistan Penal Code (P.P.C.). Sections 310 and 310-A therefore indicate that such traditions constitute derogation and disobedience of law. Handing over the lady without her consent in such humiliating manner is not only against the fundamental right and liberty of human beings, enshrined in the Constitution of Pakistan, but also against the importance and value of human beings given by the Allah Almighty to the most imminent of created things; mankind ('Ashraful Makhluqat').

At this stage, the record suggests that accused/petitioners are involved in the commission of offense and as such no good ground exists in their favor entitling them for the concession of bail. However, the tentative assessment made herein shall not prejudice the trial Court.

The bail application of the accused individuals was dismissed. The Court held that handing over a lady without her consent in such a humiliating manner is not only against the fundamental right and liberty of human beings, but also against the importance and value of human beings given by Allah to mankind.

- ***MUHAMMAD SULTAN, ET AL. V. THE STATE, ET AL.***
  2013 Pcr.LJ 950 Pesh.
  Criminal Miscellaneous B. A. No. 647-M of 2012, decided on 26 December 2012.
  Rook-Clamin Khan, J (Peshawar High Court)

Facts:

Complainant was suspected of illicit relations with Mst. Khan Bibi, a married woman. Mst. Bibi was ousted by her in-laws to the house of her parents. A jirga was convened to settle the dispute between the complainant and Mst. Bibi's in-laws, whereby the elders of the locality gave the hand of complainant's sister (Mst. Sardari Gul, the victim) to another person as 'swara'. After three months, the complainant learned that Mst. Bibi was killed.
The accused individuals, petitioners in this case, were father and brother of the victim, respectively, who fully participated in the Jirga and gave away the victim in lieu of threat to the complainant's life. They are charged under Section 310-A of the P.P.C. They filed a bail application, which was not opposed by the complainant.

Issue:

Whether or not the accused should be released on bail.

Decision:

No. At the time of the decision of the jirga members, section 310-A has already been inserted in the Pakistan Penal Code (P.P.C.). Sections 310 and 310-A therefore indicate that such traditions constitute derogation and disobedience of law. Handing over the lady without her consent in such humiliating manner is not only against the fundamental right and liberty of human beings, enshrined in the Constitution of Pakistan, but also against the importance and value of human beings given by the Allah Almighty to the most imminent of created things: mankind (*'Ashraful Makhluqat'*).

Since the petitioners fully participated in the jirga and were in charge of Mst. Sardari Gul, being her father and brother, there is a *prima facie* case against them, falling under the prohibitory clause of section 497, Cr.P.C. They are thus are not entitled to the concession of bail.

B. Handouts

- **Handout A: Excerpts of Relevant Laws**
- **Handout B: Khyber Pakhtunkhwa Elimination of Custom of Ghag Act, 2013**
- **Handout C: Sindh Child Marriages Restraint Act, 2013**
- **Handout D: Relevant Laws from Punjab Province**

• Handout A: Excerpts of Relevant Laws

HONOUR KILLING

A. INTERNATIONAL LAW

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Article 5 - 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;

Article 16
1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage;
(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
(c) The same rights and responsibilities during marriage and at its dissolution;
(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

B. NATIONAL LAWS

Constitution of Islamic Republic of Pakistan, 1973

9. Security of a Person.__ No person shall be deprived of life or liberty save in accordance with law.

• Handout A: Excerpts of Relevant Laws

14. Inviolability of dignity of man, etc.__(1) The dignity of man and, subject to law, the privacy of home, shall be inviolable.

(2) No person shall be subjected to torture for the purpose of extracting evidence.

Pakistan Penal Code, 1860

299 (ee). "fasad-fil-arz"__ includes the past conduct of the offender or whether he has any previous conviction or the brutal or shocking manner in which the offence has been committed which is outrageous to the public conscience or if the offender is considered a potential danger to the community or if the offence has been committed in the name or on the pretext of honour;"

299 (ii). "**offence committed in the name or on the pretext of honour**"__ means an offence committed in the name or on the pretext of karo kari, siyah kari or similar other customs or practices;

300. Qatl-e-amd.__ Whoever, with the intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death, or with the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes the death of such person, is said to commit qatl-e-amd.

302. Punishment of qatl-e-amd.__ Whoever commits qatl-e-amd shall, subject to the provisions of this Chapter be:

(a) punished with death as qisas;

(b) punished with death for imprisonment for life as ta'zir having regard to the facts and circumstances of the case, if the proof in either of the forms specified in section 304 is not available; or

(c) punished with imprisonment of either description for a term which may extend to twenty five years, where according to the Injunctions of Islam the punishment of qisas is not applicable.

Provided that nothing in clause (c) shall apply where the principle of fasad filarz is attracted and in such cases only clause (a) or clause (b) shall apply.

305. Wali. In case of a qatl, the wali shall be __

(a) the heirs of the victim, according to his personal law but shall not include the accused or the convict in case of qatl-e-amd if committed in the name or on the pretext of honour ;and

(b) the Government, if there is no heir.

309. Waiver Afw of qisas in qatli'amd.__ (1) In the case of qatli'amd, an adult sane wali may, at any time and without any compensation, waive his right of qisas:

Provided that the right of qisas shall not be waived

(a) where the Government is the wali ; or

(b) where the right of qisas vests in a minor or

Provided further that where the principle of fasad-fil-arz is attracted, waiver of qisas shall be subject to the provisions of section 311.

• Handout A: Excerpts of Relevant Laws

(2) Where a victim has more than one wali, anyone of them may waive his right of qisas:

Provided that the wali who does not waive the right of qisas shall be entitled to his share of diyat.

(3) Where there are more than one victim, the waiver of the right of qisas by the wali of one victim shall not affect the right of qisas of the wali of the other victim.

(4) Where there are more than one offenders, the waiver of the right of qisas against one offender shall not affect the right of qisas against the other offender.

310.Compounding of qisas (Sulh) in qatli amd.__ (1) In the case of qatli 'amd, an adult sane wali may, at any time on accepting badali sulh, compound his right of qisas:

Provided that a female shall not be given in marriage or otherwise in badal-e-sulh

Provided further that where the principle of fasad-fil-arz is attracted, compounding of the right of qisas shall be subject to the provisions of section 311.

(2) Where a wali is a minor or an insane, the wali of such minor or insane wali may compound the right of qisas on behalf of such minor or insane wali:
Provided that the value of badalisulh shall not be less than the value of diyat.

(3) Where the Government is the wali, it may compound the right of qisas:
Provided that the value of badal-e-sulh shall not be less than the value of diyat.

(4) Where the badali sulh is not determined or is a property or a right the value of which cannot be determined in terms of money under Shari'ah the right of qisas shall be deemed to have been compounded and the offender shall be liable to diyat.

(5) Badal-e-sulh may be paid or given on demand or on a deferred date as may be agreed upon between the offender and the wali.

Explanation.__In this section, BadalI sulh means the mutually agreed compensation according to Shari'ah to be paid or given by the offender to a wali in cash or in kind or in the form of moveable or immovable property.

311. Ta'zir after waiver or compounding of right of qisas in qatli amd.__ Where all the wali do not waive or compound the right of qisas, or if the principle of fasad-fil-arz is attracted, the court may, having regard to the facts and circumstances of the case, punish an offender against whom the right of qisas has been waived or compounded with death or imprisonment for life or imprisonment of either description for a term of which may extend to fourteen years as ta'zir.

Provided that if the offence has been committed in the name of or on the pretext of honour, the punishment shall be imprisonment for life.

• Handout A: Excerpts of Relevant Laws

Provided that if the offence has been omitted in the name or on the pretext of honour, the imprisonment shall not be less than ten years.

Explanation.__ For the purpose of this section, the expression fasad-fil-arz shall include the past conduct of the offender, or whether he has any previous convictions, or the brutal or shocking manner in which the offence has been committed which is outrageous to the public conscience, or if the offender is considered a potential danger to the community or if the offence has been committed in the name or on the pretext of honour.

Provided that if the offence has been committed in the name or on the pretext of honour, the imprisonment shall not be less than ten years or if the offence has been committed in the name or on the pretext of honour.

324. Attempt to commit qatl-i-amd.__ Whoever does any act with such intention or knowledge, and under such circumstances, that, if he by that act caused qatl, he would be guilty of qatl-i-amd, shall be punished with imprisonment for either description for a term which may extend to ten year but shall not be less than five years if the offence has been committed in the name or on the pretext of honour and shall also be liable to fine, and, if hurt is caused to any person by such act, the offender shall, in addition to the imprisonment and fine as aforesaid, be liable to the punishment provided for the hurt caused:
Provided that, where the punishment for the hurt is qisas which is not executable, the offender shall be liable to arsh and may also be punished with imprisonment of either description for a term which may extend to seven years.

338E. Waiver or compounding of offences.__ (1) Subject to the provisions of this Chapter and section 345 of the Code of Criminal Procedure, 1898 (V of 1898), all offences under this Chapter may be waived or compounded and the provisions of sections 309, 310 and 311shall, mutatis mutandis, apply to the waiver or compounding of such offence:

Provided that, where an offence has been waived or compounded, the court may, in its discretion having regard to the facts and circumstances of the case, acquit or award tazir to the offender according to the nature of the offence

Provided further that where an offence under this Chapter has been committed and the principle of fasad-fil-arz is attracted, the court having regard to the facts and circumstances of the case shall punish an offender with imprisonment or fine as provided for that offence.

(2) All questions relating to waiver or compounding of an offence or awarding of punishment under section 310, whether before or after the passing of any sentence, shall be determined by trial court:

Provided that where the sentence of qisas or any other sentence is waived or compounded during the pendency of an appeal, such questions may be determined by the appellate court.

• Handout A: Excerpts of Relevant Laws

The Code of Criminal Procedure, 1898

154. Information in cognizable cases. Every information relating to the commission of a cognizable offence If given orally to an officer incharge of a police-station, shall be reduced to writing by him or under his direction, and be read over to the informant, and every such information, whether given in writing or reduced to writing as aforesaid shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer In such form as the Provincial Government may prescribe in this behalf.

161. Examination of witnesses by police. (1) Any police-officer making an investigation under this Chapter or any police-officer not below such rank as the Provincial Government may. by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police-officer may reduce Into writing any statement made to him in the course of an examination, under this section, and if he does so he shall make a separate record of the statement, of each such person whose statement he records.

345. Compounding offence: (2) The offences punishable under the sections of the Pakistan Penal Code specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that table:

Qatl-i- Amd	302	By the heirs of the victim other than the accused or the convict if the offence has been committed by him in the name or on the pretext of *Karo kari, siyah kari* or similar other customs or practices.

The Anti-Terrorism Act, 1997

6. Terrorism. (1) In this Act, "terrorism" means the use or threat of action where:
(a) the action falls within the meaning of sub-section (2);

(2) An "action" shall fall within the meaning of sub-section (1), if it:
(b) involves grievous violence against a person or grievous bodily injury or harm to a person;

• Handout A: Excerpts of Relevant Laws

(7) In this Act, a "terrorist" means:

(a) an individual who has committed an offence of terrorism under this Act, and is or has been concerned in the commission, preparation, facilitation, funding or instigation of acts of terrorism;

(b) an individual who is or has been, whether before or after the coming into force of this Act, concerned in the commission, preparation, facilitation, funding or instigation of acts of terrorism, shall also be included in the meaning given in clause (a) above.

7. **Punishment for acts of terrorism.-** (1) Whoever commits an act of terrorism under section 6, whereby:

(a) death of any person is caused, shall be punishable, on conviction, with death or with imprisonment for life, and with fine; or

(b) he does anything likely to cause death or endangers life, but death or hurt is not caused, shall be punishable, on conviction, with imprisonment of either description for a terms which shall he not less than ten years but may extend to imprisonments for life and with fine; or

(c) grievous bodily harm or injury is caused to any person, shall be punishable, on conviction, with imprisonment of either description for a term which shall not be less than ten years but may extend to imprisonment for life and shall also be liable to a fine; or

(d) grievous damage to property is caused, shall be punishable on conviction, with imprisonment, of either description for a term not less than ten year and not exceeding 1[but may extend to imprisonment for life] and shall also be liable to a fine; or

(e) the offence of kidnapping for ransom or hostage-taking has been committed, shall be punishable, or conviction, with death or imprisonment for life; or

(f) the offence of hijacking, has been committed, shall be punishable, on conviction, with death or imprisonment for life and fine;

(ff) the act of terrorism committed falls under section 6 (2) (ee), shall be punishable with imprisonment which shall not be less than fourteen years but may extend to imprisonment for life;

(g) the act of terrorism committed falls under section 6 (2) (f) and (g), shall be punishable, on conviction, with imprisonment of not less than two years and not more than five years and with fine; or

(h) the act of terrorism committed falls under clauses (h) to (n) of sub-section (2) of section 6, shall be punishable on conviction, to imprisonment of not less than five years but may extend to imprisonment for life and with fine;

(i) any other act of terrorism not falling under clauses (a) to (h) above or under any other provision of this Act, shall he punishable, on convection, to imprisonment of not less then five years and not more then ten years or with fine or with both.

(2) An accused, convicted of an offence under this Act shall be punishable with imprisonment of ten years or more, including the offences of kidnapping for ransom and hijacking shall also be liable to forfeiture of property.

• Handout A: Excerpts of Relevant Laws

ACID ATTACK

A. INTERNATIONAL LAW

International Covenant on Civil and Political Rights

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

B. NATIONAL LAWS

PAKISTAN PENAL CODE, 1860

336A. Hurt caused by corrosive substance.__ Whoever with the intention or knowingly causes or attempts to cause hurt by means of corrosive substance or any substance which is deleterious

• Handout A: Excerpts of Relevant Laws

to human body when it is swallowed, inhaled, comes into contact or received into human body or otherwise shall be said to cause hurt by corrosive substance.

Explanation.__ In this subsection, unless the context otherwise requires, "corrosive substance" means a substance which may destroy, cause hurt, deface or dismember any organ of the human body and includes every kind of acid, poison, explosive or explosive substance, heating substance, noxious thing, arsenic or any other chemical which has a corroding effect and which is deleterious to human body.

336B. Punishment for hurt by corrosive substance.__ Whoever causes hurt by corrosive substance shall be punished with imprisonment for life or imprisonment of either description which shall not be less than fourteen years and a minimum fine of one million rupees.
Anti Terrorism provisions, which were dealt under Honour killing are also applicable to acid attacks also.

• Handout A: Excerpts of Relevant Laws

SWARA & WANI

A. INTERNATIONAL LAW

Convention on the Elimination of All Forms of Discrimination against Women

Article 16
1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage;
(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
(c) The same rights and responsibilities during marriage and at its dissolution;
(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

B. NATIONAL LAWS

The Constitution of Islamic Republic of Pakistan, 1973

9. Security of a Person.__ No person shall be deprived of life or liberty save in accordance with law.

14. Inviolability of dignity of man, etc.__(1) The dignity of man and, subject to law, the privacy of home, shall be inviolable.

(2) No person shall be subjected to torture for the purpose of extracting evidence.

• Handout A: Excerpts of Relevant Laws

25. Equality of citizens.__(1) All citizens are equal before law and are entitled to equal protection of law.

(2) There shall be no discrimination on the basis of sex.

(3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

The Muslim Family Laws Ordinance, 1961

5. Registration of Marriages
(1) Every marriage solemnized under Muslim Law shall be registered in accordance with the provisions of this Ordinance.

(2) For the purpose of registration of marriages under this Ordinance, the Union Council shall grant licences to one or more persons, to be called Nikah Registrars, but in no case shall more than one Nikah Registrar be licensed for any one Ward.

(3) Every marriage not solemnized by the Nikah Registrar shall, for the purpose of registration under this Ordinance be reported to him by the person who has solemnized such marriage.

(4) Whoever contravenes the provisions of sub-section (3) shall be punishable with simple imprisonment for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both.

In Section 5, (2A) has been inserted after subsection (2):

> "The Nikah Registrar or the person who solemnizes a Nikah shall accurately fill all the columns of the Nikahnama form with specific answers of the bride or the bridegroom"

The specified imprisonment term and fine mentioned in (4) have been changed to one month and Rs. 25,000 respectively for violation of (2A), and three months and Rs. 1 lac respectively for violation of (3).

The Pakistan Penal Code, 1860

310A. Punishment for giving a female in marriage or otherwise in badla-e-sulh, wanni or swara.__ Whoever gives a female in marriage or otherwise compels her to enter into marriage, as badla-e-sulh, wanni, or swara or any other custom or practice under any name, in consideration of settling a civil dispute or a criminal liability, shall be punished with imprisonment of either description for a term which may extend to seven years but shall not be less than three years and shall also be liable to fine of five hundred thousand rupees.

• Handout A: Excerpts of Relevant Laws

GHAG OR FORCE MARRIAGE

A. NATIONAL LAWS

The Pakistan Penal Code, 1860

498 B. Prohibition of force marriage: Whoever coerces or in any manner whatsoever compels a women to enter into marriage shall be punished with imprisonment of either description for a term which may extend to seven years or for a term which shall not be less than three years and shall also be liable to fine of five hundred thousand rupees.

493 A. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage: Every man who deceitfully causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit with him in that belief, shall be punished with rigorous imprisonment for a term which may extend to twenty-five years and shall also be liable to fine.

496 A. Enticing or taking away or detaining with criminal intent a woman: Whoever takes or entices away any women with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any women, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

KHYBER PAKHTUNKHWA

Khyber Pakhtunkhwa Elimination of Custom of Ghag Act, 2013

2 (b). "Ghag" means a custom, usage, tradition or practice whereby a person forcibly demands or claims the hand of a woman, without her own or her parents' or wali's will and free consent, by making an open declaration either by words spoken or written or by visible representation or by an imputation, innuendo, or insinuation, directly or indirectly, in a locality or before public in general that the woman shall stand engaged to him or any other particular man and that no other man shall make a marriage proposal to her or marry her, threatening her parents and other relatives to refrain from giving her hand in marriage to any other person, and shall also include obstructing the marriage of such woman in any other manner pursuant to such declaration; and
Explanation.-For the purpose of this definition, ghag shall also include "awaz", "noom" or any word or phrase, denoting such declaration.

3. Prohibition of Ghag. No one shall demand the hand of a woman in marriage by way of Ghag.

4. Punishment. Whoever, violates or abets in the violation of the provisions of section 3, shall be punishable with imprisonment of either description for a term which may extend to seven years but shall not be less than three years and shall also be liable to fine up to five hundred thousand rupees or both.

• Handout A: Excerpts of Relevant Laws

EARLY OR CHILD MARRIAGES

A. NATIONAL LAWS

The Child Marriage Restraint Act, 1929

4. Punishment for male adult above eighteen years of age marrying a child. Whoever, being a male above eighteen years of age, contracts child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

6. Punishment for parent or guardian concerned in a child marriage. (1) Where a minor contracts a child marriage any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized, shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both: Provided that no woman shall be punishable with imprisonment.

(2) For the purpose of this section, it shall be presumed, unless and until the contrary is proved, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnized.

7. Imprisonment not to be awarded for offence under section 3. Notwithstanding anything contained in section 25 of the General Clauses At, 1897, or section 64 of the Pakistan Penal Code, Court sentencing an offender under section 3 shall not be competent to direct that, in default of payment of the fine imposed, he shall undergo only term of imprisonment.

The Sindh Child Marriages Restraint Act, 2013

4. Punishment for solemnizing a child marriage: Whoever performs, conducts, directs, brings about or in any way facilitates any child marriage shall be punished with rigorous imprisonment which may extend to three years but shall not be less than two years and shall also be liable to fine, unless he proves that he had reason to believe that the marriage was not a child marriage.

5. Punishment for parent or guardian concerned in a child marriage: (1) Where a parent or guardian or any other person in any capacity, lawful or unlawful, does any act to promote the child marriage or permits it to be solemnized, or fails to prevent it negligently, from being solemnized, shall be punished with rigorous imprisonment which may extend to three years but shall not be less than two years and shall also be liable to fine.
(2) For the purposes of this section, it shall be presumed, until contrary is proved, that where a child has been contracted into a marriage, a person having charge of such child failed to prevent the marriage from being solemnized.

• Handout A: Excerpts of Relevant Laws

MARRIAGE TO QURAN

A. NATIONAL LAWS

The Pakistan Penal Code, 1860

498C. Prohibition of marriage with the Holy Quran.__ Whoever compels or arranges or facilitates the marriage of a woman with the Holy Quran shall be punished with imprisonment of either description which may extend to seven years which shall not be less than three years and shall be liable to fine of five hundred thousand rupees.

Explanation.__ Oath by a woman on Holy Quran to remain unmarried for the rest of her life or, not to claim her share of inheritance shall be deemed to be marriage with the Holy Quran.

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• Handout B: Khyber Pakhtunkhwa Elimination of Custom of Ghag Act, 2013

AN
ACT
to eradicate a social evil called "Ghag".

WHEREAS the Constitution of the Islamic Republic of Pakistan provides that the dignity of man, and subject to law, the privacy of home, shall be inviolable and the State shall protect the marriage and the family;

AND WHEREAS the Constitution of the Islamic Republic of Pakistan ordains that steps shall be taken to enable the Muslims of Pakistan, individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam, and to provide facilities whereby they may be enabled to understand the meaning of life according to the Holy Quran and Sunnah;

AND WHEREAS the Shariah gives right to women to enter into valid marriage with their free consent;

AND WHEREAS the Constitution of Islamic Republic of Pakistan enjoins upon the State to promote social justice and eradicate social evils;

AND WHEREAS it is expedient to take steps to eliminate such evil practices;

It is hereby enacted as follows:-

1. Short title, extent and commencement.---(1) This Act may be called the Khyber Pakhtunkhwa Elimination of Custom of Ghag Act, 2013.

(2) It shall extend to the whole of the Province of the Khyber Pakhtunkhwa.

(3) It shall come into force at once.

2. Definitions.---(1) In this Act, unless the context otherwise requires:

(a) "Code" means Code of Criminal Procedure, 1898 (Act V of 1898);

(b) "Ghag" means a custom, usage, tradition or practice whereby a person forcibly demands or claims the hand of a woman, without her own or her parents' or wali's will and free consent, by making an open declaration either by words spoken or written or by visible representation or by an imputation, innuendo, or insinuation, directly or indirectly, in a locality or before public in general that the woman shall stand engaged to him or any other particular man and that no other man shall make a marriage proposal to her or marry her, threatening her parents and other relatives to refrain from giving her hand in marriage to any other person, and shall also include obstructing the marriage of such woman in any other manner pursuant to such declaration; and

Explanation.- For the purpose of this definition, ghag shall also include "awaz", "noom" or any word or phrase, denoting such declaration.

(c) "woman" denotes a female human being of any age.

(2) The words and expressions used herein but not defined shall have the same meaning as are assigned to them in the relevant laws for the time being in force.

• Handout B: Khyber Pakhtunkhwa Elimination of Custom of Ghag Act, 2013

3. Prohibition of Ghag.---No one shall demand the hand of a woman in marriage by way of Ghag.

4. Punishment.---Whoever, violates or abets in the violation of the provisions of section 3, shall be punishable with imprisonment of either description for a term which may extend to seven years but shall not be less than three years and shall also be liable to fine up to five hundred thousand rupees or both.

5. Abetment.---Any person who knowingly and willfully abets the commission of or who aids to commit or does any act preparatory to or in furtherance of the commission of an offence under section 3 of this Act, shall be guilty of that offence and shall be liable on conviction to the punishment provided for the offence under section 4.

6. Jurisdiction.--- Offences under the Act shall be triable by the Court of Sessions established under the Code.

7. Offence to be cognizable, non-bailable and non-compoundable.--- (1) The offence under this Act, shall be cognizable, non-bailable and non-compoundable.

(2) The provisions of Code shall mutatis mutandis apply to all the proceedings under this Act.

8. Act to override other laws, etc.---This Act shall have effect notwithstanding anything contained in any other law for the time being in force.

9. Repeal.--- The Khyber Pakhtunkhwa Elimination of Custom of Ghag Ordinance, 2012 (Khyber Pakhtunkhwa Ord. No. VI of 2012) is hereby repealed.

BY ORDER OF MR. SPEAKER
PROVINCIAL ASSEMBLY OF KHYBER
PAKHTUNKHWA

(AMANULLAH)
Secretary,
Provincial Assembly of Khyber Pakhtunkhwa

• Handout C: Sindh Child Marriages Restraint Act, 2013

PROVINCIAL ASSEMBLY OF SINDH
NOTIFICATION
KARACHI, THE 11TH JUNE, 2014

NO.PAS/Legis-B-25/2013-The Sindh Child Marriages Restraint Bill, 2013 having been passed by the Provincial Assembly of Sindh on 28th April, 2014 and assented to by the Governor of Sindh on 10th June, 2014 is hereby published as an Act of the Legislature of Sindh.

THE SINDH CHILD MARRIAGES RESTRAINT ACT, 2013

SINDH ACT NO.XV OF 2014

AN
ACT

to restrain the solemnization of child marriages.

WHEREAS it is expedient to restrain the solemnization of child marriages. **Preamble.**

It is hereby enacted as follows:-

1. (1) This Act may be called the Sindh Child Marriages Restraint Act, 2013. **Short title and commencement.**

(2) It shall come into force at once.

2. In this Act, unless there is anything repugnant in the subject or context – **Definitions.**

(a) "child" means a person male or female who is under eighteen years of age;

(b) "child marriage" means a marriage to which either of the contracting party is a child;

(c) "Code" means the Code of Criminal Procedure, 1898 (No. V of 1898);

(d) "contracting party" to marriage means either of the party whose marriage is, or is about to be solemnized;

(e) "Court" means the Court of a Judicial Magistrate of First Class;

(f) "Government" means the Government of Sindh.

3. Whoever, being a male above eighteen years of age, contracts a child marriage shall be punished with rigorous imprisonment which may extend to three years but shall not be less than two years and shall be liable to fine. **Punishment for male contracting party.**

• Handout C: Sindh Child Marriages Restraint Act, 2013

4. Whoever performs, conducts, directs, brings about or in any way facilitates any child marriage shall be punished with rigorous imprisonment which may extend to three years but shall not be less than two years and shall also be liable to fine, unless he proves that he had reason to believe that the marriage was not a child marriage. **Punishment for solemnizing a child marriage.**

5. (1) Where a parent or guardian or any other person in any capacity, lawful or unlawful, does any act to promote the child marriage or permits it to be solemnized, or fails to prevent it negligently, from being solemnized, shall be punished with rigorous imprisonment which may extend to three years but shall not be less than two years and shall also be liable to fine. **Punishment for parent or guardian concerned in a child marriage.**

(2) For the purposes of this section, it shall be presumed, until contrary is proved, that where a child has been contracted into a marriage, a person having charge of such child failed to prevent the marriage from being solemnized.

6. Notwithstanding anything contained in section 190 of the Code, no court other than the Court of a Judicial Magistrate of First Class shall take cognizance of or try any offence under this Act. **Jurisdiction under this Act.**

7. (1) Notwithstanding anything to the contrary contained in any other law, the court may, if satisfied from information laid before it through an application that a child marriage in contravention of this Act is going to be arranged or is about to be solemnized, issue an injunction prohibiting such marriage. **Power to issue injunction prohibiting marriage in contravention of this Act.**

(2) No injunction under sub-section (1), shall be issued against any person unless the Court has previously given notice to such person, and has afforded him an opportunity to show cause against the issue of the injunction. The Court may dispense with notice if deemed necessary.

(3) The Court may, either on its own motion or on an application of any person, rescind or alter any order made under sub-section (1).

(4) Where an application is received, the Court shall afford an opportunity of appearing before it either in person or by pleader; and if the Court rejects the application wholly or in part, it shall record in writing its reasons for so doing.

(5) Whoever, knowing that an injunction has been issued against him under sub-section (1) of this section, disobeys such injunction, shall be punished with imprisonment of either description for a term which may extend to one year or fine or with both.

8. Notwithstanding anything contained in the Code, an offence punishable under this Act shall be cognizable, non-bailable and non-compoundable. **Offence to be punishable and triable.**

9. The Court shall on taking cognizance of a case proceed with the trial and conclude the case within ninety days. **Cognizance, trial and conclusion of the case.**

10. Government may, by notification in the official Gazette, make rules for carrying out the purposes of this Act. **Rules.**

11. No suit, prosecution or other legal proceedings shall lie, against any person in respect of anything which is in good faith done or intended to be done under this Act. **Indemnity.**

• Handout C: Sindh Child Marriages Restraint Act, 2013

Removal of difficulty.

12. If any difficulty arises in giving effect to any of the provisions of this Act, Government may make such order, not inconsistent with the provisions of this Act, as may appear to Government to be necessary for the purpose of removing the difficulty.

Repeal and saving.

13. (1) The provisions of the Child Marriage Restraint Act, 1929, relating to the Province of Sindh are hereby repealed.

(2) Notwithstanding the repeal of the Child Marriages Restraint Act, 1929, all orders made, decisions taken, judgment passed by any Court, shall be deemed to have been validly made, taken and passed under this Act.

BY ORDER OF THE SPEAKER
PROVINCIAL ASSEMBLY OF SINDH

G.M.UMAR FAROOQ
SECRETARY
PROVINCIAL ASSEMBLY OF SINDH

• Handout D: Relevant Laws from Punjab Province

- **Amendment to Punjab Poison Rules 1919**[23]
  - Conditions of granting license: Only persons with licenses can sell, purchase, use, manufacture or possess any harmful material.
  - Persons Licensed to hold harmful materials include
    - Pharmaceutical practitioners
    - Medical practitioners
    - Dentists
    - Any other persons permitted under this act
    - Restriction on sale and delivery of non-medical poisons:
  - Sale of any non-medicinal poison is restricted and will only be permitted if a certificate is issued to that person by an authority, or if the seller is aware of the use of the poison.
  - Penalties: If a person violates a condition of her/his license, she or he will be punished with:
    - Imprisonment of up to one year, or fine of Rs. 100,000/-, or both;
    - Repeat offenders will be punished with imprisonment of up to two years or fine of up to Rs. 200,000/-, or both.
  - Cancellation and suspension of licenses: If a licensed person does anything that is against the conditions of a license, harmful to public health, or used to cause harm to any person, the licensing authority will allow the wrongdoer to defend himself, and either suspend, cancel or allow the licensed person to retain her/his license.

- **The Punjab Land Revenue (Amendment) Act 2012**[24]
  - Amendment to Inheritance Laws
    - It was observed that rights of female heirs are not properly safeguarded due to existing lacunas in the laws and rules governing land administration. Hence, after sanctioning of inheritance mutation, commencement of proceedings for partition of joint holding without submission of application has been made mandatory upon Revenue Officers through Punjab Land Revenue (Amendment) Act 2012. Punjab Assembly passed the amendment bill on Dec 27, 2012 and the Act was notified on January 5, 2013. This is a landmark step for protection of right to property, in general, and for women's right to property, in particular.
    - Following amendments have been made in the Punjab Land Revenue Rules 1968 vide Board of Revenue notification No. 2052-2012/777 dated 3-9-2012 to safeguard property rights of female heirs:
      - Upon the death of a land owner, the Revenue officer shall record the statements of at least two respectable persons in respect of legal heirs of the deceased.
      - Reference to CNIC and B form has been made mandatory while sanctioning inheritance mutation so as to ensure that no legal heir is deprived of his/her fundamental right to property.
  - Penal Action against Delinquent Revenue Officers
    - Historically, when inheritance mutation is sanctioned without legal heirs, aggrieved parties agitate at different forum at a later stage. There was a need to ensure that there is appropriate operation against those delinquent officers who due to collusion, non-exercise of due diligence or malafide intention deprive a legal heir of his/her right or award less share

23 Explanatory text from: http://pcsw.punjab.gov.pk/acidcrimes

24 Explanatory text from: http://pcsw.punjab.gov.pk/acidcrimes

or less valuable land in the mutation/partition. Accordingly, in order to create institutional accountability against any malfeasance or abuse of authority, through amendment in Punjab Land Revenue Rules 1968, District Enforcement of Inheritance Rights Committees have been constituted in every district of the province with the following salient features:

- The committee comprises DCO, District Attorney, District Public Prosecutor, ADC(R) and Assistant Commissioner of the concerned sub-division.
- If any appellate or revisional authority dealing with inheritance mutations finds that any of the legal heirs was deprived of his/her fundamental right of inheritance during sanction of mutation, the appellate/revision authority, while passing the order for correction of mutation, shall send a copy of the same to the Committee.
- The Committee will scrutinize the facts reported in the order of the appellate/revision authority and upon ascertaining that a legal heir was deprived of inheritance right due to malafide intention or negligence of the Revenue Officer or any other person it may order penal or disciplinary action.
- The Committee shall meet at least once in a month. Minutes of each meeting shall be sent to the Chief Secretary, SMBR, DG Anti-Corruption and the concerned Commissioner.

- **The Punjab Partition of Immovable Property Act 2012 (Act IV Of 2013)**[25]

  Punjab Partition of Immovable Property Bill 2012 was enacted for expeditious partition of immovable property and alleviate the suffering of joint owners specially women due to protracted litigation. The bill was passed by Punjab Assembly on Dec 27, 2012 and the Act was notified on January 5, 2013. Partition Act of 1893 has simultaneously been repealed.

  - Salient features of the new law are as follows:
    - A joint owner may file a suit for partition of joint urban property by making all the co-owners as respondents/defendants in the suit. The Court shall immediately serve a notice not later than ten days, on the defendants / respondents to submit private settlement.
    - If the parties submit the private settlement, the Court shall incorporate such settlement as decree of the Court. If all the parties agree on partition of the joint property through appointment of local commission, the Court shall appoint local commission for partition of the property.
    - If any party objects to partition of the joint property, the Court shall proceed to auction the property amongst the co-owners after fixing the base price. If a co-owner fails to pay the price in case of being successful in this limited auction, he shall be debarred from participation in the next restricted auction of the joint property amongst the co-owners. If the co-owners fail or refuse to participate in restricted auction, the Court shall order open auction of the joint property giving the co-owner right to participate in open auction.
    - If any person disputes, title or share in the joint property, the Court shall decide such question before resorting to auction of the joint property. The parties may, at any stage of proceedings before any successful auction, enter into private settlement and the Court shall give effect to such settlement.
    - The Court shall finally dispose of the suit / proceedings or partition / sale of joint urban property within six months from the date of institution of the suit. Failing which, the Court shall submit the case to the District judge seeking extension of time for disposal of the suit / proceedings. The District Judge may, grant extension in time for disposal of the suit/ proceedings taking into consideration the facts and circumstances of the case.

25 Explanatory text from: http://pcsw.punjab.gov.pk/immovable_property_2012

- **The Punjab Commission on Status of Women Act 2014**[26]

  The Punjab Commission on the Status of Women (PCSW) was established through the PCSW Act of 2014. PCSW is an oversight body that works towards women's empowerment and achievement of gender equality.
  - It monitors implementation of pro-women laws and policies and recommends changes to relevant departments; and reviews laws, policies and programs to eliminate discrimination and safeguard the rights and interests of women.
  - PCSW can initiate research to generate information and collect data for analysis and studies, and strategic actions for women empowerment.
  - PCSW has the authority to inquire into complaints of violation of women's rights and make appropriate recommendations for action to concerned authorities. For the purpose of inquiry and data collection, PCSW has powers of a Civil Court to obtain information from any public or private body or individual.
  - PCSW's Divisional members, who are specialists in women's issues, represent the Commission in all divisions of Punjab, and coordinate with local government bodies to ensure that rights of women are protected.
  - The Commission monitors the Government's compliance to Pakistan's international commitments, including inter alia, the Convention on Elimination of Discrimination against Women (CEDAW) and the Sustainable Development Goals (SDGs), and reports progress made in upholding the status and rights of women to the CEDAW Committee.

- **Punjab Muslim Family Laws (Amendment) Act 2015**[27]

  The Provincial Assembly of Punjab amended the Muslim Family Laws Ordinance 1961 (MFLO) in 2015, to include some important provisions for the protection of women.
  - Registration of marriages by licensed nikah - Registrars has been made compulsory, while marriages not solemnized by a licensed nikah Registrar can be reported and the person responsible punished with imprisonment of up to 3 months and fine of up to Rs. 1000/-.
  - Nikah Registrars are bound to accurately fill all columns of the nikahnama. Failure to fill all columns will result in fine of Rs. 25,000 and imprisonment of 1 month.
  - Succession: if the son/daughter of a deceased person dies before opening of succession, the children of the son/daughter (if they are living) shall receive their parent's share as inheritance.
  - Polygamy: No married man can remarry if he does not have permission from the Arbitration Council (a body which is headed by the Chairman, Union Council, for the purposes of divorce). A marriage contracted without permission cannot be registered, and carries a penalty of Rs. 500,000 and imprisonment of up to 1 year, along with payment of entire dower (if it was not given at the time of nikah) to the existing wife/wives.
  - Upon receiving an Application for permission, the Arbitration Council will obtain permission from the existing wife/wives' before granting the Applicant permission to remarry. If the Chairman Arbitration Council does not take permission from the existing wife, he will be liable to a fine of Rs. 100,000 and imprisonment of 3 months.
  - Divorce (talaq): any man who wishes to divorce his wife must write an Application to the Chairman Union Council. If the man does not do so, divorce cannot be final, and he can face imprisonment of up to 1 year, along with a fine of up to Rs. 5000.
  - Divorce will be effective after 90 days have passed from the day on which the notice was first presented to the Chairman. Before expiry of 90 days, divorce can be revoked by the husband.

26 Explanatory text from http://pcsw.punjab.gov.pk/pcswact

27 Explanatory text from: https://pcsw.punjab.gov.pk/family_laws

In case the wife is pregnant at the time of pronouncement of talaq, talaq will not be effective until expiry of 90 days or end of pregnancy, whichever period ends later.
- If the husband has delegated the right to divorce to the wife (haq-e-tafveez), she can divorce her husband according to the procedure mentioned above. Before expiry of 90 days, divorce can be revoked by the wife.
- Maintenance: if a husband does not maintain his wife, or wives, his wife/wives can make an application to the Chairman Union Council, who will determine an appropriate amount of maintenance to be given to the wife/wives, and issue a certificate specifying this amount, and a date on which it has to be given by the husband every month.
- Maintenance Certificates can also be issued by the Chairman Union Council if a father fails to maintain his children.

- **Punjab Family Courts (Amendment) Act 2015**[28]
  - Women can now retain up to 50% of their dower in case of khula, which they were previously bound to return if they apply for khula (divorce by Judicial Order).
  - Family Courts can now deal with matters of personal property, belongings of the wife and child, and other matters arising out of the Nikahnama.
  - Family courts have been granted the power to pass interim orders for maintenance, and obtain evidence of income and assets from the employer of the husband.
  - The Family Judge can take notice of an offence under the MFLO and the Punjab Marriage Restraint (Amendment) Act, 2015, and summon parties to Court.

- **Punjab Marriage Restraint (Amendment) Act 2015**[29]
  - Under the Punjab Marriage Restraint Act, any adult who marries a child, defined as a boy under 18 years and a girl under 16 years of age, can be punished with imprisonment of up to 6 months and a fine of Rs. 50,000. The same punishment will apply to a Nikah Registrar who solemnizes or conducts a marriage between two children, or a marriage of an adult with a child.
  - Additionally, parents or guardians of either party will be punished if they facilitate or organize the marriage of a minor (anyone under the age of 18) or a child. Parents and/or guardians will be punished with imprisonment of up to 6 months and fine of Rs. 50,000.
  - A Complainant who wishes to report a case of child marriage will need to submit a complaint to the Union Council. The Chairman Union Council will then report the case to the Family Court, which will punish the accused person according to the penalties mentioned above.
  - The Court can forbid any party from solemnizing, facilitating or organizing a child marriage through an Injunction (a Court Order preventing child marriage). This includes the groom, parents or guardians, nikah Registrars and any other person involved. Violation of an injunction is punishable with imprisonment of up to 3 months and fine of Rs. 1000.

- **Punjab Land Revenue Amendment Act 2015**[30]

  Punjab Land Revenue (Amendment) Act 2015 amends Sections 24 and 141 of the Land Revenue (Amendment) Act 2012:

  - **Section 24. Mode of service of summons.**
    (1) A summons issued by a Revenue Officer shall, if practicable, be served (a) personally

28 Explanatory text from: https://pcsw.punjab.gov.pk/family_laws

29 Explanatory text from: https://pcsw.punjab.gov.pk/child_marriage

30 Explanatory text from: http://pcsw.punjab.gov.pk/land_ammendment_act

on the person to whom it is addressed or, failing him, (b) on his authorised agent or (c) an adult male member of his family usually residing with him.
(4) A summons may, if the Revenue Officer so directs be served on the person named therein, either in addition to, or in substitution for, any other mode of service by forwarding the summons by registered post to the person concerned.
(5) When a summons is forwarded as aforesaid, the Revenue Officer may presume that the summons was served at the time when the letter would be delivered in the ordinary course of post.

➔In clause (c), "adult male" has been changed to "adult". In subsections (4) and (5), changes have been made to allow for electronic means of communication.

- **Section 141. Disposal of questions as to title in the property to be divided.**
(1) If a question of title in the holding is raised in the partition proceedings, the Revenue Officer shall inquire into the substance of such question.
(2) If as a result of the inquiry, the Revenue Officer is of the opinion that the question of title raised in a partition proceedings–
    (a) is well founded, he may, for reasons to be recorded, require a party specified by him to file a suit in the competent court, within such period not exceeding thirty days from the date of his order, for obtaining a decision regarding the question; or
    (b) is not well founded, he shall proceed with the partition of the holding.
(3) In case the suit is filed under subsection (2), the Revenue Officer shall suspend further action on the partition proceedings till the decision of the suit and submission before him the order or decree of the Court.
(4) In case the suit is not filed within the specified period, the Revenue Officer shall proceed to decide the question of title and on that basis, the partition of the holding.
(5) Where the Revenue Officer himself proceeds to determine the question, the following rules shall apply, namely:- (a)...(e).

➔ This section has been substituted with the following:
"141. Question of title of holding – If a question of title in the holding is raised in the partition proceedings, the Revenue Officer shall inquire into the substance of such question and decide the matter after hearing the parties".
➔ The succeeding subsections (2) to (5) have been done away with, as the parties concerned are no longer required to file suit.
➔ Together with the Punjab Land Revenue (Amendment) Act 2015, this amendment ensures that the litigation is facilitated and conducted without discrimination to women. The Revenue Officer is now required by law to decide the question of the partition of the property himself after the Inheritance Mutation (Intiqal), instead of requiring a party to file civil suit. This will curtail the practice of making women give up their land ownership in favour of the male heirs. A further change allows the inclusion of using electronic means and devices as valid modes of serving the summons.

- **Punjab Partition of Immovable Property (Amendment) Act 2015**[31]

  Punjab Partition of Immovable Property (Amendment) Act 2015 omits the subsection (3) in section 9 of the Punjab Partition of Immovable Property Act 2012 (Act IV of 2013):

  > Section 9. Appointment of referee for partition
  > (3) Notwithstanding anything in subsection (1) but subject to subsection(2), the Court may, on an application of one or more co-owners who desires his or their shares in the immovable property partitioned, appoint a referee who shall determine whether such share or shares is partible and if so, he shall propose partition of the property to that extent.

  - This subsection provided for appointment of a referee for partition of the joint property at the request of one of the co-owners in suit for partition of an immovable property. In the new Act, the provision has been omitted so as to ensure that the referee may only be appointed in event of consent of all the co-owners. This will ensure early disposal of partition cases.
  - Together with the Punjab Land Revenue (Amendment) Act 2015, this amendment ensures that partition cases will curtail litigation delays and discrimination against women.

- **Punjab Protection of Women Against Violence Act 2016**

  This law recognized and established remedies for different forms of violence against women, including economic, domestic, psychological and sexual violence. It also established a toll-free hotline for reporting abuse, and mandates the establishment of Violence Against Women Centres in Punjab.[32] It also establishes district-level panels to investigate reports of abuse, and requires the use of GPS bracelets to keep track of offenders.[33] It sets punishments of up to a year in jail for violators of court orders related to domestic violence, with that period rising to two years for repeat offenders.[34] The relevant provisions in terms of legal remedies are:

  - **4. Complaint to Court.–**
    (1) An aggrieved person, or a person authorized by the aggrieved person or the Women Protection Officer may submit a complaint for obtaining a protection, residence or monetary order in favour of the aggrieved person in the Court within whose jurisdiction:
    (a) the aggrieved person resides or carries on business;
    (b) the defendant resides or carries on business; or
    (c) the aggrieved person and the defendant last resided together.
    (2) The Court shall proceed with the complaint under this Act and the Court shall fix the first date of hearing which shall not be beyond seven days from the date of the receipt of the complaint by the Court.
    (3) On receipt of the complaint, the Court shall issue a notice to the defendant calling upon him to show cause within seven days of the receipt of notice as to why any order under the Act may not be made and if the defendant fails to file a reply within the specified time, the Court, subject to service of the notice on the defendant, shall assume that the defendant has no plausible defense and proceed to pass any order under this Act.
    (4) The Court shall finally decide the complaint within ninety days from the date of the receipt of the complaint, as nearly as possible, under Chapter XXII of the Code relating to the summary trials.

31 Explanatory text from pcsw.punjab.gov.pk/immovable_property_2015

32 Aljazeera News. Pakistani police arrest 20 for ordering 'revenge rape'. 27 July 2017. http://www.aljazeera.com/news/2017/07/pakistani-police-arrest-20-ordering-revenge-rape-170726151054091.html

33 Reuters. Pakistan province passes landmark law protecting women against violence. 25 February 2016. http://www.reuters.com/article/us-pakistan-rights-women-idUSKCN0VY1QE

34 Id.

- **5. Right to reside in house –**
  Notwithstanding anything contained in any other law, the aggrieved person, who is the victim of domestic violence:
  (a) shall not be evicted, save in accordance with law, from the house without her consent or if wrongfully evicted, the Court shall restore the position maintaining before the eviction of the aggrieved person if the aggrieved person has right, title or beneficial interest in the house; or
  (b) may choose to reside in the house, or in an alternative accommodation to be arranged by the defendant as per his financial resources, or in a shelter home.

- **6. Interim order.–**
  (1) Pending proceedings under this Act, the Court may, at any stage of the complaint, pass such interim order as it deems just and proper.
  (2) If the Court is satisfied that the complaint prima facie shows that the defendant has committed an act of violence or is likely to commit an act of violence, it may issue an order on the basis of an affidavit of the aggrieved person or any other material before the Court.

- **7. Protection order.–**
  (1) If the Court is satisfied that any violence has been committed or is likely to be committed, the Court may pass a protection order in favour of the aggrieved person and direct the defendant:
    (a) not to have any communication with the aggrieved person, with or without exceptions;
    (b) stay away from the aggrieved person, with or without exceptions;
    (c) stay at such distance from the aggrieved person as may, keeping in view the peculiar facts and circumstances of the case, be determined by the Court;
    (d) wear ankle or wrist bracelet GPS tracker for any act of grave violence or likely grave violence which may endanger the life, dignity or reputation of the aggrieved person;
    (e) move out of the house in case of an act of grave violence if the life, dignity or reputation of the aggrieved person is in danger;
    (f) surrender any weapon or firearm which the defendant lawfully possesses or prohibit the defendant from purchasing a firearm or obtaining license of a firearm;
    (g) refrain from aiding or abetting an act of violence;
    (h) refrain from entering the place of employment of the aggrieved person or any other place frequently visited by the aggrieved person;
    (i) refrain from causing violence to a dependent, other relative or any person who provides assistance to the aggrieved person against violence; or
    (j) refrain from committing such other acts as may be specified in the protection order.
  (2) The Court may issue one or more directions contained in subsection (1) even if the aggrieved person has not prayed for such direction and may, keeping in view the peculiar facts and circumstances of the case, specify the period for which the protection order shall remain operative.
  (3) The Court may impose any additional conditions or pass any other direction which it may deem reasonably necessary to protect and provide for the safety of the aggrieved person or any dependent child of the aggrieved person.
  (4) The Court may require the defendant to execute a bond, with or without sureties, for preventing the commission of violence.
  (5) While making an order under this section or section 8, the Court may, pass an order directing the Women Protection Officer to provide protection to the aggrieved person or to assist the aggrieved person or the person making a complaint on behalf of the aggrieved person.
  (6) The Court may direct the police to assist the Women Protection Officer in the implementation of the protection or residence order.

- **8. Residence order.–**
  (1) The Court, in case of domestic violence, may in addition to any order under section 7, pass a residence order directing that:
  (a) the aggrieved person shall not be evicted, save in accordance with law, from the house;
  (b) the aggrieved person has the right to stay in the house;
  (c) the aggrieved person may be relocated from the house to the shelter home for purposes of relief, protection and rehabilitation;
  (d) the defendant shall deliver the possession of any property or documents to the aggrieved person to which the aggrieved person is entitled;
  (e) the defendant or any relative of the defendant is restrained from entering the shelter home or place of employment or any other place frequently visited by the aggrieved person; or
  (f) shall arrange an alternative accommodation for the aggrieved person or to pay rent for the alternative accommodation.
  (2) The Court may, keeping in view the peculiar facts and circumstances of the case, issue one or more directions contained in subsection (1) even if the aggrieved person has not prayed for such direction and may specify the period for which the residence order shall remain in force.
  (3) The Court shall have due regard to the financial needs and resources of the parties before passing any order having financial implications.

- **9. Monetary order.–**
  (1) The Court may, at any stage of the trial of a case, pass an order directing the defendant to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and such relief may include:
  (a) such compensation, as the Court may determine, to the aggrieved person for suffering as a consequence of economic abuse;
  (b) loss of earning;
  (c) medical expense;
  (d) loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person to which the aggrieved person is entitled;
  (e) payment of reasonable rent and meals for shelter provided to the aggrieved person and dependent children in a shelter home if the defendant is mandated by the law to provide shelter to the aggrieved person and dependent children; and
  (f) reasonable maintenance for the aggrieved person and her dependent children, if any, in addition to an order of maintenance under family laws.
  (2) The Court shall have due regard to the financial needs and resources of the parties before passing any order under subsection (1).
  (3) The defendant shall pay monetary relief to the aggrieved person within the period specified in the order made under subsection (1).
  (4) If the defendant fails to make payment within the period mentioned in the order, the Court shall direct the employer or debtor of the defendant, directly to pay the aggrieved person or to deposit with the Court a portion of the wages or debt due to or accrued to the credit of the defendant.
  (5) The amount paid or deposited under subsection (4) shall be adjusted by the employer or debtor towards payment to the defendant.
  (6) The Court may direct that the monetary relief payable or paid on account of shelter being provided in the shelter home shall be credited to the protection system.

- **15. Power to enter.–**
  (1) The District Women Protection Officer or a Women Protection Officer, at any time, enter in any place or house for the purpose of rescuing an aggrieved person but such officer or official shall not rescue the aggrieved person without her consent.
  (2) The District Women Protection Officer or a Women Protection Officer shall give reasonable notice to the incharge of the place or house before entering and the incharge shall allow free access and afford all reasonable facilities to meet a woman residing or kept in the place or house.
  (3) If access to such place or house cannot be obtained under sub-section (2), it shall be lawful for the District Women Protection Officer or a Women Protection Officer to enter such place or house in collaboration with district authorities including police and to meet an aggrieved person residing or kept in the place or house, and in order to effect an entrance into such place or house, to force her entry into the house or place.
  (4) If the District Women Protection Officer or a Women Protection Officer who enters a place or house under this Act is detained in the house or place, she may force her exit from any house or place.
  (5) Notwithstanding anything contained in this section, the powers of entry in a house or place of abode of a woman shall only be exercised by a female officer of the protection system.

- **16. Assistance on request.–**
  (1) The District Women Protection Officer or a Women Protection Officer shall provide all reasonable assistance to an aggrieved person or to any other woman who needs such assistance in accordance with the provisions of this Act.
  (2) The District Women Protection Officer or a Women Protection Officer may provide or offer to provide assistance under the Act on the request of the aggrieved person or on information or complaint received from any corner in collaboration with district authorities including police.
  (3) Nothing in this Act shall be construed to provide assistance to an aggrieved person when the woman or aggrieved person has voluntarily refused to accept such assistance.

- **17. Assistance to officers.–**
  (1) For protection of an aggrieved person, the designated police officer, agency or local government shall be bound to assist the District Women Protection Officer or the Women Protection Officer in the performance of their functions under the Act.
  (2) In the performance of their functions under the Act, the District Women Protection Committee may call for any information from any agency of the Government or a local government in the district and such agency or local government shall be bound to provide the requisite information.

- **18. Penalty for obstructing a Protection Officer.**– Any person, who obstructs the District Woman Protection Officer or a Woman Protection Officer in the performance of the duties under this Act, shall be liable to imprisonment for a term which may extend to six months or fine which may extend five hundred thousand rupees or both.

- **19. Penalty for filing false complaint.**– A person, who gives false information about the commission of violence which that person knows or has reason to believe to be false, shall be liable to punishment of imprisonment for a term which may extend to three months or

fine which may extend to one hundred thousand rupees but which shall not be less than fifty thousand rupees or both.

- **20. Penalty for breach of orders.–**
  (1) A defendant, who commits breach of an interim order, protection order, residence order or monetary order, or illegally interferes with the working of the GPS tracker, shall be punished with imprisonment for a term which may extend to one year or fine which may extend to two hundred thousand rupees but which shall not be less than fifty thousand rupees or both.
  (2) A defendant, who violates the interim order, protection order, residence order or monetary order more than once, shall be liable to punishment which may extend to two years but which shall not be less than one year and to fine which may extend to five hundred thousand rupees but which shall not be less than one hundred thousand rupees.

Module 4:
TREATMENT OF GBV OFFENCES - INTERNATIONAL, NATIONAL, RELIGIOUS, AND CUSTOMARY CONTEXT: RAPE, SODOMY, AND ZINA

A. Module Activities

- **Activity 1: Hypothetical Cases**

Hypothetical 1

At the police lock-up, the policeman told Aliya that she had a choice of either staying in the lockup for several weeks, or if she agreed to have sex with him, he would make the record of her offence 'disappear' and she could go home to take care of her children. Aliya is a widow with two children, Sohail aged 3 and Hasina aged 5. She agreed and they had sexual intercourse at the police station.

Discuss –

- The possible charges against the policemen and Aliya;
- Can Aliya be said to have consented to the sexual act?
- The evidence, including medical evidence to support the charges;
- Their defences, if any;
- Aggravating circumstances, if any.

Hypothetical 2

Aliya was arrested. At the lockup, a policeman told Aliya, a widow with two small children, that he could make her stay at the lockup very 'unpleasant' if she did not have sex with him. They then had sexual intercourse. Later, when Aliya tried to lodge an FIR, she was mocked by the police who suggested that she 'enjoyed it' and they are sure she has loose morals. Otherwise how is she feeding her children. They also said that the court will have the same view.

Discuss –

- The possible charges against the policemen and Aliya;
- Can Aliya be said to have consented to the sexual act?
- The evidence, including medical evidence to support the charges;

- Their defences, if any;
- Aggravating circumstances, if any.

Hypothetical 3

Jamal, 20, was a promising boxer. He has been coached by boxing legend and Olympic medallist Sulaiman since he was eight years old. Late one evening, a fellow boxer saw Jamal and Sulaiman engaged in sexual acts as he was leaving the gym. He called the police. During investigations, Jamal and Sulaiman admitted to having had sexual relations since Jamal was eleven.

Discuss –

- The possible charges against Jamal and Sulaiman.
- Evidence, including medical evidence, to support the charges.
- Their defences, if any.
- Aggravating circumstances, if any.
- Will your answer in any of the above differ if Jamal was fifteen and not twenty?

Hypothetical 4

Jamila, 20, was a promising Sarangi player. She has been taught by music legend, Sulaiman, since he was eight years old. Late one evening, another music student saw Jamila and Sulaiman engaged in sexual acts. He called the police. During investigations, Jamila and Sulaiman admitted to having had sexual relations since Jamila was eleven. Jamila was sent for virginity testing.

Discuss –

- The possible charges against Jamaliah and Sulaiman.
- Evidence, including medical evidence, to support the charges.
- Their defences, if any.
- Aggravating circumstances, if any.
- Will your answer in any of the above differ if in the hypothetical Jamila was aged 15, and had sexual intercourse with her music teacher, Sulaiman, who had taught her since she was eleven years old? Jamila said she was afraid of Sulaiman but dared not refuse her parents who insisted that it was an honour to be taught by Sulaiman.

Hypothetical 5

Fauzia, aged 19, is Hashim's younger sister. Hashim, aged 30, was an cannabis addict and unable to maintain a job. One evening he persuaded Fauzia to smoke 'cigarettes' with him. Unknown to Fauzia, Hashim rolled cannabis for her and they began smoking together. Hashim also arranged for Yusuf, his cannabis supplier, to 'socialise' with Fauzia in exchange for cannabis supply. When Yusuf arrived, Hashim disappeard. During his absence, Fauzia and Yusuf engaged in sexual acts. Fauzia is single (unmarried) while Yusoff is wealthy and married with one child. The police arrested Fauzia and Yusuf. Fauzia insisted she did not agree to have sex with Yusuf. Fauzia was sent for virginity test.

Discuss –

- The possible charges against Fauzia, Yusuf and Hashim.
- Evidence, including medical evidence, to support the charges.
- Their defences, if any.
- Aggravating circumstances, if any.

B. Case Law

- **SODOMY IS CONSTITUTED IRRESPECTIVE OF CONSENT. ELSEWHERE, THIS PROVISION HAS BEEN INTERPRETED TO APPLY ONLY TO NON-CONSENSUAL SODOMY.**

▶ ***NAVTEJ SINGH JOHAR & ORS. V. UNION OF INDIA***
Supreme Court of India
Writ Petition (Criminal) No. 76 of 2016

Facts:

Writ Petition (Criminal) No. 76 of 2016 was filed for declaring (i) "right to sexuality," "right to sexual autonomy" and "right to choice of a sexual partner" to be part of the right to life guaranteed under Article 21 of the Constitution of India, and further (ii) Section 377 of the Indian Penal Code (IPC) to be unconstitutional. Section 377 states:

> 377. Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 377 does not define "carnal intercourse against the order of nature". Even though the provision is facially neutral, the Petitioners submit that the thrust of this provision has been to target the LGBT community in light of the colonial history of anti-sodomy laws, and penalise what was perceived to be 'deviant' or 'perverse' sexual behaviour.

Out of twenty Petitioners, sixteen are gay, two are bisexual women and one is a bisexual man. One among the Petitioners is a transwoman. Three of the Petitioners explain that they suffered immense mental agony due to which they were on the verge of committing suicide. Another two stated that speaking about their sexual identity has been difficult, especially since they did not have the support of their families, who, upon learning of their sexual orientation, took them for psychiatric treatment to cure the so-called "disease." The families of three Petitioners ignored their sexual identity. One of them qualified to become an Indian Administrative Services officer in an examination which more than 4,00,000 people write each year. But he chose to forgo his dream because of the fear that he would be discriminated against on the ground of his sexuality. Some of them have experienced depression; others faced problems focusing on their studies while growing up; one among them was forced to drop out of high school as she was residing in a girl's hostel where the authorities questioned her identity. The parents of one of them brushed his sexuality under the carpet and suggested that he marry a woman. Some doubted whether or not they should continue their relationships given the atmosphere created by Section 377. Several work in organisations that have policies protecting the LGBT community in place. Having faced so much pain in their personal lives, the Petitioners submit that with the continued operation of Section 377, such treatment will be unabated.

Decision:

- **Dipak Misra, CJI (for himself and A.M. Khanwilkar, J.)**

It is the concept of constitutional morality which strives and urges the organs of the State to maintain such a heterogeneous fibre in the society, not just in the limited sense, but also in multifarious ways. It is the responsibility of all the three organs of the State to curb any propensity or proclivity of popular sentiment or majoritarianism. Any attempt to push and shove a homogeneous, uniform, consistent and a standardised philosophy throughout the society would violate the principle of constitutional morality. Devotion and fidelity to constitutional morality must not be equated with the popular sentiment prevalent at a particular point of time.

Any asymmetrical attitude in the society, so long as it is within the legal and constitutional framework, must at least be provided an environment in which it could be sustained, if not fostered. It is only when such an approach is adopted that the freedom of expression including that of choice would be allowed to prosper and flourish and if that is achieved, freedom and liberty, which is the quintessence of constitutional morality, will be allowed to survive.

We may hasten to add here that in the context of the issue at hand, when a penal provision is challenged as being violative of the fundamental rights of a section of the society, notwithstanding the fact whether the said section of the society is a minority or a majority, the magna cum laude and creditable principle of constitutional morality, in a constitutional democracy like ours where the rule of law prevails, must not be allowed to be trampled by obscure notions of social morality which have no legal tenability. The concept of constitutional morality would serve as an aid for the Court to arrive at a just decision which would be in consonance with the constitutional rights of the citizens, howsoever small that fragment of the populace may be. The idea of number, in this context, is meaningless; like zero on the left side of any number. [...]

In the garb of social morality, the members of the LGBT community must not be outlawed or given a step-motherly treatment of malefactor by the society. If this happens or if such a treatment to the LGBT community is allowed to persist, then the constitutional courts, which are under the obligation to protect the fundamental rights, would be failing in the discharge of their duty. A failure to do so would reduce the citizenry rights to a cipher.

[...] Section 377 IPC, in its present form, abridges both human dignity as well as the fundamental right to privacy and choice of the citizenry, howsoever small. As sexual orientation is an essential and innate facet of privacy, the right to privacy takes within its sweep the right of every individual including that of the LGBT to express their choices in terms of sexual inclination without the fear of persecution or criminal prosecution.

The sexual autonomy of an individual to choose his/her sexual partner is an important pillar and an insegregable facet of individual liberty. When the liberty of even a single person of the society is smothered under some vague and archival stipulation that it is against the order of nature or under the perception that the majority population is peeved when such an individual exercises his/her liberty despite the fact that the exercise of such liberty is within the confines of his/her private space, then the signature of life melts and living becomes a bare subsistence and resultantly, the fundamental right of liberty of such an individual is abridged.

While saying so, we are absolutely conscious of the fact that the citizenry may be deprived of their right to life and personal liberty if the conditions laid down in Article 21 are fulfilled and if, at the same time, the procedure established by law as laid down in Maneka Gandhi (supra) is satisfied. Article 21 requires that for depriving a person of his right to life and personal liberty, there has to be a law and the said law must prescribe a fair procedure. The seminal point is to see whether Section 377 withstands the sanctity of dignity of an individual, expression of choice, paramount concept of life and whether it allows an individual to lead to a life that one's natural orientation commands. That apart, more importantly, the question is whether such a gender-neutral offence, with the efflux of time, should be allowed to remain in the statute book especially when there is consent and such consent elevates the status of bodily autonomy. Hence, the provision has to be tested on the principles evolved under Articles 14, 19 and 21 of the Constitution.

In Sunil Batra v. Delhi Administration and others, Krishna Iyer, J. opined that what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counterproductive, is unarguably unreasonable and arbitrary and is shot down by Article 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21.

We, first, must test the validity of Section 377 IPC on the anvil of Article 14 of the Constitution. What Article 14 propounds is that "all like should be treated alike". In other words, it implies equal treatment for all equals. Though the legislature is fully empowered to enact laws applicable to a particular class, as in the case at hand in which Section 377 applies to citizens who indulge in carnal intercourse, yet the classification, including the one made under Section 377 IPC, has to satisfy the twin conditions to the effect that the classification must be founded on an intelligible differentia and the said differentia must have a rational nexus with the object sought to be achieved by the provision, that is, Section 377 IPC.

In M. Nagaraj and others v. Union of India and others, it has been held:- "The gravamen of Article 14 is equality of treatment. Article 14 confers a personal right by enacting a prohibition which is absolute. By judicial decisions, the doctrine of classification is read into Article 14. Equality of treatment under Article 14 is an objective test. It is not the test of intention. Therefore, the basic principle underlying Article 14 is that the law must operate equally on all persons under like circumstances."

In E.P. Royappa v. State of Tamil Nadu and another, this Court observed that equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. It was further held that equality is antithetic to arbitrariness, for equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch.

In Budhan Choudhry v. The State of Bihar, while delineating on the concept of reasonable classification, the Court observed thus:- "—It is now well-established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases;

namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

A perusal of Section 377 IPC reveals that it classifies and penalizes persons who indulge in carnal intercourse with the object to protect women and children from being subjected to carnal intercourse. That being so, now it is to be ascertained whether this classification has a reasonable nexus with the object sought to be achieved. The answer is in the negative as the non-consensual acts which have been criminalized by virtue of Section 377 IPC have already been designated as penal offences under Section 375 IPC and under the POCSO Act. Per contra, the presence of this Section in its present form has resulted in a distasteful and objectionable collateral effect whereby even "consensual acts", which are neither harmful to children nor women and are performed by a certain class of people (LGBTs) owning to some inherent characteristics defined by their identity and individuality, have been woefully targeted. This discrimination and unequal treatment meted out to the LGBT community as a separate class of citizens is unconstitutional for being violative of Article 14 of the Constitution.

In Shayara Bano (supra), the Court observed that manifest arbitrariness of a provision of law can also be a ground for declaring a law as unconstitutional. Opining so, the Court observed thus:-

> "The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

In view of the law laid down in Shayara Bano (supra) and given the fact that Section 377 criminalises even consensual sexual acts between adults, it fails to make a distinction between consensual and non-consensual sexual acts between competent adults. Further, Section 377 IPC fails to take into account that consensual sexual acts between adults in private space are neither harmful nor contagious to the society. On the contrary, Section 377 trenches a discordant note in respect of the liberty of persons belonging to the LGBT community by subjecting them to societal pariah and dereliction. Needless to say, the Section also interferes with consensual acts of competent adults in private space. Sexual acts cannot be viewed from the lens of social morality or that of traditional precepts wherein sexual acts were considered only for the purpose of procreation. This being the case, Section 377 IPC, so long as it criminalises consensual sexual acts of whatever nature between competent adults, is manifestly arbitrary.

The LGBT community possess the same human, fundamental and constitutional rights as other citizens do since these rights inhere in individuals as natural and human rights. We must remember that equality is the edifice on which the entire non-discrimination jurisprudence rests. Respect for individual choice is the very essence of liberty under law and, thus, criminalizing carnal intercourse under Section 377 IPC is irrational, indefensible and manifestly arbitrary. It is true that the principle of choice can never be absolute under a liberal Constitution and the law restricts one individual's choice to prevent harm or injury to others. However, the

organisation of intimate relations is a matter of complete personal choice especially between consenting adults. It is a vital personal right falling within the private protective sphere and realm of individual choice and autonomy. Such progressive proclivity is rooted in the constitutional structure and is an inextricable part of human nature.

In the adverting situation, we must also examine whether Section 377, in its present form, stands the test of Article 19 of the Constitution in the sense of whether it is unreasonable and, therefore, violative of Article 19. [...] [W]e need to check whether public order, decency and morality as grounds to limit the fundamental right of expression including choice can be accepted as reasonable restrictions to uphold the validity of Section 377 IPC. We are of the conscious view that Section 377 IPC takes within its fold private acts of adults including the LGBT community which are not only consensual but are also innocent, as such acts neither cause disturbance to the public order nor are they injurious to public decency or morality. The law is et domus sua cuique est tutissimum refugium – A man's house is his castle. [...]

That apart, any display of affection amongst the members of the LGBT community towards their partners in the public so long as it does not amount to indecency or has the potentiality to disturb public order cannot be bogged down by majority perception. Section 377 IPC amounts to unreasonable restriction as it makes carnal intercourse between consenting adults within their castle a criminal offence which is manifestly not only overboard and vague but also has a chilling effect on an individual's freedom of choice.

In view of the test laid down in the aforesaid authorities, Section 377 IPC does not meet the criteria of proportionality and is violative of the fundamental right of freedom of expression including the right to choose a sexual partner. Section 377 IPC also assumes the characteristic of unreasonableness, for it becomes a weapon in the hands of the majority to seclude, exploit and harass the LGBT community. It shrouds the lives of the LGBT community in criminality and constant fear mars their joy of life. They constantly face social prejudice, disdain and are subjected to the shame of being their very natural selves. Thus, an archaic law which is incompatible with constitutional values cannot be allowed to be preserved.

Bigoted and homophobic attitudes dehumanize the transgenders by denying them their dignity, personhood and above all, their basic human rights. It is important to realize that identity and sexual orientation cannot be silenced by oppression. Liberty, as the linchpin of our constitutional values, enables individuals to define and express their identity and individual identity has to be acknowledged and respected.

The very existence of Section 377 IPC criminalising transgenders casts a great stigma on an already oppressed and discriminated class of people. This stigma, oppression and prejudice has to be eradicated and the transgenders have to progress from their narrow claustrophobic spaces of mere survival in hiding with their isolation and fears to enjoying the richness of living out of the shadows with full realization of their potential and equal opportunities in all walks of life. The ideals and objectives enshrined in our benevolent Constitution can be achieved only when each and every individual is empowered and enabled to participate in the social mainstream and in the journey towards achieving equality in all spheres, equality of opportunities in all walks of life, equal freedoms and rights and, above all, equitable justice. This can be achieved only by inclusion of all and exclusion of none from the mainstream.

[...] It is through times of grave disappointment, denunciation, adversity, grief, injustice and despair that the transgenders have stood firm with their formidable spirit, inspired commitment, strong determination and infinite hope and belief that has made them look for the rainbow in every cloud and lead the way to a future that would be the harbinger of liberation and emancipation from a certain bondage indescribable in words – towards the basic recognition of dignity and humanity of all and towards leading a life without pretence eschewing duality and ambivalence. It is their momentous —walk to freedom and journey to a constitutional ethos of dignity, equality and liberty and this freedom can only be fulfilled in its truest sense when each of us realize that the LGBT community possess equal rights as any other citizen in the country under the magnificent charter of rights – our Constitution.

Thus analysed, Section 377 IPC, so far as it penalizes any consensual sexual activity between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) and lesbians (woman and a woman), cannot be regarded as constitutional. However, if anyone, by which we mean both a man and a woman, engages in any kind of sexual activity with an animal, the said aspect of Section 377 IPC is constitutional and it shall remain a penal offence under Section 377 IPC. Any act of the description covered under Section 377 IPC done between the individuals without the consent of any one of them would invite penal liability under Section 377 IPC. [...]

Conclusions

In view of the aforesaid analysis, we record our conclusions in seriatim:-

(i) The eminence of identity which has been luculently stated in the NALSA case very aptly connects human rights and the constitutional guarantee of right to life and liberty with dignity. With the same spirit, we must recognize that the concept of identity which has a constitutional tenability cannot be pigeon-holed singularly to one's orientation as it may keep the individual choice at bay. At the core of the concept of identity lies self-determination, realization of one's own abilities visualizing the opportunities and rejection of external views with a clear conscience that is in accord with constitutional norms and values or principles that are, to put in a capsule, "constitutionally permissible."

(ii) In Suresh Koushal (supra), this Court overturned the decision of the Delhi High Court in Naz Foundation (supra) thereby upholding the constitutionality of Section 377 IPC and stating a ground that the LGBT community comprised only a minuscule fraction of the total population and that the mere fact that the said Section was being misused is not a reflection of the vires of the Section. Such a view is constitutionally impermissible.

(iii) Our Constitution is a living and organic document capable of expansion with the changing needs and demands of the society. The Courts must commemorate that it is the Constitution and its golden principles to which they bear their foremost allegiance and they must robe themselves with the armoury of progressive and pragmatic interpretation to combat the evils of inequality and injustice that try to creep into the society. The role of the Courts gains more importance when the rights which are affected belong to a class of persons or a minority group who have been deprived of even their basic rights since time immemorial.

(iv) The primary objective of having a constitutional democracy is to transform the society progressively and inclusively. Our Constitution has been perceived to be transformative in

the sense that the interpretation of its provisions should not be limited to the mere literal meaning of its words; instead they ought to be given a meaningful construction which is reflective of their intent and purpose in consonance with the changing times. Transformative constitutionalism not only includes within its wide periphery the recognition of the rights and dignity of individuals but also propagates the fostering and development of an atmosphere wherein every individual is bestowed with adequate opportunities to develop socially, economically and politically. Discrimination of any kind strikes at the very core of any democratic society. When guided by transformative constitutionalism, the society is dissuaded from indulging in any form of discrimination so that the nation is guided towards a resplendent future.

(v) Constitutional morality embraces within its sphere several virtues, foremost of them being the espousal of a pluralistic and inclusive society. The concept of constitutional morality urges the organs of the State, including the Judiciary, to preserve the heterogeneous nature of the society and to curb any attempt by the majority to usurp the rights and freedoms of a smaller or minuscule section of the populace. Constitutional morality cannot be martyred at the altar of social morality and it is only constitutional morality that can be allowed to permeate into the Rule of Law. The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society.

(vi) The right to live with dignity has been recognized as a human right on the international front and by number of precedents of this Court and, therefore, the constitutional courts must strive to protect the dignity of every individual, for without the right to dignity, every other right would be rendered meaningless. Dignity is an inseparable facet of every individual that invites reciprocative respect from others to every aspect of an individual which he/she perceives as an essential attribute of his/her individuality, be it an orientation or an optional expression of choice. The Constitution has ladened the judiciary with the very important duty to protect and ensure the right of every individual including the right to express and choose without any impediments so as to enable an individual to fully realize his/her fundamental right to live with dignity.

(vii) Sexual orientation is one of the many biological phenomena which is natural and inherent in an individual and is controlled by neurological and biological factors. The science of sexuality has theorized that an individual exerts little or no control over who he/she gets attracted to. Any discrimination on the basis of one's sexual orientation would entail a violation of the fundamental right of freedom of expression.

(viii) After the privacy judgment in Puttaswamy (supra), the right to privacy has been raised to the pedestal of a fundamental right. The reasoning in Suresh Koushal (supra), that only a minuscule fraction of the total population comprises of LGBT community and that the existence of Section 377 IPC abridges the fundamental rights of a very minuscule percentage of the total populace, is found to be a discordant note. The said reasoning in Suresh Koushal (supra), in our opinion, is fallacious, for the framers of our Constitution could have never intended that the fundamental rights shall be extended for the benefit of the majority only and that the Courts ought to interfere only when the fundamental rights of a large percentage of the total populace is affected. In fact, the said view would be completely against the constitutional ethos, for the language employed in Part III of the Constitution as well as the intention

of the framers of our Constitution mandates that the Courts must step in whenever there is a violation of the fundamental rights, even if the right/s of a single individual is/are in peril.

(ix) There is a manifest ascendance of rights under the Constitution which paves the way for the doctrine of progressive realization of rights as such rights evolve with the evolution of the society. This doctrine, as a natural corollary, gives birth to the doctrine of non-retrogression, as per which there must not be atavism of constitutional rights. In the light of the same, if we were to accept the view in Suresh Koushal (supra), it would tantamount to a retrograde step in the direction of the progressive interpretation of the Constitution and denial of progressive realization of rights.

(x) Autonomy is individualistic. Under the autonomy principle, the individual has sovereignty over his/her body. He/she can surrender his/her autonomy wilfully to another individual and their intimacy in privacy is a matter of their choice. Such concept of identity is not only sacred but is also in recognition of the quintessential facet of humanity in a person's nature. The autonomy establishes identity and the said identity, in the ultimate eventuate, becomes a part of dignity in an individual.

(xi) A cursory reading of both Sections 375 IPC and 377 IPC reveals that although the former Section gives due recognition to the absence of "wilful and informed consent" for an act to be termed as rape, per contra, Section 377 does not contain any such qualification embodying in itself the absence of "wilful and informed consent" to criminalize carnal intercourse which consequently results in criminalizing even voluntary carnal intercourse between homosexuals, heterosexuals, bisexuals and transgenders. Section 375 IPC, after the coming into force of the Criminal Law (Amendment) Act, 2013, has not used the words "subject to any other provision of the IPC". This indicates that Section 375 IPC is not subject to Section 377 IPC.

(xii) The expression "against the order of nature" has neither been defined in Section 377 IPC nor in any other provision of the IPC. The connotation given to the expression by various judicial pronouncements includes all sexual acts which are not intended for the purpose of procreation. Therefore, if coitus is not performed for procreation only, it does not per se make it "against the order of nature".

(xiii) Section 377 IPC, in its present form, being violative of the right to dignity and the right to privacy, has to be tested, both, on the pedestal of Articles 14 and 19 of the Constitution as per the law laid down in Maneka Gandhi (supra) and other later authorities.

(xiv) An examination of Section 377 IPC on the anvil of Article 14 of the Constitution reveals that the classification adopted under the said Section has no reasonable nexus with its object as other penal provisions such as Section 375 IPC and the POCSO Act already penalize non-consensual carnal intercourse. Per contra, Section 377 IPC in its present form has resulted in an unwanted collateral effect whereby even "consensual sexual acts", which are neither harmful to children nor women, by the LGBTs have been woefully targeted thereby resulting in discrimination and unequal treatment to the LGBT community and is, thus, violative of Article 14 of the Constitution.

(xv) Section 377 IPC, so far as it criminalises even consensual sexual acts between competent adults, fails to make a distinction between non-consensual and consensual sexual acts of

competent adults in private space which are neither harmful nor contagious to the society. Section 377 IPC subjects the LGBT community to societal pariah and dereliction and is, therefore, manifestly arbitrary, for it has become an odious weapon for the harassment of the LGBT community by subjecting them to discrimination and unequal treatment. Therefore, in view of the law laid down in Shayara Bano (supra), Section 377 IPC is liable to be partially struck down for being violative of Article 14 of the Constitution.

(xvi) An examination of Section 377 IPC on the anvil of Article 19(1)(a) reveals that it amounts to an unreasonable restriction, for public decency and morality cannot be amplified beyond a rational or logical limit and cannot be accepted as reasonable grounds for curbing the fundamental rights of freedom of expression and choice of the LGBT community. Consensual carnal intercourse among adults, be it homosexual or heterosexual, in private space, does not in any way harm the public decency or morality. Therefore, Section 377 IPC in its present form violates Article 19(1)(a) of the Constitution.

(xvii) Ergo, Section 377 IPC, so far as it penalizes any consensual sexual relationship between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) or lesbians (woman and a woman), cannot be regarded as constitutional. However, if anyone, by which we mean both a man and a woman, engages in any kind of sexual activity with an animal, the said aspect of Section 377 is constitutional and it shall remain a penal offence under Section 377 IPC. Any act of the description covered under Section 377 IPC done between two individuals without the consent of any one of them would invite penal liability under Section 377 IPC.

(xviii) The decision in Suresh Koushal (supra), not being in consonance with what we have stated hereinabove, is overruled.

- **Dr. Dhananjaya Y Chandrachud, J**

Apart from the visible social manifestations of Section 377, the retention of the provision perpetuates a certain culture. The stereotypes fostered by section 377 have an impact on how other individuals and non-state institutions treat the community. While this behaviour is not sanctioned by Section 377, the existence of the provision nonetheless facilitates it by perpetuating homophobic attitudes and making it almost impossible for victims of abuse to access justice. Thus, the social effects of such a provision, even when it is enforced with zeal, is to sanction verbal harassment, familial fear, restricted access to public spaces and the lack of safe spaces. This results in a denial of the self. Identities are obliterated, denying the entitlement to equal participation and dignity under the Constitution. Section 377 deprives them of an equal citizenship. Referring to the effect of Foucault's panopticon in inducing "a state of conscious and permanent visibility that assures the automatic functioning of power", Ryan Goodman writes:

> "The state's relationship to lesbian and gay individuals under a regime of sodomy laws constructs a similar, yet dispersed, structure of observation and surveillance. The public is sensitive to the visibility of lesbians and gays as socially and legally constructed miscreants. Admittedly certain individuals, namely those who are certified with various levels of state authority, are more directly linked to the extension of law's power. Yet the social effects of sodomy laws are not tied to these specialized agents alone. On the ground level, private individuals also perform roles of policing and controlling lesbian and gay lives in a mimetic relation to the modes of justice itself."

The effect of Section 377, thus, is not merely to criminalize an act, but to criminalize a specific set of identities. Though facially neutral, the effect of the provision is to efface specific identities. These identities are the soul of the LGBT community.

The Constitution envisaged a transformation in the order of relations not just between the state and the individual, but also between individuals: in a constitutional order characterized by the Rule of Law, the constitutional commitment to egalitarianism and an anti-discriminatory ethos permeates and infuses these relations. In K S Puttaswamy v. Union of India ("Puttaswamy")117, this Court affirmed the individual as the bearer of the constitutional guarantee of rights. Such rights are devoid of their guarantee when despite legal recognition, the social, economic and political context enables an atmosphere of continued discrimination. The Constitution enjoins upon every individual a commitment to a constitutional democracy characterized by the principles of equality and inclusion. In a constitutional democracy committed to the protection of individual dignity and autonomy, the state and every individual has a duty to act in a manner that advances and promotes the constitutional order of values.

By criminalizing consensual sexual conduct between two homosexual adults, Section 377 has become the basis not just of prosecutions but of the persecution of members of the affected community. Section 377 leads to the perpetuation of a culture of silence and stigmatization. Section 377 perpetuates notions of morality which prohibit certain relationships as being against the 'order of nature.' A criminal provision has sanctioned discrimination grounded on stereotypes imposed on an entire class of persons on grounds prohibited by Article 15(1). This constitutes discrimination on the grounds only of sex and violates the guarantee of non-discrimination in Article 15(1).

History has been witness to a systematic stigmatization and exclusion of those who do not conform to societal standards of what is expected of them. Section 377 rests on deep rooted gender stereotypes. In the quest to assert their liberties, people criminalized by the operation of the provision, challenge not only its existence, but also a gamut of beliefs that are strongly rooted in majoritarian standards of what is 'normal'. In this quest, the attack on the validity of Section 377 is a challenge to a long history of societal discrimination and persecution of people based on their identities. They have been subjugated to a culture of silence and into leading their lives in closeted invisibility. There must come a time when the constitutional guarantee of equality and inclusion will end the decades of discrimination practiced, based on a majoritarian impulse of ascribed gender roles. That time is now.

[T] he right to privacy is a natural right. The judgment of four judges in Puttaswamy held that the right to sexual orientation is an intrinsic part of the right to privacy. [...] Justice Kaul, concurring with the recognition of sexual orientation as an aspect of privacy, noted that:

> "...The sexual orientation even within the four walls of the house thus became an aspect of debate. I am in agreement with the view of Dr. D.Y. Chandrachud, J., who in paragraphs 144 to 146 of his judgment, states that the right of privacy cannot be denied, even if there is a miniscule fraction of the population which is affected. The majoritarian concept does not apply to Constitutional rights and the Courts are often called up on to take what may be categorized as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India. One's sexual orientation is undoubtedly an attribute of privacy..."

We must now consider the impact of Section 377 on the exercise of the right to privacy by sexual minorities. Legislation does not exist in a vacuum. The social ramifications of Section 377 are enormous. While facially Section 377 only criminalizes certain "acts", and not relationships, it alters the prism through which a member of the LGBTQ is viewed. Conduct and identity are conflated. The impact of criminalising non-conforming sexual relations is that individuals who fall outside the spectrum of heteronormative sexual identity are perceived as criminals.

[...] The existing heteronormative framework – which recognises only sexual relations that conform to social norms – is legitimized by the taint of 'unnaturalness' that Section 377 lends to sexual relations outside this framework. The notion of 'unnatural acts', viewed in myopic terms of a "fixed procreational model of sexual functioning", is improperly applied to sexual relations between consenting adults. Sexual activity between adults and based on consent must be viewed as a "natural expression" of human sexual competences and sensitivities. The refusal to accept these acts amounts to a denial of the distinctive human capacities for sensual experience outside of the realm of procreative sex.

To deny the members of the LGBT community the full expression of the right to sexual orientation is to deprive them of their entitlement to full citizenship under the Constitution. The denial of the right to sexual orientation is also a denial of the right to privacy. The application of Section 377 causes a deprivation of the fundamental right to privacy which inheres in every citizen. This Court is entrusted with the duty to act as a safeguard against such violations of human rights. [...]

The exercise of the natural and inalienable right to privacy entails allowing an individual the right to a self-determined sexual orientation. Thus, it is imperative to widen the scope of the right to privacy to incorporate a right to 'sexual privacy' to protect the rights of sexual minorities. Emanating from the inalienable right to privacy, the right to sexual privacy must be granted the sanctity of a natural right, and be protected under the Constitution as fundamental to liberty and as a soulmate of dignity.

Citizens of a democracy cannot be compelled to have their lives pushed into obscurity by an oppressive colonial legislation. In order to ensure to sexual and gender minorities the fulfilment of their fundamental rights, it is imperative to 'confront the closet' and, as a necessary consequence, confront 'compulsory heterosexuality.' Confronting the closet would entail "reclaiming markers of all desires, identities and acts which challenge it." It would also entail ensuring that individuals belonging to sexual minorities, have the freedom to fully participate in public life, breaking the invisible barrier that heterosexuality imposes upon them. The choice of sexuality is at the core of privacy. But equally, our constitutional jurisprudence must recognise that the public assertion of identity founded in sexual orientation is crucial to the exercise of freedoms.

In conceptualising a right to sexual privacy, it is important to consider how the delineation of 'public' and 'private' spaces affects the lives of the LGBTIQ community. Members of the community have argued that to base their claims on a right to privacy is of no utility to individuals who do not possess the privilege of a private space. In fact, even for individuals who have access to private spaces the conflation of 'private' with home and family may be misplaced. The home is often reduced to a public space as heteronormativity within the family can force the individual to remain inside the closet. Thus, even the conception of a private space for certain individuals is utopian.

Privacy creates "tiers of 'reputable' and 'disreputable' sex", only granting protection to acts behind closed doors. Thus, it is imperative that the protection granted for consensual acts in private must also be available in situations where sexual minorities are vulnerable in public spaces on account of their sexuality and appearance. If one accepts the proposition that public places are heteronormative, and same-sex sexual acts partially closeted, relegating 'homosexual' acts into the private sphere, would in effect reiterate the "ambient heterosexism of the public space." It must be acknowledged that members belonging to sexual minorities are often subjected to harassment in public spaces. The right to sexual privacy, founded on the right to autonomy of a free individual, must capture the right of persons of the community to navigate public places on their own terms, free from state interference.

[...] An individual's sexuality cannot be put into boxes or compartmentalized; it should rather be viewed as fluid, granting the individual the freedom to ascertain her own desires and proclivities. The self- determination of sexual orientation is an exercise of autonomy. Accepting the role of human sexuality as an independent force in the development of personhood is an acknowledgement of the crucial role of sexual autonomy in the idea of a free individual. Such an interpretation of autonomy has implications for the widening application of human rights to sexuality. Sexuality cannot be construed as something that the State has the prerogative to legitimize only in the form of rigid, marital procreational sex. Sexuality must be construed as a fundamental experience through which individuals define the meaning of their lives. Human sexuality cannot be reduced to a binary formulation. Nor can it be defined narrowly in terms of its function as a means to procreation. To confine it to closed categories would result in denuding human liberty of its full content as a constitutional right. The Constitution protects the fluidities of sexual experience. It leaves it to consenting adults to find fulfilment in their relationships, in a diversity of cultures, among plural ways of life and in infinite shades of love and longing.

By criminalising consensual acts between individuals who wish to exercise their constitutionally-protected right to sexual orientation, the State is denying its citizens the right to intimacy. The right to intimacy emanates from an individual's prerogative to engage in sexual relations on their own terms. It is an exercise of the individual's sexual agency, and includes the individual's right to the choice of partner as well as the freedom to decide on the nature of the relationship that the individual wishes to pursue.

[...] In furtherance of the Rawlsian notion of self-respect as a primary good, individuals must not be denied the freedom to form relationships based on sexual intimacy. Consensual sexual relationships between adults, based on the human propensity to experience desire must be treated with respect. In addition to respect for relationships based on consent, it is important to foster a society where individuals find the ability for unhindered expression of the love that they experience towards their partner. This "institutionalized expression to love" must be considered an important element in the full actualisation of the ideal of self-respect. Social institutions must be arranged in such a manner that individuals have the freedom to enter into relationships untrammelled by binary of sex and gender and receive the requisite institutional recognition to perfect their relationships. The law provides the legitimacy for social institutions. In a democratic framework governed by the rule of law, the law must be consistent with the constitutional values of liberty, dignity and autonomy. It cannot be allowed to become a yoke on the full expression of the human personality. By penalising sexual conduct between consenting adults, Section 377 imposes moral notions which are anachronistic to

a constitutional order. While ostensibly penalising 'acts', it impacts upon the identity of the LGBT community and denies them the benefits of a full and equal citizenship. Section 377 is based on a stereotype about sex. Our Constitution which protects sexual orientation must outlaw any law which lends the authority of the state to obstructing its fulfilment.

The operation of Section 377 denies consenting adults the full realization of their right to health, as well as their sexual rights. It forces consensual sex between adults into a realm of fear and shame, as persons who engage in anal and oral intercourse risk criminal sanctions if they seek health advice. This lowers the standard of health enjoyed by them and particularly by members of sexual and gender minorities, in relation to the rest of society.

The right to health is not simply the right not to be unwell, but rather the right to be well. It encompasses not just the absence of disease or infirmity, but "complete physical, mental and social well being", and includes both freedoms such as the right to control one's health and body and to be free from interference (for instance, from non-consensual medical treatment and experimentation), and entitlements such as the right to a system of healthcare that gives everyone an equal opportunity to enjoy the highest attainable level of health.

The jurisprudence of this Court, in recognizing the right to health and access to medical care, demonstrates the crucial distinction between negative and positive obligations. Article 21 does not impose upon the State only negative obligations not to act in such a way as to interfere with the right to health. This Court also has the power to impose positive obligations upon the State to take measures to provide adequate resources or access to treatment facilities to secure effective enjoyment of the right to health.

[...] [I]ndividuals across the world are denied access to equal healthcare on the basis of their sexual orientation. That people are intimidated or blatantly denied healthcare access on a discriminatory basis around the world proves that this issue is not simply an ideological tussle playing out in classrooms and courtrooms, but an issue detrimentally affecting individuals on the ground level and violating their rights including the right to health.

The right to health is one of the major rights at stake in the struggle for equality amongst gender and sexual minorities. [...]While the enumeration of the right to equal healthcare is crucial, an individual's sexual health is also equally significant to holistic well-being. A healthy sex life is integral to an individual's physical and mental health, regardless of whom an individual is attracted to. Criminalising certain sexual acts, thereby shunning them from the mainstream discourse, would invariably lead to situations of unsafe sex, coercion, and a lack of sound medical advice and sexual education, if any at all.

Laws that criminalize same-sex intercourse create social barriers to accessing healthcare, and curb the effective prevention and treatment of HIV/AIDS. Criminal laws are the strongest expression of the State's power to punish certain acts and behaviour, and it is therefore incumbent upon the State to ensure full protection for all persons, including the specific needs of sexual minorities. The equal protection of law mandates the state to fulfill this constitutional obligation. Indeed, the state is duty bound to revisit its laws and executive decisions to ensure that they do not deny equality before the law and the equal protection of laws. That the law must not discriminate is one aspect of equality. But there is more. The law must take affirmative steps to achieve equal protection of law to all its citizens, irrespective of sexual orientation.

In regard to sexuality and health, it is important to distinguish between behaviour that is harmful to others, such as rape and coerced sex, and that which is not, such as consensual same-sex conduct between adults, conduct related to gender-expression such as cross-dressing, as well as seeking or providing sexual and reproductive health information and services. The use of criminal laws in relation to an expanding range of otherwise consensual sexual conduct has been found to be discriminatory by international and domestic courts, often together with violations of other human rights, such as the rights to privacy, self-determination, human dignity and health.

Section 377 has a significant detrimental impact on the right to health of those persons who are susceptible to contracting HIV – men who have sex with men ("MSM") and transgender persons. [...] Section 377 has had far-reaching consequences for this "key population", pushing them out of the public health system. MSM and transgender persons may not approach State health care providers for fear of being prosecuted for engaging in criminalized intercourse. Studies show that it is the stigma attached to these individuals that contributes to increased sexual risk behaviour and/or decreased use of HIV prevention services.

The silence and secrecy that accompanies institutional discrimination may foster conditions which encourage escalation of the incidence of HIV/AIDS. The key population is stigmatized by health providers, employers and other service providers. As a result, there exist serious obstacles to effective HIV prevention and treatment as discrimination and harassment can hinder access to HIV and sexual health services and prevention programmes.

[...] To safeguard the health of persons who are at the greatest risk of HIV infection, it is imperative that access is granted to effective HIV prevention and treatment services and commodities such as clean needles, syringes, condoms and lubricants. A needle or a condom can only be considered a concrete representation of the entitlements of vulnerable groups: the fundamental human rights of dignity, autonomy and freedom from ill- treatment, along with the right to the highest attainable standard of physical and mental health, without regard to sexuality or legal status. This is the mandate of the Directive Principles contained in Part IV of the Constitution.

[...] Under our constitutional scheme, no minority group must suffer deprivation of a constitutional right because they do not adhere to the majoritarian way of life. By the application of Section 377 of the Indian Penal Code, MSM and transgender persons are excluded from access to healthcare due to the societal stigma attached to their sexual identity. Being particularly vulnerable to contraction of HIV, this deprivation can only be described as cruel and debilitating. The indignity suffered by the sexual minority cannot, by any means, stand the test of constitutional validity.

[...] Medical and scientific authority has now established that consensual same sex conduct is not against the order of nature and that homosexuality is natural and a normal variant of sexuality. Parliament has provided legislative acknowledgment of this global consensus through the enactment of the Mental Healthcare Act, 2017. Section 3 of the Act mandates that mental illness is to be determined in accordance with 'nationally' or 'internationally' accepted medical standards. The International Classification of Diseases (ICD-10) by the World Health Organisation is listed as an internationally accepted medical standard and does not consider non-peno-vaginal sex between consenting adults either a mental disorder or an

illness. The Act through Section 18(2) and Section 21 provides for protection against discrimination on the grounds of sexual orientation.

The repercussions of prejudice, stigma and discrimination continue to impact the psychological well-being of individuals impacted by Section 377. Mental health professionals can take this change in the law as an opportunity to re-examine their own views of homosexuality.

[...] International human rights treaties and jurisprudence impose obligations upon States to protect all individuals from violations of their human rights, including on the basis of their sexual orientation. Nevertheless, laws criminalizing same-sex relations between consenting adults remain on the statute books in more than seventy countries. Many of them, including so-called "sodomy laws", are vestiges of colonial-era legislation that prohibits either certain types of sexual activity or any intimacy or sexual activity between persons of the same sex. In some cases, the language used refers to vague and indeterminate concepts, such as 'crimes against the order of nature', 'morality', or 'debauchery'. There is a familiar ring to it in India, both in terms of history and text.

International law today has evolved towards establishing that the criminalization of consensual sexual acts between same-sex adults in private contravenes the rights to equality, privacy, and freedom from discrimination. These rights are recognised in international treaties, covenants, and agreements which India has ratified, including the UDHR, ICCPR, and the ICESCR. India has a constitutional duty to honour these internationally recognized rules and principles. Article 51 of the Constitution, which forms part of the Directive Principles of State Policy, requires the State to endeavour to "foster respect for international law and treaty obligations in the dealings of organised peoples with one another."

The human rights treaties that India has ratified require States Parties to guarantee the rights to equality before the law, equal protection of the law and freedom from discrimination. For example, Article 2 of the ICESCR requires states to ensure that:

> "The rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The Committee on Economic, Social and Cultural Rights - the body mandated by the ICESCR to monitor States Parties' implementation of the treaty – has stated that "other status" in article 2 (2) includes sexual orientation, and reaffirmed that "gender identity is recognized as among the prohibited grounds of discrimination", as "persons who are transgender, transsexual or intersex often face serious human rights violations."
The prohibition against discrimination in the ICCPR is contained in Article 26, which guarantees equality before the law:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

India is also required to protect the right to privacy, which includes within its ambit the right to engage in consensual same-sex sexual relations. Article 12 of the UDHR recognises the right to privacy:

> "Article 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

Similarly, Article 17 of the ICCPR, which India ratified on 11 December 1977, provides that:

> "The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of the right."

In its General Comment No. 16, the Human Rights Committee confirmed that any interference with privacy, even if provided for by law, "should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."

In their general comments, concluding observations and views on communications, human rights treaty bodies have affirmed that States are obliged to protect individuals from discrimination on grounds of sexual orientation and/or gender identity, as these factors do not limit an individual's entitlement to enjoy the full range of human rights to which they are entitled.

In NALSA, while dealing with the rights of transgender persons, this Court recognized the 'Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity' – which outline the rights that sexual minorities enjoy as human persons under the protection of international law – and held that they should be applied as a part of Indian law. Principle 33 provides thus:

> "Everyone has the right to be free from criminalisation and any form of sanction arising directly or indirectly from that person's actual or perceived sexual orientation, gender identity, gender expression or sex characteristics."

While the Yogyakarta Principles are not legally binding, NALSA nevertheless signifies an affirmation of the right to non-discrimination on the grounds of gender identity, as well as the relevance of international human rights norms in addressing violations of these rights.

There is a contradiction between India's international obligations and Section 377 of the Indian Penal Code, insofar as it criminalizes consensual sexual acts between same-sex adults in private. In adjudicating the validity of this provision, the Indian Penal Code must be brought into conformity with both the Indian Constitution and the rules and principles of international law that India has recognized. Both make a crucial contribution towards recognizing the human rights of sexual and gender minorities.

[...] From an analysis of comparative jurisprudence from across the world, the following principles emerge:

(1) Sexual orientation is an intrinsic element of liberty, dignity, privacy, individual autonomy and equality;
(2) Intimacy between consenting adults of the same-sex is beyond the legitimate interests of the state;
(3) Sodomy laws violate equality by targeting a segment of the population for their sexual orientation;
(4) Such a law perpetrates stereotypes, lends authority of the state to societal stereotypes and has a chilling effect on the exercise of freedom;
(5) The right to love and to a partner, to find fulfillment in a same-sex relationship is essential to a society which believes in freedom under a constitutional order based on rights;
(6) Sexual orientation implicates negative and positive obligations on the state. It not only requires the state not to discriminate, but also calls for the state to recognise rights which bring true fulfillment to same-sex relationships; and
(7) The constitutional principles which have led to decriminalization must continuously engage in a rights discourse to ensure that same-sex relationships find true fulfillment in every facet of life. The law cannot discriminate against same-sex relationships. It must also take positive steps to achieve equal protection.

[...] A broad analysis of criminal theory points to the general conclusion that criminologists and legal philosophers have long been in agreement about one basic characteristic of crime: that it should injure a third person or the society. An element of larger public interest emerges as the crux of crime. The conduct which Section 377 criminalises voluntary 'carnal intercourse against the order of nature' with a man or woman, inter alia – pertains solely to acts between consenting adults. Such conduct is purely private, or as Mill would call it, "self-regarding," and is neither capable of causing injury to someone else nor does it pose a threat to the stability and security of society. Once the factor of consent is established, the question of such conduct causing any injury, does not arise.

Although Section 377 prima facie appears to criminalise certain acts or conduct, it creates a class of criminals, consisting of individuals who engage in consensual sexual activity. It typecasts LGBTQ individuals as sex-offenders, categorising their consensual conduct on par with sexual offences like rape and child molestation. Section 377 not only criminalises acts (consensual sexual conduct between adults) which should not constitute crime, but also stigmatises and condemns LGBTQ individuals in society.

We are aware of the perils of allowing morality to dictate the terms of criminal law. If a single, homogenous morality is carved out for a society, it will undoubtedly have the effect of hegemonizing or 'othering' the morality of minorities. The LGBTQ community has been a victim of the pre-dominant (Victorian) morality which prevailed at the time when the Indian Penal Code was drafted and enacted. Therefore, we are inclined to observe that it is constitutional morality, and not mainstream views about sexual morality, which should be the driving factor in determining the validity of Section 377.

[...] The values of a democracy require years of practice, effort, and experience to make the society work with those values. Similar is the position of non-discrimination, equality, fraternity and secularism. While the Constitution guarantees equality before the law and equal protection of the law, it was felt that the realization of the constitutional vision requires the existence of a commitment to that vision. Dr Ambedkar described this commitment to be

the presence of constitutional morality among the members of the society. The conception of constitutional morality is different from that of public or societal morality. Under a regime of public morality, the conduct of society is determined by popular perceptions existent in society. The continuance of certain symbols, labels, names or body shapes determine the notions, sentiments and mental attitudes of the people towards individuals and things. Constitutional morality determines the mental attitude towards individuals and issues by the text and spirit of the Constitution. It requires that the rights of an individual ought not to be prejudiced by popular notions of society. It assumes that citizens would respect the vision of the framers of the Constitution and would conduct themselves in a way which furthers that vision. Constitutional morality reflects that the ideal of justice is an overriding factor in the struggle for existence over any other notion of social acceptance. It builds and protects the foundations of a democracy, without which any nation will crack under its fissures. For this reason, constitutional morality has to be imbibed by the citizens consistently and continuously.

[...] Constitutional morality requires that all the citizens need to have a closer look at, understand and imbibe the broad values of the Constitution, which are based on liberty, equality and fraternity. Constitutional morality is thus the guiding spirit to achieve the transformation which, above all, the Constitution seeks to achieve. This acknowledgement carries a necessary implication: the process through which a society matures and imbibes constitutional morality is gradual, perhaps interminably so. Hence, constitutional courts are entrusted with the duty to act as external facilitators and to be a vigilant safeguard against excesses of state power and democratic concentration of power. This Court, being the highest constitutional court, has the responsibility to monitor the preservation of constitutional morality as an incident of fostering conditions for human dignity and liberty to flourish. Popular public morality cannot affect the decisions of this Court.

The flourishing of a constitutional order requires not only the institutional leadership of constitutional courts, but also the responsive participation of the citizenry. Constitutional morality is a pursuit of this responsive participation. The Supreme Court cannot afford to denude itself of its leadership as an institution in expounding constitutional values. Any loss of its authority will imperil democracy itself.

The question of morality has been central to the concerns around homosexuality and the rights of LGBT individuals. Opponents – including those of the intervenors who launched a diatribe in the course of hearing – claim that homosexuality is against popular culture and is thus unacceptable in Indian society. [...]

After the enactment of the Constitution, every individual assertion of rights is to be governed by the principles of the Constitution, by its text and spirit. The Constitution assures to every individual the right to lead a dignified life. It prohibits discrimination within society. It is for this reason that constitutional morality requires this court to issue a declaration - which we now do - that LGBT individuals are equal citizens of India, that they cannot be discriminated against and that they have a right to express themselves through their intimate choices. In upholding constitutional morality, we affirm that the protection of the rights of LGBT individuals are not only about guaranteeing a minority their rightful place in the constitutional scheme, but that we equally speak of the vision of the kind of country we want to live in and of what it means for the majority. The nine-judge Bench of this Court in Puttaswamy had

held in clear terms that discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. [...]

Constitutional morality will impact upon any law which deprives the LGBT individuals of their entitlement to a full and equal citizenship. After the Constitution came into force, no law can be divorced from constitutional morality. Society cannot dictate the expression of sexuality between consenting adults. That is a private affair. Constitutional morality will supersede any culture or tradition.

The interpretation of a right in a matter of decriminalisation and beyond must be determined by the norms of the Constitution.

LGBT individuals living under the threats of conformity grounded in cultural morality have been denied a basic human existence. They have been stereotyped and prejudiced. Constitutional morality requires this Court not to turn a blind eye to their right to an equal participation of citizenship and an equal enjoyment of living. Constitutional morality requires that this Court must act as a counter majoritarian institution which discharges the responsibility of protecting constitutionally entrenched rights, regardless of what the majority may believe. Constitutional morality must turn into a habit of citizens. By respecting the dignity of LGBT individuals, this Court is only fulfilling the foundational promises of our Constitution.

In summation: transformative constitutionalism

This case has required a decision on whether Section 377 of the Penal Code fulfills constitutional standards in penalising consensual sexual conduct between adults of the same sex. We hold and declare that in penalising such sexual conduct, the statutory provision violates the constitutional guarantees of liberty and equality. It denudes members of the LGBT communities of their constitutional right to lead fulfilling lives. In its application to adults of the same sex engaged in consensual sexual behaviour, it violates the constitutional guarantee of the right to life and to the equal protection of law.

Sexual orientation is integral to the identity of the members of the LGBT communities. It is intrinsic to their dignity, inseparable from their autonomy and at the heart of their privacy. Section 377 is founded on moral notions which are an anathema to a constitutional order in which liberty must trump over stereotypes and prevail over the mainstreaming of culture. Our Constitution, above all, is an essay in the acceptance of diversity. It is founded on a vision of an inclusive society which accommodates plural ways of life.

The impact of Section 377 has travelled far beyond criminalising certain acts. The presence of the provision on the statute book has reinforced stereotypes about sexual orientation. It has lent the authority of the state to the suppression of identities. The fear of persecution has led to the closeting of same sex relationships. A penal provision has reinforced societal disdain. Sexual and gender-based minorities cannot live in fear, if the Constitution has to have meaning for them on even terms. In its quest for equality and the equal protection of the law, the Constitution guarantees to them an equal citizenship. In de-criminalising such conduct, the values of the Constitution assure to the LGBT community the ability to lead a life of freedom from fear and to find fulfilment in intimate choices.

The choice of a partner, the desire for personal intimacy and the yearning to find love and fulfilment in human relationships have a universal appeal, straddling age and time. In protecting consensual intimacies, the Constitution adopts a simple principle: the state has no business to intrude into these personal matters. Nor can societal notions of heteronormativity regulate constitutional liberties based on sexual orientation.

This reference to the Constitution Bench is about the validity of Section 377 in its application to consensual sexual conduct between adults of the same sex. The constitutional principles which we have invoked to determine the outcome address the origins of the rights claimed and the source of their protection. In their range and content, those principles address issues broader than the acts which the statute penalises. Resilient and universal as they are, these constitutional values must enure with a mark of permanence.

Above all, this case has had great deal to say on the dialogue about the transformative power of the Constitution. In addressing LGBT rights, the Constitution speaks – as well – to the rest of society. In recognising the rights of the LGBT community, the Constitution asserts itself as a text for governance which promotes true equality. It does so by questioning prevailing notions about the dominance of sexes and genders. In its transformational role, the Constitution directs our attention to resolving the polarities of sex and binarities of gender. In dealing with these issues we confront much that polarises our society. Our ability to survive as a free society will depend upon whether constitutional values can prevail over the impulses of the time.

A hundred and fifty eight years is too long a period for the LGBT community to suffer the indignities of denial. That it has taken sixty eight years even after the advent of the Constitution is a sobering reminder of the unfinished task which lies ahead. It is also a time to invoke the transformative power of the Constitution.

The ability of a society to acknowledge the injustices which it has perpetuated is a mark of its evolution. In the process of remedying wrongs under a regime of constitutional remedies, recrimination gives way to restitution, diatribes pave the way for dialogue and healing replaces the hate of a community. For those who have been oppressed, justice under a regime committed to human freedom, has the power to transform lives. In addressing the causes of oppression and injustice, society transforms itself. The Constitution has within it the ability to produce a social catharsis. The importance of this case lies in telling us that reverberations of how we address social conflict in our times will travel far beyond the narrow alleys in which they are explored.

- **THE EVIDENCE OF A VICTIM OF A SEXUAL OFFENCE IS ENTITLED TO GREAT WEIGHT, ABSENCE OF CORROBORATION NOTWITHSTANDING. CORROBORATIVE EVIDENCE IS NOT AN IMPERATIVE COMPONENT OF JUDICIAL CREDENCE IN EVERY CASE OF RAPE.**

▶ ***STATE OF M.P. V. DAYAL SAHU***
Supreme Court of India
Case No.: Appeal (crl.) 8 of 1998, decided on 29 September 2005
H.K. Sema & G.P.Mathur, JJ.

Facts:

The prosecutrix was allegedly raped by the accused. In the rape trial, the prosecution examined as many as 14 witnesses. Amongst others, the prosecutrix-Santribai was examined as PW-1. Ramdas, the husband of the prosecutrix was examined as PW-2. Puslibai, the mother-in-law of the prosecutrix was examined as PW-3, who was declared hostile by the Trial Court. She was cross-examined by Public Prosecutor, when she admitted that she is hard of hearing. Deorao Kotwar, who took the prosecutrix to the police station and got the report lodged, was examined as PW-4. Chindhiye, the father-in-law of the prosecutrix was examined as PW-5. Dr.V.M. Pursule, who examined the accused and on examination of his private parts found that the accused was healthy and capable of committing sexual intercourse, was examined as PW-9. It appears that the prosecutrix was also medically examined by a lady doctor and her slide, pubic hair, saree, underwear and petticoat, which she was wearing at the time of incident, had been sent to F.S.L. Sagar for examination. The report of F.S.L. was also received vide Ex.P.8 and Ex.P.9. According to the report, white and hard stains were found on the underwear of the accused and on the saree and petticoat of the prosecutrix. As per Ex.P-9 report, stains of semen and sperms were found on the underwear of accused.

The Trial Court examined the evidence of the P.W.1- prosecutrix, P.W.2-husband, P.W.4-Deorao Kotwar and P.W.5- father in law and came to a conclusion that their testimony inspires confidence and convicted the accused. On appeal, the High Court reversed the conviction and acquitted the accused based on reasonable doubt. It held that while the testimony of the prosecution's witnesses was believable, the lady doctor who examined the prosecutrix did not come in the witness box to prove the report or the prosecution did not take care to examine the doctor.

Issue:

Whether the testimony of the doctor who examined the prosecutrix is essential to proving the rape charge.

Decision:

No. The view taken by the High Court is perverse, erred in law as well as on fact and contrary to the established law laid down by the Supreme Court in a catena of decisions. The High Court accepted the statements of P.Ws.1, 2, 4 and 5 as having inspired confidence yet acquitted the accused by giving him benefit of doubt in an offence of rape. In the case of State of Punjab vs. Gurmit Singh, (1996) 2 SCC 384, it has been held that a conviction can be founded on the testimony of prosecutrix alone unless there are compelling reasons for seeking corroboration. It is further held that her evidence is more reliable than that of an injured witness.

[...] In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. [...] The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. [...]

A plethora of decisions by the Supreme Court would show that once the statement of prosecutrix inspires confidence and accepted by the courts as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the courts for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. It is also noticed that minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case. Non-examination of doctor and non-production of doctor's report would not cause fatal to the prosecution case, if the statements of the prosecutrix and other prosecution witnesses inspire confidence. It is also noticed that the Court while acquitting the accused on benefit of doubt should be cautious to see that the doubt should be a reasonable doubt and it should not reverse the findings of the guilt on the basis of irrelevant circumstances or mere technicalities.

Reverting back to the facts of the case, the testimony of prosecutrix- PW.1 that she has been ravished by the accused at 4.00 A.M. on 1.4.1991 remains unimpeached. She was subjected to cross-examination but nothing could be elicited to demolish the statement-in-chief. Her statement was corroborated by the statements of PWs 2, 4 and 5 in material particular, coupled with FSL report Ex.P-8 and Ex.P-9, which has been accepted by the Trial Court and

even by the High Court. The High Court was totally erred in law in recording the acquittal of the accused by giving him benefit of doubt for non-examination of doctor, thereby committed grave miscarriage of justice.

• REFUSAL TO ACT ON THE TESTIMONY OF A VICTIM OF SEXUAL ASSAULT IN THE ABSENCE OF CORROBORATION AS A RULE, IS ADDING INSULT TO INJURY.

▶ ***BHARWADA BHOGINBHAI HIRJIBHAI V. STATE OF GUJARAT***
1983 AIR 753
Supreme Court of India
Criminal Appeal No. 68 of 1977, decided on 24 May 1983
H.K. Sema & G.P.Mathur, JJ.

Facts:

The incident occurred on Sunday, September 7, 1975, at about 5.30 p.m. at the house of the appellant. The evidence of P.W. 1 and P.W. 2 shows that they went to the house of the appellant in order to meet his daughter (belonging to their own age group of 10 or 12) who happened to be their friend. The appellant induced them to enter his house by creating an impression that she was at home, though, in fact she was not. Once they were inside, the appellant closed the door, undressed himself in the presence of both the girls, and exposed himself. He asked P.W. 2 to indulge in an indecent act. P.W. 2 started crying and fled from there. P.W. 1 however could not escape. She was pushed into a cot, and was made to undress. The appellant sexually assaulted her. P.W. 1 was in distress and was weeping as she went out.

P.W. 1 was sent to the medical officer for medical examination. The medical examination disclosed that there was evidence to show that an attempt to commit rape on her had been made a few days back.

The appellant was found guilty of serious charges of sexual misbenaviour with two young girls (aged about 10 or 12) and convicted the appellant for the offence of rape, outraging the modesty of women, and wrongful confinement.

The High Court affirmed the order of conviction under Sec. 342 of the Indian Penal Code for wrongfully confining the girls. The High Court also sustained the order of conviction under Sec. 354 of the Indian Penal Code for outraging the modesty of the two girls. With regard to the more serious charge of rape on one of the girls, the High Court concluded that what was established by evidence was an offence of attempt to commit rape and not of rape.

Issue:

Whether the testimony of the prosecutrix in sex offences must be corroborated to convict the accused.

Decision:

No. This Court, in Rameshwar v. The State of Rajasthan, has declared that corroboration is not the sine que-non for a conviction in a rape case. The rule, which according to the cases has hardened into one oflaw, is not that corroboration is essential before there can be a

conviction, but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge [...] The only rule of law is that this rule of prudence must be present to the mind of the Judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand.

[...] In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opiniated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focused on the Indian horizon. We must not be swept off the feet by the approach made in the Western World which has its own social mileu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the Western World. It is wholly unnecessary to import the said concept on a turn-key basis and to transplate it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian Society and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical. [...]

Without the fear of making too wide a statements or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural Society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because: (1) A girl or a woman in the tradition bound non- permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracised by the Society or being looked down by the Society including by her own family members, relatives, friends and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (S) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being over powered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless

of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent.

[...] And while corroboration in the form of eye witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the courts in the Western World. Obseisance to which has perhaps become a habit presumably on account of the colonial hangover. We are therefore of the opinion that if the evidence of the victim does not suffer from any basic infirmity, and the probabilities-factors does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification: Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self-preservation. Or when the 'probabilities-factor' is found to be out of tune.

Now we return to the facts of the present case. Testing the evidence from this perspective, the evidence of P.W. 1 and P.W. 2 inspires confidence. The only motive suggested by defence was that there was some history of past trade union rivalry between the father of P.W. 2 and the appellant. It must be realized that having regard to the prevailing mores of the Indian Society, it is inconceivable that a girl of 10 or 12 would invent on her own a false story of sexual molestation. Even at the age of 10 or 12 a girl in India can be trusted to be aware of the fact that the reputation of the entire family would be jeopardised, upon such a story being spread. She can be trusted to-know that in the Indian Society her own future chances of getting married and settling down in a respectable or acceptable family would be greatly marred if any such story calling into question her chastity were to gain circulation in the Society. It is also unthinkable that the parents would tutor their minor daughter to invent such a story in order to wreak vengence on someone. They would not do so for the simple reason that it would bring down their own social status in the Society apart from ruining the future prospects of their own child. They would also be expected to be conscious of the traumatic effect on the psychology of the child and the disastrous consequences likely to ensue when she grows up. She herself would prefer to suffer the injury and the harassment, rather than to undergo the harrowing experience of lodging a complaint in regard to a charge reflecting on her own chastity.

We therefore refuse to countenance the suggestion made by the defence that the appellant has been falsely roped in at the instance of the father of P.W. 2 who was supposed to have some enmity against the appellant. It is unthinkable that the parents of P.W. 2 would tutor her to invent a story of sexual misbehavior on the part of the appellant merely in order to implicate him on account of past trade union rivalry. The parents would have also realized the danger of traumatic effect on the psychology of their daughter. In fact it would have been considered to be extremely distasteful to broach the subject. It is unthinkable that the parents would go to the length of inventing a story of sexual assault on their own daughter and tutor her to narrate such a version which would bring down their own social status and spoil their reputation in Society. Ordinarily no parents would do so in Indian society as at

present. Under the circumstances the defence version that the father of P.W. 2 had tutored her to concoct a false version in order to falsely implicate the appellant must be unceremoniously thrown overboard. Besides, why should the parents of P.W. 1 mar the future prospects of their own daughter? It is not alleged that P.W. 1 had any motive to falsely implicate the appellant. So also it is not even suggested why P.W. 1 should falsely implicate the appellant. From the standpoint of probabilities it is not possible to countenance the suggestion that a false story has been concocted in order to falsely implicate the appellant. The medical evidence provided by P.W 6, Dr. Hemangini Desai, fully supports the finding of the High Court that there was an attempt to commit rape on P.W. 1. Under the circumstances the conclusion reached by the High Court cannot be successfully assailed.

- **THE MERE FACT THAT NO INJURY WAS FOUND ON THE PRIVATE PARTS OF THE PROSECUTRIX OR HER HYMEN WAS FOUND TO BE INTACT DOES NOT BELIE THE STATEMENT OF THE PROSECUTRIX. TO CONSTITUTE THE OFFENCE OF RAPE, PENETRATION, HOWEVER SLIGHT, IS SUFFICIENT.**

  ▶ ***RANJIT HAZARIKA V. STATE OF ASSAM***
  (1998) 8 SCC 635
  Supreme Court of India
  A Anand, S Majmudar, JJ.

  Facts:

  The prosecutrix, a young girl of 14 years of age, alleged that the appellant raped her. After she was raped, the prosecutrix rushed to her house and informed her parents about the occurrence. The FIR was lodged at Teok Police Station. The investigation was taken in hand. The prosecutrix was sent up for medical examination. The prosecution, in support of its case, examined apart from the prosecutrix, her parents, the doctor and the investigation officer. The appellant, in his statement under Section 313 CrPC, denied the prosecution allegations.

  The appellant was found guilty by the trial court and the High Court. On appeal, he asserts that the judgment must be overturned because no injury was found on the private parts of the prosecutrix, i.e., her hymen was found to be intact.

  Issue:

  Whether lack of injury on the genital area of the prosecutrix belies her testimony.

  Decision:

  No. The mere fact that no injury was found on the private parts of the prosecutrix or her hymen was found to be intact does not belie the statement of the prosecutrix as she nowhere stated that she bled per vagina as a result of the penetration of the penis in her vagina. She was subjected to sexual intercourse in a standing posture and that itself indicates the absence of any injury on her private pans. To constitute the offence of rape, penetration, however slight, is sufficient. The prosecutrix deposed about the performance of sexual intercourse by the appellant and her statement has remained unchallenged in the cross-examination. Neither the non-rupture of the hymen nor the absence of injuries on her private

parts, therefore, belies the testimony of the prosecutrix particularly when we find that in the cross-examination of the prosecutrix, nothing has been brought out to doubt her veracity or to suggest as to why she would falsely implicate the appellant and put her own reputation at stake. The opinion of the doctor that no rape appeared to have been committed was based only on the absence of rupture of the hymen and injuries on the private parts of the prosecutrix. This opinion cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. Besides, the opinion of the doctor appears to be based on "no reasons".

The evidence of the prosecutrix in this case inspires confidence. Nothing has been suggested by the defence as to why she should not be believed or why she would falsely implicate the appellant. We are unable to agree with the learned counsel for the appellant that in the absence of corroboration of the statement of the prosecutrix by the medical opinion, the conviction of the appellant is bad. The prosecutrix of a sex offence is a victim of a crime and there is no requirement of law which requires that her testimony cannot be accepted unless corroborated.

Even though no corroboration of her testimony was essential to record the conviction of the appellant, we find that in this case there is sufficient corroboration of her testimony available from the evidence of her parents, PW 2 and PW 3.

• A DOUBT, AS UNDERSTOOD IN CRIMINAL JURISPRUDENCE, HAS TO BE A REASONABLE DOUBT AND NOT AN EXCUSE FOR A FINDING IN FAVOUR OF ACQUITTAL.

▶ ***STATE OF RAJASTHAN V. N. K.***
30 March 2000
Supreme Court of India
S.N.Variava, R.C.Lahoti, JJ.

Facts:

According to the prosecution, G, PW2, the prosecutrix, was aged 15 years and was living in village BhaniaYana (Jaisalmer) with her father, mother and a younger sister. The family resided in a lonely hutment situated in a field. On 1.10.1993 at about 12 noon, the prosecutrix was alone in her hut busy washing clothes on a water pump. NK, the accused-respondent was known to the prosecutrix since before. He came to her and initially asked for water which she provided in a lota. The accused then asked for a knife for peeling the skin of a cucumber. The prosecutrix brought the knife and handed it over to him. When the prosecutrix was about to turn and go back, the accused caught hold of her . He twisted her hand on her back and forcibly took her to a nearby place called Bhitian, , i.e., a place surrounded by walls. The accused forced the prosecutrix to lie down on the ground, put his foot on her chest, closed her mouth with his palm, removed her lehenga upwards and then forcibly committed sexual intercourse with her. The prosecutrix offered resistance and tried to save herself but the respondent gagged her mouth by a towel pressed against her mouth. Having thus raped the prosecutrix, the accused-respondent went away to Thane, another village or another part of the same village. The prosecutrix reached back her home and narrated the entire incident to a woman, described as wife of Udai Singh and to her father, PW 10, who had returned by that time. The victim accompanied by her father wanted to go to the police station and lodge the first infor-

mation report of the incident but they were prevented from doing so by several village people belonging to the community of the accused who also proposed the matter being settled within the village by convening a panchayat. However, report of the incident was lodged on 5.10.1993 at 11.20 a.m. The offence was registered and investigation commenced.

The prosecutrix was referred for medical examination so as to find out the injuries on her person as also to ascertain her age. Dr. Jetha found inter alia the hymen of the prosecutrix was ruptured in multiple radial tears, the edges of which showed healing at most of the places and mild tenderness. The hymen hole admitted one finger easily with mild tenderness. Sample of vaginal swab from posterior front of vagina was taken and smear slide was prepared which was sealed and sent to forensic science laboratory for examination. In the opinion of Dr. Jetha sexual intercourse with the prosecutrix was done 5 to 7 days before the day of examination. He further opined that after a lapse of 5 to 7 days, the examination of vaginal smear and vaginal swab could not confirm the presence of semen.

The trial court found the incident, as alleged, proved. The High Court has, in an appeal preferred by the accused-respondent, held that the prosecutrix was not proved beyond reasonable doubt to be below 16 years of age. In the opinion of the High Court though the factum of accused- respondent having committed sexual intercourse with the prosecutrix was proved but the absence of injuries on the person of the prosecutrix was a material fact not excluding the possibility of the prosecutrix having been a consenting party. The delay in lodging the FIR was not satisfactorily explained. The delay coupled with the non-examination of the wife of Udai Singh to whom the incident was first narrated by the prosecutrix immediately after the occurrence rendered the prosecution case doubtful. Mainly on this reasoning the High Court has allowed the appeal and acquitted the accused-respondent.

Issue:

The questions arising for consideration before us are: Whether the prosecution story, as alleged, inspires confidence of the court on the evidence adduced? Whether the prosecutrix, is a witness worthy of reliance? Whether the testimony of a prosecutrix who has been a victim of rape stands in need of corroboration and, if so, whether such corroboration is available in the facts of the present case? Whether she was a consenting party to the crime? Whether there was unexplained delay in lodging the F.I.R.?

Decision:

If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the Court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none exists. A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for finding in favour of acquittal.

An unmerited acquittal does no good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the Court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none exists. A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for finding in favour of acquittal.

[...] It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court of facts may find it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice would do. [...]

It is true that the incident dated 1.10.1993 was reported to the police on 5.10.1993. The prosecutrix was a married woman. Her muklana ceremony had not taken place. Muklana ceremony is a rural custom prevalent in Rajasthan, whereunder the bride is left with the parents after marriage having been performed and is taken away by the husband and/or the in-laws to live with them only after a lapse of time. The origin of the custom owes its existence to performance of child-marriages which are widely prevalent there. The muklana was yet to take place. The prosecutrix was a virgin prior to the commission of the crime and this fact finds support from the medical evidence. The parents of such a prosecutrix would obviously be chary to such an incident gaining publicity because it would have serious implications for the reputation of the family and also on the married life of the victim. The husband and the in-laws having become aware of the incident may even refuse to carry the girl to reside with them. The incident if publicised may have been an end of the marriage for the prosecutrix. Added to this is the communal tinge which was sought to be given by the community of the accused. PW-10, the father of the prosecutrix, the prosecutrix PW-2 and other witnesses have stated that while they were about to move to the Police Station they were prevented from doing so by the community fellows of the accused who persuaded them not to lodge report with the police and instead to have the matter settled by convening a panchayat of village people. After all the family of the victim had to live in the village in spite of the incident having taken place. The explanation is not an afterthought. An indication thereof is to be found in the F.I.R. itself where the complainant has stated the delay in lodging the report is due to village panchayat, insult and social disrepute. Nothing has been brought out in the cross-examination of the witnesses to doubt the truth and reasonableness of the explanation so offered.

We may however state that a mere delay in lodging the FIR cannot be a ground by itself for throwing the entire prosecution case overboard. The Court has to seek an explanation for delay and test the truthfulness and plausibility of the reason assigned. If the delay is explained to the satisfaction of the Court it cannot be counted against the prosecution. [...] In the present case, in our opinion the delay in lodging the F.I.R. has been satisfactorily explained.

Absence of injuries on the person of the prosecutrix has weighed with the High Court for inferring consent on the part of the prosecutrix. We are not at all convinced. We have already noticed that the delay in medical examination of the prosecutrix was occasioned by the factum of the lodging of the F.I.R. having been delayed for the reasons which we have already discussed. The prosecutrix was in her teens. The perpetrator of the crime was an able bodied youth bustling with energy and determined to fulfill his lust armed with a knife in his hand and having succeeded in forcefully removing the victim to a secluded place where there was none around to help the prosecutrix in her defence. The injuries which the prosecutrix

suffered or might have suffered in defending herself and offering resistance to the accused were abrasions or bruises which would heal up in ordinary course of nature within 2 to 3 days of the incident. The absence of visible marks of injuries on the person of the prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any injuries or that she had offered no resistance at the time of commission of the crime. Absence of injuries on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix. It will all depend on the facts and circumstances of each case. [...] A Judge of facts shall have to apply common sense rule while testing the reasonability of the prosecution case. The prosecutrix on account of age or infirmity or overpowered by fear or force may have been incapable of offering any resistance. She might have sustained injuries but on account of lapse of time the injuries might have healed and marks vanished. [...]

Certainly consent is no defence if the victim has been proved to be under 16 years of age. If she be of 16 years of age or above, her consent cannot be presumed; an inference as to consent can be drawn if only based on evidence or probabilities of the case. The victim of rape stating on oath that she was forcibly subjected to sexual intercourse or that the act was done without her consent, has to be believed and accepted like any other testimony unless there is material available to draw an inference as to her consent or else the testimony of prosecutrix is such as would be inherently improbable. The prosecutrix before us had just crossed the age of 16 years. She has clearly stated that she was subjected to sexual intercourse forcibly by the accused. She was not a consenting party. She offered resistance to the best of her ability but she succumbed and fell victim to the force employed by the accused. [...]

She narrated the incident to a woman described as the wife of Udai Singh and to her father in quick succession. The statement of the father of the prosecutrix corroborates her in all material particulars and is admissible in evidence and relevant under Section 157 as her former statement corroborating her testimony as also under Section 8 of the Evidence Act as evidence of her conduct. In spite of delay in medical examination in the circumstances already discussed the medical evidence corroborates the testimony of the prosecutrix. According to Dr. Jetha, he had found the hymen ruptured in multiple radial tears, the edges of which showed healing at most of the places and mild tenderness. The prosecutrix was not used to sexual intercourse. Pieces of broken bangles were found at the place of the incident and seized. The Forensic Science Laboratory has found (vide report Ex.P/9) presence of human semen on the Lehenga seized from the prosecutrix.

It is true that wife of Udai Singh has not been examined. It would have been better it she would have been examined. However, no dent is caused in the case of the prosecution by her non-examination. She would have repeated the same story as has been narrated by the father of the prosecutrix. We have found the testimony of prosecutrix's father (PW 10) trustworthy and unembellished. The prosecutrix and her father have both been subjected to lengthy cross-examination. The trial court has found both the witnesses reliable. We too find no reason to disbelieve their testimony. A father would not ordinarily subscribe to a false story of sexual assault involving his own daughter and thereby putting at stake the reputation of the family and jeopardizing the married life of the daughter. We find the testimony of prosecutrix's father reliable and lending support to the narration of the incident by the prosecutrix. No reason has been proved, not even suggested during cross-examination of any of the witnesses why the prosecutrix or any member of her family would falsely implicate

the accused roping him in false charge of rape. We are surprised to note how an inference as to consent could have been drawn against the prosecutrix and to hold that she was a willing party to the sexual assault made by the accused. Upon an evaluation of evidence available on record we are satisfied to hold that the prosecutrix is a witness of truth. Her testimony inspires confidence. Other evidence available on record lends assurance to her testimony.

• NO PROBATIVE VALUE OF TWO-FINGER TEST

The two-finger test was used mainly to discredit the victim, as a form of character attack to show that the victim was immoral.

▶ ***FAHAD AZIZ V. THE STATE***
2008 YLR 2846
Lahore High Court
K. A. Bhinder, J.

Facts:

It was alleged that the petitioner Fahad Aziz and his accomplices abducted Mst. Nargis and committed Zina-bil-Jabr with her. Petitioner seeks post-arrest bail. He asserts that the instant FIR was lodged after a delay of 28 days in which he was not nominated and no role was ascribed to him. He further submits that the statements of the complainant before the police and before the Magistrate are at variance. He also submits that the medical examination of the victim was done six months after the occurrence and that there is no direct evidence against the petitioner except the statement of the complainant.

Issue:

Whether or not the petitioner is entitled to post-arrest bail.

Decision:

Yes. In order to know the factual position, Mst. Nargis Bibi was summoned by the Court. She stated that the petitioner committed Zina-bil-Jabr with her but the fact remains that her statement does not find independent corroboration from the statement of any other witness. Her statements before the police, the Magistrate, and the Court differed, as such no reliance could be placed on her statement.

The medical report also reveals that her hymen was torn with old healed scars and the vagina admitted two fingers easily. As such, the victim appears to be a woman of easy virtue, indulged in sexual activities and her sole statement could not be relied upon in the absence of strong corroboration. The FIR was delayed by 28 days without any explanation for such delay. This coupled by the fact that the petitioner was not nominated in the FIR, the Court found that the case against the petitioner is that of further inquiry into his guilt.

▶ *AMAN ULLAH V. THE STATE*

PLD 2009 SC 542
Criminal Petition No. 250-L of 2009, decided on 29 May 2009
Khalil-Ur-Reman Ramday, Faqir Muhammad Khokhar and Mahmood Akhtar Shahid Siddiqui, JJ (Supreme Court)

Facts:

The petitioner is accused of rape, but bail was sought on the ground that the petitioner had been found innocent by the Investigating Officer who had even recommended his discharge from the case.

According to the medico-legal examination of the prosecution, the rape victim was about 18 years of age at the time of occurrence. Her hymen was found torn at multiple places, which bled on touch. Her vagina admitted two fingers but rightly and painfully.

The police file showed that the accused had been declared innocent and his discharge recommended only because C.A.M.B. Forensic Science Laboratory had found, after the DNA test, that the traces of semen found in the vagina were not those of the accused.

Issue:

Whether the accused is entitled to bail on the ground that the DNA test shows that it was not his semen found in the victim's vagina.

Decision:

No. From the medical evidence, 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. No reasons could be offered to us to explain the alleged substitution of Aman Ullah petitioner with the person who had actually committed the sexual intercourse with the said lady.

Reports of so-called experts are only corroborative in nature and are required only when the ocular testimony is of a doubtful character. In the present case, no reasons could be offered as to why the prosecutrix who had admittedly been subjected to sexual intercourse, should have spared the actual offender and should have, instead substituted the accused for him. In the circumstances, at least prima facie and for the purpose of bail petition, it could not be said that the testimony offered by the prosecutrix could admit of any doubt.

We would like to add that it is for the first time that we have noticed a D.N.A. test being used in such a case. We therefore feel compelled to place our warning on record that unless one was absolutely sure and confident of the capacity, the competence, and the veracity of the Laboratory, as well as the integrity of the one conducting such a test, taking recourse to the same would be fraught with immense dangers and could in fact lead to disastrous consequences not only in criminal cases but even in cases, for example, of paternity and inheritance etc. In the present case, at least prima facie, we find the laboratory report in question, a doubtful affair.

• PROHIBITION OF PROSECUTION OF RAPE VICTIM

▶ ***SAFIA BIBI V. THE STATE***
PLD 1985 FSC 120
Criminal Suo Motu No, 112/1 and Criminal Appeal No, 123/1 of 1983
Aftab Hussain, C.J. (Federal Shariat Court)

Facts:

Mst. Safia Bibi, aged 20 years, who suffered from acute myopia, and is now said to be blind, was convicted under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to 3 years' rigorous imprisonment, whipping numbering 15 stripes and a fine of Rs, 1,000, in default of payment of which she was directed to undergo further rigorous imprisonment for a period of 6 months. Her co-accused, Maqsood Ahmad, was however acquitted for want of evidence.

Mst. Safia Bibi, in her own statement under section 342, Cr. P. C. stated that she was taken by the grandmother of Maqsood Ahmad to her house for domestic work and there Maqsood Ahmad committed Zina-bilJabr with her. After about 10 days, Mst. Rashida Bibi, mother of Maqsood Ahmad again took her to her house for some domestic work and at that time Muhammad Ali, father of Maqsood Ahmad, committed the same offence with her. She conceived from this Zina and gave birth to an illegitimate child, who died in the hospital.

Decision:

There is no evidence against Mst. Safia Bibi. It is unfortunate that though a victim of Zina-bil-Jabr, the natural phenomena of her pregnancy and motherhood betrayed her and she had to suffer the humiliation of a trial, conviction and sentence in addition to the disgrace and dishonour suffered by her at the hands of her fellow human beings in society.

The trial Court took her pregnancy as evidence of culpability. He held that her statement was self-exculpatory and could not be called a confession. Despite this, he entered the realm of conjecture, and convicted her simply on the ground that there was no evidence that she had ever complained about the commission of the offence by Maqsood Ahmad, and had kept quiet for almost 10 months.

This is a clear departure from the well-known principles of criminal law that it is the duty of the prosecution to establish by evidence the offence of an accused person beyond any shadow of doubt. It is settled law that a confession should be read as a whole and the self-exculpatory portions therein cannot be excluded from consideration unless there be evidence on record to prove those portions to be incorrect. The learned Additional Sessions Judge could not hold Mst. Safia Bibi guilty of Zina by consent under section 10(2) of the Ordinance, in the absence of any evidence to establish that she and Maqsood Ahmad had any sentimental attachment for and were on intimate terms with one another. No such evidence is forthcoming on the record.

I may, however, take note of some comments that it was strange that the person who had committed the offence of Zina was acquitted, but the girl was convicted. I do not think that this comment is at all reasonable. There may be cases in which only the girl, who has given birth to a child may be convicted and the co-accused who is blamed for committing Zina

with her, be acquitted. If there is no evidence of eyewitnesses and the only evidence is for example, a confessional statement made by the girl involving the male accused, then in the absence of any other evidence against the male accused, he cannot be convicted but the girl can be convicted on her confession.

Section 30, Evidence Act allows the Court to take into consideration a confession of one accused made in the Court in a joint trial of more persons than one, against a co-accused. But it is settled law that conviction of the co-accused cannot be based on such confession unless it is corroborated by independent evidence. This may be one category of cases in which the girl may be convicted while the male may be acquitted.

Another category may be, in which a self-exculpatory statement is made by the girl, as in this case, putting the entire blame for committing rape with her on the male accused. If there is evidence on the record showing that both of them had been seen in amorous position off and on, and that their relationship was of close and intimate lovers negating the possibility of rape, it may be sufficient to hold that the statement of the girl to the extent of self-exculpation, is not correct. In such a case she may be convicted. But her statement would not be evidence against her paramour under section 30 and in the absence of any other evidence, he may be acquitted.

In the present case, it is clear that except for the self-exculpatory statement of the girl and the statement of her father, who also maintained that she had been subjected to Zina-bil-Jabr, there is no other evidence. The learned Additional Sessions Judge has obviously ignored, for technical reasons that portion of the evidence of Dilawar Khan, complainant, P. W. 3, in which he stated that Mst. Safia Bibi soon after the first occurrence, had informed her mother of the commission of Zina-bil-Jabr with her by Maqsood Ahmad, and also that thereafter she refused to visit the house of Maqsood Ahmad for many a day till Mst. Rashida Bibi came to fetch her. This is sufficient evidence to confirm her statement under section 342, Cr. P. C.

Even under Shariah if a girl makes such a statement as made in the present case, she cannot be convicted of Zina. The principle of Fiqh is that she will be asked about the cause of pregnancy, if she says that she was forced to commit adultery or someone had committed sexual intercourse with her under suspicion about her identity, her statement will be accepted and she will not be convicted. This is based on the tradition of Hazrat Ali that when Shuraha came to him and said, "I have committed adultery", Hazrat Ali said to her, "You might have been forced or someone might have committed sexual intercourse with you while you were sleeping". [...]

It would be clear that even in Shariah the confession of one accused against the co-accused is not sufficient or the conviction of the fi latter. Views differ only on the point whether only the person denying should be acquitted or the person confessing should also be absolved of the charge. There is no difference on the main point between Fiqh, the Common Law of England or the Law in Pakistan, that the appellant also / cannot be convicted on the evidence on record.

▶ *ZAFRAN BIBI V. THE STATE*

PLD 2002 FSC 1
Criminal Appeal No.6/P and Criminal Reference No.7/I of 2002, decided on 6th June, 2002.
Fazal Ilahi Khan, C. J., Dr. Fida Muhammad Khan and Ch. Ejaz Yousaf, JJ (Federal Shariat Court)

Facts:

On 26-3-2001, Mst. Zafran Bibi made a report at the Police Station, Gumbat, District Kohat, to the effect that her husband Niamat Khan, who had been convicted about nine years before in a murder case, was since then confined in Central Jail, Haripur. She alleged that about 11 / 12 days prior to the report, when she had gone to the nearby hill, Akmal Khan son of Ghuncha Gul, overpowered her and committed "Zina-bil-Jabr" with her. Thereafter, she returned to her house and informed her mother-in-law Zar Bibi. On that day her father-in-law had gone to Haripur to see his son, therefore, her mother-in-law advised her to wait for his return and report the matter to police if advised by him to do so. After his return, she lodged the report accordingly. At the time of her report at police station, her father-in-law, Zabita Khan son of Khan Muhammad was accompanying her. The said report was thumb-marked by her as well as by her father-in-law as a token of its correctness.

Thereafter, Mst. Zafran Bibi was sent for medical examination, along with her father-in-law, under the custody of I.H.C. Jalal Din. The Woman Medical Officer found her pregnant for about 7-8 weeks. Considering the period of her pregnancy vis-a-vis the period of her subjection to Zina, as alleged by her in her report before the police, being at variance, the police arraigned her also as accused along with accused Akmal Khan and challaned them to face the trial. Both of them were formally charged on 13-10-2001 for offence punishable under section 10(2) of the Ordinance. They did not plead guilty to the charge and claimed trial. Therefore, they were tried. She admitted that she had given birth to a daughter who was still alive and in her custody.

At one point, she also made statement on oath in the following words: ""I am the wife of Niamat Gul. He was in the Central Jail, Haripur as was imprisoned/convicted in some criminal case. Zabta Khan is my father-in-law. I was residing in the house of my husband alongwith his father. One day he took me to the Police Station, Gumbat, where he lodged the report. I have not given any statement in police station nor lodged any report to the police. What has been done in the police station was done by the police at the instance of my father-in-law. In fact Jamal son of Zabta Khan has committed Zina forcibly with me and my father-in-law to save his son Jamal involved accused in the case in hand. Accused Akmal has not committed Zina with me. He is innocent. Sher Haider, Advocate was engaged by my husband for the prosecution of the case on my behalf. The said Advocate has acted and prosecuted the case at the direction of my husband. I am totally unaware about the proceeding and my statement under section 342, Cr.P.C."

Niamat Khan, husband of the appellant/accused, also made the following statement: "Mst. Zafran Bibi is my wife. She was on visiting term with me while I was serving imprisonment in jail at Haripur. Mst. Zafran Bibi has given birth to Mst. Shabnam Bibi from our wedlock. I have seen my affidavit, Exh.D-1, which was drafted at my instance and read over to me. After admitting it correct I have thumb-impressed the same. The application is Exh.D-2, Mst. Shabnam Bibi is my legitimate child."

On conclusion of the trial, while her co-accused Akmal Khan was acquitted, Mst. Zafran Bibi was convicted.

Decision:

Before proceeding with the consideration of the grounds taken in appeal it seems more appropriate to refer to section 8 of the Ordinance which provides the standard of proof required for Zina liable to Hadd. The same reads as under:--

> "Proof of Zina or Zina-bil-Jabr liable to Hadd.--Proof of Zina or Zina-bil-Jabr liable to Hadd shall be in one of the following forms, namely:--
> (a) the accused makes before a Court of competent jurisdiction a confession of the commission of the offence; or
> (b) at least four Muslim adult male witnesses, about whom the Court is satisfied, having regard to the requirements of Tazkiyah-al- Shuhood, that they are truthful persons and abstain from major sins (Kabair), give evidence as eye-witnesses of the act of penetration necessary to the offence:
>
> Provided that, if the accused is a non-Muslim, the eye-witnesses may be non-Muslims.
>
> Explanation.--In this section "Tazkiyah-al-Shuhood" means the mode of inquiry adopted by a Court to satisfy itself as to the credibility of a witness.
>
> Confession recorded by a Court other than the one competent to try the case not a confession. An accused has to make a confession of the commission of the offence before a Court of competent jurisdiction i.e the trial Court."

As is evident from the above, there must be either a confession of the accused of the commission of offence of Zina, before a Court of competent jurisdiction, or, in the alternative, ocular evidence of at least four Muslim adult male witnesses whose veracity conforms to the standard of Tazkiyah-al- Shuhood (i.e. purgation).

Admittedly, regarding the four witnesses as required under the law, there is no testimony of even one eyewitness in this case. The whole case is based on circumstantial evidence, coupled with the statements made by the appellant/accused, at different stages of the case. The trial Court considered these statements as confession and, taking into account the factum of pregnancy and subsequent delivery of a child, perhaps as corroboration, the learned Judge deemed it a sufficient ground for culpability of the appellant. However, thorough scrutiny reveals that neither the statements of appellants come under the ambit of confession, as envisaged by section 8 of the Ordinance, nor the pregnancy/delivery of child, could, in circumstances, be construed as sufficient basis for award of Hadd punishment. [...]

So far as the statements of the appellant/accused are concerned these are made before the police, which formed basis for formal F.I.R. on 27-3-2001, secondly before the Magistrate, recorded under section 164, Cr.P.C. on 28-3-2001 and thereafter before the trial Court under the provision of sections 342 and 340(2), Cr.P.C. It is highly pertinent to observe that all these statements could by no stretch of imagination be called confession of the guilt. It may be noted that confession in context of the Ordinance means inter alia. statement of an adult and sane person, regarding commission of offence of Zina with consent, for which the charge

is founded before the Court of competent jurisdiction. It does not include commission of offence of Zina under duress. There is difference between wilful commission of offence of Zina and subjection to the same under coercion. The statement made by appellant contains the word "forcible" everywhere. Her stand, right from recording of the F.I.R. till final stage of the trial, is that of her subjection to "forcible Zina". Thus, no statement made by her at all stages could be considered an acknowledgement of her guilt. The complaint made by her before the police was rather expression of a grievance to seek its remedy. The nature of other statements is also exculpatory. It is pertinent to mention that the confession to be effective in the context of the Ordinance, firstly must be voluntary, with free consent without any coercion or inducement, secondly must be explicit as to the commission of the actual offence of Zina with free-will, thirdly must be four times in four different meetings as held in a number of cases by Federal Shariat Court and Shariah Appellate Bench' and, fourthly, must be recorded by the Court who has competent jurisdiction to try the offence under the law. Needless to say that the prosecution is always loaded with the responsibility to produce its own evidence to establish guilt of an accused beyond reasonable doubt.

In the instant case there is nothing on record to dislodge the exculpatory portion of her statements maintained by her throughout the trial. There is nothing on record to even presume that she was a woman of easy virtue. There is also no iota of evidence to show even that she was having any illicit liaison with any male person. The available record is also completely silent about her having been seen in the company of any accused, nominated by her in her statements. No complaint about her conduct was ever made by anyone of the locality. Therefore, her statement is to be accepted as a whole: The prosecution cannot make pick and choose exercise to formulate its case against the appellant. Unless there is anything cogent on record to contradict her self-exculpation, her statement according to the established principles of criminal law is to be accepted in its entirety. We may also add that she has nominated two different accused for commission of Zina-bil-Jabr with her but the prosecution cannot get benefit from the same, because defence of an accused, whatever absurdity it might contain, cannot take the place of evidence against him/her. However, the contradiction found in the statements created doubt about the actual male accused and thus the co-accused nominated by her got the benefit thereof and was acquitted. Here we may make it clear that Hudood do not discriminate.

We may also observe that at the time of making report the appellant was accompanied by her father-in-law. At that time she was living in his house. Keeping in view the cultural and traditional background of the area her father-in-law had not the slightest suspicion about her guilt or consent for the alleged sexual intercourse or illegality of her pregnancy otherwise he would have acted differently by either resorting to "honour killing" or at least to the expulsion of appellant from his house.

Regarding her pregnancy and subsequent birth of child, which is a significant circumstance against her we may mention that mere pregnancy in itself it is not a conclusive proof of her commission of Zina. She was a married lady whose husband was still alive. Although he was imprisoned in Central Jail, Haripur but there was absolutely no embargo on any one of his visitors to meet him, as he was not undergoing solitary confinement. It is on record that at the time of occurrence her father-in-law had gone to visit him in the jail and, on account of this reason, report of the matter to police was delayed. His affidavit shows that like other family members, the appellant was visiting him off and on and had also occasions for privacy with

him as he was, allegedly, detailed to perform duty with one of the Jail Wardens and had probably enjoying more freedom than the other prisoners. Her husband who submitted affidavit also subsequently made statement on oath, reproduced hereinabove, wherein, inter alia, he owned legitimacy of the child born during the trial. This is a highly pertinent aspect of the whole case and it is certainly noticeable to mention that who else can better testify and be a better judge of the pregnancy/legitimacy of child of a married lady other than that of her husband. Therefore, mere pregnancy of appellant Mst. Zafran Bibi, in circumstances, was no ground for her conviction.

For the sake of further elucidation, we may also mention that, even otherwise, mere pregnancy, by itself when there is no other evidence at all, of a married lady, having no access to her husband, or even of an unmarried girl is no ground for imposition of Hadd punishment if she comes out with the defence that that was the result of commission of rape with her. [...]

In this respect we would like to mention that although promptness in lodging of F.I.R. in ordinary criminal cases has always been considered necessary to exclude the possibility of deliberation and fabrication, no hard and fast rule can be laid down to precisely prescribe time limit of this purpose. Nevertheless the Court can better evaluate the weight to be attached to delay that occurs in this connection, on the basis of overall evidence on record in a given case. Despite this, as held by superior Courts including Federal Shariat Court, in number of cases, mere delay per se is no ground for drawing adverse inference in such-like cases because they involve family honour. Members of the family are normally hesitant to promptly make report to police and, therefore, they wait for getting approval of male/elder members of the family to do so. In the instant case the delay has been plausibly explained in the F.I.R. itself. The appellant who is also the complainant waited for return of her father-in-law to lodge the report, as advised by her mother-in-law. Therefore, there was no reason to conclude that her delay in reporting the matter was on account of her long silence and consent to the sexual act and she only disclosed the occurrence when she came to know that she was pregnant. Nevertheless the very fact that she was found pregnant of 7/8 weeks could also have been considered a proof of her innocence, otherwise she could have easily advanced the date of occurrence to bring it in line with the period of her pregnancy. In this context it is also pertinent to observe that in her initial report she made no reference to her pregnancy have been resulted from Zina-bil-Jabr. There was no reason with the Investigating Officer to conclude that she was telling lie about the date of occurrence. Her pregnancy and subjection to Zina-bil-Jabr were two different matters and were not inter-connected so as to provide basis for conjecture for her culpability. [...]

It has also been held that in case of pregnancy of woman, either unmarried or, in case of being married, having no access to her husband, conceives but pleads that that was the result of commission of offence of rape on her, she cannot be awarded punishment of Hadd. Imam Malik, however, adds [...] that the burden of proving her lack of consent shifts to her and the truth of her statement could be ascertained from the attending circumstances at the time and after the occurrence.

In fact this concept is based on the cardinal principle of Islamic Criminal Law that conviction of someone for commission of unlawful sexual intercourse, it is not only necessary to make certain that he/she committed that act, but it is also to be ensured that he/she committed that of his/her own free will. In case someone performs that act under compulsion by some-

one, he/she is neither guilty nor liable to conviction. This position is summed up in the general principle of the Shariah which holds that a man is acquitted of responsibility for acts to which he, has been compelled. [...]

The prosecution has failed to prove its case against the appellant beyond any reasonable doubt and consequently, for the reasons stated above, we allow this appeal, set aside conviction and sentences of Mst. Zafran Bibi, wife of Niamat Khan, and acquit her of the charge.

Module 5:

TREATMENT OF GBV OFFENCES - INTERNATIONAL, NATIONAL, RELIGIOUS, AND CUSTOMARY CONTEXT: DOMESTIC VIOLENCE AND ECONOMIC VIOLENCE

A. Module Activities

- **Activity 1: Article Discussion**

  The participants are to read the article "The Punjab Protection of Women against Violence Act 2016: A Legislative Review." They are to be then divided into 4 groups, with each group working on the corresponding questions below.

  Group No 1:

  The three provincial protection and prevention laws of Pakistan were met with a lot of opposition. Is this opposition justified in your opinion?

  Group No 2:

  The Pakistan Penal code takes cognizance of an extremely wide variety of offences; there was no need to make additional laws pertaining to domestic violence. Do you concur with this view?

  Group No 3:

  Animated discussions took place on TV talk shows to take stock of the domestic violence laws. Some critics opined that the integrity and strong family structure of the country would be weakened due to these laws. Does this argument have credence?

  Group No 4:

  Interestingly the Punjab Domestic Violence Law was challenged by the Islamic ideology council. A petition was filed against it in the Federal Shariat Court. It was even deemed to be against the ideology of Pakistan. Keeping in mind the teachings of Islam, how sound do you think these religious arguments are?

B. Case Law

• DOMESTIC VIOLENCE IS NOT A PRIVATE MATTER

▶ ***OPUZ V. TURKEY***
App. No. 33401/02
9 June 2009
(European Court of Human Rights)

Facts:[35]

The applicant and her mother had both been threatened, gravely assaulted and beaten by the applicant's husband on numerous occasions during the course of their marriage. The husband had even tried to overrun the two with his car, thereby gravely wounding the mother. The injuries sustained had been life-threatening. Several times the two women complained to the police about the husband's actions. Although he was prosecuted for some of the violence, the prison term of three months was later commuted to a fine. After his release the violence continued and eventually ended in the killing of the mother by the applicant's husband.

The applicant claimed that the injuries and anguish she had suffered as a result of the violence inflicted upon her by her husband had amounted to torture within the meaning of Article 3 of the European Convention on Human Rights (the right not to be subject to torture or cruel, inhumane or degrading treatment). She felt that the violence seemed as if it had been inflicted under state supervision as despite the ongoing violence and her repeated requests for help, the authorities had failed to protect her from her husband.

Issue:
Whether the authorities correctly asserted that the dispute concerned a "private matter."

Decision:

In the Court's opinion, [the local authorities] seem to have given exclusive weight to the need to refrain from interfering in what they perceived to be a "family matter". Moreover, there is no indication that the authorities considered the motives behind the withdrawal of the complaints. This is despite the applicant's mother's indication to the Diyarbakır Public Prosecutor that she and her daughter had withdrawn their complaints because of the death threats issued and pressure exerted on them by the applicant's husband. It is also striking that the victims withdrew their complaints when the husband was at liberty or following his release from custody.

As regards the Government's argument that any further interference by the national authorities would have amounted to a breach of the victims' rights under Article 8 of the Convention, the Court recalls its ruling in a similar case of domestic violence (see Bevacqua and S. v. Bulgaria, no. 71127/01, § 83, 12 June 2008), where it held that the authorities' view that no assistance was required as the dispute concerned a "private matter" was incompatible with their positive obligations to secure the enjoyment of the applicants' rights. Moreover, the Court reiterates that, in some instances, the national authorities' interference with the private

[35] Facts taken from Equal Rights Trust: http://www.equalrightstrust.org/ertdocumentbank//opuz%20v%20turkey%20case%20summary%20erl%20edit.pdf and ECHR blog: http://echrblog.blogspot.com/2009/06/landmark-judgment-on-domestic-violence.html

or family life of the individuals might be necessary in order to protect the health and rights of others or to prevent commission of criminal acts. The seriousness of the risk to the applicant's mother rendered such intervention by the authorities necessary in the present case.

However, the Court regrets to note that the criminal investigations in the instant case were strictly dependent on the pursuance of complaints by the applicant and her mother on account of the domestic law provisions in force at the relevant time; i.e. Articles 456 § 4, 457 and 460 of the now defunct Criminal Code, which prevented the prosecuting authorities to pursue the criminal investigations because the criminal acts in question had not resulted in sickness or unfitness for work for ten days or more. It observes that the application of the aforementioned provisions and the cumulative failure of the domestic authorities to pursue criminal proceedings against H.O. deprived the applicant's mother of the protection of her life and safety. In other words, the legislative framework then in force, particularly the minimum ten days' sickness unfitness requirement, fell short of the requirements inherent in the State's positive obligations to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for the victims. The Court thus considers that, bearing in mind the seriousness of the crimes committed the applicant's husband in the past, the prosecuting authorities should have been able to pursue the proceedings as a matter of public interest, regardless of the victims' withdrawal of complaints.

• PREVENTING GBV: COURTS' ROLE

▶ *MUHAMMAD SIDDIQUE V. THE STATE*

PLD 2002 Lahore 444
Criminal Appeal No.170 of 2000, heard on 3 June 2007
Tassaduq Hussain Jilani and Asif Saeed Khan Khosa, JJ (Lahore High Court)

Facts:

This case involved the triple murder by the father of the deceased girl who had married of her choice against the wishes of her parents. Her father allegedly killed her, her husband and their daughter of 6/7 months. The accused had registered the case against his daughter and her husband under Hudood law. The deceased husband and wife had been called by the accused through co-accused on the pretext that the former (accused) wanted to compromise the matter.

Decision:

In deciding that the accused was guilty of the crime, the Court stated the following:

> "We have given our anxious consideration to the prayer for appellant's acquittal on the basis of compromise and not that the appellant pre-planned the triple murder and carried out the plan in a cold-blooded, calculated and brutal manner. There was no element of grave and sudden provocation. The only fault of appellant's adult daughter Mst. Salma was that she married someone of her own choice. There is no evidence that there was no marriage or that they were living a life of adultery. They had entered the sacred union of marriage and had given birth to a baby girl.
>
> While examining the case this Court, with a tinge of dismay, took judicial notice of the fact that the act of the appellant is not a singular act of its kind. It is symptomatic of a

culture and a certain behavior pattern which leads to violence when a daughter or a sister marries a person of her choice. Attempts are made to sanctify this behaviour in the name of "family honor". It is this perception and psyche which had led to hundreds of murders.

According to the report of the Human Rights Commission of Pakistan which has not been controverted by any State agency, over 1000 victims were of "honor killing" in the year 1999 and 888 in the single Province of Punjab in the year 1988. Similarly in Sindh, according to the statistical record maintained by the Crimes Branch of Sindh, it was 65 in 1980, 141 in 1999 and 121 in 2000. In the year 2001, at least 227 "honor killings" were reported in Punjab alone.

These killings are carried out with an evangelistic spirit. Little do these zealots know that there is nothing religious about it and nothing honorable either. It is male chauvinism and gender bias at their worst. These prejudices are not country specific, region specific or people specific. The roots are rather old and violence against women has been a recurrent phenomenon in human history. The Pre-Islamic Arab Society was no exception. Many cruel and inhuman practices were in vogue which were sought to be curbed by the advent of Islam. It is well-known that in those times, daughters used to be buried alive, it was strongly deprecated and a note of warning was conveyed in Holy Qur'an. In Sura No.81 (Al-Takwir), Verse 8, the Day of Judgment is portrayed in graphic detail when inter alia those innocent girls, who were buried alive or killed, would be asked to speak out against those who wronged them and the latter would have to account for that.

The tragedy of the triple murder is yet another tale of an old Saga; the characters are different yet plot is the same, the victims were accused of the same "crime" and even the method in madness remained the same i.e. the prosecutor, the Judge and the executioners all in one. Perhaps if the police had fairly investigated the case and the subordinate Courts had gone by the book by extending requisite protection, Salma and Saleem (deceased) would not have run away to Islamabad. This is a typical example of misuse and misapplication of Hudood Laws in the country. This abdication of authority by the State institutions made the couple run for its life and provided an opportunity to the appellant to call them over by way of deception. In utter disregard to the basic right of an adult woman to marry, to the institution of family, and motivated by self-conceived notion of "family honor", the appellant had started a tirade against them by having a criminal case registered. Baby girl was born out of the wedlock. The daughter left her home and hearth and even the city of her birth and started living in Islamabad in the fond dream of creating a "new home" and "new world" but the appellant's venom, it seems, never subsided. ... He thought a plan and a rather treacherous one of inviting them to his house. When they came, he brought out his gun and killed each one of them with repeated shots.

A murder in the name of honor is not merely the physical elimination of a man or a woman. It is at a socio-political plane a blow to the concept of a free dynamic and an egalitarian society. In great majority of cases, behind it at play, is a certain mental outlook, and a creed which seeks to deprive equal rights to women i.e. inter alia the right to marry or the right to divorce which are recognized not only by our religion but have been protected in law and enshrined in the Constitution. Such murders, therefore, represent deviant behaviors which are violative of law, negatory of religious tenets and

an affront to society. These crimes have a chain reaction. They feed and promote the very prejudices of which they are the outcome, both at the conscious and sub-conscious level to the detriment of our enlightened ideological moorings.

But are these social aberrations immutable? Is it and inexorable element of fate that the women should continue to be the victims of rage when it comes to the exercise of those fundamental rights which are recognized both in law and religion? NAY! No tradition is sacred, no convention is indispensable and no precedent worth emulation if it does not stand the test of the fundamentals of a civil society generally expressed through law and the Constitution. If humans were merely slaves of tradition or fate, they would still be living in caves eating, mating and fighting like other animals.

It is the mind and the ability to reason which distinguishes them from other living creatures. Human progress and evolution are the product of this ability. Law is part of this human odyssey and achievement. Law is a dynamic process. It has to be in tune with the ever-changing needs and values of a society failing which individuals suffer and social fabric breaks down. It is this dimension of law which makes it a catalyst of social change. Law, including the judge-made law, has to play its role in changing the inhuman social moors.

The offence which stands proved against the appellant has to have a judicial response which serves as a deterrent, so that such aberrations are effectively checked. Any other response may amount to appeasement or endorsement. A society which fails to effectively punish such offenders becomes privy to it. The steady increase in these kinds of murders is reflective of this collective inaction, of a kind of compromise with crime and if we may say so of a complicity of sorts. A justice system of crime and punishment, bereft of its purposive and deterrent elements loses its worth and credibility both. The individual, institutional and societal stakes, therefore, are high.

In these attending circumstances, we are of the considered view that the appellant does not deserve the indulgence of a compromise leading to acquittal. The sentences awarded to the appellant, therefore, do not call for interference."

▶ ***MARIA DA PENHA V. BRAZIL***
Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000)
April 16, 2001
(Inter-American Commission on Human Rights)

Facts:

The petition alleges that the Federative Republic of Brazil (hereinafter "Brazil" or "the State") condoned, for years during their marital cohabitation, domestic violence perpetrated in the city of Fortaleza, Ceará State, by Marco Antônio Heredia Viveiros against his wife at the time, Maria da Penha Maia Fernandes, culminating in attempted murder and further aggression in May and June 1983. As a result of this aggression, Maria da Penha has suffered from irreversible paraplegia and other ailments since 1983.

The petition maintains that the State has condoned this situation, since, for more than 15 years, it has failed to take the effective measures required to prosecute and punish the aggressor, despite repeated complaints. The petition alleges violation of Article 1(1) (Obligation

to Respect Rights), 8 (a Fair Trial), 24 (Equal Protection), and 25 (Judicial Protection) of the American Convention, in relation to Articles II and XVIII of the American Declaration of the Rights and Duties of Man ("the Declaration"), as well as Articles 3, 4(a), (b), (c), (d), (e), (f), and (g), and 5 and 7 of the Convention of Belém do Pará.

Decision:

The impunity that the ex-husband of Mrs. Fernandes has enjoyed and continues to enjoy is at odds with the international commitment voluntarily assumed by the State when it ratified the Convention of Belém do Pará. The failure to prosecute and convict the perpetrator under these circumstances is an indication that the State condones the violence suffered by Maria da Penha, and this failure by the Brazilian courts to take action is exacerbating the direct consequences of the aggression by her ex-husband. Furthermore, as has been demonstrated earlier, that tolerance by the State organs is not limited to this case; rather, it is a pattern. The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women.

Given the fact that the violence suffered by Maria da Penha is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors, it is the view of the Commission that this case involves not only failure to fulfill the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices. That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.

• INTERNATIONAL JURISPRUDENCE ON STATE ACCOUNTABILITY

TURKEY

▶ ***OPUZ V. TURKEY***
App. No. 33401/02.
9 June 2009
(European Court of Human Rights)

Facts: [36]

The applicant and her mother had both been threatened, gravely assaulted and beaten by the applicant's husband ("H.O.") on numerous occasions during the course of their marriage. The husband had even tried to overrun the two with his car, thereby gravely wounding the mother. The injuries sustained had been life-threatening. Several times the two women complained to the police about the husband's actions. Although he was prosecuted for some of the violence, the prison term of three months was later commuted to a fine. After his release the violence continued and eventually ended in the killing of the mother by the applicant's husband.

The applicant claimed that the injuries and anguish she had suffered as a result of the violence inflicted upon her by her husband had amounted to torture within the meaning

[36] Facts taken from Equal Rights Trust: http://www.equalrightstrust.org/ertdocumentbank//opuz%20v%20turkey%20case%20summary%20erl%20edit.pdf and ECHR blog: http://echrblog.blogspot.com/2009/06/landmark-judgment-on-domestic-violence.html

of Article 3 of the European Convention on Human Rights (the right not to be subject to torture or cruel, inhumane or degrading treatment). She felt that the violence seemed as if it had been inflicted under state supervision as despite the ongoing violence and her repeated requests for help, the authorities had failed to protect her from her husband.

Issue:

Whether the State could be held responsible, under Article 3, for the ill-treatment inflicted on persons by non-state actors.

Decision:

The obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.

The local authorities, namely the police and public prosecutors, did not remain totally passive. After each incident involving violence, the applicant was taken for medical examination and criminal proceedings were instituted against her husband. The police and prosecuting authorities questioned H.O. in relation to his criminal acts, placed him in detention on two occasions, indicted him for issuing death threats and inflicting actual bodily harm and, subsequent to his conviction for stabbing the applicant seven times, sentenced him to pay a fine.

However, none of these measures were sufficient to stop H.O. from perpetrating further violence. In this respect, the Government blamed the applicant for withdrawing her complaints and failing to cooperate with the authorities, which prevented the latter from continuing the criminal proceedings against H.O., pursuant to the domestic law provisions requiring the active involvement of the victim.

The Court reiterates its opinion in respect of the complaint under Article 2, namely that the legislative framework should have enabled the prosecuting authorities to pursue the criminal investigations against H.O. despite the withdrawal of complaints by the applicant on the basis that the violence committed by H.O. was sufficiently serious to warrant prosecution and that there was a constant threat to the applicant's physical integrity.

However, it cannot be said that the local authorities displayed the required diligence to prevent the recurrence of violent attacks against the applicant, since the applicant's husband perpetrated them without hindrance and with impunity to the detriment of the rights recognised by the Convention. By way of example, the Court notes that, following the first major incident, H.O. again beat the applicant severely, causing her injuries which were sufficient to endanger her life, but he was released pending trial "considering the nature of the offence and the fact that the applicant had regained full health". The proceedings were ultimately discontinued because the applicant withdrew her complaints. Again, although H.O. assaulted the applicant and her mother using a knife and caused them severe injuries, the prosecuting authorities terminated the proceedings without conducting any meaningful investigation. Likewise, H.O. ran his car

into the applicant and her mother, this time causing injuries to the former and life-threatening injuries to the latter. He spent only 25 days in prison and received a fine for inflicting serious injuries on the applicant's mother. Finally, the Court was particularly struck by the Diyarbakır Magistrate's Court's decision to impose merely a small fine, which could be paid by installments, on H.O. as punishment for stabbing the applicant seven times.

Thus, the response to the conduct of the applicant's former husband was manifestly inadequate to the gravity of the offences in question. It therefore observes that the judicial decisions in this case reveal a lack of efficacy and a certain degree of tolerance, and had no noticeable preventive or deterrent effect on the conduct of H.O.

THE PHILIPPINES

▶ ***VERTIDO V. PHILIPPINES***
Communication No. 18/2008
16 July 2010
(Views adopted by the CEDAW Committee, forty-sixth session under the Optional Protocol to CEDAW)

Facts:

In 1996, Karen Tayag Vertido ("the author") worked as Executive Director of the Davao City Chamber of Commerce and Industry in the Philippines. She filed a complaint for rape against J. B. C. ("the accused"), who at that time was a former 60-year-old President of the Chamber. The rape allegedly took place on 29 March 1996.

Within 24 hours of being raped, the author underwent a medical and legal examination at the Davao City Medical Centre. Within 48 hours of being raped, the author reported the incident to the police. On 1 April 1996, she filed a complaint in which she accused J. B. C. of raping her.

The case remained at the trial court level from 1997 to 2005. The reasons for the prolonged trial included the fact that the trial court judge was changed several times and the accused filed several motions before the appellate courts. Three judges recused themselves from the case. The case was referred to Judge Virginia Hofileña-Europa in September 2002.

On 26 April 2005 Judge Hofileña-Europa issued a verdict acquitting J. B. C. The Court challenged the credibility of the author's testimony. Although the Court allegedly took into account a Supreme Court ruling according to which "the failure of the victim to try to escape does not negate the existence of rape", it concluded that that ruling could not apply in this case, as the Court did not understand why the author had not escaped when she allegedly appeared to have had so many opportunities to do so. The Court found the allegations of the complainant as to the sexual act itself to be implausible. Guided by a Supreme Court ruling, the Court concluded that had the author really fought off the accused when she had regained consciousness and when he was raping her, the accused would have been unable to proceed to the point of ejaculation, in particular bearing in mind that he was already in his sixties. It also concluded that the testimony of the accused was corroborated on some material points by the testimony of other witnesses (namely the motel room boy and the friend of the accused). The Court therefore concluded that the evidence presented by the prosecution, in particular the testimony of the complainant herself, left too many doubts in the mind of the Court to achieve the moral certainty necessary to merit a conviction.

Issue:

Did Judge Hofileña-Europa rely on gender-based myths and misconceptions about rape and rape victims in her decision? If so, did this amount to a violation of the rights of the complainant and a breach of the Philippines' obligations to end discrimination in the legal process under articles 2 (c), 2 (f) and 5 (a) of the Convention?

Decision:

Yes, the Philippines has failed to fulfill its obligations and has thereby violated the rights of the author under article 2 (c) and (f), and article 5 (a), read in conjunction with article 1 of the Convention and general recommendation No. 19 of the Committee.

With regard to the author's claim in relation to article 2 (c), the Committee, while acknowledging that the text of the Convention does not expressly provide for a right to a remedy, considers that such a right is implied in the Convention, in particular in article 2 (c), by which States parties are required "to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination". The Committee notes the undisputed fact that the case remained at the trial court level from 1997 to 2005. It considers that for a remedy to be effective, adjudication of a case involving rape and sexual offenses claims should be dealt with in a fair, impartial, timely and expeditious manner.

The Committee further reaffirms that the Convention places obligations on all State organs and that States parties can be responsible for judicial decisions which violate the provisions of the Convention. It notes that by articles 2 (f) and 5 (a), the State party is obligated to take appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women. In this regard, the Committee stresses that stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general. The Committee further recalls its general recommendation No. 19 on violence against women. This general recommendation addresses the question of whether States parties can be held accountable for the conduct of non-State actors in stating that "... discrimination under the Convention is not restricted to action by or on behalf of Governments..." and that "under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation". In the particular case, the compliance of the State party's due diligence obligation to banish gender stereotypes on the grounds of articles 2 (f) and 5 (a) needs to be assessed in the light of the level of gender sensitivity applied in the judicial handling of the author's case.

The Committee notes that, under the doctrine of stare decisis, the Court referred to guiding principles derived from judicial precedents in applying the provisions of rape in the Revised Penal Code of 1930 and in deciding cases of rape with similar patterns. At the outset of the judgment, the Committee notes a reference in the judgment to three general guiding principles used in reviewing rape cases. It is its understanding that those guiding principles, even if not explicitly referred to in the decision itself, have been influential in the handling of the case. The Committee finds that one of them, in particular, according to which "an accusation

for rape can be made with facility", reveals in itself a gender bias. With regard to the alleged gender-based myth and stereotypes spread throughout the judgment and classified by the author, the Committee, after a careful examination of the main points that determined the judgment, notes the following issues.

First of all, the judgment refers to principles such as that physical resistance is not an element to establish a case of rape, that people react differently under emotional stress, that the failure of the victim to try to escape does not negate the existence of the rape as well as to the fact that "in any case, the law does not impose upon a rape victim the burden of proving resistance". The decision shows, however, that the judge did not apply these principles in evaluating the author's credibility against expectations about how the author should have reacted before, during and after the rape owing to the circumstances and her character and personality. The judgment reveals that the judge came to the conclusion that the author had a contradictory attitude by reacting both with resistance at one time and submission at another time, and saw this as being a problem. The Committee notes that the Court did not apply the principle that "the failure of the victim to try and escape does not negate the existence of rape" and instead expected a certain behavior from the author, who was perceived by the court as being not "a timid woman who could easily be cowed". It is clear from the judgment that the assessment of the credibility of the author's version of events was influenced by a number of stereotypes, the author in this situation not having followed what was expected from a rational and "ideal victim" or what the judge considered to be the rational and ideal response of a woman in a rape situation.

Although there exists a legal precedent established by the Supreme Court of the Philippines that it is not necessary to establish that the accused had overcome the victim's physical resistance in order to prove lack of consent, the Committee finds that to expect the author to have resisted in the situation at stake reinforces in a particular manner the myth that women must physically resist the sexual assault. In this regard, the Committee stresses that there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.

Further misconceptions are to be found in the decision of the Court, which contains several references to stereotypes about male and female sexuality being more supportive for the credibility of the alleged perpetrator than for the credibility of the victim. In this regard, the Committee views with concern the findings of the judge according to which it is unbelievable that a man in his sixties would be able to proceed to ejaculation with the author resisting the sexual attack. Other factors taken into account in the judgment, such as the weight given to the fact that the author and the accused knew each other, constitute a further example of "gender-based myths and misconceptions".

HUNGARY

▶ *MS. A. T. V. HUNGARY*

Communication No.: 2/2003
26 January 2005
(Views of the CEDAW Committee under article 7, paragraph 3, of the Optional Protocol to CEDAW)

Facts:

Ms. A. T. ("the author") states that for the past four years she has been subjected to regular severe domestic violence and serious threats by her common law husband, L. F., father of her two children, one of whom is severely brain-damaged. Although L. F. allegedly possesses a firearm and has threatened to kill the author and rape the children, the author has not gone to a shelter, reportedly because no shelter in the country is equipped to take in a fully disabled child together with his mother and sister. The author also states that there are currently no protection orders or restraining orders available under Hungarian law.

In March 1999, L. F. moved out of the family apartment. His subsequent visits allegedly typically included battering and/or loud shouting, aggravated by his being in a drunken state. In March 2000, L. F. reportedly moved in with a new female partner and left the family home, taking most of the furniture and household items with him. The author claims that he did not pay child support for three years, which forced her to claim the support by going to the court and to the police, and that he has used this form of financial abuse as a violent tactic in addition to continuing to threaten her physically. In addition, there were some instances when L. F. broke into the apartment using violence.

L. F. is said to have battered the author severely on several occasions, beginning in March 1998. Since then, 10 medical certificates have been issued in connection with separate incidents of severe physical violence, even after L. F. left the family residence, which, the author submits, constitute a continuum of violence.

The author states that there have been civil proceedings regarding L. F.'s access to the family's residence, a 2 and a half room apartment jointly owned by L. F. and the author. Decisions by the court of the first instance and the regional court authorized L. F. to return and use the apartment. The judges reportedly based their decision on the following grounds: (a) lack of substantiation of the claim that L. F. regularly battered the author; and (b) that L. F.'s right to the property, including possession, could not be restricted. Since that date, and on the basis of the earlier attacks and verbal threats by her former partner, the author claims that her physical integrity, physical and mental health and life have been at serious risk and that she lives in constant fear. The author reportedly submitted to the Supreme Court a petition for review of the regional court's decision.

The author states that she also initiated civil proceedings regarding division of the property, which have been suspended. She claims that L. F. refused her offer to be compensated for half of the value of the apartment and turn over ownership to her. In these proceedings the author reportedly submitted a motion for injunctive relief (for her exclusive right to use the apartment), which was rejected.

The author states that there have been two ongoing criminal procedures against L. F., one that began in 1999 concerning two incidents of battery and assault causing her bodily harm

and the second that began in July 2001 concerning an incident of battery and assault that resulted in her being hospitalized for a week with a serious kidney injury. The author further states that L. F. has not been detained at any time in this connection.

Issue:

Whether Ms. A. T. is the victim of a violation of articles 2 (a), (b) and (e), 5 (a) and 16 of the Convention because, as she alleges, for the past four years Hungary (the State Party) has failed in its duty to provide her with effective protection from the serious risk to her physical integrity, physical and mental health and her life from her former common law husband.

Decision:

Yes. With regard to article 2 (a), (b), and (e), the Committee notes that the State party has admitted that the remedies pursued by the author were not capable of providing immediate protection to her against ill-treatment by her former partner and, furthermore, that legal and institutional arrangements in the State party are not yet ready to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence. While appreciating the State party's efforts at instituting a comprehensive action programme against domestic violence and the legal and other measures envisioned, the Committee believes that these have yet to benefit the author and address her persistent situation of insecurity.

The Committee further notes the State party's general assessment that domestic violence cases as such do not enjoy high priority in court proceedings. The Committee is of the opinion that the description provided of the proceedings resorted to in the present case, both the civil and criminal proceedings, coincides with this general assessment. Women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy. The Committee also takes note that the State party does not offer information as to the existence of alternative avenues that the author might have pursued that would have provided sufficient protection or security from the danger of continued violence. In this connection, the Committee recalls its concluding comments from August 2002 on the State party's combined fourth and fifth periodic report, which state "... [T]he Committee is concerned about the prevalence of violence against women and girls, including domestic violence. It is particularly concerned that no specific legislation has been enacted to combat domestic violence and sexual harassment and that no protection or exclusion orders or shelters exist for the immediate protection of women victims of domestic violence". Bearing this in mind, the Committee concludes that the obligations of the State party set out in article 2 (a), (b) and (e) of the Convention extend to the prevention of and protection from violence against women, which obligations in the present case, remain unfulfilled and constitute a violation of the author's human rights and fundamental freedoms, particularly her right to security of person.

In respect of the case now before the Committee, the facts of the communication reveal aspects of the relationships between the sexes and attitudes towards women that the Committee recognized vis-à-vis the country as a whole. For four years and continuing to the present day, the author has felt threatened by her former common law husband, the father of her two children. The author has been battered by this same man, her former common law husband. She has been unsuccessful, either through civil or criminal proceedings, to temporarily or permanently bar L. F. from the apartment where she and her children have continued

to reside. The author could not have asked for a restraining or protection order since neither option currently exists in the State party. She has been unable to flee to a shelter because none are equipped to accept her together with her children, one of whom is fully disabled. None of these facts have been disputed by the State party and, considered together, they indicate that the rights of the author under articles 5 (a) and 16 of the Convention have been violated.

BRAZIL

▶ *MARIA DA PENHA V. BRAZIL*

Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000)
April 16, 2001
(Inter-American Commission on Human Rights)

Facts:

The petition alleges that the Federative Republic of Brazil (hereinafter "Brazil" or "the State") condoned, for years during their marital cohabitation, domestic violence perpetrated in the city of Fortaleza, Ceará State, by Marco Antônio Heredia Viveiros against his wife at the time, Maria da Penha Maia Fernandes, culminating in attempted murder and further aggression in May and June 1983. As a result of this aggression, Maria da Penha has suffered from irreversible paraplegia and other ailments since 1983.

The petition maintains that the State has condoned this situation, since, for more than 15 years, it has failed to take the effective measures required to prosecute and punish the aggressor, despite repeated complaints. The petition alleges violation of Article 1(1) (Obligation to Respect Rights), 8 (a Fair Trial), 24 (Equal Protection), and 25 (Judicial Protection) of the American Convention, in relation to Articles II and XVIII of the American Declaration of the Rights and Duties of Man ("the Declaration"), as well as Articles 3, 4(a), (b), (c), (d), (e), (f), and (g), and 5 and 7 of the Convention of Belém do Pará.

Decision:

The impunity that the ex-husband of Mrs. Fernandes has enjoyed and continues to enjoy is at odds with the international commitment voluntarily assumed by the State when it ratified the Convention of Belém do Pará. The failure to prosecute and convict the perpetrator under these circumstances is an indication that the State condones the violence suffered by Maria da Penha, and this failure by the Brazilian courts to take action is exacerbating the direct consequences of the aggression by her ex-husband. Furthermore, as has been demonstrated earlier, that tolerance by the State organs is not limited to this case; rather, it is a pattern. The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women.

Given the fact that the violence suffered by Maria da Penha is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors, it is the view of the Commission that this case involves not only failure to fulfill the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices. That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.

AUSTRIA

▶ *GOEKCE V. AUSTRIA*

Communication No. 5/2005
6 August 2007
(Views of the CEDAW Committee under article 7, paragraph 3, of the Optional Protocol to CEDAW)

Facts: [37]

Şahide Goekce (Şahide), an Austrian national of Turkish origin, lived with her husband, Mustafa Goekce (Mustafa), and their two daughters, in Austria. Mustafa subjected Şahide to physical violence, taunting and death threats for over three years, before fatally shooting her on 7 December 2002.

The first reported case of violence by Mustafa against Şahide took place in December1999, when Mustafa allegedly choked and threatened to kill Şahide. Police were called to the family apartment several times between 2000 and 2002 in response to reports of disturbances, disputes and/or battering. During this period, Mustafa was issued with two expulsion and prohibition to return orders and an interim injunction order. It is alleged that police were informed that Mustafa had breached the interim injunction order and that he was in possession of a handgun, despite being subject to a weapons prohibition. On two occasions the police requested that Mustafa be detained for making a criminally dangerous threat (a death threat) and assaulting Şahide. These requests were denied by the Police Prosecutor. It appears that no explanation was provided at the time for the refusal.

On 5 December 2002, the Public Prosecutor stayed all court proceedings against Mustafa. The Public Prosecutor claimed that there were insufficient reasons to prosecute Mustafa for causing bodily harm and making criminally dangerous threats.

On 7 December 2002, Şahide phoned a police emergency call service but no police officer was sent to the apartment in response to the call. Several hours later, Mustafa shot and killed Şahide in the family apartment, in front of their two daughters, with a handgun he had purchased three weeks earlier. Mustafa surrendered himself to police two-and-a-half hours after committing the crime.

Mustafa was found guilty of murdering Şahide. Nevertheless, Mustafa was held to have committed the homicide under the influence of a "paranoid jealous psychosis" as Şahide had claimed that Mustafa was not the father of "all of her children," in an argument that preceded her murder. The court accepted that the psychosis met the requirements for a defence of mental illness. On this ground Mustafa was absolved of criminal responsibility. He is now serving a life sentence in a mental health institution.

The communication was jointly brought before the CEDAW Committee by the Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice, on behalf of Şahide and with the written consent of the guardian of Şahide's three minor children, the City of Vienna Office for Youth and Family Affairs.

37 Facts by Antonia Ross, from https://opcedaw.wordpress.com/category/communications/sahide-goekce-deceased-v-austria/

The authors submitted that Austria failed to protect the deceased from domestic violence because the State Party did not take effective measures to protect Şahide's right to personal security and life and because it did not recognise Mustafa as an extremely violent and dangerous offender. The authors claimed that slow and ineffective communication between police and the Public Prosecutor lead to Mustafa avoiding conviction. Moreover, the authors claimed that Austria's existing domestic laws do not adequately protect women from violent persons, especially where the offender is repeatedly violent or makes death threats. The authors claimed that Austria violated articles 1, 2, 3 and 5 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). They cited several other international instruments in support of their claim, including General Recommendations 12, 19 and 21, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Issue:

Whether Austria violated its obligations under article 2 (a) and (c) through (f), and article 3 of the Convention.

Decision:

The Committee notes that the State party has established a comprehensive model to address domestic violence that includes legislation, criminal and civil law remedies, awareness-raising, education and training, shelters, counseling for victims of violence and work with perpetrators. However, in order for the individual woman victim of domestic violence to enjoy the practical realization of the principle of equality of men and women and of her human rights and fundamental freedoms, the political will that is expressed in the aforementioned comprehensive system of Austria must be supported by State actors, who adhere to the State party's due diligence obligations.

In the instant case, the Committee notes that during the three-year period starting with the violent episode that was reported to the police on 3 December 1999 and ending with the shooting of Ms. Goekce on 7 December 2002, the frequency of calls to the police about disturbances and disputes and/or battering increased; the police issued prohibition to return orders on three separate occasions and twice requested the Public Prosecutor to order that Mustafa Goekce be detained; and a three-month interim injunction was in effect at the time of her death that prohibited Mustafa Goekce from returning to the family apartment and its immediate environs and from contacting Ms. Goekce or the children. The Committee notes that Mustafa Goekce shot Ms. Goekce dead with a handgun that he had purchased three weeks earlier, despite a valid weapons prohibition against him as well as the uncontested contention by the authors that the police had received information about the weapon from the brother of Mustafa Goekce. In addition, the Committee notes the unchallenged fact that Ms. Goekce called the emergency call service a few hours before she was killed, yet no patrol car was sent to the scene of the crime.

The Committee considers that given this combination of factors, the police knew or should have known that Ms. Goekce was in serious danger; they should have treated the last call from her as an emergency, in particular because Mustafa Goekce had shown that he had the potential to be a very dangerous and violent criminal. The Committee considers that in light of the long record of earlier disturbances and battering, by not responding to the call immediately, the police are accountable for failing to exercise due diligence to protect Ms. Goekce.

Although, the State party rightly maintains that, it is necessary in each case to determine whether detention would amount to a disproportionate interference in the basic rights and

fundamental freedoms of a perpetrator of domestic violence, such as the right to freedom of movement and to a fair trial, the Committee is of the view, as expressed in its views on another communication on domestic violence, that the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity. In the present case, the Committee considers that the behavior (threats, intimidation and battering) of Mustafa Goekce crossed a high threshold of violence of which the Public Prosecutor was aware and as such the Public Prosecutor should not have denied the requests of the police to arrest Mustafa Goekce and detain him in connection with the incidents of August 2000 and October 2002.

While noting that Mustafa Goekce was prosecuted to the full extent of the law for killing Ms. Goekce, the Committee still concludes that the State party violated its obligations under article 2 (a) and (c) through (f), and article 3 of the Convention read in conjunction with article 1 of the Convention and general recommendation 19 of the Committee and the corresponding rights of the deceased Ms. Goekce to life and physical and mental integrity.

• ECONOMIC VIOLENCE: DEPRIVATION OF RIGHT TO LAND AND INHERITANCE

▶ ***GHULAM ALI V. MST SARWAR NAQVI***[38]
PLD 1990 SC 1
Muhammad Afzal Zullah, J. (Supreme Court, on appeal)

Facts:

The three petitioners in the case were the sons of Ghulam Ahmed Shah. The respondent was Shah's daughter and the petitioners' sister. The father left behind property in different estates at the time of his death. Mutations were entered and sanctioned properly in all estates except for one. She was deprived of her Islamic share in her father's property covered by this mutation.

The petitioners' (brothers) explanation for this discriminatory treatment of the respondent's (sister) share was based on the fact that the petitioners (brothers) had spent a great sum of money on their sister's marriage. They further claimed that they had maintained her for about five years. The petitioners thus claimed that for these considerations, the respondent (sister) voluntarily relinquished her inheritance.

Issue:

Whether the petitioners (brothers) could use a moral reason to take their sister's inheritance. Whether the sister can relinquish her inheritance in Islamic Law.

Decision:

The brothers had no "moral" ground to oust their sister from their father's property as the interest in property devolved on the sister automatically after the father's death. Further, the Court said that it was the brothers' moral obligation in Islam to maintain their widowed/divorced sister.

38 Digest is a composite from (a) Strategic Advocacy for Human Rights: http://www.sa-hr.org/single-post/2016/03/31/Can-a-brother-dispossess-his-sister-of-her-inheritance, and (b) https://wrcaselaw.files.wordpress.com/2012/08/right-to-inheritance-brothers-dispossessing-sister-ghulam-ali-v-mst-sarwar-naqvi.pdf.

The brothers tried to argue that they were an 'intermediary' for their sister. But the Judge responded that the concept of 'intermediary' is unknown to Islamic law. In Islamic law, there is no intermediary. The property is devolved on the heirs automatically and immediately in definite shares.

> "…. whether they (the brothers) like it, want it, abhor it, or shun it…. It is the public policy of Islamic law…If the State, the Court, the executor, the administrator (cannot) intervene, (then nobody) intervenes on any other principle, authority or relationship—(not) even of kinship."

> "It has already been held that the devolution of property through Islamic inheritance takes place immediately without any intervention; therefore, in this case the respondent became the owner of the property immediately on the death of her father."

The Judge extensively quoted from Quran to establish that a woman under Muslim Law enjoys equal rights and privileges as men and this is true even in case of inheritance. Also, by virtue of Quran (4:34), Islam enjoins upon men the duty to protect and enforce the rights of women.

> "Relinquishment" by a female of her inheritance is undoubtedly opposed to "public policy" as understood in the Islamic sense. Accordingly….in agreeing to the relinquishment (though denied by the sister) it was against public policy."

Therefore, in the Court's opinion, even if the sister had herself waived the right of inheritance, this being against public policy would invalidate the agreement to relinquish inheritance rights between petitioner and the respondent.

> "It is unimaginable that a daughter enjoying "protection and maintenance" by the father till she is married, when she is married and divorced, would lose this right—this of course is subject to certain conditions…it would be her right to be treated by the father in the best possible manner in all these circumstances. And if beyond the bare necessity he does anything concerning the daughter, it has to be treated as gift and not something which would have to be returned by the daughter by compensating the father in the tangible property. The rights of a sister, in cases like the present case, will have to be equated with that of a daughter…"

> "…it might be very rare that a male co-heir would relinquish his right for a female heir. Experience shows that is has always been the reverse. The flow of love cannot be so unnatural. Therefore, (…) in cases like the present one there will be a presumption (…) that it was not on account of natural love but on account of social constraints (…) that relinquishment has taken place. (…) In the present case, it appears to be jugglery that the petitioners claimed that the relinquishment by the respondent was in consideration of what they claim to have done in her two marriages as also for her maintenance. (…) All these claims are against the teachings of Islam- injunctions in the Holy Qur'an and the Sayings of the Holy Prophet (PBUH), wherein emphasis has been laid again and again on the best possible concern for and treatment of female relations."

C. Handouts

- **The Punjab Protection of Women against Violence Act 2016: A Legislative Review**

• Handout: The Punjab Protection of Women against Violence Act 2016: A Legislative Review

The Punjab Protection of Women against Violence Act 2016: A Legislative Review

Muhammad Khursheed Siddiqi*

The core of sadism, common to all its manifestations, is the passion to have absolute and unrestricted control over a living being… It is the transformation of impotence into omnipotence.
Erich Fromm, *The Anatomy of Human Destructiveness* (1973)

Violence against women has long been a core human rights issue in Pakistan, and attempts to protect and empower women in this regard have often faced stern opposition. The recent promulgation of the Punjab Protection of Women against Violence Act 2016 ('the PPWVA') was no exception. This legislative review seeks to understand and engage with the main grounds of opposition to the PPWVA, and argue that they largely lack substance. It highlights some of the reasons that made it imperative to have a law to protect women, critically examines the key provisions of the PPWVA and identifies some of the major loopholes in them, and makes recommendations to rectify the shortcomings. The review concludes with an assessment of the future of the PPWVA, and on the note that though this Act is a commendable piece of legislation, several complementary measures need to be taken to ensure its success.

Introduction

Legislation in pursuance of the protection and empowerment of women in Pakistan has often caused discomfort amongst various circles inclined to preserve gender inequality in the country. In particular, a large section of the religious right has often vociferously opposed reform on the pretext of defending the ideology of the country. Voices supporting the status quo have usually been louder than those calling for reform, and thus various governments have historically yielded to them. Unsurprisingly, the passage of the PPWVA has also courted much controversy, but the Punjab Government ('the Government') has thus far appeared resolute in not submitting to it. The PPWVA is not strictly a penal statute; rather it aims to counter violence by establishing a protection and rehabilitation system for women trapped in abusive relationships. It covers a broad range of violence including sexual, psychological, economic, stalking and cybercrime. The PPWVA hinges on various non-traditional measures to extend protection to women being abused, such as cuffing the abuser with a GPS tracker for monitoring movement, and these measures have arguably played a key role in driving the criticism of the Act. This legislative review critically examines the principal arguments against the PPWVA, and then proceeds to analyze the need to promulgate this Act in the current circumstances. Following this, the review critically examines various provisions of the PPWVA to gauge its potential effectiveness, and where possible, makes recommendations to overcome some of the existing loopholes in it. Lastly, given the above discussion, the review highlights some of the measures necessary to secure the future of the PPWVA.

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• Handout: The Punjab Protection of Women against Violence Act 2016: A Legislative Review

Arguments against the PPWVA

Most of the criticism of the PPWVA is leveled against the modern notions of protection and empowerment of women in the context of marriage for allegedly being against Islamic principles. The Council of Islamic Ideology ('the CII'), a body tasked with making recommendations to the legislature for ensuring that laws conform with the Islamic principles, took the lead in declaring the PPWVA to be un-Islamic on the grounds of it being contrary to the teachings of Islam.[1] The Act was seen as an attempt to impair *Shariah* and secularize the Islamic State.[2] Several leading religious scholars and representatives of top religious political parties also expressed their resentment along similar lines over the passage of the PPWVA. In expressing such views, reliance has impliedly been placed on Verse 4:34 of the Qur'an, which states:

> Men are *qawwamun* (in authority) over women, because God has preferred some over others, and because they spend of their wealth (to maintain them). Righteous women are obedient and guard in (their husbands') absence what God would have them guard. Concerning those women from whom you fear *nushuz* (disobedience/rebellion), admonish them, and/or abandon them in bed, and/or *wa-dribuhunna* (hit them). If they obey you, do not seek a means against them, God is most high, great.

This verse has since long been in the limelight in the context of domestic violence against women. On the one hand lies the traditionalist interpretation of this verse, according to which the imperative 'hit them' means that the use of force is permitted in case of necessity and as a last resort to save marriage.[3] On the other hand lies the reformist interpretation, according to which the aforementioned imperative merely implies parting ways in case of an irreconcilable dispute between the spouses.[4] Given the contemporary realities, the reformists are against the use of force by husbands.[5] However, most individuals condemning the PPWVA appear to be following the traditionalist interpretation as they take the imperative 'hit them' in its literal sense, and refuse to interpret it in the context of verses and *ahadith* that advocate protection and empowerment of women. For instance, Verse 2:228 of the Qur'an states, 'Women shall have rights similar to the rights against them, according to what is equitable'.[6] Besides, according to a *hadith*, Prophet Muhammad (PBUH) rebuked those men who hit their wives and said that those who do so are not the best of men.[7] The apparent

[1] Shyema Sajjad, 'When Will Pakistan's Clergy Celebrate Our Women?' *Dawn* (7 March 2016) <http://www.dawn.com/news/1244113/when-will-pakistans-clergy-celebrate-our-women> accessed 20 March 2016; Reuters, 'CII Rules Women's Protection Law 'un-Islamic'' *The Express Tribune* (3 March 2016) <http://tribune.com.pk/story/1058773/top-pakistani-religious-body-rules-womens-protection-law-un-islamic/> accessed 20 March 2016.

[2] Newspaper's Staff Correspondent, 'Religious Parties Can Derail Govt, Fazl tells Sana' *Dawn* (2 March 2016) <http://www.dawn.com/news/1243017/religious-parties-can-derail-govt-fazl-tells-sana> accessed 18 March 2016; Kalbe Ali, 'Religious Parties Reject Women Protection Bill' *Dawn* (6 March 2016) <http://www.dawn.com/news/1243896/religious-parties-reject-women-protection-bill> accessed 19 March 2016.

[3] Ayesha S. Chaudhry, *Domestic Violence and the Islamic Tradition* (first published 2013, Oxford University Press 2015) 154.

[4] Ibid 189.

[5] Ibid.

[6] *Saleem Ahmad v Government of Pakistan* PLD 2014 FSC 43; Saneya Saleh, 'Women in Islam: Their Status in Religious and Traditional Culture' (1972) 2 IJSF 35, 37.

[7] (n 3) 211.

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obliviousness of individuals opposing the PPWVA in its entirety to such Qur'anic verses and *ahadith* reveals a bias on their part, which can be seen as an attempt to maintain the gender status quo in the society.

Various individuals have also been contending that the PPWVA is against the ideology of Pakistan. A prime illustration of this is the formal rejection of the Act by the CII on the ground that it 'doesn't fit in with the ideology of Pakistan' and thus the 'whole law is wrong'.[8] There is no doubt, given the fact that Islam is Pakistan's state religion (Article 2) and the Objectives Resolution is a substantive part of the Constitution (Article 2A), that the ideology of the country is Islamic in nature.[9] The argument being raised by the likes of the CII, however, is problematic in at least three respects. Firstly, the Supreme Court has held that the Objectives Resolution, which deals with Islamic precepts and the ideology of Pakistan, is not supra-constitutional[10] – it does not control the substantive provisions of the Constitution. Secondly, Article 25(3) of the Constitution, which deals with equality of citizens, states, 'Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.'[11] Given that the intended purpose of the PPWVA is to protect women from violence, it certainly falls within the ambit of this Article. Thirdly, even if it were assumed that there is absolute agreement over the scope of the ideology of Pakistan, is violence against women not against Islam and thus against the ideology of the country? The argument being that one may object to certain provisions of the Act, but from an objective standpoint, one cannot validly claim that it is in its entirety against the ideology of the country.

The notion of the dignity of man has also been used as a basis to oppose the PPWVA. Perhaps the best illustration of such kind of concerns is the reasoning of Dr. Mohammad Aslam Khaki, who has challenged the Act in the Federal Shariat Court for being 'against the dignity of man and hence against Islam and the [C]onstitution.'[12] He has supported his petition by citing the following verse from the Qur'an, 'We bestowed dignity on the children of Adam and provided them with rides on the land and in the sea and provided them with a variety of good things and made them much superior to many of those whom we have created.'[13] When a question regarding this petition was raised while interviewing Additional District and Sessions Judge, Mr. Mehmood Haroon, he satirically asked, 'So the phrase "the children of Adam" doesn't include women? Don't women also have dignity? If a woman is physically tortured, isn't this against the dignity of the children of Adam?'[14] The answer to these questions is quite evident. The notion of dignity is gender-neutral in Islam.[15] This has also been reflected in Articles 14(1) and 263 of the Constitution, which state respectively, 'The dignity of man… shall be inviolable' and 'In the Constitution… words importing the masculine gender shall be taken to include females'.[16] Thereby, restricting the notion of dignity to men only and using this as a basis to oppose the PPWVA is unjustified.

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[8] Sajjad (n 1).
[9] The Constitution of the Islamic Republic of Pakistan 1973.
[10] *The State v Zia-ur-Rahman* PLD 1973 SC 49.
[11] (n 9).
[12] Nasir Iqbal, 'Women's Protection Act Challenged in Federal Shariat Court' *Dawn* (4 March 2016) <http://www.dawn.com/news/1243466/womens-protection-act-challenged-in-federal-shariat-court> accessed 18 March 2016.
[13] Ibid.
[14] Interview, Mehmood Haroon, Additional District and Sessions Judge (Jaranwala), 5 March 2016.
[15] (n 3) 9; Izzud-Din Pal, '*Women and Islam in Pakistan*' (1990) 26 MES 449, 455.
[16] (n 9).

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Another concern that has frequently been voiced regarding the PPWVA by various individuals is that it will weaken Pakistan's strong family structure, a notion allegedly lacking in the West.[17] The CII went so far as to claim that the passage of this Act is an attempt to curtail the powers of husbands and a tool to oppress them.[18] These arguments are problematic because they implicitly assume that men are superior to women in Islam when it comes to management of the family, and thus the status quo needs to be preserved by ensuring the subjugation of women, which may even be at the expense of their freedom. From a simple reading of Verse 2:228 of the Qur'an, it becomes apparent that men are one degree superior to women in financial matters of the family, as an obligation has been placed on them to maintain their wives.[19] Regarding all other family matters, men and women stand on an equal footing because they have reciprocal rights and obligations.[20] Therefore, this reciprocity can by no means be construed as validating the subjugation of women, and thus the argument regarding the Act being a threat to Pakistan's family structure is misplaced.

Was the PPWVA Needed?

It is pivotal at this point to ascertain the importance of the PPWVA by looking into whether such a law was needed in the first place. Women in Pakistan are undoubtedly susceptible to discrimination, abuse and marginalization. One of the key reasons for this is that in most cases, the financial control of the household lies in the hands of men and women are usually dependent on them for their maintenance.[21] Therefore, in the words of Judge Mr. Mehmood Haroon, 'Whenever a law for the protection of a gender would be made, it would naturally be for the protection of the feminine gender, not masculine.'[22] Arguing that men have become insecure as a result of this Act unjustifiably discounts the need to have such a law. The passage of this Act, at the very least, carries a symbolic value, and there is no doubt that it has once again stimulated the debate regarding the protection of women in prominent spheres.[23]

The figures on reported cases of violence against women reaffirm the abysmal state of affairs in this context in Pakistan. In 2014, a total of 10,070 cases of violence against women were reported across the country, of which a staggering 7,548 cases were reported in Punjab alone.[24] There was a 29.8% increase in the cases reported in Punjab in 2014 as compared to those reported in 2013.[25] A somewhat similar trend has prevailed over the past decade as well.[26] Moreover, Punjab has historically surpassed all the other provinces in not only the

[17] Mohammad Hussain Khan, 'Punjab's Pro-women Law against Constitution, Shariah: Fazl' *Dawn* (29 February 2016) <http://www.dawn.com/news/1242295/punjabs-pro-women-law-against-constitution-shariah-fazl> accessed 10 March 2016.
[18] Dr. Inamullah, Chief Research Officer (The Council of Islamic Ideology), Press Release, 5 April 2016 <http://cii.gov.pk/pressreleases/PressRelease050416.pdf> accessed 22 June 2016.
[19] Fazlur Rahman, 'A Survey of Modernization of Muslim Family Law' (1980) 11 ICMES 452-453; Lisa Hajjar, 'Religion, State Power, and Domestic Violence in Muslim Societies: A Framework for Comparative Analysis' (2004) 29 LSI 1, 10; Jane I. Smith, 'Women in Islam: Equity, Equality, and the Search for the Natural Order' (1979) 47 JAAR 518.
[20] Rahman (n 19).
[21] Donald G. Dutton, *The Domestic Assault of Women* (Allyn and Bacon 1988) 11-12.
[22] (n 14).
[23] Waqqas Mir, 'Another Law for Women' *The News* (6 March 2016) <http://tns.thenews.com.pk/another-law-women-punjab-protection-bill/#.V9ZuZ7Te5SV> accessed 8 March 2016.
[24] Aurat Foundation, *Violence Against Women in Pakistan* (Annual Report, 2014) 4.
[25] Ibid (Annual Reports, 2013-2014).
[26] Ibid (Annual Reports, 2008-2014).

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number of cases reported in a year but also the percentage increase in cases each year.[27] The increasing trend in the number of cases reported can be attributed to various factors such as lack of awareness amongst women regarding their rights as well as failure on the part of the State to implement the existing laws effectively. However, perhaps the most important factor has been the absence of a legislation specifically dealing with violence against women. Undoubtedly, the PPWVA will not improve the current situation all of a sudden, nor will it be successful without a sincere effort by the Government. Nevertheless, what is important is that this Act has formally recognized the issue of violence against women, and this is an admirable first step towards tackling it.

It is also important to examine the PPWVA from the perspective of Pakistan's international obligations as a party to various treaties. The Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW') is of particular significance in this context.[28] In March 2013, the Committee on the Elimination of Discrimination against Women urged the Government of Pakistan to encourage the National Assembly and the Provincial Assemblies to take various recommended measures for creating gender equality in the society.[29] The recommended measures included passing pending bills such as the Domestic Violence Bill 2008, repealing discriminatory laws such as the Hudood Ordinances 1979, creating awareness amongst the Parliamentarians and members of the CII regarding the rights of women, and systematizing the training of judges and lawyers on CEDAW and domestic legislation concerning women.[30] The Committee also urged the domestication of CEDAW by harmonizing the different systems of law in the country, namely, 'State law, Islamic law and customary law, with international human rights standards, in particular with the provisions of the Convention.'[31] In addition, the Committee asked for a follow-up report to be submitted by March 2017.[32] Though the Committee's recommendations are not strictly binding in nature, Pakistan will risk its reputation and image in the international community in case of non-compliance with its terms. Similar obligations also exist under various other international covenants and conventions, placing further pressure on the Government to prevent human rights violations.[33]

Analysis of Provisions of the PPWVA

The Act defines domestic violence in Section 2(h) as 'the violence committed by the defendant with whom the aggrieved is living or has lived in a house when they are related to

[27] Ibid.
[28] Ratified by Pakistan on 12 March 1996. United Nations, 'Ratification Status for Pakistan' (OHCHR) <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=131&Lang=EN> accessed 9 March 2016.
[29] Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Fourth Periodic Report of Pakistan Adopted by the Committee at its Fifty-fourth Session* (CEDAW/C/PAK/CO/4, 2013) 2.
[30] Ibid 4.
[31] Committee on the Elimination of Discrimination against Women, *List of issues and questions with regard to the consideration of periodic reports* (CEDAW/C/PAK/Q/4, 2012) 1.
[32] (n 29) 12.
[33] Some of the prominent international covenants and conventions include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). All of these have been signed as well as ratified by Pakistan. United Nations (n 28); Human Rights Commission of Pakistan, *State of Human Rights in 2014* (Annual Report, March 2015) 101.

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each other by consanguinity, marriage or adoption'.[34] This definition is problematic because it restricts domestic violence to relations existing by virtue of consanguinity, marriage, or adoption only. As a result, one might ask what remedy will be available if a relative of the husband engages in domestic violence against the wife? Though the Act provides a separate and more inclusive definition of violence in Section 2(r), it would have been wiser to provide a relatively holistic definition of domestic violence as well. The reason being that a legislation of this kind should also aim at easing the process of litigation for the aggrieved by minimizing complexities to achieve optimal results. Had the definition of domestic violence not been restricted to the relations mentioned above, it would have taken away the room from an individual to abuse a woman, and later claim that his act does not fall within the ambit of domestic violence due to his association with that woman otherwise than as envisaged in the Act. Though it can be argued that such an individual could still be penalized under Section 2(r), the importance of the available means of achieving desired outcomes should not be undermined. Thereby, given the current state of the judicial system in which litigation is expensive and time-consuming, it would have been farsighted to define domestic violence relatively broadly.

Another problematic aspect is the fact that the PPWVA does not criminalize the act of committing domestic violence in itself. It merely specifies penalties for obstructing a Protection Officer (Section 18), filing a false complaint (Section 19), or violating a Court Order (Section 20). So basically, the Act aims to penalize the abuser *after* he has committed an act of domestic violence. Though it can be argued that the Act provides considerable leeway to courts in Sections 6 and 7 (regarding passing an interim order and protection order respectively) to pre-empt an act of domestic violence, this is not enough to actively prevent the occurrence of such violence. Specifically imposing strict penalties, perhaps in the form of varying fines and terms of imprisonment according to the gravity of the domestic violence committed, would have been a stronger deterrent for those intending to commit such violence. Besides, given the extent to which domestic violence is ingrained in our social fabric, such an approach is imperative. The apparent reluctance of the Government to criminalize the act of domestic violence in itself reflects a lack of will on its part to actively combat the mentality driving such violence, and the extent to which it is unaware of the ground realities.

The dispute resolution framework envisaged under the PPWVA also has a few problematic facets. To begin with, as pointed out by Muhammad Afeef, Chairman UC-85 (Lahore), in an interview, the Act discounts the role of a Chairman in mediating between the spouses/parties having differences.[35] Instead, as evident from Sections 12(d) and 13(m), the Act relies on the District Women Protection Committees and the Protection Centers respectively for mediating between the spouses/parties. Speaking from his personal experience, Afeef added:

> A Chairman is better situated to mediate between the disputant spouses/parties because he usually personally knows them, and if needed, can mediate between them even in several sittings. However, the bodies through which the Government intends to effect mediation would most probably not be

[34] The Punjab Protection of Women against Violence Act 2016 ('the PPWVA').
[35] Interview, Muhammad Afeef, Chairman UC-85 (Lahore), 4 March 2016.

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> acquainted with the spouses/parties beforehand, and might even be over-burdened and thus be unable to spare sufficient time for mediation.[36]

These observations, having been made by a person who has more than a decade of experience in resolving disputes between spouses and other parties, seem quite reasonable. The Government should have therefore either extended the membership of the concerned District Women Protection Committee to include the Chairman of the town in which the spouses/parties having a dispute reside, or at least established a mechanism for interaction between the concerned Committee and the Chairman while resolving a dispute. The inclusion of the concerned Chairman in the Committee would have assisted in knowing about the background of the disputant spouses/parties as well as settling their dispute. Moreover, as per Section 11(4) of the Act, the members of the abovementioned Committee 'shall not be entitled to any remuneration or fee or any other charges or facilities for services rendered under the Act.'[37] This raises the question that in the absence of any incentive, why will any member of the Committee be whole-heartedly interested in dispensing a long list of duties assigned under the Act? Though some members might still be interested for the sake of public welfare, remuneration needs to be given to ensure a high level of commitment towards the obligations under the Act and thus achieving optimal results.

There are also some provisions in the PPWVA that seem unrealistic and/or culturally insensitive given the current state of affairs in the country. Section 7(d) refers to the possibility of cuffing the abuser with a GPS ankle or wrist tracker for monitoring movement round the clock. Though this might prove to be an efficient way of tracking a person's movement, it will certainly require a lot of effort and resources to make it effective. Amongst other considerations, the Government will need to invest in the requisite equipment and technology, establish centers for tracking movement, and take steps to ensure compliance by the abuser. These measures will require substantial investment and most probably prove to be time-consuming. Besides, the effect of cuffing the abuser on his relationship with the victim remains to be seen. For instance, a husband being cuffed with a GPS tracker may take it as an insult, and thus be provoked to react against his wife in an even more violent manner. This might be the case particularly in rural areas, where honor killings and acid attacks are not uncommon. Therefore, various factors would have to be taken into account to see if using a GPS tracker would be a viable option in the long run. Moreover, Section 7(e), which gives the power to the court to move the abuser out of his house while extending relief to the victim, also seems a bit unrealistic. For instance, what if the ownership of the house in which the abuser and the victim are residing lies with the former? In such an instance, how feasible would it be to enforce the order of the court to evict the abuser? Therefore, as in the case of Section 7(d), various considerations would have to be balanced before passing an order under this section. Furthermore, Section 9(4) regarding the passage of a monetary order in favor of the aggrieved person states, 'If the defendant fails to make payment within the period mentioned in the order, the Court shall direct the employer or debtor of the defendant, directly to pay the aggrieved person or to deposit with the Court a portion of the wages or debt due to or accrued to the credit of the defendant.'[38] Though this alternative might seem to be an efficient way of extracting money from the abuser, various complexities are likely to arise while implementing this section. For instance, what if the employer or debtor refuses to

[36] Ibid.
[37] (n 34).
[38] Ibid.

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pay directly to the aggrieved person? Can they be compelled to do so? Besides, even if they agree to do so, what protection(s) will they have to be shielded from litigation against them in future by the abuser? Such intricacies can potentially problematize the implementation of this section.

With respect to the phrasing and terminology of the PPWVA, it seems that some provisions have been deliberately kept vague to provide more room for interpretation, but this may also lead to further confusion and abuse of the Act. For example, Section 2(2) states, 'A word or expression not defined in this Act shall have the same meaning as assigned to it in the Code [the Code of Criminal Procedure, 1898 (V of 1898)] or the Pakistan Penal Code, 1860 (XLV of 1860).'[39] The words 'cybercrime' and 'stalking' as stated in the Act constitute acts of violence, but they have neither been explained in the Act, nor in the Pakistan Penal Code. Therefore, the courts will have to elaborate on the manner to interpret this Section to prevent frivolous litigation, or devise a kind of test to determine whether these acts of violence have taken place.[40] Otherwise, the approach of dispensing justice in cases involving such expressions will be arbitrary. Similarly, a part of Section 13(2) states that a Protection Center shall 'maintain audio-visual record of all actions carried out under the Act', which is very vague in its wording.[41] It does not specify the mechanism of such recording, nor the activities that shall be recorded. The latter is particularly problematic because the Protection Centers shall be a converging point for a host of essential activities under the Act, and thus it will most probably not be feasible to record all such activities. In Section 27, again there is a vague obligation of the Government to arrange training of the employees of the protection system at 'regular intervals'.[42] An argument can be made that under Section 29(2), a part of which states that the Government shall make rules within one hundred and twenty days of the commencement of the Act on '[the] regulation of affairs of the Protection Centres and shelter homes', the Government would be able to specify what 'regular' means.[43] Still, the way Section 27 has been phrased, it will give an opportunity to the Government to evade its obligation and thus decreases the enforceability of this section. Of course, purposefully vague phrases and terminology can mean that there is greater room for interpreting the law in a manner most convenient for the courts, but this will not be feasible at a time when there is already little litigation on the subject.

Nevertheless, the purpose of highlighting loopholes in the abovementioned provisions of the PPWVA is not to give the impression that it is an unworthy piece of legislation. The Act contains various well-crafted and much-needed provisions as well, which reflect that it is a step in the right direction. For instance, Section 4 allows a person authorized by the aggrieved person to submit a complaint on her behalf, which takes into account the fact that the aggrieved person may not be in a position to file a complaint herself. Moreover, Section 4(3), which imposes a seven-day time limit on the defendant to present a defense against the charges levied, and Section 4(4), which obligates the court to decide the complaint within ninety days from the date of its receipt, are of considerable significance. These two provisions can be seen as an attempt to provide swift justice to victims in a system where years of litigation on fairly simple family matters is not uncommon. Furthermore, Section 19 states the penalty for filing a false complaint in the form of imprisonment which may extend

[39] Ibid.
[40] (n 14).
[41] (n 34).
[42] Ibid.
[43] Ibid.

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to three months or fine which may be between fifty thousand and one hundred thousand rupees or both. The fine stated is quite high as compared to those generally prescribed under other laws, and this is likely to help in curtailing frivolous litigation as well as countering the argument that women will misuse the Act. Similarly, under Section 20, the penalty stated for breaching an order of the court or illegally interfering with the working of the GPS tracker is also quite high (imprisonment up to one year or fine up to two hundred thousand rupees or both), which is likely to result in greater compliance by the defendant.

The Future of the PPWVA

Several issues can be identified regarding the potential effectiveness of the PPWVA. To begin with, the Statement of Objects and Reasons that accompanied the bill of this Act states, 'The instances of violence against women have been on the increase primarily because the existing legal system does not adequately address the menace and violence by some is perpetrated with impunity.'[44] This phrase is instructive in a manner in which the Government perhaps did not intend it to be and reveals a lot about the state of the existing legal system.[45] This phrase is in effect reference to the failures of the implementation mechanisms to protect women. Various similar laws were introduced in the past as well, such as the Prevention of Anti-Women Practices (Criminal Law Amendment) Act 2011. However, they largely failed to deliver the intended protection, not because the codified law was not strong enough to curb violence, but because successive governments did not focus enough on mechanisms to implement the law. The laws had been introduced primarily to appease human rights activists and pressure groups that had been advocating for the protection of women and thus centered more on generating fanfare rather than being productive. Even if it were assumed that the Government introduced the PPWVA in a sincere effort to protect women, its fate may be no different from that of previous similar laws if the Government does not focus on the various aspects of its implementation. To list a few, the Government would need to actively monitor the cases being brought under the Act; address the loopholes in it that are being exploited; and ensure that the officials responsible for its implementation act responsibly and extend the necessary relief without delay.[46]

Moreover, for any law to be successful in achieving its intended goals, it is necessary for it to be socially acceptable. Judge Mr. Mehmood Haroon supported this view and remarked, 'The society-at-large will not readily accept the PPWVA because our society is male-dominated and this law, at least on paper, is an attempt to challenge male chauvinism.'[47] In support of his argument, he gave an example from his home city of Jaranwala, where when a wife told her husband that she would bring a claim against him under this Act if he continued to abuse her, the husband got infuriated and threatened to burn her alive if she did so.[48] This reflects the patriarchal mindset prevailing in the Pakistani society and shows the need to create an atmosphere in which women can safely bring claims under this Act. Besides, awareness of the law also needs to be created amongst women, especially in rural areas. Having said this, one also needs to be mindful of the role of cultural

[44] The Punjab Protection of Women against Violence Bill 2015.
[45] (n 23).
[46] Survey Conducted, The Punjab Protection of Women against Violence Act 2016, 14-16 March 2016; Kanwal Qayyum, *Domestic Violence Against Women: Prevalence and Men's Perception in PGRN Districts of Pakistan* (Rutgers WPF Pakistan, 2013) 54-55.
[47] (n 14).
[48] Ibid.

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values and norms. Judge Mr. Mehmood Haroon, who has also served as a Family Court Judge, said that in our society, parents are extremely reluctant to legally proceed against their son-in-law regarding any issue concerning their daughter.[49] The reason being that they are least interested in further straining the relationship between the two, which might culminate in a divorce, and the stigma associated with the latter is not unknown.[50] Therefore, from a pragmatic standpoint, several issues need to be addressed for making the PPWVA successful in the real sense. This will undoubtedly take time, and require considerable commitment from successive governments as well as reshaping of discourse in the society through education and awareness.[51]

Conclusion

In a nutshell, the PPWVA has the potential to be a stepping-stone in eradicating violence against women. Irrespective of the political considerations that may have driven the passage of the Act, its spirit is indeed commendable. Though the Act does contain several provisions that are problematic *per se* or the implementation of which may prove to be problematic, this does not make it an unworthy piece of legislation. Besides, a close analysis of most of the criticism of the PPWVA reveals that it is largely unjustified, and reflects the extent to which the patriarchal mindset is ingrained in the fabric of the society. The latter is the biggest challenge that needs to be tackled for promoting gender equality, and the PPWVA alone cannot sufficiently combat the prevailing mindset even if the Government were to implement it in its true letter and spirit. As Waqqas Mir has rightly said, '[The] real change will occur when a woman will not have to think twice about what society, her parents or the cops will think if she makes a complaint of violence against her person – just the way a man can.'[52] For this to happen, besides great commitment on the part of the Government, the public needs to actively engage with narratives that condemn violence – narratives that regard violence as violence irrespective of the gender that is subjected to it.[53] Until this happens, women will continue to suffer, and gender equality will remain an elusive goal.

[49] Ibid.
[50] (n 35).
[51] Rinki Bhattacharya, *Behind Closed Doors* (Sage Publications 2004) 227.
[52] (n 23).
[53] Ibid.

Module 6:
GENDER SENSITIZED CONDUCT OF GBV OFFENCES: WOMEN AND TRANSGENDER PERSPECTIVE

A. Module Activities

- **Activity 1: Women and Transgender Stereotypes and Myths**

  Mark with a tick in the box as to whether the statement is true of false.

  Assume that the forced sodomy is of a Transgender Male (a biological male).

Number	Statement	True?	False?	Does your answer differ if the victim is a transgender person?
1	A genuine victim reports rape/forced sodomy immediately after it happens.			
2	Delay in reporting rape/forced sodomy indicates that a rape claim is false.			
3	All rape/forced sodomy victims should physically put up a fight and failure to do so indicates consent.			
4	All rape/forced sodomy victims will sustain genital injuries.			
5	All rape/forced sodomy victims will sustain bodily injuries.			
6	Absence of any physical injuries indicates that the victim has consented to sexual conduct.			
7	Consent to sex can be assumed when women/transgender persons: (a) wear provocative clothing or makeup. (b) engage in flirtatious behaviour. (c) are out in public late at night.			
8	Rape/forced sodomy occurs because men are unable to control their sexual urges when they are provoked by behaviour such as in 7 above.			

Number	Statement	True?	False?	Does your answer differ if the victim is a transgender person?
9	Transgender persons are unreliable as witnesses about forced sodomy allegations and there must be corroboration of their evidence by independent witnesses or evidence.			Not relevant here
10	A judge may rely solely on the demeanour of a victim in court when deciding whether to believe their evidence that a rape/forced sodomy occurred.			

B. Case Law

• RECOGNISING A VICTIM'S EXPERIENCE

▶ ***PEOPLE V. MELIVO***
G.R. No. 113029
February 8, 1996
(Supreme Court of the Philippines)

Facts:

The complainant charged her father, Apolonio Melivo, with the crime of the rape, which was allegedly committed on five different occasions. In his defense, the accused stated, among others, that that the complainant reported the incidents of rape only on August 10, 1992, slightly over two months after the very first incident, asserting that her initial silence contradicts the natural course of things.

Issue:

Whether or not the delay in reporting the crime should be taken against the complainant.

Decision:

No. This Court has held that delay in reporting rape incidents, in the face of threats of physical violence, cannot be taken against the victim. A rape victims actions are oftentimes overwhelmed by fear rather than by reason. It is this fear, springing from the initial rape, that the perpetrator hopes to build a climate of extreme psychological terror, which would, he hopes, numb his victim into silence and submissiveness. Incestuous rape magnifies this terror, because the perpetrator is a person normally expected to give solace and protection to the victim. Furthermore, in incest, access to the victim is guaranteed by the blood relationship, proximity magnifying the sense of helplessness and the degree of fear.

In this case there is ample evidence indicating that the defendant did not hesitate to use physical violence in order to cow his daughter into submission. Appellant himself averred that he whipped his daughter several times a few days before his arrest. He did not hesitate to use a knife on his own daughter during the first incident of June 10, 1992. That he did not

have to use a knife in subsequent incidents indicates the degree of terror and fear he was able to instill into his young daughter's mind. In her young mind, fear and terror constituted a prison from which it was painful and difficult to break out.

The pattern of instilling fear and terror, utilized by the perpetrator in incestuous rape to intimidate his victim into submission is evident in virtually all similar cases which have reached this Court: the rapist perverts whatever moral ascendancy and influence he has over his victim in order to intimidate and force the latter to submit to repeated acts of rape over a period of time. In many instances, he succeeds and the crime is forever kept on a lid. In a few cases, the victim suddenly finds the will to summon unknown sources of courage to cry out for help and bring her depraved malefactor to justice.

With all the attendant social consequences such a classification brings, many cases of rape go naturally unreported, and those cases which manage to reach the authorities are routinely treated in a manner so demeaning to the victims dignity that the psychological ordeal and injury is repeated again and again in the hands of inexperienced, untrained and oftentimes callous investigators and courtroom participants. If a woman would have second thoughts about filing an ordinary rape case, all the more would it be difficult and painful for a child to complain against her own father. In the case at bench, moreover, the records are bereft of any evil motive which would have moved Maritess to charge her own father with rape. Appellants alleged beating of complainant days prior to his arrest and family resentment over appellants keeping a mistress are not enough to overcome the fact that the consequences of a rape charge are so serious and far reaching affecting the accused, the victim and their loved ones.

• LEGAL RIGHTS OF TRANSGENDER PERSONS

- ***DR. MUHAMMAD ASLAM KHAKI AND ANOTHER V. S.S.P. (OPERATION) RAWALPINDI AND OTHERS***
  2013 SCMR 187
  Const. Petition No. 43/2009
  (Supreme Court of Pakistan)

▶ *DR. MUHAMMAD ASLAM KHAKI AND ANOTHER V. S.S.P. (OPERATION) RAWALPINDI AND OTHERS*

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
Mr. Justice Iftikhar Muhammad Chaudhry, CJ.
Mr. Justice Ch. Ijaz Ahmed
Mr. Justice Rahmat Hussain Jafferi

Const. Petition No. 43/2009.

Dr. Muhammad Aslam Khaki & another. ...Petitioners

Versus

S.S.P. (Operation), Rawalpindi & others. ...Respondents

For the petitioners: Dr. M. Aslam Khaki, ASC (in person) with Almas Shah alias Boby.

On Court notice: Mr. Shah Khawar, A.G.P.
Ch. Khadim Hussain Qaiser, Addl. A.G. Pb.
Nemo (for A.G. Sindh, NWFP and Balochistan)

Date of hearing: 04.11.2009

ORDER

Learned Attorney General for Pakistan requests that this case may be adjourned for one week enabling him to contact Chief Secretaries of the respective Provinces as well as the Advocate Generals because they were directed by the Court to furnish reports which they have not furnished so far except the Province of Punjab. Request is allowed. Adjourned to 20.11.2009.

2. In the meanwhile, Attorney General shall also prepare some proposals on the basis of which the Federal and the Provincial Governments can conveniently recognize the status of eunuchs to be the respectable citizens and to protect their right of inheritance in moveable and immovable properties left by their parents/ elders and their legal obligations to provide maintenance to them on account of disability due to which they are not being treated at par with other citizens of the country.

Sd/- Iftikhar Muhammad Chaudhry, C.J
Sd/- Ch. Ijaz Ahmed, J
Sd/- Rahmat Hussain Jafferi, J

SUPREME COURT OF PAKISTAN

ISLAMABAD, THE
4th November, 2009

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Superintendent
Supreme Court of Pakistan
ISLAMABAD

▶ *DR. MUHAMMAD ASLAM KHAKI AND ANOTHER V. S.S.P. (OPERATION) RAWALPINDI AND OTHERS*

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:
MR. Justice Iftikhar Muhammad Chaudhry, CJ
Mr. Justice Ch. Ijaz Ahmed
MR. Justice Khilji Arif Hussain

Constitution Petition No.43 of 2009

Dr. Muhammad Aslam Khaki
And another ...Petitioners

VERSUS

SSP (Operations) Rwp & others ...Respondents

For the petitioners: Dr. M. Aslam Khaki, ASC
a/w Almas Shah @ Boby

On Court Notice: Mr. Shah Khawar, Attorney General
Mr. Mehmood Raza, Addl. A.G.
Mr. Khadim Hussain Qaiser Addl.AG(Pb)
Mr. Zahid Yousaf, Addl. AG NWFP
Mr. Muhammad Akhtar Ghori,
Dir. Social Welfare (Sindh)
Mr. Afsar Khan, Dir. SW (NWFP)
Mr. Nazar Abbasi, Law Officer

Date of hearing: 20.11.2009

ORDER

Learned Attorney General states that he has convened a meeting with the learned counsel for the petitioners, learned Advocate Generals of the respective Provinces as well as with the representatives of the Social Welfare Department. During course

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Superintendent
Supreme Court of Pakistan
ISLAMABAD

▶ *DR. MUHAMMAD ASLAM KHAKI AND ANOTHER V. S.S.P. (OPERATION) RAWALPINDI AND OTHERS*

whereof it has been decided to prepare a working paper for approval of the Government as well as for this Court, to protect the rights and welfare of unix.

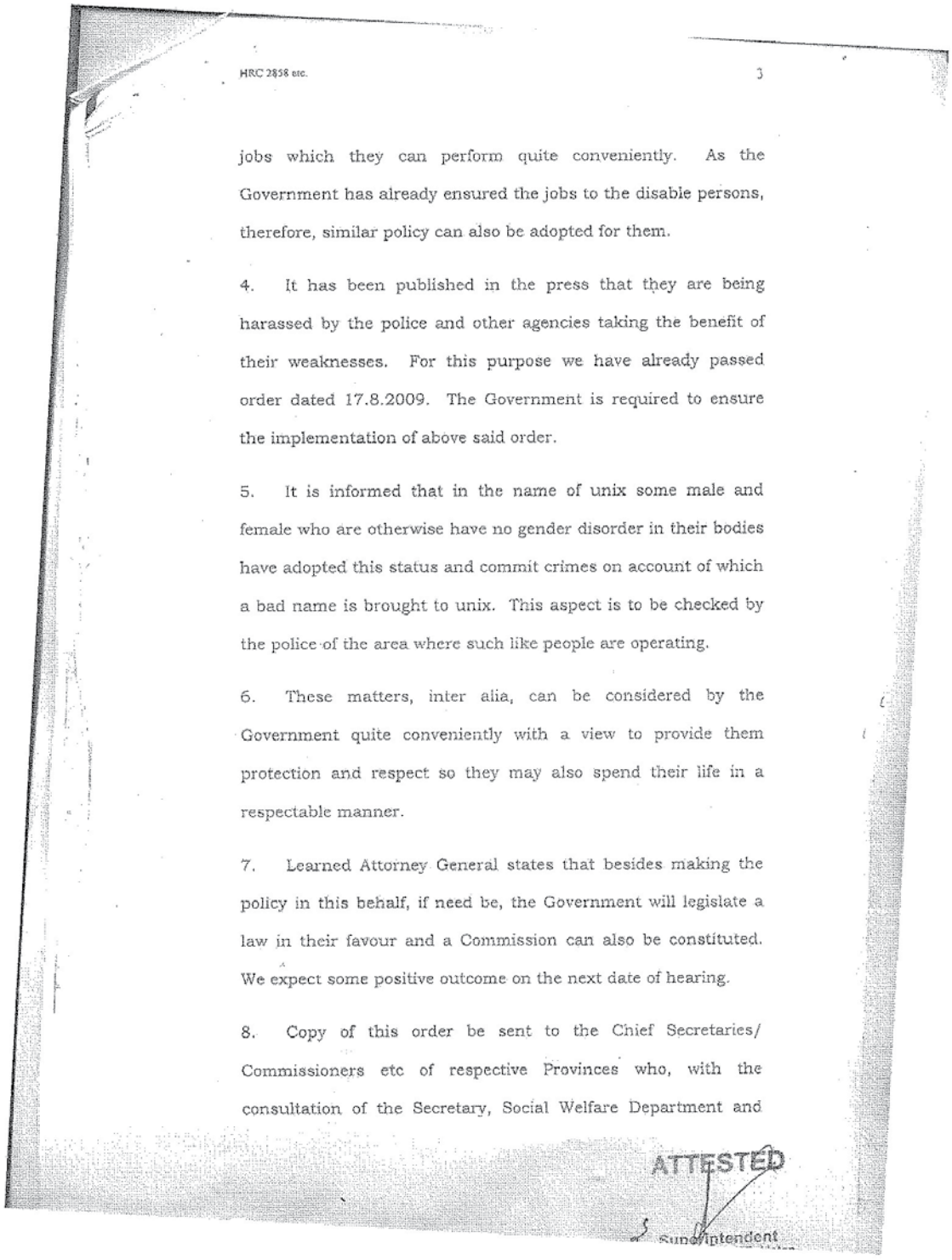
2. It is to be noted that this class of the society has been neglected merely on account of gender disorder in their bodies, otherwise they are entitled to enjoy all the rights granted to them by the Constitution being its subject, including their rights in inherited property because normally to deprive them from their such legitimate rights, some time their families disowned them. As far as existing laws are concerned, there are no provisions on the basis of which they can be deprived from their legitimate rights to inherit the properties. Similarly NADRA is required to adopt a strategy with the assistance of the concern departments of the Govt. to record exact status in the column meant for male or female after undertaking some medical tests based on hormones etc. They are also entitled for entering their names in the electoral list. As far as the question of casting the vote is concerned, it could be decided separately, because they can, if need be, exercise the right of franchise etc.

3. As number of unix have been registered in all the Provinces as well as in the Federal Territory, therefore, Federal and Provincial Governments can also ensure for extending them opportunity of receiving education in childhood or in higher institutions/schools subsequently. On account of gender disorder in their bodies they can be accommodated against the

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Supreme Court of Pakistan
ISLAMABAD

▶ *DR. MUHAMMAD ASLAM KHAKI AND ANOTHER V. S.S.P. (OPERATION) RAWALPINDI AND OTHERS*



HRC 2858 etc. 3

jobs which they can perform quite conveniently. As the Government has already ensured the jobs to the disable persons, therefore, similar policy can also be adopted for them.

4. It has been published in the press that they are being harassed by the police and other agencies taking the benefit of their weaknesses. For this purpose we have already passed order dated 17.8.2009. The Government is required to ensure the implementation of above said order.

5. It is informed that in the name of unix some male and female who are otherwise have no gender disorder in their bodies have adopted this status and commit crimes on account of which a bad name is brought to unix. This aspect is to be checked by the police of the area where such like people are operating.

6. These matters, inter alia, can be considered by the Government quite conveniently with a view to provide them protection and respect so they may also spend their life in a respectable manner.

7. Learned Attorney General states that besides making the policy in this behalf, if need be, the Government will legislate a law in their favour and a Commission can also be constituted. We expect some positive outcome on the next date of hearing.

8. Copy of this order be sent to the Chief Secretaries/ Commissioners etc of respective Provinces who, with the consultation of the Secretary, Social Welfare Department and

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Superintendent

▶ *DR. MUHAMMAD ASLAM KHAKI AND ANOTHER V. S.S.P. (OPERATION) RAWALPINDI AND OTHERS*

DCO will make efforts to implement the same. All the concerned Ministries are expected to cooperate with the learned Attorney General and Advocate Generals for implementation of the same and to prepare a policy in this behalf.

At the request of learned Attorney General for Pakistan case is adjourned to a date in office after one month.

SEAL OF THE SUPREME COURT OF PAKISTAN

Sd/- Iftikhar Muhammad Chaudhry, C.J
Sd/- Ch. Ijaz Ahmed, J
Sd/- Khilji Arif Hussain, J

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Supreme Court of Pakistan
ISLAMABAD

Islamabad the,
20th. November, 2009.

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▶ *DR. MUHAMMAD ASLAM KHAKI AND ANOTHER V. S.S.P. (OPERATION) RAWALPINDI AND OTHERS*

12A/1

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:
Mr. Justice Iftikhar Muhammad Chaudhry, CJ.
Mr. Justice Anwar Zaheer Jamali
Mr. Justice Khilji Arif Hussain

Constitution Petition No.43 of 2009

Dr. Muhammad Aslam Khaki & another
...Petitioners

Versus

S.S.P.(Operations) Rawalpindi & others
...Respondents

Petitioners:	Dr. Muhammad Aslam Khaki, ASC With Almas Shah, @ Boby
On Court Notice:	Mr. Shah Khawar, Act. Attorney General With Mr. Javed Iqbal, SP (Legal), Islamabad
For Govt. of Punjab:	Mr. Khadim Hussain Qaiser, Addl. A.G. Pb. With Mr. Akhtar Ali, SHO, Taxila Mr. Muhammad Nazir, SI
For Govt. of Sindh:	Raja Abdul Ghafoor, ASC With Dr. Iqbal Saeed Khan, Dir. Social Welfare Dept. Dr. Saeed Ahmed Qureshi, focal person to Secy. Health,
For Govt. of NWFP:	Mr. Ishtiaq Ibrahim, Addl. A.G. With Waris Khan, S.O (Health)
For Govt. of Baluchistan:	Mr. Mehmood Raza, Addl. A.G. Baluchistan With Mr. Saeed Ahmed Kasi, S.O. Social Welfare Dept.
Date of hearing:	23.12.2009

ORDER

On the last date of hearing it was observed that unix/eunuchs are entitled of shares from inherited property in pursuance whereof their registration has been completed, therefore, the Secretaries Social Welfare Departments are directed that on the basis of such registration they should approach the respective DCOs and communicate the order of this Court to them that after tracing their family roots, it may be ensured that they get their shares of inheritance, if any, and if no inheritance, yet has opened, they should be considered at the time of opening of the same as there is no law of the land, which deprives them from their respective

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Superintendent

▶ *DR. MUHAMMAD ASLAM KHAKI AND ANOTHER V. S.S.P. (OPERATION) RAWALPINDI AND OTHERS*

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
Mr. Justice Iftikhar Muhammad Chaudhry, CJ.
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Mr. Justice Rahmat Hussain Jafferi

Const. Petition No. 43/2009.

Dr. Muhammad Aslam Khaki & another. ...Petitioners
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For the petitioners: Dr. M. Aslam Khaki, ASC (in person) with Almas Shah alias Boby.

On Court notice: Mr. Shah Khawar, A.G.P.
Ch. Khadim Hussain Qaiser, Addl. A.G. Pb.
Nemo (for A.G. Sindh, NWFP and Balochistan)

Date of hearing: 04.11.2009

ORDER

Learned Attorney General for Pakistan requests that this case may be adjourned for one week enabling him to contact Chief Secretaries of the respective Provinces as well as the Advocate Generals because they were directed by the Court to furnish reports which they have not furnished so far except the Province of Punjab. Request is allowed. Adjourned to 20.11.2009.

2. In the meanwhile, Attorney General shall also prepare some proposals on the basis of which the Federal and the Provincial Governments can conveniently recognize the status of eunuchs to be the respectable citizens and to protect their right of inheritance in moveable and immovable properties left by their parents/ elders and their legal obligations to provide maintenance to them on account of disability due to which they are not being treated at par with other citizens of the country.

Sd/- Iftikhar Muhammad Chaudhry, C.J
Sd/- Ch. Ijaz Ahmed, J
Sd/- Rahmat Hussain Jafferi, J

SUPREME COURT OF PAKISTAN

ISLAMABAD, THE
4th November, 2009

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Supreme Court of Pakistan
ISLAMABAD

▶ *DR. MUHAMMAD ASLAM KHAKI AND ANOTHER V. S.S.P. (OPERATION) RAWALPINDI AND OTHERS*

Provincial Governments whether such scheme is still there or not. However, in absence of any scheme, the government may ensure admission in the educational institutions including technical and vocational institutions, of all those unix who have not crossed the age of receiving the education so far.

6. It is informed by Mr. Iqbal Saeed, Director Social Welfare Department, Mr. Saeed Ahmed, Director Health, Government of Sindh that unix were involved by these two departments during Polio Vaccination Scheme of this month. Efforts made in this behalf by the Government of Sindh are highly appreciable and we expect that other Provincial Governments shall also follow the same practice. Besides, they shall also accommodate them against other jobs as has already been noticed that steps be made to create some respectable jobs so they may earn their livelihood respectably. In this behalf all the Secretaries of the Social Welfare Department of the Provinces shall submit a comprehensive report.

7. The police authorities apparently had not taken any step to ensure that unix are not being harassed and actions are being taken against those persons who in fact are not unix but by using such status are committing the crimes and ultimately the actual unix are being blamed for the same. In this behalf the IGPs shall instruct their subordinates to adopt a mechanism to ensure that they are not being harassed and their status being of unix be not exercised by other persons etc.

8. Learned Attorney General stated that the Government has decided to prepare a scheme and if need be, legislation shall be made to protect the rights of the unix, being citizens of this Country in terms of Article 25(3) of the Constitution on the same lines as are guaranteed to the other citizens of the Country. **Adjourned to a date after one month** for receiving the reports.

9. It has been pointed out that in the State of Bihar (India) a strategy has been evolved to provide respectable jobs to the unix like recovery of taxes from the habitual defaulter etc. Extract of such information has been downloaded from the internet which is reproduced herein below:

> *"The Bihar government is trying out innovative ways to involve the eunuchs, also called kinnars or hijras, in socially useful work. It has successfully used the services of eunuchs to recover taxes from habitual defaulters in Patna. Now, the social welfare department plans to rehabilitate them – in a first such rehabilitation scheme for eunuchs. Bihar Social Welfare Minister Damodar Raut told IANS that the government would soon launch a plan for the rehabilitation of eunuchs. "It is in the pipeline. The rehabilitation scheme for rehabilitation scheme for eunuchs will be a reality in the state soon, he said. Eunuchs will be*

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Superintendent
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ISLAMABAD

▶ *DR. MUHAMMAD ASLAM KHAKI AND ANOTHER V. S.S.P. (OPERATION) RAWALPINDI AND OTHERS*

provided literacy and vocational training to prepare them for respectable regular employment. It will give them the opportunity to enhance their socio-economic status, "said Masood Hassan, director of the social welfare department."

10. The Government of Pakistan, Social Welfare Departments as well as the Provincial Governments may also take this information as well for the purpose of ensuring respectable jobs to the UNIX.

Sd/- Iftikhar Muhammad Chaudhry, C.J
Sd/- Anwar Zaheer Jamali, J
Sd/- Khilji Arif Hussain, J

Islamabad, the
23rd December, 2009

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Superintendent
Supreme Court of Pakistan
ISLAMABAD

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▶ *DR. MUHAMMAD ASLAM KHAKI AND ANOTHER V. S.S.P. (OPERATION) RAWALPINDI AND OTHERS*

PLD 2013 SC 188
Const. Petition No. 43/2009, decided on 25 September 2012
Iftikhar Muhammad Chaudhry, C J. (Supreme Court of Pakistan)

Decision:

The Court ordered:

"In pursuance of this Court's direction, a concise statement has been filed on behalf of NADRA. Copy of the same has been handed over to the petitioner in person who after having gone through the same stated that the arrangement being followed by the NADRA for issuing National Identity Cards to the eunuchs (Khwaja Sraa). He further stated that as now focal person[s] have been nominated by the Provinces, therefore, at present they are not facing any problem and if such problem arises at any time, the same will be solved by the executive/law enforcing agencies of the concerned Provincial Governments. This petition was instituted for the enforcement of fundamental rights of the person which include eunuchs, guaranteed under the Constitution including security to life and property as they are more vulnerable among humans. The petitioner and all the Provincial Governments through their Advocate Generals have provided assistance and implemented the directions issued by this Court from time to time.

We may point out that eunuchs are entitled to be respected by all the segments of society as other citizens deserve. In the past [there] had been practice being followed invariably when they were not being treated at par with the other human beings/citizens but now with the cooperation of the Federal and Provincial Governments and other organizations they are being respected and dignified as citizen[s] of this country in view of the fact that their rights are fully protected under the Constitution including the inherited property rights detail of which we have obtained so that the eunuchs are not deprived from their legitimate right in respect of movable and immovable proper, right to get education, right of the franchise and also to ensure their participation/jobs in all walk[s] of life and they should not be intervened either by their relatives or by any other functionary.

Copy of this order be communicated to the Commissioner ICT, Home Secretaries to the Provinces and the IGPs for information and strict adherence of the same. The eunuchs should be treated equally as other citizens in this country enjoying the same rights under the Constitution of Islamic Republic of Pakistan. We place our gratitude to the petitioner in person, to the representatives of the Government, the NGOs and all others who have assisted us on the issue for its final disposal through this judgment.

Disposed of in the above terms."

▶ *HUMAN RIGHTS CASE NO. 32005-P/2018*

IN THE SUPREME COURT OF PAKISTAN, ISLAMABAD
(Original Jurisdiction)

15

To,

1. Syed Nayyar Abbas Rizvi, Addl. Attorney General for Pakistan
2. The Advocate General, Punjab at Islamabad.
3. The Chief Secretary, Punjab, Lahore C/o DR(Lahore)
4. The Secretary, Law & Justice Commission of Pakistan, Islamabad **(copy of report enclosed)**
5. The Secretary, Health Punjab, Lahore C/o DR(Lahore)
6. The Secretary, Social Welfare Department, Punjab C/o DR(Lahore)
7. The DG, NADRA, Punjab, Lahore C/o DR(Lahore)
8. The Secretary, Punjab Social Protection Authority C/o DR(Lahore)
9. All the Members of Provincial Monitoring Committee through Chief Secretary, Punjab, Lahore C/o DR(Lahore).
10. Malik Sohail Ahmed, Senior Deputy Director (Software), Supreme Court of Pakistan, Islamabad **(copy of report enclosed)**

SUBJECT: HUMAN RIGHTS CASE No 32005 –P/ 2018
IN THE MATTER OF REGARDING ISSUANCE OF CNIC TO TRANSGENDER.

Take notice that the above noted case came up for hearing before the Court on **27.08.2018** when the following order was passed:-

> **"Pursuant to our *suo motu* action in this case and the various orders passed and on account of the final workshop conducted under the auspices of the Law & Justice Commission of Pakistan *(LJCP)*, the Terms of Reference have been deliberated upon and duly answered in the report submitted in Court today. Let this report be uploaded onto the websites of the Supreme Court of Pakistan, LJCP and the concerned departments of the Provincial Governments. Copies of the report have been handed over to all the Advocates General with the direction that their comments must reach this Court within 12 days with and advance copy brought on the record. After the comments are received it shall be decided as o how this report is to be enforced and implemented in letter and spirit. Any delinquent responsible for non-compliance of the order of this Court shall be dealt with in accordance with law."**

Take further notice that the above cited matter stands fixed for next hearing before the Court on **12.09.2018,** at 09:00 a.m. in the Court House, at Islamabad. You are, therefore, required to ensure compliance on your part, of the above reproduced Order in letter & spirit and also to appear before the Court on the date and time fixed accordingly.

Islamabad: 3rd September, 2018

(Sr. Court Associate)
(Human Rights Cell)
Phone: 051-9203557
Fax:-051-9219516

EUNUCH Processing Report
June 16, 2018 to August 20, 2018

Social Welfare Data

Transgenders Registered with Social Welfare	Registration of Transgenders in Hand at Social Welfare	Cases Referred to NADRA by Social Welfare	Transgender who Appeared at NADRA and Issued Tokens	Data Loaded by NADRA	Printed/ Dispatched	Delivered to Applicant
3,230	302	824	476	267	248	181
			All applicants did not come to NADRA Centres	All applicants did not submit CNIC forms after attestation or other formalities		

NADRA Processing Detail

Province	RHO	No of Guru Registered		Today Processing			So far Processing			NIC Printing		Under Process at HQ	No. of MRVs Deployed
		Affidavit Received	Guru Registered	Total	Fresh	Other Category (Modification/ Reprint)	Total	Fresh	Other Category (Modification/ Reprint)	Printed/ Dispatched	Delivered to Applicant		
Baluchistan	r h o quetta	0	0	0	0	4	2	2	3	1	1	1	
KP	r h o peshawar	0	0	0	0	0	4	1	3	4	2	0	0
Sindh	r h o sukkur	0	0	0	0	0	4	2	2	4	3	0	0
Sindh	r h o karachi	0	0	0	0	0	12	7	5	12	11	0	0
Total		**0**	**0**	**0**	**0**	**4**	**22**	**12**	**13**	**21**	**17**	**1**	0
Punjab	r h o islamabad	0	0	0	0	0	20	2	18	17	8	7	**0**
Punjab	r h o lahore	24	24	0	0	0	122	92	30	119	80	3	0
Punjab	r h o multan	15	15	0	0	0	82	45	37	77	58	5	1
Punjab	r h o sargodha	60	60	0	0	53	43	10	49	35	35	8	0
Total		**99**	**99**	**0**	**0**	**53**	**267**	**149**	**134**	**248**	**181**	**23**	0
Grand Total		**99**	**99**	**0**	**0**	**57**	**289**	**161**	**147**	**269**	**198**	**24**	**1**
													1

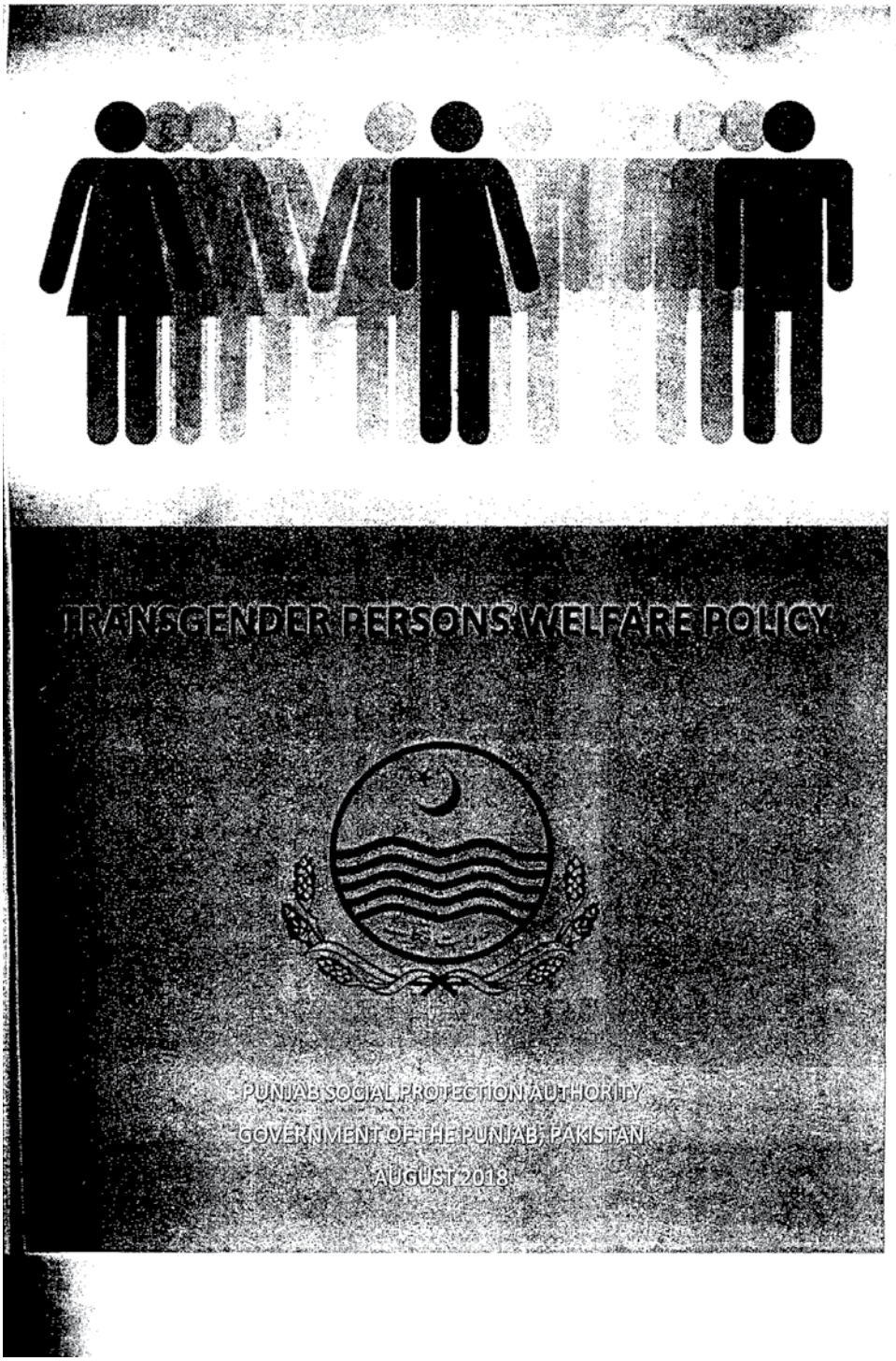
Total EUNUCH REGISTRATION 2280

DG (Ops)

Brig (Retd)
DG Operations
(Nasar Ahmed Mir)
Headquarters NADRA

21/8/18

▶ ***HUMAN RIGHTS CASE NO. 32005-P/2018***



▶ *HUMAN RIGHTS CASE NO. 32005-P/2018*

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▶ *HUMAN RIGHTS CASE NO. 32005-P/2018*

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▶ HUMAN RIGHTS CASE NO. 32005-P/2018

1. Introduction

Mostly known as Khwaja Sira, albeit with many pejorative variants for their personal and social identity, transgender persons have long been a vulnerable group in Pakistan. Unlike the narrow understanding of a transgender person in terms of biological anomalies, World Health Organization (WHO) defines this state of gender as:

> "Transgender is an umbrella term for people whose gender identity and expression does not conform to the norms and expectations traditionally associated with the sex assigned to them at birth; it includes people who are transsexual, transgender or otherwise considered gender non-conforming"[1].

Government of Pakistan recently passed Transgender Persons (Protection of Rights) Act[2] in May 2018 to provide for protection of rights, relief and rehabilitation of transgender persons and other related matters. The definition of transgender persons given by this Act is consistent with the WHO definition. As per the Act, a "transgender person" can have any of the following characteristics:

i. Intersex, with mixture of male and female genital features or congenital ambiguities; or
ii. eunuch assigned male at birth, but undergoes genital excision or castration; or
iii. a transgender man, transgender woman, *Khawaja Sira* or any person whose gender identity[3] or gender expression[4] differs from the social norms and cultural expectations based on the sex they were assigned at the time of their birth.

According to this definition, any person who identifies emotionally or psychologically with the sex other than one's biological or legal sex at birth, irrespective of any later biological change, would be classified as a transgender person.

Objective of this document: As in the case of many comparable countries, Transgender people in Pakistan face a range of personal, social, cultural, economic and psychological issues, often exposing them to a high risk of isolation and social exclusion. These vulnerabilities make them a key group for the attention of Social Protection policymakers in the country. This document aims to identify some of the causal and reinforcement factors that result in the social vulnerabilities of transgender people in Pakistan and stipulates future policy measures to address their condition.

Transgender Persons Welfare Policy outlines the Government's understanding of the marginalization of transgender people and its ongoing efforts to reduce their problems and increase welfare. The policy especially aims to provide guiding principles and priority areas in implementing various future programs for welfare and protection of rights of transgender persons. In this manner, it will complement the Transgender Persons (Protection of Rights) Act 2018. The policy development process leading to this

[1] See: http://www.who.int/hiv/topics/transgender/en/
[2] Key features of Transgender Persons (Protection of Rights) Act are given in the Annex-A.
[3] Defined in the act as "a person's innermost and individual sense of self as male, female or a blend of both or neither that can correspond or not to the sex assigned at birth".
[4] Defined in the act as "a person's presentation of his gender identity and the one that is perceived by others".

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policy, led by Punjab Social Protection Authority (PSPA), was consultative and evidence based. It started with a review of international practices in rights and welfare of transgender persons especially in comparable developing countries. This was followed by a review of the progress made for transgender persons' rights in Pakistan. The next step was to engage with a set of key stakeholders all across Pakistan including community representatives, government functionaries, academics, and civil society representatives. This consultative process culminated with a consultative Seminar in Supreme Court of Pakistan held on 09.08.2018 under the auspices of Law and Justice Commission of Pakistan. The concluding session of the event was chaired by Hon'ble Chief Justice of Pakistan, Mr. Justice Ijaz Nisar, whereas the earlier sessions were presided by former Judge of Supreme Court, Mr Justice (R) Khilji Arif Hussain. After extensive deliberations, a set of priority areas were identified and policy decisions in each of these areas were listed. This draft policy is now being shared with all stakeholders and any further feedback will again be incorporated. This final policy will be notified after undergoing this exercise.

This draft of the policy document discusses key objectives and instruments for the welfare of the transgender persons to be considered by the Government of Pakistan, federating units and NGOs and is organized as follows. The first few sections present theoretical perspectives related to transgender persons including their social place according to religious and cultural tradition in South Asia. Next, there is a discussion of key risks and vulnerabilities that transgender persons face in 21st century Pakistan. This is followed by a section on the policy environment in Pakistan, capturing the recent legal and institutional developments that impact issues related to the welfare of transgender persons. Section nine is a detailed presentation of the Transgender Persons Welfare Policy. It enunciates the objectives and principles that underlie the Policy and describes various instruments to address the problems of transgender persons.

Limitations: This policy concerns itself with the improvement of the lives of the low-income and vulnerable transgender persons, under the existing legal framework and as such has its two major limitations. First, the process for identification and registration of transgender people with the state is already provided under the guidance of the Act and instructions of Hon'ble Supreme Court of Pakistan and therefore this policy does not go in any of those areas of discussion. Secondly, the provisions and process related to the choice and change of gender and its implications for social, cultural, religious and economic aspects of life, such as the issues of life-partners, marriages, children, inheritance etc of transgender persons are also beyond the scope of this policy.

2. Theoretical Perspectives

For the purposes of this policy, it is important to distinguish between sex and gender. Sex is assigned at birth and refers to one's biological status as either male or female. It is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy. Gender is primarily a social construct. It refers to the roles, behaviors, activities, and attributes that a given society considers appropriate for its male and female members.

West and Zimmerman (1987) famously made the argument that gender is constructed by, and for, social interaction. According to Butler (1990), everyone reflects one's internal

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self through gender and thereby facilitates the social process. From this perspective, gender becomes a performance for which every person alters outward appearances to align with an internal sense of gender identity.

Gender identity is defined as "a person's innermost and individual sense of self as male, female or a blend of both or neither that can correspond or not to the sex assigned at birth" [5]. While, gender expression is defined as "a person's presentation of his gender identity and the one that is perceived by others".

The term transsexual denotes individuals who desire to discard their biologic sex and to live (or actually lived) permanently in the social role of the opposite gender, and who want to undergo (or actually went through) sex reassignment.

In the widely used psychiatric classification system DSM-III, transsexualism first appeared as a diagnosis in 1980. However, in the most recent version of this system, DSMIV, the term "transsexualism" was abandoned. Instead, the term gender identity disorder (GID) was used for individuals who show a strong and persistent cross-gender identification and a persistent discomfort with their anatomical sex, or a sense of inappropriateness in the gender role of that sex (Cohen-Kettenis and Gooren, 1999).

Gender dysphoria encompasses transsexualism as well as other gender identity disorders and is often still used as a synonym for GID. Gender dysphoria is the term for distress resulting from conflicting gender identity and sex of assignment.

A new discourse in transgender studies is of Queer Theory. Lorber (1996) asked: "why, if we wish to treat women and men as equals, there needs to be two sex categories at all". This is the essence of Queer theory- a postmodern analysis framing the subversion and potential elimination of gender binary. Under this theory, sexual and gender categories are declared "inherently unstable and fluid" (Stein and Plummer, 1996).

Queer theory and social constructionism have been presented as two alternative theoretical perspectives on gender (Burdge, 2007). Burdge argues that transgender community is an at-risk population and that social workers need to target society's traditional gender dichotomy for change. This echoes McPhail (2004) and Wilchins (2004) who said that gender oppression cannot be eliminated by disregarding the intrinsic oppressiveness of the hierarchical gender dichotomy.

Various conditions that lead to atypical development of physical sex characteristics are collectively referred to as intersex conditions. An intersex is any individual who has anatomic characteristic of both sexes or whose external genitalia are inappropriate for either the normal male or female.

The terms hermaphrodite and pseudohermaphrodite have been used to describe types of intersex persons. A hermaphrodite is a person who has both testicular and ovarian tissues. A pseudohermaphrodite is a person who has a mixture of male or female anatomy but has only testes or ovaries. Chromosomal abnormalities explain these types of anatomies. Dreger, et al (2005) have argued to discard the usage of hermaphrodite and

[5] Government of Pakistan (2018)

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pseudohermaphrodite and adopt an umbrella term "disorders of sexual differentiation" (DSD) also called as disorders of sexual development by other authors.

In the literature, differences between other transgender persons and intersex persons have been noted (see, for example, Costello, 2016). Costello informs that many intersex people are completely in the closet about their intersex status and do not interact knowingly with other persons of their type. According to Costello, only a few of the intersex people employ the identity framework (they, rather, employ the disorder framework) in contrast to other transgender persons who need to solidify a transgender identity in for their self-actualization.

On a related definitional issue, a eunuch is a male who undergoes genital excision or castration and is accordingly recognized as a transgender person according to the 'Transgender Persons (Protection of Rights) Act 2018'.

It is important to note that the gender concepts could vary region to region. In an influential report, Khan and Khilji (2002) found a sexual identity called *zenana* which was involved in male to male sexual interaction. They write, "At the same time, male to male sexual behaviours in the country do not appear to "fit" into a heterosexual/homosexual framework, of fixed sexual identities leading to fixed and oppositional behaviours based on same-sex and gender versus opposite sex and gender patterns. Rather, what appears to exist to a large extent is that of female gender identification by the penetrated or "passive" partner who have (to a significant extent) a socialised, gendered, sexual identity known as zenana".

3. Concept of Transgender in Islam

The spirituality of transgender is considered as authentic as that of men and women. According to Khan (2017), the Prophet Muhammad (peace be upon him) treated transgender with respect, prohibited their ill-treatment, and praised spiritually-inclined transgender persons[6].

The Qur'an is clear on genetic determinations by pointing out that Allah is the "One who shapes you in the wombs as He pleases." (Qur'an 3:6). According to the Islamic outlook of beliefs, nothing takes place except with a divine concurrence. It is therefore a strong pillar of contemporary Muslim faith that all human forms, shapes, races, physical traits and individual attributes are elements of a bigger order of creation, which need to be embraced and respected. This implies that every human being — male, female, or transgender—has the equal place in Islam and there is no ground for discrimination against anyone on the basis of their gender characteristics.

The Qur'an does not mention transgender persons explicitly. At one place, addressing the believing women, Allah allows women to reveal their adornment to, among others, "such men as attend them, not having sexual desire".[7] Some exegetes have included those

[6] Khan, Liaquat Ali. 2017. Transgender Dignity in Islam. Huffington Post. Available from: https://www.huffingtonpost.com/liaquat-ali-khan/transgender-dignity-in-is_b_10089712.html
[7] The Quran 24:31. Translation taken from Arberry (1955).

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intersex persons who have no desire for women in this category and have argued that they can work as household servants. [8]

In Islamic literature the term *mukhannath* has been used for mostly for effeminate people (as well as for hermaphrodite) and *khuntha* for hermaphrodite (Rowson, 1991).

Recognizing them as members with equal rights in the household, Islamic jurisprudence not only provides for the share of transgender people in inheritance but stipulates equity and fairness. Tafsir Saadi by As-Sa'adi (2003) informs that a *mukhannath* with male characteristics pre-dominating will get a male's share, a *mukhannath* with female characteristics pre-dominating will get a female's share, while for a *mukhannath* with ambiguous characteristics (called a *mukhannath-mushkil*), a middle ground will be found.

Marmon (1995) reveals the presence of a sacred society of eunuchs, established at the tomb of the Prophet Muhammad (PBUH) at some time in the mid-twelfth century. Similar eunuch societies appeared at tombs elsewhere (including at the Ka'ba in Mecca) and have endured as active organizations well into the modern times (Marmon, 1995).

4. History of Transgender Persons in South Asia

The social position of transgender people has seen its ups and downs in the history of Indian Sub-continent. In Mughal era, castrated men, known as *Khawja saras* were employed as security officials in-charge of female quarters at the palace and elsewhere and were given posts of power and trust. Even before that, in the fourteenth century, Malik Kafur, a eunuch was a trusted courtier and an army general of the Delhi Sultanate ruler, Alauddin Khalji. However, under the British rule, circumstances for the transgender people changed. The British passed the 1871 Criminal Tribes Act and included transgender people (hijras) as a criminal tribe. As a result, transgender people moved to the fringes of social order and started to face gradual isolation and economic exclusion. Instances of external shaming led to humiliation and social stigma. Increasingly, they had to resort to occupations as dancing and theatrical performances at various occasions, such as the child birth (mostly boys) for collecting *wadhais* (tips), acting as entertainers, panhandlers or hustlers etc. [9]

After the independence of Pakistan in 1947, although the Criminal Tribes Act was repealed, the state or society undertook little affirmative action to reverse the loss of identity caused to transgender people in the past. As a result, the stigma of delinquency, slack scruples and menial status continued to haunt them over time and still goes on largely unrestrained.

Different terms exist in South Asia for eunuchs, intersex and transgender persons. However, the term *Khwaja Sara* is preferred by the transgender community as many of the other terms are derogatory.

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[8] For example, see Panipati (2002).

[9] Khan, Liaquat Ali. 2017. Transgender Dignity in Islam. Huffington Post. Available from: https://www.huffingtonpost.com/liaquat-ali-khan/transgender-dignity-in-is_b_10089712.html

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5. Population of Transgender Persons

Because of the reasons of neglect, exclusion and stigma, statistically credible data collection in respect of this group has always been an arduous task. On the one hand, there have seldom been any serious efforts to gather information pertaining to this group and on the other, an anxious reluctance on the part of the community to reveal themselves to statistical authorities. It is no wonder that the population of transgender people as per the Census 2017 is as under-reported as exhibited in the table below[10].

Residence Status	Administrative Unit						
	Pakistan	KPK	FATA	Punjab	Sind	Balochistan	Islamabad
Rural	2767	223	27	2124	301	40	52
Urban	7651	690	0	4585	2226	69	81
Total	10418	913	27	6709	2527	109	133

The reasons for this apparent under-reporting can range for the construct of questionnaire to the socio-psychological constructs. UNFPA's monitoring report on the Census mentions that the "Enumerators seldom asked questions on disability and transgender. In many instances, the enumerators inferred the response on disability and transgender because they felt it was culturally sensitive (or offensive) to ask the head of household such questions".[11] Moreover, the referred to transgender category here is apparently intersex as the questions of this sort were asked in the census: "I am sure you don't have a she-male in your house?"[12] Understandably, where questions were not a problem, the psychological awkwardness associated with the admission of being a transgender inhibited the documentation of actual numbers. As a result, only 10418 transgender people have been reported nation-wide in the latest census figures. Understandably, when such statistics are not adequately captured in the official estimates of Pakistan, any policy being contemplated for the welfare of these people need to triangulate other possible sources of information or at least estimates available on the number and circumstances of this community.

According to recent research studies conducted on transgenderism, approximately one out of 50 children are identified with a transgender tendency/ potential.[13] In other words, about 2 percent population of Pakistan is influenced by transgenderism. Region-wise population across Pakistan could not be found but as per one news article,[14] there were around 45,000 transgender people in Khyber Pakhtunkhwa only in 2016. Another news article in 2009, quoted transgender community leaders' estimate of 300,000 transgender persons in Pakistan.[15] Although these number cannot be relied upon for an

[10] Taken from http://www.statistics.gov.pk/assets/publications/Population_Results.pdf.
[11] Available at: http://www.statistics.gov.pk/assets/publications/Pakistan%20Paopulation%20and%20Housing%20Census-2017%20National%20Report.pdf
[12] ibid
[13] http://www.newspakistan.tv/transgender-in-pakistan-by-mahwish-akhtar-jinnah-university-for-women/
[14] http://www.dawn.com/news/1264944/newspaper/newspaper/newspaper/column
[15] https://in.reuters.com/article/us-pakistan-transvestites/pakistans-transvestites-to-get-distinct-gender-idINTRE5BM2BX20091223

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objective policy process, they do reflect the glimpses of ongoing public discourse and educated estimates in this regard.

One of the reasons why such estimates cannot be dismissed as exaggerated is the scale of the prevalence of transgenderism in some other countries. For instance, while the federal data sources providing population estimates in the United States do not include direct questions about sexual orientation or gender identity, Gates (2011), by averaging results from the surveys in Massachusetts and California, derives an estimate for the transgender population in USA as 0.3 percent. If the same prevalence is used for Pakistan, the estimated population of transgender persons will come to around 0.6 million people[16]. Arguably, United States' numbers, could be higher than Pakistan's given the contrasting nature of the two societies vis-à-vis freedom of gender expression. Nonetheless, US numbers still help benchmark a ballpark threshold, if not to arrive at a realistic estimate of transgender persons in Pakistan, at least to be certain that their actual number is significantly higher than the one reported in 2017 national census.

6. Key Challenges that Require a Transgender Persons Policy

A review of the existing literature and recent empirical interactions with selected representatives of transgender community reveal following issues as highlights of their circumstances in Pakistan:

- Most people in Pakistan do not consider transgender persons as an integral or acceptable part of their community. Massive rejections are faced by transgender persons in almost all the parts of Pakistan. They are usually not encouraged to live amongst regular neighborhoods. As a result, they are often constrained to establish their own settlements outside of regular communities.
- Almost 30% of transgender people have attended schools up to primary level, 23% to Secondary and 7% percent to Higher Secondary or College level. The remaining 40% never went to school.[17]
- Even those who persevere long enough to attain the College-level education have to struggle to find decent paid work. Consequently, many of these individuals still do not have other options but to make their living by singing and dancing alongside their less educated gender-mates.
- Many members of the transgender community, commonly viewed as objects for the pleasure of others, are forced by the circumstances to make their living by prostitution.
- Abusive treatment by law enforcement personnel is a common complaint by the members of transgender community.
- Public humiliation, derision, ridicule, marginalization and exclusion. This behaviour is not only limited to the street public but is also experienced in government offices, hospitals, schools etc.
- Trans Action Alliance/Blue Veins have documented 46 killings of transgender persons and 300 violent attacks on them across KP from January 2015 to July 2016.

[16] Pakistan's population is 207.7 million as per Census 2007.
[17] AAWAZ Programme. 2016. The Transgender Community in Pakistan: Issues in Access to Public Services. Available from https://aawaz.org.pk/cms/lib/downloadfiles/1482822154Final%20Transgender%20Report.pdf.

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In Punjab, the Khwaja Sira Society documented 70 instances of domestic abuse in 2015.

- Vision's mapping study found that an overwhelming majority of Transgender people; i.e. 82% had suffered sexual abuse in their childhood.
- Currently, there is no government aid or support system to help these individuals live a normal life. In fact, government institutions, police and other governing bodies are known to harass these individuals.
- The lack of social or state support at the time of need is alarming. In case of any criminal victimization or sexual harassment, these individuals get little help/ support from either the broader community or government institutions.
- A derogatory word *khusra* is in active currency to denigrate the personality of transgender persons. Friends might tease a feminine-looking friend as a khusra. Even an incompetent public figure can be called a khusra. In both India and Pakistan, the word khusra is associated with impotence, incompetence and powerlessness.
- In Pakistan, the people have forgotten the spiritual role that the transgender persons played in the native history. Transgender persons are ridiculed and insulted. Popular TV shows can unwittingly or willfully make cruel jokes against transgender community.

7. Government's Efforts for Welfare of Transgender Persons

Government efforts for the welfare of transgender persons have been, until recently, limited to their identification and registration. In its 2009 ruling, Supreme Court passed the order of including the category of 'third gender' in the national identity card form. Transgender persons in Pakistan were awarded the right to register as a third gender on their Computerized National Identity Cards (CNICs) in 2012 and, in 2013 elections, a limited number of transgender persons in Pakistan casted their vote using the new CNIC.

In June 2018, following a visit of Fountain House Lahore, Hon'ble Chief Justice of Pakistan, Mr. Justice Saqib Nisar took suo moto notice of the plight of the transgender community and directed the government to address the lingering issue of registration of the transgender persons. It was noted that while Akhuwat had taken lead in registering transgender people with NADRA, followed by provision of monthly stipends and interest-free loans, no similar welfare initiatives were underway either by the provincial or federal governments. Under the directions of the Hon'ble Supreme Court, a Provincial Monitoring Committee was constituted to provide CNICs to transgender people. District Officers of Social Welfare Department Punjab ran a social mobilization drive to ensure maximum reach-out to the transgender community. As of the writing of this document, these officers are liaising with Assistant Directors of National Database and Registration Authority (NADRA) at the local level for prompt registration of transgender persons. Besides individual registrations, '*Gurus*' and their '*Chailas*' are also being registered against each other for capturing information on their social structures. As of 25th August 2018, the number of transgender persons registered with Social Welfare Department Punjab have exceeded 3200. Out of these, NADRA has issued CNIC to a majority of people, whereas the rest of the cases are under process at different stages and are expected to be completed in near future.

Government of Pakistan has recently passed Transgender Persons (Protection of Rights) Act in May 2018 to provide for protection, relief and rehabilitation of rights of the

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transgender persons and their welfare and other related matters. Besides giving the transgender persons the right to be recognized as per one's gender identity or gender expression, it also specifies inheritance shares, prohibits discrimination and harassment and requires the government to establish protection centers, provide medical facilities, institute mechanisms for awareness; and support livelihood.

8. Policy Measures for Assisting and Protecting Transgender People

Going forward, it is important to devise a carefully thought-out mechanism to address the various vulnerabilities of transgender community mentioned in the previous sections and suggest policy measures that can address these issues. Accordingly, a future roadmap document for protecting and assisting transgender people is as follows:

8.1. Vision, Mission and Strategic Objectives

Vision

To create a society where persons of every gender have equal social status, opportunities for socio-economic inclusion and mutual respect for one another.

Mission

To ensure that all transgender persons have recognition in accordance with their gender identity and expression, their rights protected by the state, a secure and respectable livelihood, and equal access to public services and labor market.

Strategic Objectives

The transgender persons policy aims to ameliorate the suffering of transgender persons in multiple dimensions of life. Its main objectives are as follows:

1) **Equity**: To protect transgender persons against destitution by ensuring a minimum standard of living and access to basic services;
2) **Resilience**: To insure transgender persons against the negative consequences of shocks and risks along the lifecycle, such as the health shocks;
3) **Opportunity**: To promote human capital accumulation and access to productive assets and income generating activities alongside other two genders;
4) **Gender Equality**: To raise awareness in order to empower transgender persons and provide them opportunities to exercise gender equality; and
5) **Social Inclusion**: To mainstream transgender persons, who are typically excluded from public services and programs, through enforcement of rights, providing means of livelihood and inculcating mutual respect among all genders.

8.2. Principles of SP Program Design and Implementation

In prioritizing the areas of actions and designing and implementing SP programs, the following principles will form the ground rules for action. Research on gender and

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transgender issues by local and international institutions will be used while following these principles.

A Systems Approach: Rather than developing individual programs for the benefit of transgender people by various departments and agencies, a comprehensive system of support will be developed. A systems approach promotes a balanced development and utilization of diverse policy instruments to achieve the intertwined objectives discussed above. It will involve improving integration and harmonization of fragmented programs and implementation efficiency. The systems approach will require an extensive use of technology to establish cohesive administrative systems including a common payment platform for providing cash assistance to transgender people. Similarly, it will ensure the development of a comprehensive Management Information System (MIS) so that multiple programs communicate towards one system. Such an approach will also allow more dynamic updating of records and thus strengthen systems of monitoring and evaluation regarding various interventions. In addition, it emphasizes close coordination of the federal government with the provincial and local governments (e.g. sharing of beneficiary registries) so that synergies could be created without duplication.

Advocacy: Often transgender persons are unable to make their voices heard. One principle of transgender initiatives will be to ensure that transgender persons are able to express their opinions and have their views considered in the development of policies and programs for their welfare. To create an enabling environment, government will support out-of-box initiatives such as the street theatres experimented by VISION organization in order to raise awareness of issues related to transgender persons and proposed solutions. Partnerships with Civil Society Organizations and NGOs need to be encouraged to achieve this end. Similarly, drives and campaigns such as for the registration, recognition, equality, full participation and social inclusion of transgender people are required to be run on a regular basis.

Community's Participation: There is a need to ensure that broader communities are also involved in efforts related to the welfare of transgender people. Alongside running awareness, mobilization, and information campaigns for transgender people, it needs to be ensured that their families, parents, neighbors and other social networks are also on board regarding the various programs being run in this regard. This will ensure an inclusive policymaking and delivery process for the welfare of transgender people and will make the welfare programs responsive to the needs of the stakeholders. Transgender people and their families will be more willing to take up the services and benefits offered to them that are made with their consultation. Non-governmental organizations and civil society groups can play a major role in engaging transgender communities with this partnership effort. The Government will leverage existing voluntary-sector networks, wherever possible, to reduce costs and to increase effectiveness of its advocacy, awareness and social mobilization initiatives. Grievance and redress systems will also be built in with key initiatives and programs to let this partnership permeate every stage of program cycle.

Benefit Adequacy: It is expected that the initiatives for transgender persons will contribute to poverty reduction or prevention in the transgender community, particularly prioritizing the reduction of extreme and chronic poverty. To achieve that end, ensuring the adequacy of benefits within the budget constraint is also important.

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However, the coverage and benefits of a program under fiscal affordability pose a significant trade-off; for a fixed budget, a greater benefit amount means smaller coverage and vice versa. Therefore, careful assessments on the program design and the impacts of changing the design features on the coverage, poverty, and fiscal space, among others, will be conducted on a regular basis. The inherent tension between adequacy and affordability can be in part addressed through a provision of non-monetary benefits. For instance, transformative legal measures (e.g. legislation for protection of rights of transgender persons) or labour regulations for adequate benefits and worker protection (e.g. workplace health and safety measures) can be considered.

Community's Reciprocity: While providing social assistance to transgender people, the principle of reciprocity needs to be emphasized. It means that when the government delivers necessary services and benefits under social protection programs to the transgender persons, they also abide by such rules and conditionalities which are aimed at their personal and human development potential. This mutual respect for the terms of co-responsibility will lead to the optimal behavioral changes.

Promoting Self-sufficiency: Successful social policies and programs promote self-sufficiency among beneficiaries, rather than a long-term reliance on the programs. This contributes to sustainability of such initiatives and programs as new beneficiaries can be added when former ones exit. Where feasible, the eligibility rules would be designed for graduation and exit from each program. More importantly, measures to help beneficiaries graduate out of poverty and marginalization, and to escape from intergenerational transmissions of poverty will be incorporated in the overall welfare regime for transgender people.

Political Agency: For formulation of polices beneficial to transgender persons it is necessary that transgender persons have political freedom and could freely participate in political activities including contesting elections and voting as per their will. Such programs will be initiated that promote political agency of the transgender persons.

8.3. Formulation of the Transgender Persons Policy

The process of formulation of transgender policy began with the Honorable Chief Justice of Pakistan Mr Saqib Nisar's hearing of a Human Right Case (Case No. 32005-P/2018) related to a matter regarding issuance of CNIC in favour of transgender persons. It was during the proceedings of this case that he issued directions to formulate a comprehensive policy for the welfare, rehabilitation and mainstreaming of transgender community in the society without any exclusion or stigma.

Complying with Chief Justice's directions, PSPA started working on the Transgender Persons Welfare Policy. Besides literature review, multiple meetings with transgender community, government officials and representatives of the non-government were conducted to get first-hand knowledge of the situation of the transgender persons. The final step in this process was a seminar on rights and welfare of transgender people on 9th August 2018 in Supreme Court of Pakistan under the aegis of Law and Justice Commission of Pakistan in collaboration with PSPA. The proceedings of the seminar were chaired by Honorable Justice (R) Khilji Arif Hussain whereas Honorable Chief Justice of Pakistan graced the occasion by chairing concluding session of the seminar.

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Representatives from judiciary, relevant government departments, the civil society & transgender community attended the seminar to share with each other the challenges, opportunities, current initiatives and reform options regarding transgender persons.

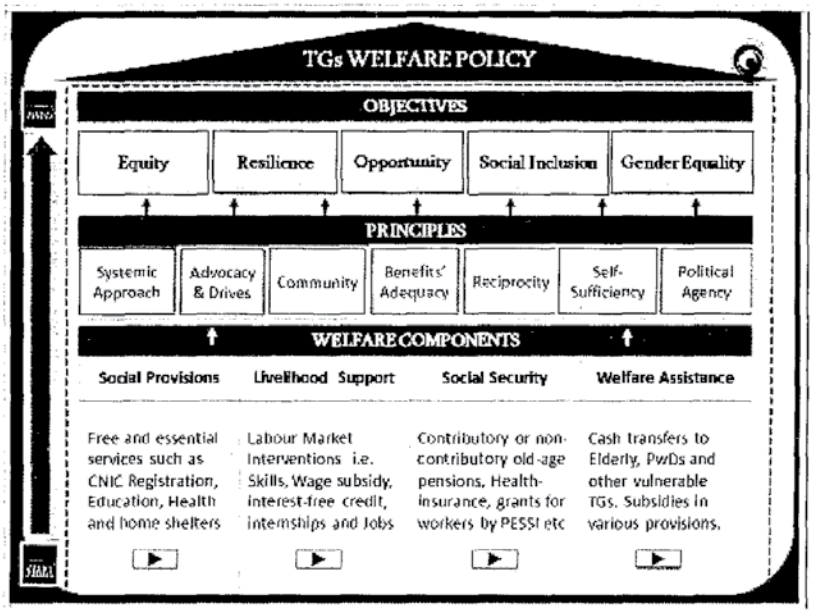
In the seminar, Chief Justice of Pakistan stressed the need to end social exclusion of the transgender community. He stated that the right to live a dignified life and be treated equally is fundamental to natural justice and provided in the Constitution of Islamic Republic of Pakistan. He urged the federal and provincial governments to formulate a policy for the welfare of these people. He appreciated the efforts for registration of transgender persons in the Punjab and instructed the rest of the provinces to register these persons following the model adopted in the Punjab.

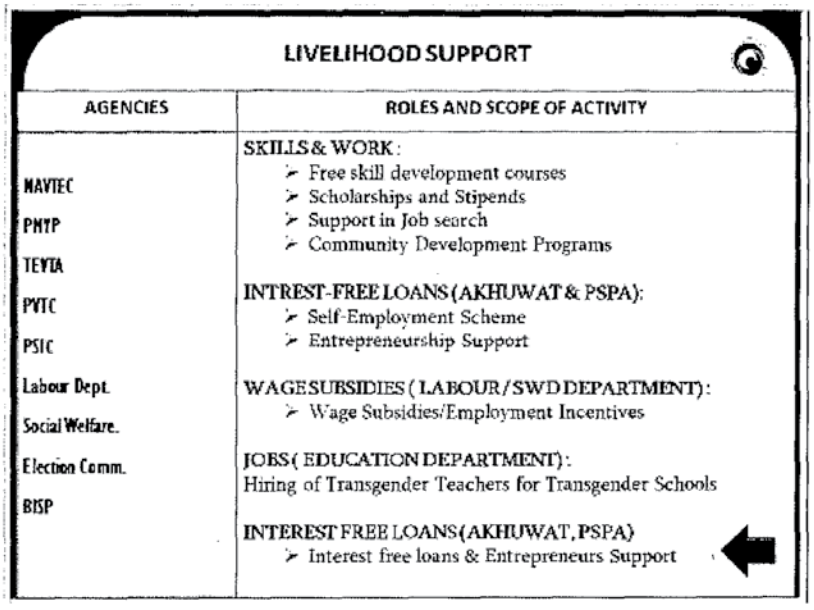
In concluding session, Dr. Sohail Anwar, Chief Executive Officer, Punjab Social Protection Authority, shared the recommendations formulated during the seminar and explained the outline of the policy for the welfare and protection of rights of the transgender community. Key suggestions presented in the seminar for alleviating the suffering of the transgender community were related to advocacy for resilience, equity and social inclusion. Specific welfare proposals included the provision of health services and health cards, better treatment by the police, accelerated and non-formal education for transgender persons, skills provisions and loans, assistance for persons with disabilities and senior citizens, provision of shelters and housing, job quota, awareness-raising, and need for provincial legislation.

The slides from the concluding presentation are available in the Exhibit No. 1 below. The Chief Justice of Pakistan appreciated the policy framework and asked the relevant authorities to publish the recommendations for feedback and comments.

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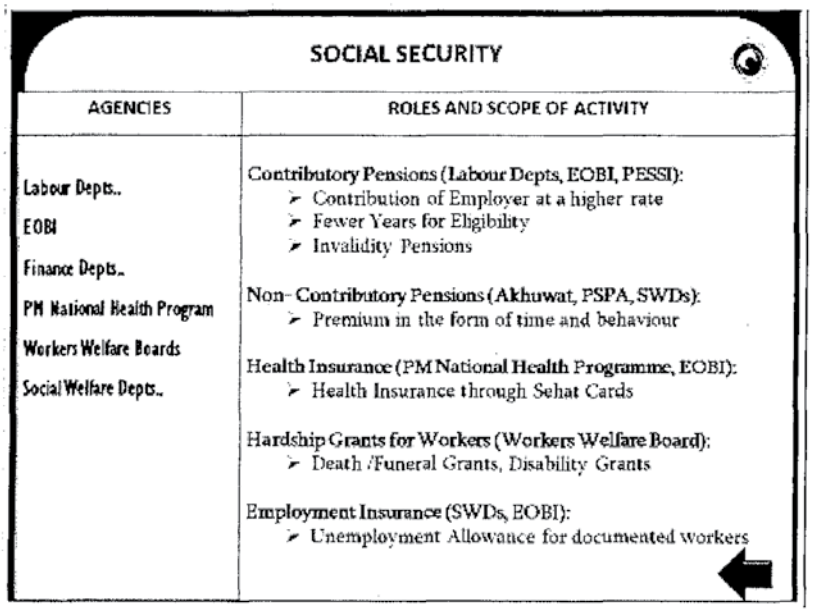
Exhibit No. 1 Outline of TGs Welfare Policy





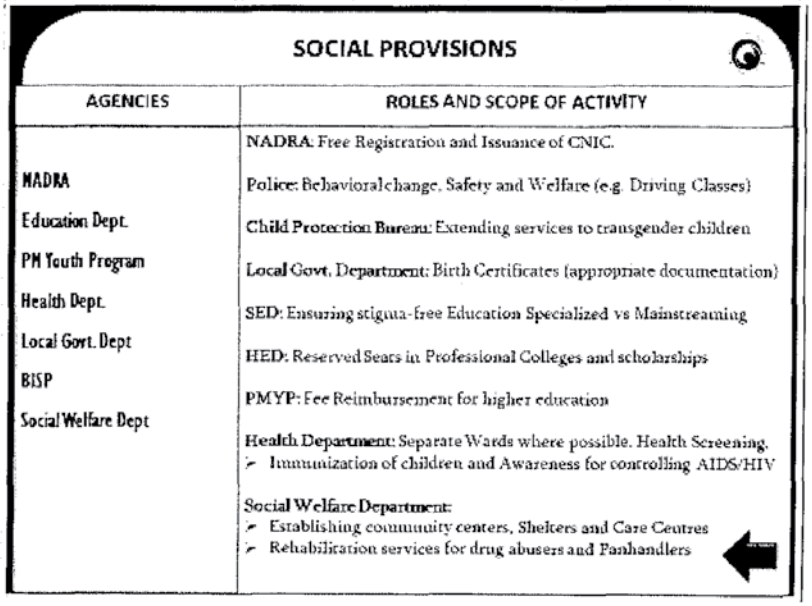
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SOCIAL SECURITY

AGENCIES	ROLES AND SCOPE OF ACTIVITY
Labour Depts., EOBI Finance Depts., PM National Health Program Workers Welfare Boards Social Welfare Depts.,	**Contributory Pensions (Labour Depts, EOBI, PESSI):** ➢ Contribution of Employer at a higher rate ➢ Fewer Years for Eligibility ➢ Invalidity Pensions **Non- Contributory Pensions (Akhuwat, PSPA, SWDs):** ➢ Premium in the form of time and behaviour **Health Insurance (PM National Health Programme, EOBI):** ➢ Health Insurance through Sehat Cards **Hardship Grants for Workers (Workers Welfare Board):** ➢ Death /Funeral Grants, Disability Grants **Employment Insurance (SWDs, EOBI):** ➢ Unemployment Allowance for documented workers



SOCIAL PROVISIONS

AGENCIES	ROLES AND SCOPE OF ACTIVITY
NADRA Education Dept. PM Youth Program Health Dept. Local Govt. Dept BISP Social Welfare Dept	**NADRA:** Free Registration and Issuance of CNIC. **Police:** Behavioral change, Safety and Welfare (e.g. Driving Classes) **Child Protection Bureau:** Extending services to transgender children **Local Govt. Department:** Birth Certificates (appropriate documentation) **SED:** Ensuring stigma-free Education Specialized vs Mainstreaming **HED:** Reserved Seats in Professional Colleges and scholarships **PMYP:** Fee Reimbursement for higher education **Health Department:** Separate Wards where possible. Health Screening. ➢ Immunization of children and Awareness for controlling AIDS/HIV **Social Welfare Department:** ➢ Establishing community centers, Shelters and Care Centres ➢ Rehabilitation services for drug abusers and Panhandlers

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WELFARE ASSISTANCE

AGENCIES	ROLES AND SCOPE OF ACTIVITY
AKHUWAT BISP PSPA Zakat & Usher Depts. Social Welfare Depts. Transport Dept. Agriculture Dept. Housing Dept.	UCTs (Unconditional Cash Transfers) ➢ Akhuwat: Has started to give Rs. 1250 PM & Food Basket ➢ BISP: Eligibility agreed for Transgender Persons of 18 yrs - ➢ BISP: Data of 1359 transgender in 14 districts of Pakistan. ➢ PSPA: Khidmat Card for TGs with disability and over 50 ➢ Zakat: Guzara Allowance Priority ➢ SWDs: Various Baitulmal-funded and other initiatives. CCTs (Conditional Cash Transfers) ➢ Inclusion of Transgender Children in WeT ➢ CCT for immunization of Transgender children SUBSIDIES Transport Department Travel Cards Agriculture Department: Agriculture inputs Housing Department: Low cost housing units Livestock Department Subsidized Asset Transfer

8.4. Components of Transgender Persons Welfare Policy

This section describes specific welfare instruments and programs that the Government prioritizes. Transgender Persons Welfare Policy will contribute to the overall social welfare of the transgender persons including their identification, health, education skills provisions, employment, old-age pensions etc. For this purpose, various policy instruments will be used to achieve the five objectives described above. Table-1 presents a taxonomy of the programs and instruments that are part of this policy. The table also indicates potential implementers of these programs.

Table 1: Social Welfare Instruments and their Application to Transgender Persons

Social Welfare Program Classification	Instruments	Prospective Agencies for Implementation
Social Provisions	Free and essential services such as CNIC Registration, Education, Health and home shelters and protection of rights	NADRA, Education Departments, PM Youth Program, Health Departments, Local Government Departments, BISP, Social Welfare Departments

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Livelihood Support	Labour market interventions i.e. Skills, interest-free credit, internships and jobs	NAVTEC, PMYP, TEVTA PVTC, PSIC, Labour Departments, Social Welfare Departments, Election Commission, BISP
Social Security	Contributory or non-contributory old-age pensions, Health- insurance, grants for workers by PESSI etc.	Labour Departments, EOBI, Finance Departments, PM National Health Program, Workers Welfare Board, Social Welfare Departments
Welfare Assistance	Cash transfers to Elderly, People with disabilities and other vulnerable TGs.	BISP, Akhuwat, PSPA, Zakat & Usher Departments, Social Welfare Departments, Transport Departments, Agriculture Departments, Housing Departments

8.4.1. Social Provisions

Under Social Provisions, measures will be undertaken to ensure the rights of transgender persons are not violated, they have access to key public services such as education, health and housing etc. and society is transformed through awareness-raising for acceptance rather than exclusion of transgender persons. Details of key interventions under this thematic area are provided below.

8.4.1.1. Rights of Transgender Persons

The Pakistan Constitution does not explicitly make mention of sexual orientation or gender identity. In 2009, Supreme Court of Pakistan declared that the transgender community is equally entitled to rights guaranteed in the Constitution to all citizens, including the right of inheritance after the death of parents, job opportunities, free education and health care. Recently passed Transgender Persons (Protection of Rights) Act 2018 has also declared rights guaranteed in the constitution such as fundamental rights to be applicable to transgender persons as well (see Annex-A for a charter of rights of transgender persons as per Transgender Persons (Protection of Rights) Act).

Despite these rulings, a lot of room is left to create equal opportunities for the transgender persons. The government shall make utmost effort to ensure these rights are provided. A special nation level committee will be formed to oversee the enforcement of rights of transgender persons. Transgender Persons (Protection of Rights) Act 2018 will be amended to include an implementing agency for law enforcement regarding transgender persons.

8.4.1.2. Identification

The current definition of transgender in the act considers anyone whose gender identity

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or gender expression do not conform to that associated with the sex assigned at the time of their birth. As this definition does not link being transgender to biological characteristics, this may have its peculiar implications in our societal context.

In India, the definition adopted by the Transgender Persons (Protection of Rights) Bill, 2016 is as follows:

> "Transgender person means a person who is:
> (A) neither wholly female nor wholly male; or
> (B) a combination of female or male; or
> (C) neither female nor male;
> and whose sense of gender does not match with the gender assigned to that person at the time of birth, and includes trans-men and trans-women, persons with intersex variations and gender-queers."[18]

Accordingly, in the context of our society, while for the purposes of gender identity or expression, anyone can exercise the choice provided to them by the Act, for the matters where some financial benefit is involved and for marriages, there might arise a need for further filters to establish transgender status of a person. Additionally, mingling with females in female-only environment (educational institutions, health facilities, public facilities, etc.) may also become subject to some scrutiny. However, the final opinion on these matters is left to a separate legal assessment and advice.

8.4.1.3. Registration

Many problems, such as difficulties in reaching out to the hidden transgender communities and mobilizing them to NADRA established registration centres, still slow-down the registration of transgender persons.

Under this policy, transgender persons will be registered at a faster pace. The resources of relevant bodies (NADRA, SWDs and provincial monitoring committees) will be strengthened and their procedures simplified for this purpose. NADRA will continue to provide free registration and issuance of CNIC to all transgender applicants.

8.4.1.4. Social and Public Services

One of the main reasons behind the plight of transgender persons is that they are excluded from many public services. In order to ensure a decent standard of living, access of transgender people to social services needs to be improved. This policy aims to ensure that the needs of transgender persons pertaining to basic services of life are addressed. For this purpose, following actions will be undertaken:

- Housing:

Social exclusion of transgender persons means they have to take refuge in settlements that are secluded from common public. Due to lack of resources, such residences are in

[18] http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/210_2016_LS_Eng.pdf

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often in shabby condition unfit for a dignified life. In order to this sorry situation, following measures will be undertaken:

- Transgender shelters will gradually be built in every district where homeless transgender persons are able to live with dignity.
- Low-cost housing units will also be built over the coming years by Housing Departments for transgender persons so that they do not have to live in congested, unclean places where they normally have to live.

- Education

Abdullah et al (2012) have stated that a lack of occupational and educational opportunities has pushed Khwaja Sira in Pakistan towards entering the risky or contentious businesses. Thus, it becomes imperative to ensure that transgender persons obtain adequate general and technical education. Following measures will be undertaken in this regard:

- Transgender education schools and vocational institutes will be established for providing stigma-free education. Steps will be undertaken to enhance mainstreaming of transgender children in the regular stream of schools as well. Such mainstreaming will pave the way for inclusion of transgender persons in the general society.
- Transgender teachers would be trained for teaching to their community. This will result in employment opportunities for educated transgender persons as well as better student-teacher rapport. Regular teachers will also get training to teach transgender persons.
- To break the shackles of resource constraints for speedy improvement in the lives of transgender persons, accelerated non-formal basic education program will be launched for providing education to transgender persons in informal settings. Accelerated education programs in the formal sector (both by government and private organizations) will also be started.
- Special scholarships will be provided for transgender persons through Education Endowment Funds.
- Under Prime Minster Youth Program or such provincial programs, fee reimbursement for higher education can be instituted so that needy transgender persons can also attain higher education.
- Seats for transgender students will be reserved in government higher and professional education institutes to improve opportunities for them.

- Health Services

Transgender persons are often excluded from public health services as well. Often, they cannot afford specialized treatment and counselling that they require. Consequently, they fall prey to many diseases and mental problems. Newfield et al. (2006) found that, in case of female-to-male transgender persons, mental-health related quality of life was lower than general US population. In Pakistani society, this problem is likely to be more acute. Therefore, it is necessary to provide preventive, diagnostic and curative health facilities to the transgender population. Following interventions will be made under this policy:

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- Regular or customized health screening, free medical treatment and free medicine will be made available for transgender persons in government health facilities.
- All lawful surgeries and treatments in the areas of hormone therapy, sex reassignment etc. will be made available, with a provision of financial assistance to needy persons.
- Speech and language therapists will be appointed / or made available, wherever possible, on visitation basis in transgender schools who help transgender people to speak in a fashion that is more aligned with the general society.
- Psychologic help will be provided for building confidence of these people. Such help will also help transgender persons deal with depression that they often feel as a result of their incongruence with societal expectations.
- Special efforts, including awareness campaigns, will be done for HIV/AIDS prevention and care for transgender people by health departments.
- Depending on local context, separate wards for transgender people at District Head Quarter Hospitals will be made. Separation within male and female wards will also be allowed.
- BISP will promote health awareness through its beneficiary groups.

• Emergency/Support Centres

Given repeated instances of violence against transgender persons (a case in point is recent killings of transgender persons in Khyber Pakhtunkhwa), there is a dire need to provide emergency support to transgender members of our society. Toward this end, the following actions will be taken:

- Emergency centres will be established for providing emergency relief and services e.g. in case of violence against transgender persons.
- Social Welfare Departments will establish community centers and shelters for transgender persons.
- Social Welfare Departments will also provide counselling services to the families of transgender persons.
- Social Welfare Departments will also provide specialized social care services for victims of violence and rehabilitation services for drug abusers.

• General Public Services

Other general public services that will be provided under this policy are:

- Transgender persons will have full access to services such as character certificate, telecom services, banking services, birth/death certificate, domicile certificate, property related services (including *fard-e-malkiyat*), vehicle registration, driving license, passport, legal services (including stamp paper, etc.) assets purchase, and taxation etc.
- Where immediate next of kin are not available, *Shehr-e-Khamoshan* Authority/municipal committees (depending on provincial context) will be responsible for the funeral of transgender persons.

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- Separate lavatory facilities for transgender persons will be made available wherever possible.

8.4.1.5. Prohibition of Wanton Abandonment of Transgender Children

There is a need to generate a public discourse whether abandonment of a minor transgender child should be a criminal offence or parents should be allowed to handover their transgender children to registered Gurus, Child Protection Bureaus, and organizations working for transgender children. In case the latter is allowed, parents will need to submit a copy of birth certificate while submitting their child to such Gurus and organizations. Registered Gurus and organizations will maintain record of children admitted and will show this record with the government on demand. Any children found without their parents may not be admitted by the Gurus. Rather, they can be handed over to the government bodies/registered NGOs.

Child Protection Bureaus will extend their regular services to transgender children as well.

8.4.1.6. Charter of Responsibilities for Transgender Community

A charter of responsibilities will bind the registered gurus and organizations providing shelter to the transgender children and taking care of these children for maintaining minimum standard of living. The government will also institute mechanisms for regular monitoring of living arrangements of transgender persons.

8.4.1.7. Elimination of Social Evils

Special joint teams of Social Welfare Departments (SWD) and Police will be formed to deal with issues such as beggary and other contentious activities by the transgender persons. These teams will be trained to deal all such cases with professional courtesy and respect.

8.4.1.8. Awareness campaigns

Awareness campaigns need to be run to encourage tolerance and diversity. Shaming and humiliating of transgender people ought to be checked not only at the societal level but also through legal means. All individuals are entitled to self-respect and dignity based on their individuality and have the inalienable right not to be judged by the prejudices of others about their character and sexuality. Awareness campaign for changing mindsets will be run for this purpose. Following actions will also be undertaken:

- Lessons will be added in the curriculum from the early stages to inculcate respect for all genders
- Training material in police academies, judicial academy, etc. will also have sensitization material regarding transgender persons.
- Training will be provided to various types of people including law enforcement personnel, teachers and health staff to improve treatment of transgender people.

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- As part of a responsible media policy, print and electronic media will be required to refrain from ridiculing transgender persons.
- Families of transgender persons will be sensitized about the rights of transgender persons and their responsibilities.
- Awareness meetings will be conducted with transgender community and Gurus about their rights and responsibilities. Awareness material (including audio-visual materials) will also be distributed amongst transgender community and Gurus.

8.4.1.9. Correct Population Estimates

A methodology will be devised to collect accurate information on transgender persons in the next census. Using same methodology, sample surveys will be undertaken to obtain reasonably good estimates of transgender population in Pakistan. This information will help decide if some seats can be reserved for transgender persons in the parliament.

Sexual orientation and gender identity questions will be added in the national data sources so as to provide provincial and regional estimates of transgender persons.

8.4.1.10. Establishment of Special Cell on Transgender in SWDs

A special cell for the welfare of transgender persons will be established under provincial Social Welfare Departments. This cell will be responsible for overall welfare of the transgender community including their education, training, employment, business, health, shelter, and legal help etc. Other departments and government functionaries such as Deputy Commissioners of respective districts will support SWDs, where required.

8.4.2. Social Security

In the conceptual framework of social protection presented by Sabates-Wheeler and Devereux (2008) Social Security is set of measures that fall in the category of preventive measures of social protection. Preventive measures are those measures that aim to prevent standard of living falling an acceptable level. As such, social security protects vulnerable workers and self-employment people who face present and future risks related to their livelihoods. Interventions that will be made under social security are outlined below.

8.4.2.1. Pensions

Programs for contributory and non-contributory (where premium could be in the form of time and behavior) pension for transgender persons will be initiated. Contribution of the employer will be set at a higher rate with fewer years for eligibility than in regular cases. Invalidity Pensions will also be provided to those transgender persons that become unable to work due to illness, injury, etc.

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8.4.2.2. Unemployment Insurance

Unemployment allowance is a standard social security measure to help those workers who have undertaken paid work in the past and are actively looking for work. This allows consumption smoothing and obviates the need for negative risk coping (e.g. selling assets). Depending on resource availability and implementation feasibility, such programs will be gradually introduced all across Pakistan for documented transgender workers.

8.4.2.3. Health Insurance

Health insurance (*Sehat*) cards under Prime Minister National Health Program, provincial Health Insurance Programs and any similar initiatives in public and private sector will be provided for the treatment of transgender persons in private / enlisted clinics. This will enable them to meet their health expenses easily.

8.4.2.4. Hardship Grants for Workers

To meet unforeseen expenses, for example, in case of death of a relative, transgender workers will need occasional assistance. To fulfill these needs, provincial Workers Welfare Boards will provide death /funeral grants and disability grants. Similarly, benefits available to other workers from provincial employees social security institutions (such as illness grant, funeral grant, and pension and free health facilities in case of disability of workers, etc.) will be extended to transgender workers as well.

8.4.3. Livelihood Support

Promotive measures of social protection aim to augment incomes and capabilities of the vulnerable groups through programs for enhancing livelihood of these groups. The prime objective of these programs is to smooth consumption on one hand and to increase incomes by giving access to economic opportunities with better returns. Transgender Persons (Protection of Rights) Act, 2018 specifically requires the government to support and promote livelihood for transgender persons. Vocational training, asset transfer and microfinance are examples of such livelihood support measures that this policy aims to undertake. These initiatives are described below.

8.4.3.1. Skill Building through a Conditional Cash Transfer

In 2012, the Vocational Training Institute (VTI), Chunian (home to a large population of transgender persons), run by the Punjab Vocational Training Council (PVTC), announced a training course on industrial garments stitching, exclusively for transgender persons.[19] National Vocational & Technical Training Commission's website mentions various other such programs for transgender people.[20] First-ever training institute for

[19] http://tvetreform.org.pk/gender-is-no-barrier-in-skills-development/
[20] See http://www.navttc.org/SuccessStories.aspx

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transgender people was opened in Rawalpindi in 2013.[21] These instances show that there have been sporadic efforts to equip transgender persons with the skills.

Transgender Persons (Protection of Rights) Act, 2018 makes it an obligation of the government to "formulate special vocational training programs to facilitate, promote and support livelihood for transgender persons". Under this policy, free skill development courses will be offered to transgender persons by all provincial governments. Training (including training on soft skills) for all suitable professions including driving, cooking, makeup and grooming, domestic help etc. will be provided.

For giving incentive to transgender persons for enrolment in skill development programs, conditional cash transfer (CCT) programs can be started in every province. CCTs are programs that transfer cash, generally to poor households, on the condition that those households modify their behavior/actions e.g. by making sending their girls to schools or by getting their pregnant females regularly visit health facilities, etc. These programs have been found to have significant impact on the targeted variables, for example, Gertler (2004), shows that PROGRESA (now Prospera)-a CCT in Mexico –led to significant improvement in the health of children. Usage of such programs for skill development of transgender persons can also bear fruits.

8.4.3.2. Jobs/Entrepreneurship Support

Federal and provincial governments need to consider the fixation of a reasonable quota for transgender persons for government jobs, especially from BS 1-5. The government will also find ways to support job search by transgender persons. For instance, Education departments can hire transgender teachers for the teaching and emotional support of transgender students.

To make transgender people self-reliant, entrepreneurship will be promoted in the transgender persons. For this purpose, schemes for the provision of free or subsidized productive assets are needed to be introduced. Under asset transfer schemes, an asset or an asset grant, which is substantial in local economic terms, is provided to poor households. Combined with the skill provision, the transfer of an asset means that the poor have both the material (poultry, livestock, sewing machines, etc.) and non-material (technical skills and market linkages) resources to make use of economic opportunities. This 'graduation' approach was pioneered by the BRAC, Bangladesh (Hulme and Moore, 2008). Such graduation programs have been shown to result in higher incomes and lasting improvements in the well-being of the recipients (Banerjee et al, 2015).

Subsidized agricultural inputs and similar products can also be given as assets. Agriculture Departments will design such schemes for transgender persons or add them as eligible people in such existing schemes for the assistance of poor farmers.

Microfinance is another social protection instrument that can be used for making transgender people self-reliant. As Parker (2000) notes, 'even in its most basic form, access to microfinance services gives households a way to both prepare for and cope with crisis'. There have been many empirical studies proving effectiveness of the microcredit

[21] https://www.thenews.com.pk/archive/print/420707-first-ever-vocational-training-centre-for-eunuchs-opened

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initiatives. In a rigorous study by Angelucci et al (2015), it is shown that micro loans have been used for investment and risk management and have led to increases in business size, trust, and female decision making, and decreases in depression and reliance on or need for aid. Positive, though not very large, effects were found on income, consumption, and wealth as well. In line with the international experience, interest-free micro and small loans shall be provided to transgender people through government as well as voluntary sector organizations such as Akhuwat.

8.4.4. Welfare Assistance

Welfare or social assistance includes measures that provide relief from deprivation and, thus, can be seen as part of social safety nets. Generally, these measures are narrowly targeted on the poor population. These programs mostly take form of cash transfers to the poor and persons with disabilities and old-age people. This equates closely to mainstream 'social welfare'. Educational and health fees waivers and subsidies can also be part of welfare assistance. The measures adopted by this policy are described as under.

8.4.4.1. Unconditional Cash Transfer for Old-age Persons

Supreme Court of Pakistan in its 2009 judgment articulated eunuchs' condition as a disability and "gender disorder."[22] As such, on the lines of cash assistance to persons with disabilities provided by PSPA, an unconditional cash transfer will be started for transgender persons. Low-income older transgender people (50+ years of age) may be prioritized for assistance as they hardly have any means of earning. A cash grant starting at Rs. 2,000-3,000 per month can be provided to such people through ATM Card/branchless banking mechanism. A transgender holding CNIC with sex column "Transgender/Third Gender/Other", or certified transgender by medical board constituted for the purpose will be eligible. BISP is already contemplating to make transgender group eligible for their unconditional cash transfer. Same example can by followed by organizations such as PSPA Punjab and similar organizations in other provinces. Private organizations such as Akhuwat will be encouraged to form partnership with the government in this regard.

8.4.4.2. Unconditional Cash Transfer for PWDs

Using the model of Khidmat Card Program of PSPA for the people with disabilities in Punjab, federal / provincial programs will be launched for providing cash assistance to those transgender persons that have various disabilities.

8.4.4.3. Conditional Cash Transfers for Education and Health

Transgender children will be included in *Waseela-e-Taleem* Program run by BISP. A conditional cash transfer program will be run for immunization of transgender children. Similarly, provincial governments' school enrollment and retention programs such as Zevar-e-Taleem Program-a Conditional Cash Transfers for girls of 16 low literacy districts in Punjab-can be extended to transgender children.

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[22] See https://www.icj.org/wp-content/uploads/2012/07/Khaki-v.-Rawalpindi-Supreme-Court-of-Pakistan.pdf.

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8.4.4.4. Assistance from Other Bodies

Conditional and unconditional cash transfers would also be provided by other government (BISP and Zakat, Ushr and Bait-ul-Maal Departments) and non-governmental organizations (such as Akhuwat, which is already distributing Rs. 1250 per month among transgender persons registered with it).

Zakat departments will also include needy transgender persons in its Guzara Allowance Program. Transport Departments can issue travel cards for reducing travel costs for the transgender persons.

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Annex-A Key Features of Transgender Persons (Protection of Rights) Act 2018

Identity and Registration of Transgender Persons

The act defines "transgender person" as a person who is:

i. intersex (khusra) with mixture of male and female genital features or congenital ambiguities; or
ii. eunuch assigned male at birth, but undergoes genital excision or castration; or
iii. a transgender man, transgender woman, *Khawaja Sira* or any person whose gender identity[23] or gender expression[24] differs from the social norms and cultural expectations based on the sex they were assigned at the time of their birth.

A transgender person shall have a right i) to be recognized as per his or her self-perceived gender identity and ii) to get himself or herself registered as per self-perceived gender identity with NADRA (if aged above 18 years) and other government departments. Those already registered with such departments are allowed to change the name and gender according to his or her self-perceived identity on the CNIC, Child Registration Certificate (CRC), driving license and passport.

Prohibition against Discrimination and Harassment

Discrimination against a transgender person is prohibited. Such discrimination includes unequal treatment with regard to educational institutions; employment, trade or occupation; healthcare services; general public services, mobility and transportation; rights related to movable and immovable property including inheritance, the opportunity to stand for or hold public or private office; and any establishment in whose care or employment a transgender person may be.

The act defines harassment as "sexual, physical, mental and psychological harassment which means any aggressive pressure or intimidation intended to coerce, unwelcome sexual advance, request for sexual favors or other verbal or written communication or physical conduct of a sexual nature or sexually demeaning attitudes, causing interference with living, mobility or work performance or creating an intimidating, hostile or offensive work or living environment including the attempt to punish the complainant[25] for refusal to comply with such requests or to bring forth the complaint".

Such harassment, both within and outside the home, based on sex, gender identity and gender expression of transgender persons is prohibited.

Obligations of the Government

The Government shall take following steps to secure full and effective participation of transgender persons in the society:

a. establish protection centers and safe houses to ensure the rescue, protection and rehabilitation of transgender persons in addition to providing medical facilities, psychological care, counseling and adult education to the transgender persons;

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[23] Defined in the act as "a person's innermost and individual sense of self as male, female or a blend of both or neither that can correspond or not to the sex assigned at birth".
[24] Defined in the act as "a person's presentation of his gender identity and the one that is perceived by others".
[25] A transgender person.

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b. establish separate prisons, jails, confinement cells, etc. for the transgender persons involved in any kind of offence or offences;
c. institute mechanisms for the periodic sensitization and awareness of the public servants, in particular, but not limited to, law enforcement agencies and medical institutions, relating to the issues involving the transgender persons and the requirement of protection and relief of such persons;
d. formulate special vocational training programmes to facilitate, promote and support livelihood for transgender persons;
e. encourage transgender persons to start small business by providing incentives, easy loan schemes and grants; and
f. take any other necessary measures to accomplish the objective of this Act.

Protection of Rights of Transgender Persons

i. Right to inherit

There shall be no discrimination against transgender persons in acquiring the rightful share of property as prescribed under the law of inheritance. The share of transgender persons shall be determined as per the gender declared on CNIC: transgender male will get the share of a male; transgender female will get the share of a female. For those with characteristics of both male and female or ambiguous characteristics, such as their state is difficult to determine upon birth, following shall apply:

(a) upon reaching the age of 18 years:

- if the person's self-perceived gender identity is transgender male, he will get a male's share;
- if the person's self-perceived gender identity is transgender female, she will get a female's share;
- if the person's self-perceived gender identity is neither transgender male nor transgender female, an average of two separate distributions for a male and a female will apply for determination of the share; and

(b) below the age of 18 years, the gender as determined by medical officer on the basis of predominant male or female features.

i. Right to education

No educational institute can discriminate against a person on the ground of that person's sex, gender identity and gender expression as regards admission, education, training, sports, student facilities etc.

Article 25A of the Constitution of the Islamic Republic of Pakistan, for provision of provide free and compulsory education, applies to transgender persons as well. The Government shall take necessary steps in this regard.

ii. Right to employment

No establishment can discriminate against a person on the ground of that person's sex, gender identity and gender expression in any matter relating to employment including, but not limited to, recruitment, remuneration, promotion, appointment, training, transfer and other related issues.

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Article 18 of the Constitution of the Islamic Republic of Pakistan guaranteeing the right to enter into any lawful profession and to conduct any lawful business applies to the transgender persons as well. The Government shall ensure that these rights are available to everyone.

iii. Right to vote and hold public office

Any adult transgender person has the right to cast a vote during national and sub-national elections according to the gender declared on his/her CNIC. Similarly, there shall be no discrimination on the basis of sex, gender identity and gender expression for transgender persons to contest election to hold public office.

iv. Right to health

The Government will review medical curriculum and improve research for doctors and nursing staff to address specific health issues of transgender persons. It will facilitate access by providing an enabling and safe environment for transgender persons in health facilities. Similarly, access of transgender persons to all necessary medical and psychological gender corrective treatment will be ensured.

v. Right to assembly

The Government will ensure the freedom of assembly for transgender persons in accordance with Article 16 of the Constitution of the Islamic Republic of Pakistan (except in case of reasonable restrictions imposed by law in the interest of public order). Appropriate safety measures in this regard will be undertaken.

vi. Right of access to public places

In view of Article 26 of the Constitution of the Islamic Republic of Pakistan, no transgender person shall be denied access to public places (including mosques) solely on the basis of his/her sex, gender identity or gender expression. Limiting the access of transgender people to general public facilities and public places will be unlawful.

vii. Right to property

No transgender person shall be denied, on the basis of his/her sex, gender identity or gender expression, right to purchase, sell, rent or lease property, household or tenancy.

Guarantee of fundamental rights

Fundamental rights mentioned in Part II of Chapter 1 of the Constitution of the Islamic Republic of Pakistan will apply for every transgender person. The government has to ensure that these rights protected and there is no discrimination for any person on the basis of sex, gender identity or gender expression.

Offences and Penalties

Whoever compels or uses any transgender person for begging will be punishable with imprisonment which may extend to six months or with fine which may extend to fifty thousand rupees or with both.

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Enforcement Mechanism

In addition to the remedies available under the Constitution or The Pakistan Penal Code 1860, the Code of Criminal Procedure, 1898 or the Code of Civil Procedure 1908, a transgender person shall have a right to move a complaint to the Federal Ombudsman, National Commission for Status of Women and National Commission of Human Rights (NCHR) if any of the his or rights are denied.

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Annex-B Institutional Arrangement for a Public Private Partnership for Unconditional Cash Transfer to Transgender Persons by PSPA

CSOs / NGOs	Social Protection Authorities/Social Welfare Departments	Public Sector Banks
Social Awareness/Mobilization and Identification of beneficiaries	Establishment of Social Assistance Centres	Issuance of ATM / Debit Cards
Communication Campaign	Communication Campaign	May sponsor such awareness campaigns
Provision of data of beneficiaries (if available) to government department responsible for making welfare payments	Data processing	-
Provision of funds to PSPA	Transfer of funds to BOP	Disbursement/ transfer of benefit amount to the accounts of beneficiaries
Certification of transgender persons by medical doctors	-	Hiring of the Telcos
Mobilization of beneficiaries to KC issuance centres	-	-
Development of MIS	Development of MIS	
Developing of Grievance Redressal Mechanism (GRM)	-	Developing of Grievance Redressal Mechanism (GRM)

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Annex-C Transgender Persons – Selected International Practices

Stylized practices from some countries (from Bangladesh, Lebanon, Syria, Egypt, Nepal and Iran) are presented below.

Gender's identity

- Bangladeshi government granted transgender persons legal status in November 2013 as members of a "third gender". This meant that they became entitled to identify their gender as 'hijra' in national documents such as passports and ID cards, rather than 'male' or 'female'. On 16 January 2014, the government issued a Gazette notification to this effect. But according to a Global Human Rights Defense report of 17 June 2015, enabling legislation establishing transgender rights as a third gender had not been introduced in Parliament[26].
- In Lebanon in January 2016, the Court of Appeals of Beirut confirmed the right of a transgender man to change his official papers, granting him access to necessary treatment and privacy. Transgender people are required to undergo sex reassignment surgery in order to change their legal gender. Sex reassignment surgery is allowed in Lebanon[27].
- The Supreme Court of Nepal dictated in 2007 that the category "other" or anya, representing "third gender" be added to all official documents. Having official documentation that reflects the person's self-identification and gender presentation allows for "third gender" identifying individuals to open bank accounts, own property, register for universities and allowing citizens to register to vote as "third gender. Central Bureau of Statistics officially entered the recognition of third gender as male or female in 2011 Nepal censes[28]. The government started issuing passports in 2015 that recognized three genders[29].
- Iranian law allows for the legal recognition of trans individuals' gender identity; however, such recognition is only granted to individuals officially diagnosed with GID and upon their successful completion of a long process of legal and medical gender transition.[30]

Voter registration

- The Independent (Bangladesh) reported on 24 July 2016 that the Election Commission had not yet enrolled transgender voters as a third gender, and a third gender category had not yet been included on the NID (National Identity) card[31].
- Gay rights come to the fore as Lebanon prepares to vote[32].

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[26]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/660538/Bangladesh_-_SOGI_-_CPIN_-_v3.0__Nov_2017_.pdf
[27] https://en.wikipedia.org/wiki/LGBT_rights_in_Lebanon
[28] https://en.wikipedia.org/wiki/LGBT_rights_in_Nepal
[29] https://www.hrw.org/news/2017/08/11/how-did-nepal-become-global-lgbt-rights-beacon
[30] https://www.outrightinternational.org/sites/default/files/TransReportEXSum.pdf
[31]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/660538/Bangladesh_-_SOGI_-_CPIN_-_v3.0__Nov_2017_.pdf
[32] https://edition.cnn.com/2018/05/04/middleeast/lebanon-elections-lgbt-rights-intl/index.html

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Property rights

A seminar organized by the National Human Rights Commission (NHRC) and Bandhu Social Welfare Society on 29 April 2015, the Chairman of the Parliamentary Standing Committee on the Law Ministry noted, 'Nowhere in the Constitution is it stated that people of the transgender community are barred from getting family property. Nor is banned in any religion practiced in our country[33].

Constitutional rights

In the new constitution of Nepal, passed in September 2015, article 12 allows citizens of Nepal to "obtain a certificate of citizenship of Nepal with gender identity".[34] Article 18, ("Right to Equality")," states, "No discrimination shall be made in the application of general laws on grounds of... sex, [and] physical condition".[35] Article 42 ("Right to Social Justice") provides gender and sexual minorities with the right "to participate in the State bodies on the basis of inclusive principle". [36]

The Bangladeshi constitution has several provisions that could apply to transgender citizens. Part II Article 19 promises equal opportunity for all citizens. Part III Article 27 promises equality before the law for all citizens".[37]

Living standard

- Bangladeshi government launched the programs to develop the living standard of transgender community like Rehabilitation program, Scholarship for the transgender children, Training the 18 above people to improve their skill and efficiency for a better living, Developing their financial condition and ensuring social security, Provided old-age allowance for the 50 and above[38]. Bank loans for setting up their own business[39].
- Until 2001, the Egyptian government refused to recognize that homosexuality was the sexual identity for some of its residents and after 2001, it only did so only to brush off criticism from human rights organizations and foreign politicians[40].
- Verdict stated Supreme court of Nepal in 2012 is "Individuals can decide as to choosing their ways of living either separately or in partnership together with homosexuals or heterosexuals – with or without solemnizing marriage. Although in the prevailing laws and tradition "marriage" denotes legal bond between heterosexuals (male and female), the legal provisions on the homosexual relations are either inadequate or mute [sic] by now"[41]

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[33] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/660538/Bangladesh_-_SOGI_-_CPIN_-_v3.0__Nov_2017_.pdf
[34] Constitution of Nepal. Accessed from http://www.wipo.int/edocs/lexdocs/laws/en/np/np029en.pdf.
[35] ibid
[36] ibid
[37] https://en.wikipedia.org/wiki/LGBT_rights_in_Bangladesh
[38] http://www.msw.gov.bd/site/page/a3498c96-c94a-4fba-9518-13497bdfb46f/Transgender-People
[39] https://www.csbronline.org/wp-content/uploads/2016/08/ShaleAhmed_HjraRights_CSBR-ILGAAsia2015.pdf
[40] https://en.wikipedia.org/wiki/LGBT_rights_in_Egypt#Support_for_LGBT_rights
[41] https://en.wikipedia.org/wiki/LGBT_rights_in_Nepal

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Prohibition against discrimination

- Discrimination against transgender persons is common in other developing countries as well. For example, Human Rights Watch states that discrimination against transgender people is pervasive in Bangladesh [42]. At many places, transgender community is not protected against discrimination.
- In Egypt, though the constitution does not mention transgender persons or use general gender terms, the Article 9 of the constitution, which provides that the state "shall ensure equal opportunities for all citizens without discrimination"[43] could be taken as applicable to all genders.
- In Lebanon, a number of individuals with non-normative sexual orientations and gender identities have reported being expelled from work without compensation after being outed. Highest rates of arbitrary expulsion were among individuals identified as gay men or man having sex with man (MSM). It was reported that they could not seek legal protection not to be outed to their families, as this might involve higher risks[44].
- Similarly, in Syria, transgender persons have no protection against discrimination including employment discrimination and housing discrimination[45].

Homosexuality and Same-sex marriage

- Same sex sexual activities are illegal in Syria. = Penalty: Prison sentence up to 3 years[46]. Article 520 of the penal code of 1949, prohibits having homosexual relations, i.e. "carnal relations against the order of nature", and provides for up to 3 three-years imprisonment,[3] although the law is not strictly enforced[47].
- Bangladeshi government does not recognize same-sex marriage nor civil unions[48].
- In Egypt, same sex marriage is illegal but it is not criminalized and also adoption is illegal. Gay marriage is also not criminalized[49].
- The Supreme Court of Nepal issued a "landmark" ruling ordering the government to end discrimination based on sexual orientation, "to extend equal rights to gender minorities," and to formulate "a same-sex partnership and marriage act based on legislation in other countries. In December 2007, the Court had issued a decision that recognized homosexuals as citizens, stating: "lesbian, gay, bisexual, transsexual and intersex are natural persons irrespective of their masculine and feminine gender and they have the right to exercise their rights and live an independent life in society," and calling upon the government to formulate new laws and amend existing ones to safeguard those rights[50]

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[42] https://en.wikipedia.org/wiki/LGBT_rights_in_Bangladesh
[43] Constitution of Egypt. 2014. Accessed from http://www.wipo.int/edocs/lexdocs/laws/en/eg/eg060en.pdf
[44] http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/LBN/INT_CCPR_ICO_LBN_27152_E.pdf
[45] https://www.equaldex.com/region/syria
[46] https://en.wikipedia.org/wiki/LGBT_rights_in_Syria
[47] https://ipfs.io/ipfs/QmXoypizjW3WknFiJnKLwHCnL72vedxjQkDDP1mXWo6uco/wiki/LGBT_rights_in_Syria.html
[48] https://en.wikipedia.org/wiki/LGBT_rights_in_Bangladesh
[49] https://www.equaldex.com/region/egypt
[50] http://www.loc.gov/law/foreign-news/article/nepal-supreme-court-orders-drafting-of-same-sex-partnershipmarriage-law/

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Violence/Discrimination based on Sexual Orientation and Gender Identity

- Consensual same-sex sexual activity is illegal under the law in Bangladesh. "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description that is, hard labor or simple for a term which may extend to ten years, and shall also be liable to fine (Bangladeshi Penal Code: section 377)". Commercial surrogacy for gay male couples is declared Illegal for all couples regardless of sexual orientation[51].
- In Egypt, Commercial surrogacy is Illegal for all couples regardless of sexual orientation[52].
- Homosexuality is not explicitly outlawed in Lebanon. Rather, article 534 of the Lebanese Penal Code states that "any sexual intercourse contrary to the order of nature is punishable by up to one year in prison." This provision has been used mainly to prosecute people suspected of homosexuality even though the law does not specify what might constitute "contrary to the order of nature," leaving a large margin of interpretation to individual judges[53].
- In Nepal, A further judgment was issued on 18 November 2008 where the Supreme Court reiterated that all transgender persons are defined as "natural persons" and that their physical growth as well as their sexual orientation and gender identity (SOGI) and expression are all part of a natural process. Thus, equal rights, identity and expression must be ensured regardless of sex at birth[54].

HIV and AIDS Social Stigma/Illness

- In Bangladesh, social stigma against HIV and AIDS and against higher-risk populations could be a barrier for accessing health services, especially for the transgender community and men who have sex with men[55].
- In 2005, Egyptian government started to allow for confidential HIV testing, although most people fear that being tested positive will result in being labelled as a homosexual and thus a de facto criminal. Some Egyptians have access to home test kits brought back from the United States, but most Egyptians lack accurate information about the pandemic and quality care if they do become infected[56].
- In Lebanon, HIV/AIDS is stigmatized due to sensitivities about extramarital relations. Few who contracted the disease did so in the course of homosexual relations, which are also taboo. The main challenge facing AIDS patients, in addition to stigma and discrimination, was that many were unable to pay for regular follow-up tests that the Ministry of Public Health does not cover. The law requires the government to offer treatment to all residents who are AIDS patients rather than deporting foreigners who carry the disease[57].

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[51] https://en.wikipedia.org/wiki/LGBT_rights_in_Bangladesh
[52] https://en.wikipedia.org/wiki/LGBT_rights_in_Egypt#Support_for_LGBT_rights
[53] https://www.hrw.org/report/2013/06/26/its-part-job/ill-treatment-and-torture-vulnerable-groups-lebanese-police-stations
[54] http://www.asia-pacific.undp.org/content/dam/rbap/docs/Research%20&%20Publications/hiv_aids/rbap-hhd-2014-blia-nepal-country-report.pdf
[55] https://en.wikipedia.org/wiki/LGBT_rights_in_Bangladesh
[56] https://en.wikipedia.org/wiki/LGBT_rights_in_Egypt#Support_for_LGBT_rights
[57] https://www.state.gov/j/drl/rls/hrrpt/2016/nea/265508.htm

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- In Nepal, Country code no. 10(B) of chapter 19 provides that in the event a person commits torture/ill person from his/her residence by rejecting or doing any inhuman or degrading treatment to him/her on the ground that he/she suffered from any disease, the person shall be liable to punishment from 3 months to 2 years or fine NRS 5000 to 25000 or both[58].

Discrimination in Employment

The Bangladeshi labor law prohibits wage discrimination on the basis of sex or disability, but it does not prohibit other discrimination based on sex, disability, social status, caste, sexual orientation, or similar factors[59]. The Bangladeshi cabinet has decided to recruit transgender populace in Traffic Police from the next fiscal year. A meeting of the Cabinet Committee on Social Safety Net, chaired by Finance Minister, reached this decision on 19 May 2015[60].

In Nepal, recommendations to the Ministry of Labor have been made to support transgender persons in employment including provision of psychosocial support for increasing participation and productivity, legal support to victims of employment-related discrimination, penalization of firms that discriminate against transgender people, and support and encouragement of transgender entrepreneurs and business owners. [61]

Human rights

Bangladesh-Article 3 of the Universal Declaration of Human Rights states that "everyone has the right to life, liberty and security of person" (Article 3). All the signatories to the declaration are therefore obliged to ensure these rights for everyone, irrespective of their gender[62].

In Bangladesh, Section 377 of the Penal Code is used in conjunction with sections 54 and 55 of the Code of Criminal Procedure (CCP), which allow law enforcement agencies to arrest without a warrant, to harass the transgender community[63].

Accommodation

During the Home Office FFM to Bangladesh in May 2017, a representative from Boys of Bangladesh considered that few gay couples choose to live together as this would mean coming out to their family. It was the view of the NHRC official that a gay man or lesbian could rent a property with a member of the same sex, if they did not identify themselves

[58] https://issuu.com/undpasiapacific/docs/rbap-hhd-2013-nepal-legal-reference
[59] https://en.wikipedia.org/wiki/LGBT_rights_in_Bangladesh
[60] https://www.csbronline.org/wp-content/uploads/2016/08/ShaleAhmed_HjraRights_CSBR-ILGAAsia2015.pdf
[61] http://www.asia-pacific.undp.org/content/dam/rbap/docs/Research%20&%20Publications/hiv_aids/rbap-hhd-2014-blia-nepal-country-report.pdf
[62] http://www.dhakalawreview.org/blog/2014/08/protecting-the-transgender-people-in-bangladesh-182
[63] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/660538/Bangladesh_-_SOGI_-_CPIN_-_v3.0__Nov_2017_.pdf

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as being gay. The official believed it would be harder for a heterosexual unmarried couple to rent a property than 2 members of the same sex[64].

Right to change the legal gender

- In Bangladesh, changing gender is legal but surgery not required[65].
- In Egypt, Right to change legal gender is legal but surgery not required[66].
- In Syria, Transsexuals allowed to change legal gender. Sex reassignment surgery is allowed for people whose gender is unclear or whose physical features do not match their physiological, biological and genetic characteristics, first case was reported in 2004[67].
- The Islamic Republic of Iran conceptualizes trans people through the clinical framework of gender identity disorder (GID) and, in response, provides limited subsidized support to specific forms of transition related healthcare—including gender confirmation surgery (GCS), hormone replacement therapy (HRT), and various forms of psychosocial counseling[68].

Education

- Bangladesh sparked the headlines in 2013 of all national and international newspapers for officially adopting the 'Third Gender' in its constitution and to make this new bill a success, we must also equally act to create access to education for the third gender. Everyone has the right to education"(Article 26(1))[69].
- In Lebanon, The lack of anti-bullying mechanisms at educational institutes lead to high rates of dropouts as this might be assessed as the only security exit[70].
- In Nepal, all schools and other education providers to adopt anti-bullying policies to protect transgender students, and ensure teachers receive training on how to respond to homophobic and transphobic bullying: Integrate education on sexual orientation, gender identity, gender expression and intersex status into school curricula in age-appropriate ways: Provide non-discriminatory sex education to address taboos surrounding adolescent sexuality, sexual orientation, gender identity and gender expression and provide adolescents with access to accurate information about the diversity of sexualities, gender identities and sex variations: Recognize the right of students to freedom of gender expression in the school environment. Students should be allowed to wear uniforms and express an appearance that corresponds to the gender with which they identify: Provide all students, including transgender and intersex students, with access to safe toilets and bathroom facilities: Provide educational resources for parents of transgender children[71]

[64] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/660538/Bangladesh_-_SOGI_-_CPIN_-_v3.0__Nov_2017_.pdf
[65] https://www.equaldex.com/region/bangladesh
[66] https://www.equaldex.com/region/egypt
[67] https://en.wikipedia.org/wiki/LGBT_rights_in_Syria
[68] https://www.outrightinternational.org/sites/default/files/TransReportEXSum.pdf
[69] https://observerbd.com/details.php?id=66143
[70] http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/LBN/INT_CCPR_ICO_LBN_27152_E.pdf
[71] https://en.wikipedia.org/wiki/LGBT_rights_in_Nepal

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Media campaigns

A Lebanese non-profit organization, marked the International Day Against Homophobia, Transphobia and Biphobia (IDAHOT) by launching a media campaign in May 2015. The campaign consisted of an awareness ad featuring several prominent Lebanese artists and celebrities calling on the Lebanese Government to provide equal rights to all citizens and residents regardless of sexual orientation, nationality etc[72].

Iranian State Support for Trans People

Under existing regulations, there are several key government agencies tasked with addressing various aspects of the trans community's needs.

i. **Medical care:** According to the government's guidelines on "Supporting Patients with Gender Identity Disorder," the official diagnosis of GID is the responsibility of the Legal Medicine Office. Providing medical care to trans individuals is primarily the responsibility of the Ministry of Health.
ii. **psychosocial support:** The provision of social and psychosocial support for trans patients is assigned to the State Welfare Office.
iii. **Reissue National ID cards:** Ministry of Labor, which coordinates national political and legal advocacy efforts in support of the trans community; the Law Enforcement Agency, which refers trans individuals that are reported to them to the SWO; the NOCR, which reissues national ID cards after judicial and medical approval; and the Military Draft Board, which assesses whether trans individuals should be exempted from compulsory military service.
iv. **financial assistance:** Iran's state-run Imam Khomeini Relief Foundation,44 which is in charge of providing services to low-income and vulnerable populations, provides financial assistance to qualified trans individuals, and (on a limited basis) offers disability benefits to trans individuals who are not able to work.
v. **Social services provision:** The SWO leads national efforts to support trans community members through initiatives such as "the admission of individuals with gender identity disorder to Crisis Intervention Centers of social services, "psychosocial counseling, legal aid, and medical transition related care."[73]

[72] https://en.wikipedia.org/wiki/LGBT_rights_in_Lebanon
[73] https://www.outrightinternational.org/sites/default/files/OutRightTransReport.pdf

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Annex-D Salient Features of the Transgender Persons (Protection of Rights) Bill, 2016 India[74]

TRANSGENDER PERSON DEFINITION

2.(i) "Transgender person" means a person who is—

(*A*) neither wholly female nor wholly male; or

(*B*) a combination of female or male; or

(*C*) neither female nor male; and

whose sense of gender does not match with the gender assigned to that person at the time of birth, and includes trans-men and trans-women, persons with intersex variations and gender-queers.

Prohibition of Certain Acts

Under Article 3 discrimination against a transgender person is prohibited. Such discrimination includes unequal treatment with regard to educational institutions; employment, trade or occupation; healthcare services; general public services, mobility and transportation; rights related to movable and immovable property including inheritance, the opportunity to stand for or hold public or private office; and any establishment in whose care or employment a transgender person may be.

Recognition of Identity of Transgender Persons

4. (*1*) A transgender person shall have a right to be recognized as such, in accordance with the provisions of this Act.

(*2*) A person recognized as transgender under sub-section (*1*) shall have a right to self-perceived gender identity.

5 A transgender person may make an application to the District Magistrate for issuing a certificate of identity as a transgender person, in such form and manner, and accompanied with such documents, as may be prescribed:

Provided that in the case of a minor child, such application shall be made by a parent or guardian of such child.

6. (*1*) On the receipt of an application under section 5, the District Magistrate shall refer such application to the District Screening Committee to be constituted by the appropriate Government for the purpose of recognition of transgender persons.

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[74] http://www.prsindia.org/uploads/media/Transgender/Transgender%20Persons%20Bill,%202016.pdf
Bill No. 210 of 2016

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(2) The District Screening Committee referred to in sub-section (1) shall comprise—

(a) the Chief Medical Officer;
(b) District Social Welfare Officer;
(c) a Psychologist or Psychiatrist;
(d) a representative of transgender community; and
(e) an officer of the appropriate Government to be nominated by that Government.

7. (1) The District Magistrate shall issue to the applicant under section 5 a certificate of identity as transgender person on the basis of the recommendations made by the District Screening Committee in such form and manner, within such time, as may be prescribed, indicating the gender of such person as transgender.

(2) The gender of transgender person shall be recorded in all official documents in accordance with certificate issued under sub-section (1).

(3) A certificate issued to a person under sub-section (1) shall confer rights and be a proof of recognition of his identity as a transgender person.

8. (1) After the issue of a certificate under sub-section (1) of section 7, if there is any change in the gender of a transgender person, he shall make an application to the District Magistrate for revised certificate.

(2) The District Magistrate shall, on receipt of an application under sub-section (1), and on the recommendation made by the District Screening Committee, issue a certificate

(3) The person who has been issued revised certificate shall be entitled to change the first name in the birth certificate and all other official documents relating to the identity of such person:

Provided that such change in gender and the issue of revised certificate under subsection (1) shall not affect the rights and entitlements of such person under this Act.

Welfare Measures by Government

- Inclusion in society: Government shall take steps to secure full and effective the participation of transgender persons and their inclusion in society.
- Protect rights and facilitate: Government shall take such measures as may be necessary to protect the rights and interests of the transgender person, and facilitate their access to welfare schemes framed by that Government.
- Formulate transgender-sensitive schemes: Government shall formulate welfare schemes and programmes which are transgender sensitive, non-stigmatizing and non-discriminatory.
- Rehabilitation: Government shall take steps for the rescue, protection and rehabilitation of transgender persons to address the needs of such person.

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- Cultural and recreational activities: Government shall take appropriate measures to promote and protect the right of transgender persons to participate in cultural and recreational activities.

Obligation of Establishments and Other Person

- Right to employment: No establishment shall discriminate against any transgender person in any matter discrimination relating to employment including, but not limited to, recruitment, promotion and other related in issues.
- Every establishment consisting of one hundred or more persons shall designate a redressal person to be a complaint officer to deal with the complaints relating to violation of the mechanism.
- **Right to residence and to live with family**

No transgender person shall be separated from parents or immediate family on the ground of being a transgender, except on an order of a competent court, in the interest of such person.

Every transgender person shall have—

(a) a right to reside in the house-hold where parent or immediate family members reside;
(b) a right not to be excluded from such house-hold or any part thereof;
(c) a right to enjoy and use the facilities of such house-hold in a non-discriminatory manner.

- **Provision of rehabilitation centre**

Where any parent or a member of his immediate family is unable to take care of a transgender, the competent court shall by an order direct such person to be placed in rehabilitation centre.

Education, Social Security and Health of Transgender Person

- Right to inclusive education: All educational institutions funded or recognized by the appropriate Government Educational shall provide inclusive education and opportunities for sports, recreation and leisure activities institutions to provide without discrimination on an equal basis with others.
- Right to welfare schemes and self-employment: Government shall formulate welfare schemes and programmes to facilitate and support livelihood for transgender persons including their vocational training and self-employment.
- Right to healthcare facilities: Government shall take the following measures in relation to the transgender persons, namely:

(a) a separate human immune deficiency virus Sero-surveillance Centres;
(b) to provide for medical care facility including sex reassignment surgery and hormonal therapy;
(c) pre and post sex reassignment surgery and hormonal therapy counselling;

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(d) bring out a Health Manual related to sex reassignment surgery in accordance with the World Profession Association for Transgender Health guidelines;

(e) review of medical curriculum and research for doctors to address their specific health issues;

(f) to facilitate access to the transgender persons in the hospitals and other healthcare institutions and centres;

(g) provision for coverage of medical expenses by a comprehensive insurance scheme for transgender persons.

National Council for Transgender Persons

- Right to constitute National council: Government shall by notification constitute a National Council for Transgender to exercise the powers conferred on, and to perform the functions assigned to it, under this Act.
- Five representatives of transgender community

Functions of the council

The National Council shall perform the following functions, namely: —

- to advise the Central Government on the formulation of policies, programmes, legislation and projects with respect to transgender persons;
- to monitor and evaluate the impact of policies and programmes designed for achieving equality and full participation of transgender persons.
- to review and coordinate the activities of all the Departments of Government and other Governmental and non-Governmental Organizations which are dealing with matters relating to transgender persons;
- to perform such other functions as may be prescribed by the Central Government.

Offences and Penalties

Whoever, —

(a) compels or entices a transgender person to indulge in the act of begging or other similar forms of forced or bonded labour other than any compulsory service for public purposes imposed by Government;

(b) denies a transgender person the right of passage to a public place or obstructs such person from using or having access to a public place to which other members have access to or a right to use;

(c) forces or causes a transgender person to leave house-hold, village or other place of residence;

(d) harms or injures or endangers the life, safety, health, or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse;

shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.

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References

Is social exclusion pushing the Pakistani Hijras (Transgenders) towards commercial sex work? a qualitative study Abdullah, Muhammad Ahmed, Zeeshan Basharat, Bilal Kamal, Nargis Yousaf Sattar, Zahra Fatima Hassan, Asghar Dil Jan and Anum Shafqat. (2012). BMC International Health and Human Rights, 12:32.

http://www.biomedcentral.com/1472-698X/12/32 Ahmed, S. (2013). Recognition of 'Hijra' as Third Gender in Bangladesh. Retrieved June 21, 2018, from https://www.csbronline.org/wp-content/uploads/2016/08/ShaleAhmed_HjraRights_CSBR-ILGAAsia2015.pdf

Angelucci, Manuela, Dean Karlan, and Jonathan Zinman. (2015). Microcredit Impacts: Evidence from a Randomized Microcredit Program Placement Experiment by Compartamos Banco. American Economic Journal: Applied Economics, 7(1): 151–182.

As-Sa'adi, Abd Ar-Rahman ibn Nasir. (2003). Tafsir Saadi. Lahore: Dar-us-Salam.

Banerjee, Abhijit, Esther Duflo, Nathanael Goldberg, Dean Karlan, Robert Osei, William Parienté, Jeremy Shapiro, Bram Thuysbaert, and Christopher Udry. (2015) A Multifaceted Program Causes Lasting Progress for the Very Poor: Evidence from Six Countries. Science: Vol. 348, Issue 6236.

BBC News. (2002, March 6). Egypt crackdown on homosexuals. Retrieved from http://news.bbc.co.uk/2/hi/programmes/crossing_continents/1858469.stm

Bochenek, M., & Knight, K. (2015). Establishing a third gender category in Nepal: Process and Prognoosis. ResearchGate, 12-41.

Burdge, Barb J. (2007). Bending Gender, Ending Gender: Theoretical Foundations for Social Work Practice with the Transgender Community, *Social Work*, Volume 52, Issue 3, 1 July 2007, Pages 243–250.

Cohen-Kettenis, P. T. and L. J. G. Gooren. (1999) Transsexualism: A Review of Etiology, Diagnosis and Treatment. Journal of Psychosomatic Research, Vol. 46, No. 4, pp. 315-333.

Dhaka Law Review. (2014). Protecting the Transgender People in Bangladesh. Retrieved from http://www.dhakalawreview.org/blog/2014/08/protecting-the-transgender-people-in-bangladesh-182.

Dreger, A.D.; Chase, C.; Sousa, A.; Gruppuso, P.A.; Frader, J. (2005). Changing the Nomenclature/Taxonomy for Intersex: A Scientific and Clinical Rationale. Journal of Pediatric Endocrinology & Metabolism, 18, 729-733.

Fehr, T. (2017, December 17). Nepal's New Constitution Leads Region in LGBTI Rights. Retrieved from https://www.huffingtonpost.com/tracy-fehr/nepal-constitution-lgbti-rights_b_8239360.html.

Gates, G. J. (2011). How Many People are Lesbian, Gay, Bisexual and Transgender? *UCLA:*

▶ HUMAN RIGHTS CASE NO. 32005-P/2018

The Williams Institute. Retrieved from https://escholarship.org/uc/item/09h684x2

Gertler, Paul. (2004). "Do Conditional Cash Transfers Improve Child Health? Evidence from PROGRESA's Control Randomized Experiment." American Economic Review: 94(2) 336–41.

Helem. (2017). Human Rights Violations against Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) individuals in Lebanon. Retrieved from https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/LBN/INT_CCPR_ICO_LBN_27152_E.pdf

Home Office. (2017). Country Policy and Information Note Bangladesh: Sexual orientation and gender identity. Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/660538/Bangladesh_-_SOGI_-_CPIN_-_v3.0_Nov_2017_.pdf

HRW Organization. (2013, Jan 26). Ill-treatment-and-torture-vulnerable-groups-lebanese-police-stations. Retrieved from https://www.hrw.org/report/2013/06/26/its-part-job/ill-treatment-and-torture-vulnerable-groups-lebanese-police-stations.

Hulme, David and Karen Moore. (2008). Assisting the Poorest in Bangladesh: Learning from BRAC's 'Targeting the Ultra-poor' Programme. In "*Social Protection for the Poor and Poorest : Concepts, Policies and Politics*" edited by Armando Barrientos, David Hulme. Palgrave Macmillan.

James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality.

Joe Morgan. (2013, July 25). Bangladesh lesbian couple threatened with life in jail for getting married. Retrieved from https://www.gaystarnews.com/article/bangladesh-lesbian-couple-threatened-life-jail-getting-married250713/#gs.lizVp9M

Khan, Faris Ahmed. (2014). "Khwaja Sira: Culture, Identity Politics, and "Transgender" Activism in Pakistan" Dissertations - ALL. Paper 56.

Khan, Shivananda and Khilji, Tahir. (2002). Pakistan Enhanced HIV/AIDS Program: Social Assessment and Mapping of Men Who Have Sex With Men (MSM) In Lahore, Pakistan. Naz Foundation International.

Knight, K. (2017). How Did Nepal Become a Global LGBT Rights Beacon? Retrieved from https://www.hrw.org/news/2017/08/11/how-did-nepal-become-global-lgbt-rights-beacon.

LEBANON 2016 Human Rights Report. (2016). Retrieved from https://www.state.gov/documents/organization/265720.pdf

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Leona, K. A. (2017, March 30). Education for Hijras. Retrieved from https://observerbd.com/details.php?id=66143.

LGBT Rights in Bangladesh (EQUALLDEX). Retrieved from https://www.equaldex.com/region/bangladesh.

LGBT rights in Bangladesh. Retrieved from https://en.wikipedia.org/wiki/LGBT_rights_in_Bangladesh.

LGBT Rights in Egypt(EQUALDEX). (2013, June 4). Retrieved from https://www.equaldex.com/region/egypt.

LGBT rights in Lebanon. Retrieved from https://en.wikipedia.org/wiki/LGBT_rights_in_Lebanon#cite_note-22.

LGBT Rights in Syria(EQUALDEX). Retrieved from https://www.equaldex.com/region/syria.

LGBT rights in Syria. Retrieved from https://en.wikipedia.org/wiki/LGBT_rights_in_Syria.

Marmon, Shaun Elizabeth. (1995). Eunuchs and Sacred Boundaries in Islamic society. New York: Oxford University Press.

Ministry of Social Welfare. (2015, April 5). Living standard development Program for Hijra community. Retrieved from https://msw.gov.bd/site/page/a3498c96-c94a-4fba-9518-13497bdfb46f/Transgender-People.

Newfield, Emily, Stacey Hart, Suzanne Dibble and Lori Kohler. (2006). Female-to-Male Transgender Quality of Life. Quality of Life Research, Vol. 15, No. 9, pp. 1447-1457.

OutWright Action International. Human Rights Report Being Transgender in Iran. Retrieved from https://www.outrightinternational.org/sites/default/files/TransReportEXSum.pdf.

Panipati, Qazi Muhammad Sanuallah, (2002). Tafsir-e-Mazhari. Translated by Malik Muhammad Bostan, Syed Muhammad Iqbal Shah, and Muhammad Anwar Maghalvi. Lahore: Zia-ul-Quran Publications.

Pinknews. (2010). Syrian authorities crack down on gay men. Retrieved from https://www.pinknews.co.uk/2010/06/23/syrian-authorities-crack-down-on-gay-men/.

Qiblawi, T. (2018, May 4). Gay rights come to the fore as Lebanon prepares to vote. Retrieved from https://edition.cnn.com/2018/05/04/middleeast/lebanon-elections-lgbt-rights-intl/index.html.

Rowson, Everett K., The Effeminates of Early Medina, *Journal of the American Oriental Society*, Vol. 111, No. 4 (Oct. - Dec., 1991), pp. 671-693

▶ HUMAN RIGHTS CASE NO. 32005-P/2018

SAARCLAW,IDLO and UNDP. (2011, Nov 8-10). Protective laws related to HIV, Men who have sex with men and transgender people. Retrieved from https://issuu.com/undpasiapacific/docs/rbap-hhd-2013-nepal-legal-reference.

Society, N. L. (2018, Jan 17). Retrieved from https://constituteproject.org/

Srikameswaran, A. (2005). Egypt's Fearful Gays Shy from HIV Testing. Retrieved from http://www.glapn.org/sodomylaws/world/egypt/egnews236.htm.

Supreme Court. (2008, Dec 30). Nepal: Supreme Court Orders Drafting of Same-Sex Partnership/Marriage Law. Retrieved from http://www.loc.gov/law/foreign-news/article/nepal-supreme-court-orders-drafting-of-same-sex-partnershipmarriage-law/.

Surrogacy law around the world. Retrieved from https://www.whereivf.com/ivf-guide-and-vocabulary/surrogacy-law/.

Syria: cleric saves transsexual. (2011). Retrieved from https://web.archive.org/web/20110711080616/http://www.gaymiddleeast.com/news/article17.htm.

The Advocate. (2009). Nepal to lure gay Tourists. Retrieved from https://www.advocate.com/?id=100702.

The Koran Interpreted (1955). Translated by A. J. Arberry. Allen & Unwin Ltd.

UNDP and USAID. (2014). Being LGBT in Asia: Nepal Country Report. Retrieved from http://www.asiapacific.undp.org/content/dam/rbap/docs/Research%20&%20Publications/hiv_aids/rbap-hhd-2014-blia-nepal-country-report.pdf

UNDP. (2015). Leave no one behind: Advancing social, economic, cultural and political inclusion of LGBTI people in Asia and the Pacific. Retrieved from http://www.asia-pacific.undp.org/content/dam/rbap/docs/Research%20&%20Publications/hiv_aids/rbap-hhd-2015-leave-no-one-behind.pdf

United States Department of State, Bureau of Democracy, Human Rights and Labor. (2017). BANGLADESH 2017 HUMAN RIGHTS REPORT. Retrieved from https://www.state.gov/documents/organization/277521.pdf.

Sabates-Wheeler, Rachel and Stephen Devereux. (2008). Transformative Social Protection: The Currency of Social Justice. In "*Social Protection for the Poor and Poorest : Concepts, Policies and Politics*" edited by Armando Barrientos, David Hulme. Palgrave Macmillan.

▶ *MIAN ASIA V. FEDERATION OF PAKISTAN*

PLD 2018 Lahore 54
W.P. No. 31581/2016
Abid Aziz Sheikh, J. (Lahore High Court)

Facts:

Petitioner Mian Asia, transgender, was previously issued a computerized national identity card (CNIC), which has the name "Muhammad Yousaf" as the father's name. Yousaf, the "guru" of the petitioner, passed away on 14.01.2005. Petitioner's CNIC had expired.

Petitioner applied for renewal of the CNIC, however, the renewal was declined by the respondents on the ground that petitioner could not provide the name of his father and name of his "guru" in the parent column is not acceptable.

Mian Asia argued that the CNIC card should not be denied to transgender persons who have been abandoned by their family and therefore are unaware of their parents' identity. Petitioner and many other transgenders were brought up by their "gurus", therefore, their names instead of unknown parents should be included in CNIC. Petitioner argued that the denial of the identification card violated the constitutional right to life, dignity, citizenship, equality, and non-discrimination. On the other hand, initially the stance taken by the respondents was that because petitioner and many other transgenders/eunuchs cannot provide name of their parents, therefore, they cannot be issued CNICs.

Issue:

Whether Mian Asia has a constitutional right to obtain a computerized national identity card.

Decision:

Yes. The Court referenced the colonial laws like the Criminal Tribes Act of 1871 and Section 377 of the Indian Penal Code, 1860 to recognise the history of ridicule and marginalisation faced by the transgender community. The Court held:

"At the time of British Colonial rule, the Criminal Tribes Act, 1871 (Act) was introduced to declare eunuchs (transgenders), a criminal tribe. [...] The Act was not only to attack the dignity of transgenders community, degrading them in social echelons but also to eventually force them to adopt begging and other questionable professions. After British Colonial rule, the Act was repealed in August, 1949, however, the damage done to transgenders remained irreparable. The transgenders lost social respect and various stereotypes have been built to humiliate and discount the transgenders community.

Finally in Year 2009, the august Supreme Court of Pakistan took up the matter in its original jurisdiction in Civil Petition No.43 of 2009 and directions were passed from time to time to recognize the dignity of transgenders and declaring them third gender entitled for equal protection under Article 25 of the Constitution of Islamic Republic of Pakistan, 1973 (Constitution). The apex Court noted that transgenders have been neglected on account of gender disorders in their bodies. They have been denied the right of inheritance as they were neither sons nor daughters who could inherit under Islamic Law and sometime even families intentionally disinherit transgender children. To eliminate this gender based illtreated discrimination against transgenders, the august Supreme Court in Dr. Muhammad Aslam Khaki and

another vs. Senior Superintendent of Police (Operation), Rawalpindi and others (2013 SCMR 187) directed Provincial and Federal Governments to protect transgenders identification, right to inherit property, right to education and right to life which include employment and quality of life.

The matter again brought to the notice of honourable Supreme Court of Pakistan in Dr. Muhammad Aslam Khaki and others vs. SSP (Operations) Rawalpindi and others (PLD 2013 SC 188), when the transgenders were not issued National Identify Cards by NADRA. In compliance of directions issued by apex Court, the NADRA made arrangements to issue CNIC to transgenders and honourable Supreme Court in said judgment reiterated that transgenders be treated equally as other citizens.

With above background of the matter, this Court during these proceedings apprised NADRA authorities that transgenders/eunuchs being citizens of this country are also entitled [to the] same respect, dignity and fundamental rights as are available to the other segments of the society. This Court also apprised the policy makers that in case any transgender/eunuch is not able to provide name of his father, being abandoned by his family, it cannot be a sole ground not to issue him CNIC and to deprive him from his fundamental right of being a citizen of this country. In consequence of these proceedings, the concerned policy makers (NADRA) finally framed a policy dated 21.08.2017 (Policy) to issue CNICs to the transgenders/eunuchs with unknown parentage. [...]

Under the aforesaid policy, the transgenders/eunuchs with unknown parentage will be provided CNIC after fulfilling the procedure prescribed under the policy. The learned counsel for the petitioner submits that under the policy, the grievance of the petitioner has been redressed and he has already been issued CNIC. This Court appreciates the efforts of the policy makers to address this issue and redress the problem and grievance of the petitioner and many other transgenders/eunuchs. However because contents of the policy are not under challenge, therefore, any observation in this judgment will not immune the policy from future judicial review.

Gender identity is one of the most fundamental aspect of life which refer to a person intrinsic sense of being male, female or transgender. Everyone is entitled to enjoy all human rights without discrimination on the basis of gender identity. Everyone has the right to recognition everywhere as a person before the law. This is high time to change mindset of the society and to realize that a person of diverse gender identity shall also enjoy legal capacity in all aspects of life. The transgenders/eunuchs are as respectable and dignified citizens of this country as any other person and they are also entitled for all fundamental rights including right of education, property and right of life which include quality of life and livelihood. They cannot be deprived of their rights including right to obtain CNIC or citizenship for mere reason that they are transgenders/eunuchs and do not know the whereabouts of their parents, without any fault of their own. The public functionaries and policy makers are expected to be more sensitive toward restoring dignity of transgender community rather adding to their existing plight."

• THE NEED FOR CHANGE TOWARDS TRANSGENDER PERSONS RECOGNISED BY COURTS

▶ *NATIONAL LEGAL SERVICES AUTHORITY V. UNION OF INDIA*

5 SCC 438
W.P. No. (Civil) No. 400 of 2012
K.S. Radhakrishnan, J. (Supreme Court of India)

Facts:[39]

In 2012, the National Legal Services Authority, an Indian statutory body constituted to give legal representation to marginalized sections of society, filed a writ petition with the Supreme Court of India. The petition was joined by a non-governmental organization representing the Kinnar transgender community, and an individual who identified himself as a Hijra.

The term Hijra is used to describe the transgender community in South Asia. It usually includes hermaphrodites, and castrated men as well as non-castrated men. The latter usually do not have functional reproductive organs of either sex. The transgender community in South Asia, however, is used to describe a wider range of gender non-conformity. It serves as an umbrella term that includes people who do not identify with the biological gender they were born with, as well as people who may identify as neither gender. This includes hermaphrodites, pre-operative and post-operative transsexuals, as well as transvestites.

The petition sought a legal declaration of their gender identity than one assigned at the time of birth and that non-recognition of their gender identity violates Articles 14 and 21 of the Constitution of India. The transgender community urged that their inability to express themselves in terms of a binary gender denies them the equal protection of law and social welfare schemes. They also prayed for legal protection as a backward community, as well as the right to be able to express their self-identified gender in government forms.

The Additional Solicitor General, representing the government, recognized that the matter represented a serious social issue. He informed the Court that an Expert Committee had already been established by the government to address various problems facing the transgender community.

Issue:

Whether non-recognition of a transgender's gender identity violates the Constitution of India.

Decision:

Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change. [...]

[39] Facts of the case taken from Columbia Global Freedom of Expression: https://globalfreedomofexpression.columbia.edu/cases/national-legal-services-authority-v-union-of-india/

Gender identity is one of the most-fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual person. A person's sex is usually assigned at birth, but a relatively small group of persons may born with bodies which incorporate both or certain aspects of both male and female physiology. At times, genital anatomy problems may arise in certain persons, their innate perception of themselves, is not in conformity with the sex assigned to them at birth and may include pre and post-operative transsexual persons and also persons who do not choose to undergo or do not have access to operation and also include persons who cannot undergo successful operation. Countries, all over the world, including India, are grappled with the question of attribution of gender to persons who believe that they belong to the opposite sex. Few persons undertake surgical and other procedures to alter their bodies and physical appearance to acquire gender characteristics of the sex which conform to their perception of gender, leading to legal and social complications since official record of their gender at birth is found to be at variance with the assumed gender identity. Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category.

Sexual orientation refers to an individual's enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homosexuals, [bisexuals], heterosexuals, asexual etc. Gender identity and sexual orientation, as already indicated, are different concepts. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.

[...] Article 6 of the Universal Declaration of Human Rights, 1948 and Article 16 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) recognize that every human being has the inherent right to live and this right shall be protected by law and that no one shall be arbitrarily denied of that right. Everyone shall have a right to recognition, everywhere as a person before the law. Article 17 of the ICCPR states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation and that everyone has the right to protection of law against such interference or attacks. [The] International Commission of Jurists and the International Service for Human Rights on behalf of a coalition of human rights organizations, took a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and sexual identity to bring greater clarity and coherence to State's human rights obligations. [...] [The] Yogyakarta Principles address a broad range of human rights standards and their application to issues of sexual orientation gender identity, [and they state, in part:]

- PRINCIPLE 1. THE RIGHT TO THE UNIVERSAL ENJOYMENT OF HUMAN RIGHTS. All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights. [...]

- PRINCIPLE 2: THE RIGHTS TO EQUALITY AND NONDISCRIMINATION. Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.

  Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.

- PRINCIPLE 3: THE RIGHT TO RECOGNITION BEFORE THE LAW. Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

- PRINCIPLE 4: THE RIGHT TO LIFE. Everyone has the right to life. No one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity. The death penalty shall not be imposed on any person on the basis of consensual sexual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity.

- PRINCIPLE 6: THE RIGHT TO PRIVACY. Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others.

- PRINCIPLE 9. THE RIGHT TO TREATMENT WITH HUMANITY WHILE IN DETENTION. Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person's dignity.

- PRINCIPLE 18. PROTECTION FROM MEDICAL ABUSES. No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.

- PRINCIPLE 19. THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION. Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.

UN bodies, Regional Human Rights Bodies, National Courts, Government Commissions and the Commissions for Human Rights, Council of Europe, etc. have endorsed the Yogyakarta Principles and have considered them as an important tool for identifying the obligations of States to respect, protect and fulfill the human rights of all persons, regardless of their gender identity. [...]

When we examine the rights of transsexual persons, who have undergone SRS, the test to be applied is not the "Biological test", but the "Psychological test", because psychological factor and thinking of transsexual has to be given primacy than binary notion of gender of that person. Seldom people realize the discomfort, distress and psychological trauma, they undergo and many of them undergo "Gender Dysphoria' which may lead to mental disorder. Discrimination faced by this group in our society, is rather unimaginable and their rights have to be protected, irrespective of chromosomal sex, genitals, assigned birth sex, or implied gender role. Rights of transgenders, pure and simple, like Hijras, eunuchs, etc. have also to be examined, so also their right to remain as a third gender as well as their physical and psychological integrity. [...]

Indian Law, on the whole, only recognizes the paradigm of binary genders of male and female, based on a person's sex assigned by birth, which permits gender system, including the law relating to marriage, adoption, inheritance, succession and taxation and welfare legislations. [...] Due to the absence of suitable legislation protecting the rights of the members of the transgender community, they are facing discrimination in various areas and hence the necessity to follow the International Conventions to which India is a party and to give due respect to other non-binding International Conventions and principles. Constitution makers could not have envisaged that each and every human activity be guided, controlled, recognized or safeguarded by laws made by the legislature. Article 21 has been incorporated to safeguard those rights and a constitutional Court cannot be a mute spectator when those rights are violated, but is expected to safeguard those rights knowing the pulse and feeling of that community, though a minority, especially when their rights have gained universal recognition and acceptance. [...]

[...] Courts in India would apply the rules of International law according to the principles of comity of Nations, unless they are overridden by clear rules of domestic law. [...] In the case of Jolly George Varghese v. Bank of Cochin (1980) 2 SCC 360, the Court applied the above principle in respect of the International Covenant on Civil and Political Rights, 1966 as well as in connection with the Universal Declaration of Human Rights. India has ratified the above

mentioned covenants, hence, those covenants can be used by the municipal courts as an aid to the Interpretation of Statutes by applying the Doctrine of Harmonization. But, certainly, if the Indian law is not in conflict with the International covenants, particularly pertaining to human rights, to which India is a party, the domestic court can apply those principles in the Indian conditions.

[...] Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions, e.g., Articles 14, 15, 19 and 21 of the Constitution to enlarge the meaning and content thereof and to promote the object of constitutional guarantee. Principles discussed hereinbefore on transgenders and the International Conventions, including Yogyakarta principles, which we have found not inconsistent with the various fundamental rights guaranteed under the Indian Constitution, must be recognized and followed, which has sufficient legal and historical justification in our country.

ARTICLE 14 AND TRANSGENDERS

Article 14 of the Constitution of India states that the State shall not deny to "any person" equality before the law or the equal protection of the laws within the territory of India. Equality includes the full and equal enjoyment of all rights and freedom. [...] Article 14 of the Constitution also ensures equal protection and hence a positive obligation on the State to ensure equal protection of laws by bringing in necessary social and economic changes, so that everyone including TGs may enjoy equal protection of laws and nobody is denied such protection. Article 14 does not restrict the word 'person' and its application only to male or female. Hijras/transgender persons who are neither male/female fall within the expression 'person' and, hence, entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country.

[...] Hijras/transgender persons have been facing extreme discrimination in all spheres of the society. Non-recognition of the identity of Hijras/transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police. Sexual assault, including molestation, rape, forced anal and oral sex, gang rape and stripping is being committed with impunity and there are reliable statistics and materials to support such activities. Further, non-recognition of identity of Hijras /transgender persons results in them facing extreme discrimination in all spheres of society, especially in the field of employment, education, healthcare etc. Hijras/transgender persons face huge discrimination in access to public spaces like restaurants, cinemas, shops, malls etc. Further, access to public toilets is also a serious problem they face quite often. Since, there are no separate toilet facilities for Hijras/transgender persons, they have to use male toilets where they are prone to sexual assault and harassment. Discrimination on the ground of sexual orientation or gender identity, therefore, impairs equality before law and equal protection of law and violates Article 14 of the Constitution of India.

ARTICLES 15 & 16 AND TRANSGENDERS

Articles 15 and 16 prohibit discrimination against any citizen on certain enumerated grounds, including the ground of 'sex'. In fact, both the Articles prohibit all forms of gender bias and gender based discrimination.

Article 15 states that the State shall not discriminate against any citizen, inter alia, on the ground of sex, with regard to (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

The requirement of taking affirmative action for the advancement of any socially and educationally backward classes of citizens is also provided in this Article.

Article 16 states that there shall be equality of opportunities for all the citizens in matters relating to employment or appointment to any office under the State. Article 16 (2) of the Constitution of India reads as follows: "16(2). No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State."

Article 16 not only prohibits discrimination on the ground of sex in public employment, but also imposes a duty on the State to ensure that all citizens are treated equally in matters relating to employment and appointment by the State.

Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be addressed. Constitution makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders. Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of 'sex' under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression 'sex' used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female.

TGs have been systematically denied the rights under Article 15(2) that is not to be subjected to any disability, liability, restriction or condition in regard to access to public places. TGs have also not been afforded special provisions envisaged under Article 15(4) for the advancement of the socially and educationally backward classes (SEBC) of citizens, which they are, and hence legally entitled and eligible to get the benefits of SEBC. State is bound to take some affirmative action for their advancement so that the injustice done to them for centuries could be remedied. TGs are also entitled to enjoy economic, social, cultural and political rights without discrimination, because forms of discrimination on the ground of gender are violative of fundamental freedoms and human rights. TGs have also been denied rights under Article 16(2) and discriminated against in respect of employment or office under the State on the ground of sex. TGs are also entitled to reservation in the matter of appointment, as envisaged under Article 16(4) of the Constitution. State is bound to take affirmative action to give them due representation in public services.

Articles 15(2) to (4) and Article 16(4) read with the Directive Principles of State Policy and various international instruments to which Indian is a party, call for social equality, which the

TGs could realize, only if facilities and opportunities are extended to them so that they can also live with dignity and equal status with other genders.

ARTICLE 19(1)(a) AND TRANSGENDERS

Article 19(1) of the Constitution guarantees certain fundamental rights, subject to the power of the State to impose restrictions from exercise of those rights. The rights conferred by Article 19 are not available to any person who is not a citizen of India. Article 19(1) guarantees those great basic rights which are recognized and guaranteed as the natural rights inherent in the status of the citizen of a free country. Article 19(1) (a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. Self-identified gender can be expressed through dress, words, action or behavior or any other form. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution.

[...] [T]he freedom of expression guaranteed under Article 19(1)(a) includes the freedom to express one's chosen gender identity through varied ways and means by way of expression, speech, mannerism, clothing etc.

Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(a) of the Constitution of India. A transgender's personality could be expressed by the transgender's behavior and presentation. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the Constitution of India and the State is bound to protect and recognize those rights.

ARTICLE 21 AND THE TRANSGENDERS

Article 21 of the Constitution of India reads as follows: "21. Protection of life and personal liberty – No person shall be deprived of his life or personal liberty except according to procedure established by law."

Article 21 is the heart and soul of the Indian Constitution, which speaks of the rights to life and personal liberty. Right to life is one of the basic fundamental rights and not even the State has the authority to violate or take away that right. Article 21 takes all those aspects of life which go to make a person's life meaningful. Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc. Right to dignity has been recognized to be an essential part of the right to life and accrues to all persons on account of being humans. [...]

Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one's sense of being as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution.

[...] [P]ersonal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.

[...] Hijras/Eunuchs, therefore, have to be considered as Third Gender, over and above binary genders under our Constitution and the laws.

[...] Binary notion of gender reflects in the Indian Penal Code, for example, Section 8, 10, etc. and also in the laws related to marriage, adoption, divorce, inheritance, succession and other welfare legislations like NAREGA, 2005, etc. Non-recognition of the identity of Hijras/Transgenders in the various legislations denies them equal protection of law and they face widespread discrimination.

Article 14 has used the expression "person" and the Article 15 has used the expression "citizen" and "sex" so also Article 16. Article 19 has also used the expression "citizen". Article 21 has used the expression "person". All these expressions, which are "gender neutral" evidently refer to human-beings. Hence, they take within their sweep Hijras/Transgenders and are not as such limited to male or female gender. Gender identity as already indicated forms the core of one's personal self, based on self identification, not on surgical or medical procedure. Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as third gender. [...]

We, therefore, declare:

(1) Hijras, Eunuchs, apart from binary gender, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.
(2) Transgender persons' right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.
(3) We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.
(4) Centre and State Governments are directed to operate separate HIV Sero-surveillance Centres since Hijras/Transgenders face several sexual health issues.
(5) Centre and State Governments should seriously address the problems being faced by Hijras/Transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one's gender is immoral and illegal.
(6) Centre and State Governments should take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.
(7) Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.
(8) Centre and State Governments should take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables.

(9) Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.

• DELAY BY THE VICTIM IN REPORTING RAPE

▶ ***MEHBOOB AHMAD V. THE STATE***
1999 SCMR 1102
Criminal Appeal No. 42 (S) of 1998, decided on 5 March 1999
Maulana Muhammad Taqi Usmam and Dr. Mehmood Ahmad Ghazi, JJ. (Supreme Court of Pakistan)

Facts:

The prosecutrix Saima Bibi, 11 to 12 years old, alleged that appellant raped her. There were efforts to bring about reconciliation between the parties which failed because Saima's ailing father did not agree to condone the offense. As a result, there was a delay of around 4 days in lodging the FIR.

Issue:

Whether or not the delay in reporting the crime should be taken against the complainant.

Decision:

No. We cannot be unmindful of the prevailing taboos in our society. Even in modern day advanced societies, for and on account of the prevalent predilections, many cases of rape go unreported. A victim of rape should not be penalized on account of ostensible delay in reporting what she has undergone. On the contrary, kindness, encouragement and understanding re the requirements to approbate a victim's difficult decision to purge the society of perpetrators of such heinous offenses.

▶ ***MUHAMMAD UMAR V. THE STATE***
1999 P Cr. L J 699
Criminal Appeal No. 89/Q of 1997, decided on 27 March 1998
Mian Mehboob Ahmed, C.J. and Ch. Ejaz Yousaf, J. (Federal Shariat Court)

Facts:

The complainant, father of the 11-year old victim, alleged that his stepbrother-in-law named Raja visited the complainant's family in their home. As the complainant was about to go to Sindh to visit his relatives, he requested Raja to extend his stay. When the complainant came back to his house on 24-6-1994, neither Raja, his wife, nor his children were present. The complaint searched for them but his efforts proved unfruitful. The FIR was lodged on 23-8-1994.

Three years later, the complainant found them. His daughter contended that she was abducted by the accused, confined forcibly in the house of one Muhammad Din, and was subjected to Zina-bil-Jabr by the appellant, due to which she became pregnant.

Before the court, the appellant contended, among others, that the FIR was lodged with a delay of about 2 months.

Issue:

Whether or not the delay in reporting the crime should be taken against the complainant.

Decision:

No. Record reveals that the delay in lodging the F.I.R. has been properly explained at the trial by the prosecution witnesses. It has come in evidence that the complainant subsequent to the occurrence had initially tried to search out the abductees in the area. Thereafter, he went to Tehsil Bachalwah in Jacobabad District in order to make an inquiry from Muhammad Saleh Marhata, father of the absconding accused Raja Marhata. Unsuccessful in tracing out the abductees he, according to him, again came back to Jatpat and reported the matter to the elders and notables of his tribe and area and on their persuasion, ultimately reported the matter to the police. This portion of complainant's statement has not been challenged by the defence at the trial. Therefore, to our mind, nothing on record is available to disbelieve the explanation offered by the complainant. Even otherwise, delay of such type in reporting the occurrence of this sort to the police is not uncommon in this country, particularly in the tribal society where people are normally hesitant to report to the police the matters concerning womenfolk and involving their honour. Thus, this contention raised by the appellant, in our view, has no force.

▶ ***PEOPLE V. ILAO***
G.R. Nos. 152683-84
December 11, 2003
(Supreme Court of the Philippines)

Facts:

On appeal is the decision of the Regional Trial Court convicting appellant Leonardo Ilao of two counts of rape (allegedly committed on November 18, 1999 and December 9, 1999).

The accused asserts, among others, that the delay of the complainant in reporting her alleged rape shows that no such rape occurred. The complainant revealed her ordeal to her husband on December 19, 1999. It took the family two days to decide on their course of action. On December 21, 1999, the complainant, her husband, and their daughter resolved to bring charges against appellant before the barangay (village) officials. A week after, on December 27, 1999, upon the prodding of their relatives, they sought the assistance of the National Bureau of Investigation office and executed their sworn statements thereat. The complainant later submitted herself to a physical examination.

Issue:

Whether or not the delay in reporting the crime should be taken against the complainant.

Decision:

No. While indeed the victim might have tarried in reporting her defilement, yet the delay is explained by the fear generated by appellant in the mind of complainant. The hiatus in reporting the crime does not extricate appellant from his predicament. As the trial court found, complainant did not divulge the first incident of rape out of fear for her life and that of her family. She could have kept her ordeal forever in silence were it not for the second incident which engendered her continuing fear of a repetition thereof, unless she could put a

stop to it. This reaction appears typical of a woman who has been abused. Rape is a harrowing experience and the shock concomitant to it may linger for a while. It is upon this fear springing from the initial rape that the perpetrator hopes to build a climate of psychological terror, which could numb his victim to submissiveness.

▶ ***PEOPLE V. ILAGAN***
G.R. No. 144595
August 6, 2003
(Supreme Court of the Philippines)

Facts:

On appeal is the decision of the Regional Trial Court convicting appellant Dante Ilagan of one count of qualified rape[40] (allegedly committed on May 19, 1998).

The accused asserts, among others, that the delay of the complainant (his daughter) in reporting her alleged rape shows that no such rape occurred. It was only on December 10, 1998, while the accused was in another province, that the complainant told her friend, Jocelyn, about the sexual assault by her father. They went to the Department of Social Welfare and Development, which brought the complainant to the Norzagaray Police where she gave her sworn statement. Thereafter, she was brought to the Philippine National Police Provincial Crime Laboratory for physical examination.

Issue:

Whether or not the delay in reporting the crime should be taken against the complainant.

Decision:

No. Suffice it to state that delay and the initial reluctance of a rape victim to make public the assault on her virtue is neither unknown or uncommon. Rape is a traumatic experience, and the shock concomitant with it may linger for a while. Oftentimes, the victim would rather bear the ignominy and the pain in private, rather than reveal her shame to the world or risk the rapists carrying out his threat to harm her.

• RELEVANCE OF MORAL CHARACTER OR VIRGINITY OF THE VICTIM

▶ ***PEOPLE V. ILAO***
G.R. Nos. 152683-84
December 11, 2003
(Supreme Court of the Philippines)

Facts:

On appeal is the decision of the Regional Trial Court convicting appellant Leonardo Ilao of two counts of rape (allegedly committed on November 18, 1999 and December 9, 1999).

[40] Since the complainant at the time of the offense was younger than 18 years old, and the accused was her father.

The accused asserts, among others, that the complainant was married, no longer a virgin, and older than him by 5 years.

Issue:

Whether or not these facts bear on the rape charge.

Decision:

No. The assertion of appellant that private complainant was a married woman, and was no longer a virgin, will not exculpate him from criminal liability for rape. Well-settled is the rule that in rape cases, virginity of the victim is not an element of rape. The fact that private complainant was older than appellant by 5 years does not excuse nor mitigate the heinous nature of the sexual molestation. Whether or not appellant is younger than complainant is not relevant in rape cases as force or intimidation is relative and need only be sufficient to consummate the crime.

▶ ***PEOPLE V. NAVARRO, ET AL.***
G.R. No. 137597
October 24, 2003
(Supreme Court of the Philippines)

Facts:

On appeal is the decision of the Regional Trial Court convicting appellants Jason S. Navarro and Solomon S. Navarro of rape.

At around 11:30 p.m. of July 26, 1998, the 16 year old complainant, a freshman in college, had just finished working on a project in her classmate's house and was walking along Osmeña Boulevard. A slow moving vehicle driven by appellant Jason Navarro, with Reynante Olila in the front passenger seat and appellant Solomon Navarro and Roberto Olila at the backseat, approached her and asked for directions to any exit in the vicinity. The complainant obliged by pointing to the direction of "Baseline". The four, however, claiming to be from another city and appearing to be still lost, continued asking for directions. Taking pity on them, the victim decided to accompany them to "Baseline" and boarded the vehicle, sitting in between Jason and Reynante at the front seat.

When they reached "Baseline", the complainant told the group that she had to go down, but Jason accelerated the speed of the vehicle, insisting on going around with her.

The group then went to Lahug City where Jason, Reynante and the complainant alighted and purchased liquor at a convenience store as Solomon and Roberto remained in the vehicle. The group, along with the complainant, continued going around until at 2:00 a.m. of the following day, July 27, 1998, when they reached a secluded place where the four men drank gin and lime juice outside the vehicle as the complainant stayed inside.

At around 4:00 a.m. of still the same day, July 27, 1998, the group together with the complainant proceeded to the reclamation area at Mandaue City where the vehicle suddenly stopped. Jason allegedly raped the complainant as she was held by Solomon.

Among other assertions, the accused impugned the character of the complainant and alleged that the sexual encounter was consensual because she had the opportunity to leave.

Issue:

Whether these factors bear on the charge of rape.

Decision:

No. The defense's attempt to depict the victim as a woman of loose morals deserves scant consideration. The victim's character or reputation is immaterial in rape, there being absolutely no nexus between it and the odious deed committed. A woman of loose morals could still be the victim of rape, the essence thereof being carnal knowledge of a woman without her consent.

The argument of appellants that the victim must have consented to the sexual act, if indeed there was, because she acquiesced to go with them and had the opportunity to leave their company at any time she wished, is a non sequitur. Freely going with a group for a ride around is one thing; freely having sex with one of the members thereof is another.

▶ ***PEOPLE V. SUAREZ, ET AL.***
G.R. Nos. 153573-76
April 15, 2005
(Supreme Court of the Philippines)

Facts:

On appeal is the decision of the Regional Trial Court convicting appellant of rape.

With the permission of her mother, on September 15, 2001, the complainant (14 years old) attended the birthday party of one of the accused in his house. She arrived around 10pm, accompanied by other friends.

The celebration lasted until the early morning of September 16, 2001. When it was over, the complainant slept on the sofa while the accused-appellant, Santiago, and Ricarte, slept on the mat spread out beside the sofa.

At around 2 o'clock in the morning of September 16, 2001, accused-appellant suddenly pulled down the complainant to the floor, forcibly undressed her and inserted his penis into her vagina. She could not shout as accused-appellant covered her mouth with clothes. While she was being raped by accused-appellant, Santiago and Ricarte held her hands and thighs, sucked her breasts and kissed her body. Jenalyn tried to awaken the others to no avail. When the complainant momentarily freed herself from accused-appellant, she ran to the comfort room nearby but the latter pursued her and, while sporting a knife, raped her again.

When her mother later learned of her ordeal, they immediately reported the incident to the police. On September 26, 2001, Jenalyn was examined by Dr. Michael A. Maunahan, who found deep, healed hymenal lacerations about 5-11 days old.

In his defense, the accused-appellant impugned the character of the complainant.

Issue:

Whether or not the character of the complainant bears on the charge of rape.

Decision:

No. In a last ditch effort to discredit the 14-year-old complainant, the defense attempted to picture her as a girl of loose morals. Suffice it to state that such debasement of her character does not necessarily cast doubt on her credibility, nor does it negate the existence of rape. It is a well-established rule that in the prosecution and conviction of an accused for rape, the victim's moral character is immaterial, there being absolutely no nexus between it and the odious deed committed. Even a prostitute or a woman of loose morals can be the victim of rape, for she can still refuse a man's lustful advances.

▶ ***STATE OF PUNJAB V. GURMIT SINGH & ORS***
1996 AIR 1393
16 January 1996
Dr. Anand, J (Supreme Court of India)

Facts:

This case involves the abduction and rape of a female minor, who is under 16 years of age. The respondents were acquitted of the charge of abduction and rape. Hence the appeal under Section 14 of the Terrorist Affected Areas (Special Courts) Act, 1984.

Issue:

Whether or not the accused are guilty beyond reasonable doubt of the crimes of abduction and rape.

Decision:

Yes. In deciding the case, the Supreme Court castigated the trial court for casting a stigma on the character of the rape victim, as follows:

> "The trial court not only erroneously disbelieved the prosecutrix, but quite uncharitably and unjustifiably even characterized her as a girl "of loose morals" or "such type of a girl". What has shocked our judicial conscience all the more is the inference drawn by thecourt, based on no evidence and not even on a denied suggestion, to the effect:
>
> > "The more probability is that (prosecutrix) was a girl of loose character. She wanted to dupe her parents that she resided for one night at the house of her maternal uncle, but for the reasons best known to her she does not do so and she preferred to give company to some persons."
>
> We must express our strong disapproval of the approach of the trial court and its casting a stigma on the character of the prosecutrix. The observations lack sobriety expected of a Judge. Such like stigmas have the potential of not only discouraging an even otherwise reductant victim of sexual assault to bring forth [a] complaint for trial of criminals, thereby making the society to suffer by letting the criminal escape even a trial. The courts are expected to use self-restraint while recording such findings which have larger repercussions so far as the future of the victim of the sex crime is concerned and even

wider implications on the society as a whole-where the victim of crime is discouraged-the criminal encouraged and in turn crime gets rewarded! Even in cases, unlike the present case, where there is some acceptable material on the record to show that the victim was habituated to sexual intercourse, no such inference like the victim being a girl of "loose moral character" is permissible to be drawn from that circumstance alone. Even if the prosecutrix, in a given case, has been promiscuous in her sexual behavior earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone had everyone. No stigma, like the one as cast in the present case should be cast against such a witness by the Courts, for after all it is the accused and not the victim of sex crime who is on trial in the Court.

As a result of the aforesaid discussion, we find that the prosecutrix has made a truthful statement and the prosecution has established the case against the respondents beyond every reasonable doubt."

• WHETHER ABSENCE OF VISIBLE INJURY NEGATES SEXUAL ASSAULT, FORCED RAPE OR FORCED SODOMY

▶ ***PEOPLE V. ILAO***
G.R. Nos. 152683-84
December 11, 2003
(Supreme Court of the Philippines)

Facts:

On appeal is the decision of the Regional Trial Court convicting appellant Leonardo Ilao of two counts of rape.

First count of rape: The accused-appellant pointed a knife at the complainant and shoved her into the room. It was during that fraction of time that the complainant's eldest daughter, Rose, arrived from the store and saw the ruckus. Appellant swiftly grabbed Rose by the hair, poked a knife at her, and rammed her inside the room with her mother.

At first, Zenaida tried kicking appellant. Ilao then mercilessly beat her at the upper right torso which made her writhe with pain. With his prey neutralized and weakened, appellant sexually assaulted the complainant. In her weakened state, she could not put up any further resistance; she wept after her ravishment and dishonor.

Rose, who was down on the floor, saw the entire monstrous assault by appellant on her mother. But Rose could do nothing but cower in overwhelming fear.

Second count of rape: The circumstances are almost similar to the first rape, except that this time the appellant used an ice pick instead of a knife.

Issue:

Whether or not the fact that Zenaida did not resist or attempt to flee or shout for help negates force or intimidation.

Decision:

No. Different people react differently when confronted by a shocking or a harrowing and unexpected incident, for the workings of the human mind when placed under emotional stress are unpredictable. Some people may cry out, some may faint, some may be shocked into insensibility, while others may appear to yield to the intrusion. Moreover, in rape cases, physical resistance need not be established when intimidation is exercised upon the victim and the latter submits herself out of fear. Intimidation is addressed to the mind of the victim and is therefore subjective. Here, the victim categorically described the force and intimidation exerted with the use of lethal weaponry (knife and ice pick) when she was ravished. Mentally, she was revolted at the sexual assault. Indeed with a knife poked at her, physical resistance was not only futile but truly hazardous and might cost her life and, in the first incident, that also of her daughter.

▶ ***PEOPLE V. ILAGAN***
G.R. No. 144595
August 6, 2003
(Supreme Court of the Philippines)

Facts:

On appeal is the decision of the Regional Trial Court convicting appellant Dante Ilagan of one count of qualified rape[41] (allegedly committed on May 19, 1998).

The complainant averred that while she was asleep, she was awakened by someone taking off her shorts and panties. She saw appellant (her father), naked from the waist down, lying on top of her. Appellant inserted his penis into her vagina, causing her pain. She was unable to cry for fear that appellant might kill her since he had threatened to kill her before. Appellant stopped the sexual intrusion when a substance, which looked like phlegm, came out of his penis.

The accused asserts, among others, that the complainant's failure to resist the assault impairs her credibility.

Issue:

Whether or not the complainant's failure to resist the assault impairs her credibility.

Decision:

No. Physical resistance need not be established in rape when intimidation is exercised upon the victim herself. As held in People v. Las Pinas, Jr., the test is whether the intimidation produces a reasonable fear in the mind of the victim that if she resists or does not yield to the desires of the accused, the threat would be carried out. When resistance would be futile, offering none at all does not amount to consent to sexual assault. The law does not impose upon a rape victim the burden of proving resistance.

[41] Since the complainant at the time of the offense was younger than 18 years old, and the accused was her father.

▶ *MAHRAJ DIN V. EMPEROR*

AIR 1927 Lahore 222
Criminal Appeal No. 1178 of 1926, Decided on 11 January 1927
Zafar Ali, J.

Facts:

The appellant, Mahraj Din, 18 years of age, was convicted of rape of a five-year old female child. The child, stripped of her trousers, was found seated on the naked thighs of the accused. However, there was no bleeding from her private parts with the exception of fresh redness at the entrance to the vagina. The girl bore no other mark of injury and her hymen was intact. She also did not cry out.

Issue:

Whether or not the crime committed was rape.

Decision:

No. As the trousers of the child had been taken off and were lying on the ground close by, it is difficult to see how they could be soiled with blood, etc. Further, the child could not have bled as she bore no wound nor was there anywhere a rupture of her skin. The mother of the child stated that there were only two or three drops of blood. The police found no blood on the trousers of the accused, nor on the trousers of the girl; but the Chemical Examiner detected blood on the trousers of the accused but no semen on either. It cannot be said that the invisible stain of blood on the trousers of the appellant was caused by the blood of the girl.

What the doctor had originally observed was redness and not a bruise. However, he could not positively say that the redness of the labia was the result of an attempt to effect penetration. As the girl did not cry out, it appears that she felt no pain which an attempt to effect penetration resulting in discharge of blood must have naturally caused. Her mother stated that she began to cry on seeing her. This indicates that she had not cried before that. But at that stage the accused had already gratified his lust if there was semen on the thighs of the girl.

It may therefore be safely concluded that there was no bleeding from the private parts of the girl and that the redness of the labia might or might not have been the result of the act of the appellant.

The appellant concedes that he did make an indecent assault, but he contends that he was not guilty of rape. This however was not merely an indecent assault. From the state in which the appellant and the child were found together, it may be inferred that he attempted, though unsuccessfully, to effect penetration. It may be observed here that though rupture of the hymen is by no means necessary in law, the Courts are reluctant to believe that there could have been penetration without that which is so very near to the entrance having been ruptured.

The appellant is therefore guilty of an attempt to commit rape. The conviction was altered accordingly.

▶ ***THE STATE V. SHABBIR ALIAS KAKA S/O MOZA JHAMKE AND FOZIA BIBI***
FIR No 1499/10
October 4, 2012
Jazeela Aslam, Additional Sessions Judge

Facts:

This was a case of rape. Medical examination revealed that the 14/15-year-old victim looked frightened and disoriented. There was no mark on her body. Local examination revealed fresh bleeding from her vagina, a torn hymen and a lacerated wound on the side of her vagina.

Decision:

The statement of the victim that the accused persons committed rape one by one when she was under their significant control must be accepted as true. Obviously, she being under fear could not raise any alarm and if she did, nobody would have heard or come to her rescue, as it was a cold winter midnight of 27th and 28th December. Also if there is no mark of violence on the visible parts of her body, it is not indicative of non- resistance. The peculiar circumstances of the case are such as altogether exclude the elements of consent and character of a girl of the age of 14/15 years.

• WHETHER WOMEN RAPE VICTIMS ARE UNRELIABLE – AND THEIR EVIDENCE MUST BE CORROBORATED

▶ ***AMAN ULLAH V. THE STATE***
PLD 2009 SC 542
Criminal Petition No. 250-L of 2009, decided on 29 May 2009
Khalil-Ur-Reman Ramday, Faqir Muhammad Khokhar and Mahmood Akhtar Shahid Siddiqui, JJ (Supreme Court)

Facts:

The petitioner is accused of rape, but bail was sought on the ground that the petitioner had been found innocent by the Investigating Officer who had even recommended his discharge from the case.

According to the medico-legal examination of the prosecution, the rape victim was about 18 years of age at the time of occurrence. Her hymen was found torn at multiple places, which bled on touch. Her vagina admitted two fingers but rightly and painfully.

The police file showed that the accused had been declared innocent and his discharge recommended only because C.A.M.B. Forensic Science Laboratory had found, after the DNA test, that the traces of semen found in the vagina were not those of the accused. However, no reason was offered to explain the alleged substitution of the accused with the person who had actually committed the crime.

Issue:

Whether the accused is entitled to bail on the ground that the DNA test shows that it was not his semen found in the victim's vagina.

Decision

No. Reports of so-called experts are only corroborative in nature and are required only when the ocular testimony is of a doubtful character. In the present case, no reasons could be offered as to why the prosecutrix who had admittedly been subjected to sexual intercourse, should have spared the actual offender and should have, instead substituted the accused for him. In the circumstances, at least prima facie and for the purpose of bail petition, it could not be said that the testimony offered by the prosecutrix could admit of any doubt.

We would like to add that it is for the first time that we have noticed a D.N.A. test being used in such a case. We therefore feel compelled to place our warning on record that unless one was absolutely sure and confident of the capacity, the competence, and the veracity of the Laboratory, as well as the integrity of the one conducting such a test, taking recourse to the same would be fraught with immense dangers and could in fact lead to disastrous consequences not only in criminal cases but even in cases, for example, of paternity and inheritance etc. In the present case, at least prima facie, we find the laboratory report in question, a doubtful affair.

▶ ***IMRAN V. THE STATE***
2016 PCr LJ 1888
Criminal Bail Application No. 524 of 2016, decided on 30 May 2016
Zulfiqar Ahmad Khan, J. (Sindh High Court)

Facts:

The prosecutrix claimed that while she was at home, the accused Imran called her up to ask her to come out of her home. She acceded, and was thereafter was taken on a motorcycle driven by Imran to a vacant room. She alleged that the accused raped her there, and subsequently she was brought by the accused to the house of his relatives. His relatives threatened her and would have her marry the accused, but she was not ready to marry Imran. She was then beaten up. Thereafter, the accused Imran and his elder brother Faisal took her on motorcycle and left her near her home, but also forcibly put petrol in her mouth.

Before the court, the accused alleged that: (i) the prosecutrix consented to the sexual intercourse as she had accompanied the accused of her own will; and (ii) the results of the DNA Test Report – which stated that "no human male profile was identified in the vaginal swab" – are in favour of the accused.

Issue:

Whether the complainant consented to sexual intercourse, and whether the DNA Test Report has evidentiary value.

Decision

Section 375 of P.P.C. states the following:

"375. Rape:-
A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the following descriptions,
(i) against her will;
(ii) without her consent;

(iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt;
(iv) with her consent, when the man knows that he is not married to her and that consent is given because she believes that the man is another person to whom she is or believes herself to be married; or
(v) with her consent when she is under sixteen years of age.

Explanation: Penetration is sufficient to constitute the intercourse necessary to the offence of rape."

Also of relevance is section 90, which states that: "A consent is not such a consent as is intended by any action of this Code if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception."

As could be seen from the special provisions or section 375, "will' and "consent" are differentiated, meaning thereby even if there is will but no consent, rape will be actualized, and vice versa. To start with, I would thus like to focus on the first ingredient of section 375 being 'against her will', which relates to psychological state of the prosecutrix (as compared to 'without her consent', which refers to action and performative). The word 'will' implies the faculty of reasoning power of mind that determines whether to do an act or not. There is a fine distinction between an act done 'against the will' and 'an act done without consent'. Every act done 'against the will' is obviously 'without the consent.' But every act 'without the consent' is not 'against the will.' To me clause (I) of section 375 applies where the woman is in possession of her senses and therefore capable of consenting. Courts have explained that the expression 'against her will' ordinarily means that the intercourse was done by a man with a woman despite her resistance and opposition.

Here, examination of the statement of the victim and the evidence clearly shows that she was not a consenting party, and the rape was committed against her will. The testimony of the victim in cases of rape is held to be of vital significance and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Court ought not to find any difficulty in convicting the accused on the prosccutrix's testimony alone. (2007 SCMR 605 and PLD 2011 SC 554)

With regard to the second ingredient of section 375, being that the act was done 'without her consent', I note that though the victim's consent for taking her out of her home was obtained on the basis of friendship or allurement with hidden intent, consent of this nature which is based on fraud, cannot be termed, prima facie, to conclude that she consented to the sexual act also. Had the victim known that ultimately she would be raped, there is no doubt in my mind that she would not have left home with the accused.

With regard to the second assertion that the DNA Test Report dated 29.01.2016 declared "No human male DNA profile identified in the vaginal swab", I note from the said report that the case was received at the National Forensic Science Agency on 16.11.2015. While per FIR, rape was committed on 11.09.2015, which means that whatever swab samples were presented to the said DNA Laboratory, they were more than two months old. It is not sure how these samples were preserved in this long period of time since external factors (such as tempera-

ture and humidity) and internal factors (other bodily fluids) alter the validity of a sample. Studies show that the earlier the samples are collected and tested, the higher the chances of yielding solid results. DNA testing from vaginal swabs can reliably lead to an offender only if the sample is tested within the first 7 days of rape. Therefore the conclusion given in the said report of non-finding of a male DNA from the swab tested after more than two months of rape is not surprising at all.

Thus, it appears that there is enough material to arrive at the prima facie conclusion that the applicant was involved in the offence, as well as, added with the fear that the applicant, belonging to a relatively influential class, if released on bail at this stage it is most likely that he would intimidate or influence the victim and/or the witnesses. One could also imagine a strong likelihood that in the above circumstances, the victim would make herself scarce and might flee from the justice, I am therefore not inclined to grant bail at this stage.

▶ *THE STATE V. MUHAMMAD AFZAL S/O GHULAM HAIDE*

FIR No.109/2010
January 19, 2012
Amjad Ali Shah, Additional Sessions Judge

Observations:

- "Needless to say that in cases of zina-bil-jabr/ rape there is seldom an eyewitness because such type of crimes are committed away from the public places but there is a plethora of case law to the effect that even then conviction can be passed on the sole testimony of the victim if it rings true. (ref 1983 SCMR 901 and 2984 PSC (FSC) 727)
- "[I]n many cases conviction was passed despite absence of injuries on the person of the victim on the ground that she was over powered by the assailant one way or the other. Reliance is placed on 1975 SCMR 394, 1975 SCMR 69, 1977 P Cr LJ 352, PLJ 1982 FSC 80."
- "Moreover all medical evidence is ultimately corroborative in nature and cannot take the place of direct oral evidence of rape especially when it is supported by the eyewitnesses and in that situation the conviction can be passed on this basis even in the absence of corroborative evidence like semen grouping and DNA test."
- "In our socio-religious texture of the society no daughter would normally level false allegation of Zina against her real father nor the other real daughter or wife of the accused can come forward to support such allegation unless it is true. The only plea taken by the accused and suggested to the PW's is that of general bad character of the victim... with the allegation that she had illicit relations with... The question was answered in negative by them. Moreover this is the usual allegation always repeated against women folk in our society whenever their relationships with male partners/ relatives become strained."

• STANDARDS OF COURT PRACTICE REGARDING GENDER-BASED VIOLENCE

▶ *SALMAN AKRAM RAJA V. THE GOVERNMENT OF PUNJAB THROUGH CHIEF SECRETARY, CIVIL SECRETARIAT, LAHORE AND OTHERS*

2013 SCMR 203
Constitutional Petition No. 38 of 2012, decided on 2.10.2012
Iftikhar Muhammad Chaudhry, C.J., Jawwad S. Khawaja & Khilji Arif Hussain, JJ. (Supreme Court of Pakistan)

Facts:

A 13-year old girl was gang-raped in March 2012. Her father approached the concerned Police Station on 21.03.2012 for registration of FIR. No formal FIR was registered. However, upon entry of the complaint in the Roznamcha, the sub-inspector took the rape victim to District Headquarters Hospital, Dheenda Road, Rawalpindi for medical examination. The medical officer gave his findings/opinion after eight days of examination. Despite confirmation of commission of the offence, the FIR could not be registered.

The girl attempted to end her life by committing suicide on 16.04.2012. This incident was highlighted by the media, as such, it came into the notice of the Court. The suo moto action was initiated. The Prosecutor General, Punjab was directed to pursue the case against the accused persons as well as the concerned police officers/officials who delayed the registration of FIR. However, when the case came before the Sessions Judge, Rawalpindi, the complainant (victim's father) informed the Court that he had reached an out-of-Court settlement for a consideration of Rs. 1 million with the accused persons and would drop the charge of gang-rape against them. The accused were acquitted.

The petitioners approached the Supreme Court by means of a Constitutional Petition. According to them, the out-of-Court settlement constitutes a mockery of justice and abuse of law (Cr.P.C.). It also violates the fundamental rights of the victim because such offences i.e. rape etc. are not against a single person but affect the whole society.

Thereafter, it appeared that the aggrieved family did not receive any compensation for the Razinaamas (compromise) through which they forgave the accused, and that the said compromise was a result of violent intimidation and threat to their lives. Due to interjection by the Jirga, the prosecution witnesses had not supported the prosecution case and were compelled to make compromising statements before the Court, culminating into the acquittal of the accused.

Issue:

Whether the out-of-court settlement is valid.

Decision:

No. Section 345 Cr.P.C. provides the procedure for compounding of offence; no offence can be compounded except as provided in the said provision. The offence of rape under Section 376, PPC is non-compoundable, therefore, compounding of such offence is not permissible. Even otherwise sometimes due to out-of-Court settlement, the complainant party does not

come forward to pursue the matter or produce evidence, which results in the acquittal of the accused. Cases like rape, etc., are against the whole society and these cases are registered in the name of the State. Therefore, in the cases where the accused succeed(s) in out-of-Court settlement, the State should come forward to pursue the case and the Courts should also take into consideration all these aspects while extending benefit to the accused.

On DNA evidence: Now, DNA tests provide the Courts a means of identifying perpetrators with a high degree of confidence. By using the DNA technology the Courts are in a better position to reach at a conclusion whereby convicting the real culprits and excluding potential suspects as well as exonerating wrongfully involved accused. [...] In Pakistan, the Courts also consider the DNA test results while awarding conviction, however, the same cannot be considered as conclusive proof and require corroboration/support from other pieces of evidence. [...]

The Court has power to order for DNA or any blood test in order to ascertain the truthfulness of the allegation leveled by the victim but such order must be with the consent of victim. However, this benefit cannot be extended to the accused.

DNA samples etc. should be preserved so it could be made use of at the appropriate stage whenever required. However, the legislature is free to regularize the procedure by making appropriate legislation in this behalf.

In addition, the Supreme Court agreed with the petitioner on the following points:

(a) Every Police Station that receives rape complaints should involve reputable civil society organizations for the purpose of legal aid and counseling. A list of such organizations may be provided by bodies such as the National Commission on the Status of Women. Each Police Station to maintain a register of such organization. On receipt of information regarding the commission of rape, the Investigating Officer(IO)/Station House Officer (SHO) should inform such organizations at the earliest.
(b) Administration of DNA tests and preservation of DNA evidence should be made mandatory in rape cases.
(c) As soon as the victim is composed, her statement should be recorded under Section 164, Code of Criminal Procedure, 1898, preferably by a female magistrate.
(d) Trials for rape should be conducted in camera and after regular Court hours.
(e) During a rape trial, screens or other arrangements should be made so that the victims and vulnerable witnesses do not have to face the accused persons.
(f) Evidence of rape victims should be recorded, in appropriate cases, through video conferencing so that the victims, particularly juvenile victims, do not need to be present in Court.

The Supreme Court directed concerned public authorities to enforce these guidelines through the course of investigation and prosecution of all rape matters in Pakistan.

• IMPORTANT ROLE OF JUDGES FOR A FAIR TRIAL

▶ ***REGINA V. TA***
57 NSWLR 444
25 July 2003
Constitutional Petition No. 38 of 2012, decided on 2.10.2012
Spigelman, C.J., Dowd, J., Adams, J. (Court of Criminal Appeal of Australia)

Facts:

The Appellant was convicted after trial of offences of having sexual intercourse without consent, administering a stupefying drug with intent to commit an indecent assault and indecent assault. The sexual intercourse was cunnilingus and the third the touching of the complainant's genitals. The Appellant appeals to this Court against his conviction.

Much of the relevant interaction between the complainant and the Appellant had been recorded by the use of a portable video camera. The prosecution relied on this recording, discovered by police after the Appellant's arrest, for the purpose of proving the sexual conduct, the administration of the drugs and the their effect on the complainant. The defence relied on the recording to prove that the complainant consented both to the administration of the drugs and the sexual activity she later complained about.

On the evening of 8 June 1996, the Appellant returned earlier than expected from a trip to India, while the complainant's mother was herself overseas. The Appellant told her that he should give her an injection. Before he went overseas he had mentioned that, when he returned, he would need to vaccinate her against the possibility of becoming infected with any disease that he might pick up whilst in India, saying that she might pass it on the old people she worked with. Accordingly, she agreed. He injected her in the upper arm and gave her some tablets to take to relieve the pain from the injection. The complainant said that, from that point, she had no memory of what occurred except waking up briefly twice. On the first occasion, she found a cannula taped to the back of her wrist, asking what it was for and being given tablets to take. The tablets were "very similar", she said, to the oxazepam tablets that had been tendered. (Shortly after the complainant went to the police, a blood sample was taken, showing oxazepam residue.) The complainant said she felt "sort of semi-conscious". She recalled she was on the floor in the Appellant's bedroom, wearing only a tee-shirt. On the second occasion, she said she found herself lying on the floor and said to the Appellant that she had to go and wash her hair. He told her not to move since she had "sort of had a cardiac arrest and you have stopped breathing". She said she did not believe him and recalled that the Appellant rewound the video and showed her the part where he was trying to resuscitate her. The complainant said she remembered nothing else.

In fact, the complainant had been in the Appellant's company, he naked and she almost so, for something in the order of two hours. He had performed oral intercourse and other acts of sexual intimacy on her during this period. This was video recorded.

Counsel for the Appellant at trial, Mr Zahra SC, cross–examined the complainant extensively, amongst other things, on the activities depicted in the video recording. A number of matters were put to her as having occurred during that period. In substance, the complainant's response was that she was unable to remember whether they occurred or not. It was

suggested to the complainant on a number of occasions that she remembered more than she claimed and was lying about the extent of her memory loss. The complainant denied these allegations. Mr Zahra put it to the complainant that she had consented both to experimenting with drugs and the acts of sexual intimacy that occurred between her and the Appellant. The complainant emphatically denied these suggestions.

Decision:

Adams, J.

In this Court it is submitted that [the trial court judge] erred in precluding cross–examination of the complainant designed to elicit her opinion of her state of mind as demonstrated by the transcript and the video recording. It is argued, in effect, that confronting the complainant with what appears to be her consensual and voluntary conduct as demonstrated in the transcript and, if she wished it, on the video and obtaining her opinion about it, hopefully to the effect that it seemed as though she was, in fact, consenting to what was happening and was not so adversely affected by drugs as to render her involvement involuntary, was an appropriate forensic undertaking of potentially significant assistance to the defence. To my mind, the mere statement of the argument is sufficient refutation of its validity. An opinion as to the possible conclusions of an observer is an opinion about an irrelevant matter. The opinion gains nothing by being expressed by a participant who has no recollection of the events, even though it is that participant's state of mind which is in issue. The question must assume that the participant either has no recollection or that she does have a recollection. In both events, the answer is useless: in the former case, because the lay opinion is irrelevant; and, in the latter case, because the question does not seek her recollection. Moreover, asking a question that assumes a fact that has been denied by the witness will almost certainly be unfair and, in the circumstances here, would have also have been oppressive. I respectfully agree with the observation of [the trial court judge] that, however cast, the proposed questions invited irrelevant answers. [...]

If one considered only the words spoken as appeared in the tendered transcript, it might be possible to make a strong case that the complainant was, at some points, both able to and did give consent to ingestion of some drug and acts of an intimate character, such as caressing her breasts and masturbating the Appellant. However, the depiction in the video recording gives an altogether different picture of events, especially if the jury accepted, as they were certainly entitled to do, the evidence of the complainant, in substance, that although she did voluntarily take what she thought was a vaccination and pain-killing tablets at the outset, at the Appellant's suggestion, she was thereafter so affected that she was unaware and had no memory of the insertion of the cannula, later administrations of other drugs and the sexual conduct performed on her by the Appellant. Traces of propofol were found in the complainant's blood sample, whilst the Appellant himself identified midazolam as being injected via the cannula. The undisputed medical evidence was that the drugs administered by the Appellant would have a profound effect on the ability of the person to whom they were administered to retain memories, especially short term memories, so that he or she would not be expected to remember very much of what had happened while the drugs were being ingested for a period of probably an hour or two after the last dose. Even memory of what occurred in the minutes or even hour leading up to the first dose may be adversely affected. Generally speaking, the drugs that were administered to the complainant were sedatives used, amongst other things, to make patients cooperative, suggestible and compli-

ant (behaviour very evident on the video), especially when it is proposed to undertake painful procedures, such as relocating a dislocated shoulder, that a patient might otherwise resist; the ability to make rational decisions will also be markedly impaired and the patient become confused and disorientated. However, the actual effects of the drugs on particular individuals was, to some extent, uncertain and the degree to which their higher or cognitive functions – those dealing with knowledge and consent – were impaired varied, possibly significantly. Considering the nature of the drugs, it strikes me as fantastic to suggest that the complainant willingly took them as some kind of experiment. Nor was it suggested in cross-examination that there had been a prior conversation in which this experiment had been agreed to, let alone that the nature and likely effects of the drugs had been explained to the complainant. It goes without saying that no such conversation was recorded: the video commences with the complainant almost naked and the Appellant completely so, except for his socks. [...]

The Appellant submitted that the opinion of the complainant as to her state of mind as shown on the video, as distinct from her personal awareness was admissible under section 79 of the Evidence Act 1995, which provides –

> "79. Exception: opinions based on specialised knowledge. If a person has specialised knowledge based on a person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge."

The Appellant submitted, in substance, that the complainant had experience of her own thoughts and behaviour and was thus well placed to give an opinion about what she was experiencing from observing her behaviour on the video, although she had no memory of it. The relevant issue was the extent to which she was able to and did consent to what occurred. The assumption was that she had no actual knowledge of her experience at the relevant time. There was no basis for inferring that the complainant had ever seen people apparently affected by drugs, let alone having herself been in such a situation before. Her opinion was thus no better than any other lay witness and, certainly, could not inform the jury as to the judgment that it needed to make on the matter. Moreover, the complainant's evidence was irrelevant. [...] Once it is understood that the complainant was being asked to interpret the transcript or the video depiction upon the (inevitable) assumption that she had no recollection – or no relevant recollection – of the events herself, so that she was a mere lay observer, the irrelevance of her opinion is manifest. The nature and extent of psychological effect shown on the video was a matter for medical and not lay evidence; whether the video showed free and voluntary consent or otherwise was not a matter for opinion evidence. The proposed questions would not only have deflected the jury from the true issue, namely, the effect of the drugs on the complainant, to a false issue, namely whether the complainant thought that it seemed as though she was consenting, but would have been oppressive and unfair to the complainant. It is, perhaps, worth observing that counsel never sought – for obvious reasons, I think – to play each part of the video to her and ask if her memory of the events was refreshed, although the transcript, considered alone, gives a very partial and misleading representation of the actual events. I also think it fair to observe that, having watched the video myself, I do not see how any fair-minded person could have concluded, having regard also to the medical evidence, that it was reasonably possible that the complainant's ability to give free and voluntary consent was not completely compromised by the drugs that were administered to her by the Appellant. [...]

Spigelman, C.J.:

[...] The perception of the complainant as to the events recorded in the videotape is completely irrelevant to any fact in issue.

The alternative way in which the submission is put is that in some way her "opinion as to the events recorded on the videotape" would assist in the understanding of whether she may have consented either to the administration of drugs or to sexual activity. I can see no rational relationship between an opinion about what appears on the videotape and the issue of consent.

[...] [T]he Appellant, submitted that the complainant was in a better position than the jury to draw inferences regarding her state of mind from what was said and recorded on the videotape. At one stage, it was even submitted that this was based on her own knowledge of her own behaviour. That submission was in effect withdrawn but, if it was not, should be rejected. There is no proper basis for that kind of opinion evidence. The complainant is in no better position than the jury to assess what is observable to any person on the video. The position is indistinguishable from the police witnesses who sought to give opinion evidence about the identity of a person depicted on photographs in Smith v The Queen (2001) 206 CLR 650.

In any event, in my opinion, [the trial court judge] was entitled to reject the line of cross-examination by applying s41 of the Evidence Act. The difficulties encountered by complainants in sexual assault cases in the criminal justice system has been a focus of concern for several decades. Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused. That role is perfectly consistent with the requirements of a fair trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance.

[...] [T]he line of questioning involving the complainant interpreting her own conduct was, in my opinion, unduly harassing, offensive and oppressive within s41(1)(b) of the Act. Section 41, of course, operates on the assumption that there is an element of relevance in the line of questioning. Even assuming, contrary to the opinion I have expressed, that there was some relevance, its probative force was so slight that even a small element of harassment, offence or oppression, would be enough for the Court to exercise its discretion under s41(1)(b). However, in the present case, the line of cross-examination inviting the complainant to interpret the transcript of the videotape in which she was depicted, but of which she had no material recollection was, on any objective analysis, highly distressing.

The words of s41 direct attention to the effect of questioning upon the witness. In a sexual assault matter, it is appropriate for the Court to consider the effect of cross-examination and of the trial experience upon a complainant when deciding whether cross-examination is unduly harassing, offensive or oppressive. In the present case, that standard was clearly exceeded.

C. Handouts

- **Handout A: Cases Referred to in Slides**

DELAY IN REPORTING RAPE –

CASE 1 ***Mehboob Ahmad v The State*** **(1999 SCMR 1102)**

The Court observed **"We cannot be unmindful of the prevailing taboos in our society. Even in modern-day advanced societies, for and on account of the prevalent predilections, many cases of rape go unreported. A victim of rape should not be penalised on account of ostensible delay what she has undergone. On the contrary, kindness, encouragement and understanding of the requirements to activate a victim's difficult decision to purge the society of perpetrators of such heinous offences"**

CASE 2 ***Muhummad Umar v The State*** **(1999 PCr LJ 699)**

The Federal Shariat Court did not accept the defence argument of the delay in lodging the FIR 2 months after the rape saying "**delay in reporting occurrence of such a nature to police was not uncommon, particularly in tribal society where people were normally hesitant to report to police matters concerning womenfolk and involving their honour**".
Similar views have been expressed in ***Nasreen v Fayyaz Khan v The State*** **(PLD 1991 SC 412)** a delay of several months in lodging the FIR and also ***Azhar Iqbal v The State*** **(1997 PCrLJ 1500)**.

CASE 3 ***People v. Ilao*** **(G.R. Nos. 152683-84, December 11, 2003). (The Philippines)** On appeal.

"As the trial court found, complainant did not divulge the first incident of rape out of fear for her life and that of her family. She could have kept her ordeal forever in silence were it not for the second incident which engendered her continuing fear of a repetition thereof, unless she could put a stop to it. This reaction appears typical of a woman who has been abused. **Rape is a harrowing experience and the shock concomitant to it may linger for a while**. It is upon this fear springing from the initial rape that the perpetrator hopes to build a climate of psychological terror, which could numb his victim to submissiveness.(emphasis added)

CASE 4 ***People v. Ilagan*** **(G.R. No. 144595. August 6, 2003). (The Philippines)** On appeal.

"[as to] the delay in reporting the case to the authorities, suffice it to state that **delay and the initial reluctance of a rape victim to make public the assault on her virtue is neither unknown or uncommon**. Rape is a traumatic experience, and the shock concomitant with it may linger for a while. **Oftentimes, the victim would rather bear the ignominy and the pain in private, rather than reveal her shame to the world or risk the rapist's carrying out his threat to harm her."**(emphasis added)

RELEVANCE OF MORAL CHARACTER OR VIRGINITY OF VICTIM

CASE 1 ***People v. Ilao*** **(G.R. Nos. 152683-84, December 11, 2003). (The Philippines)** On appeal.

"The assertion of appellant that the private complainant was a married woman, and was no longer a virgin, will not exculpate him from criminal liability for rape. **Well-settled is the rule that in rape cases, virginity of the victim is not an element of rape."** (emphasis added)

CASE 2 *People v. Jason Navarro, Solomon Navarro and Roberto Olila* (acquitted) (G.R. 137597, October 24, 2003) (Philippines)

"The defense's attempt to depict the victim as a woman of loose morals deserves scant consideration. **The victim's character or reputation is immaterial in rape, there being absolutely no nexus between it and the odious deed committed. A woman of loose morals could still be the victim of rape, the essence thereof being carnal knowledge of a woman without her consent.**

The argument of appellants that the victim must have consented to the sexual act, if indeed there was, because she acquiesced to go with them and had the opportunity to leave their company at any time she wished, is a *non sequitur*. **Freely going with a group for a ride around is one thing; freely having sex with one of the members thereof is another.** (emphasis added)

CASE 3 *People v. Wilson Suarez, et al.* (G.R. Nos. 153573-76 April 15, 2005) (The Philippines)

"In a last ditch effort to discredit the 14-year-old complainant, the defense attempted to picture her as a girl of loose morals. Suffice it to state that **such debasement of her character does not necessarily cast doubt on her credibility, nor does it negate the existence of rape**. It is a well-established rule that in the prosecution and conviction of an accused for rape, **the victim's moral character is immaterial, there being absolutely no nexus between it and the odious deed committed**. Even a prostitute or a woman of loose morals can be the victim of rape, for she can still refuse a man's lustful advances."(emphasis added)

CASE 4 *State of Punjab v. Gurmit Singh & Ors*, 1996 AIR 1393; 1996 SCC (2) 384 (Anand J) (India, Supreme Court)

'The trial court not only erroneously disbelieved the prosecutrix, but quite uncharitably and unjustifiably even characterised her as a girl "of loose morals" or "such type of a girl". ... We must express our strong disapproval of the approach of the trial court and its casting a stigma on the character of the prosecutrix. The observations lack sobriety expected of a judge. ... The courts are expected to use self-restraint while recording such findings which have larger repercussions so far as the future of the victim of the sex crime is concerned and even wider implications on the society as a whole – where the victim of crime is discouraged – the criminal encouraged and in turn crime gets rewarded! ... **Even if the prosecutrix, in a given case, has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone [and] everyone. No stigma, like the one as cast in the present case should be cast against such a witness by the courts, for after all it is the accused and not the victim of sex crime who is on trial in the Court.**' (emphasis added)

WHETHER COMPLAINANT CONSENTED AND ABSENCE OF VISIBLE INJURY

CASE 1 *People v. Ilao* (G.R. Nos. 152683-84, December 11, 2003) (The Philippines)

"The fact that private complainant **did not resist or attempt to flee or shout for help does not negate force or intimidation. Different people react differently** when confronted by a shocking or a harrowing and unexpected incident, for the workings of the human mind when placed under emotional stress are unpredictable. Some people may cry out, some may faint, some may be shocked into insensibility, while others may appear to yield to the intrusion. Moreover, in rape cases, physical resistance need not be established when intimidation is exercised upon

the victim and the latter submits herself out of fear. Intimidation is addressed to the mind of the victim and is therefore subjective. (emphasis added)

CASE 2 *People v Ilagan* (G.R. No. 144595. August 6, 2003) (The Philippines)

Physical resistance need not be established in rape when intimidation is exercised upon the victim herself. As held in People v. Las Pinas, Jr., **the test is whether the intimidation produces a reasonable fear in the mind of the victim that if she resists or does not yield to the desires of the accused, the threat would be carried out. When resistance would be futile, offering none at all does not amount to consent to sexual assault. The law does not impose upon a rape victim the burden of proving resistance.** (emphasis added)

Absence of injury does not mean that the victim consented to sexual assault.

CASE 3 *Mahraj Din v Emperor* AIR 1927 Lah 222

When finding the appellant guilty of attempted rape the Court noted "...though **rupture of the hymen is by no means necessary in law, the Courts are reluctant to believe that there could have been penetration without that which is so very near to the entrance having been ruptured**"

Thus partial penetration not resulting in injury to the hymen is sufficient to constitute the offence of rape as a matter of law. Whether rape has occurred would depend on the overall facts of the case.

CASE 4 *The State v Shabbir alias Kaka s/o Moza Jhamke and Fozia Bibi.* Jazeela Aslam Addl Sessions Judge, Sheikhupura. FIR No 1499/10

Medical examination revealed that the 14/15-year-old victim looked frightened and disoriented. There was no mark on her body. Local examination revealed fresh bleeding from her vagina, a torn hymen and a lacerated wound on the side of her vagina.

"The statement of the victim that the accused persons committed rape one by one when she was under their significant control must be accepted as true. Obviously, she being under fear could not raise any alarm and if she did, nobody would have heard or come to her rescue, as it was a cold winter midnight of 27th and 28th December. **Also if there is no mark of violence on the visible parts of her body, it is not indicative of non-resistance**. The peculiar circumstances of the case are such as altogether exclude the elements of consent and character of a girl of the age of 14/15 years.

See also ***Mehboob Ahmad v The State* (1999 SCMR 1102, 1103), *Haji Ahmad v The State* (1975 SCMR 6, Ghulam Sarwar v The State (PLD 1984 SC 218)** on the proposition that absence of marks of violation on the body of the victim does not imply non-commission of the offence.

WHETHER WOMEN RAPE VICTIMS ARE UNRELIABLE AND THEIR EVIDENCE MUST BE CORRBORATED (4 CASES AND REPORT EXTRACT)

CASE 1 *Amanullah v The State* PLD 2009 SC 542

The ocular account of a rape victim was preferred over DNA. Reports of "so called experts" are only corroborative in nature and required only when the ocular testimony is of doubtful nature

CASE 2 *Imran v The State* 2016 PCr LJ 1888 (Sindh)

Application for bail which was refused. Testimony of rape victim is of vital significance and unless there is compelling reason, then no corroborative evidence is required

CASE 3 *The State v Muhammad Afzal S/O Ghulam Haide*. Amjad Ali Shah Addl Sessions Judge Narowal Case FIR No.109/2010 19.01.2012

Observations:

- "Needless to say that in cases of zina-bil-jabr/ rape there is seldom an eyewitness because such type of crimes are committed away from the public places but there is a plethora of case law to the effect that even then conviction can be passed on the sole testimony of the victim if it rings true." (ref 1983 SCMR 901 and 2984 PSC (FSC) 727
- "[i]n many cases conviction was passed despite absence of injuries on the person of the victim on the ground that she was over powered by the assailant one way or the other. Reliance is placed on 1975 SCMR 394, 1975 SCMR 69, 1977 P Cr LJ 352, PLJ 1982 FSC 80."
- "Moreover all medical evidence is ultimately corroborative in nature and cannot take the place of direct oral evidence of rape especially when it is supported by the eyewitnesses and in that situation the conviction can be passed on this basis even in the absence of corroborative evidence like semen grouping and DNA test."
- "[i]n our socio—religious texture of the society no daughter would normally level false allegation of Zina against her real father nor the other real daughter or wife of the accused can come forward to support such allegation unless it is true. The only plea taken by the accused and suggested to the PW's is that of general bad character of the victim... with the allegation that she had illicit relations with... The question was answered in negative by them. Moreover this is the usual allegation always repeated against women folk in our society whenever their relationships with male partners/relatives become strained."

See also ***Muhammad Abbas v The State* (PLD 2003 SC 863), *Rana Shahbaz Ahmad v the State* (2002 SCMR 303, 306), *Shahzad v The State* (2002 SCMR 1009), *Mehboob Ahmad v The State* (1999 SCMR 1102, 1103), *Haji Ahmad v The State* (1975 SCMR 69)** for the proposition that corroboration is not required

GENDER STEREOTYPING AND WHETHER WOMEN FABICATE ALLEGATIONS OF RAPE AND DELAY IN REPORTING

International commission of Jurists (2015), *Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice*. Geneva. Switzerland

Extracts:

II. DOUBTING WOMEN'S TRUTHFULNESS: THE APPLICATION OF PROMPT COMPLAINT, CORROBORATION AND CAUTIONARY REQUIREMENTS

It is often believed that women fabricate allegations of rape and sexual assault. Underlying this may be general stereotypes to the effect that women are untruthful or related assumptions that due to shame and stigma women will not admit to having had consensual sex outside of marriage and thus will lie, saying such premarital or extramarital sex was non-consensual, or ideas that women easily make allegations of rape when they want to cause harm or seek revenge.

The inaccuracy of this belief is now verified by data that demonstrates that the percentage of women who fabricate sexual assault complaints is very low. Moreover it is increasingly accepted and understood, that in fact allegations of sexual assault are not easy to make...

UNDERLYING HARMFUL STEREOTYPES OR ASSUMPTIONS

No matter what their form, prompt complaint rules and practices in cases of sexual assaults against women are inconsistent with the prohibition of gender discrimination including the duty "not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence." They embody the belief that "real" victims of sexual violence will report the violence quickly and give legal form to inaccurate and impermissible assumptions as to what is to be "expected from a rational and ideal victim," or what is considered "to be the rational and ideal response of a woman in a rape situation."

These beliefs are incorrect. There is no evidence that delayed reports of sexual violence are less truthful. In fact statistics indicate that most crimes of sexual violence are never reported at all. As the Supreme Court of California noted, "the overwhelming body of current empirical studies, data, and other information establishes that it is not inherently "natural" for the victim to confide in someone or to disclose, immediately following commission of the offense, that he or she was sexually assaulted." Instead survivors are often afraid of reporting the crime because of stigma and shame. If the perpetrator is someone the survivor knows personally, as is often the case, it can be even more difficult to report the crime.

Corroboration requirements in sexual assault cases embody the skepticism with which women alleging sexual assault have historically been treated and reflect the inherent assumption that women fabricate claims of sexual assault. As the High Court of Australia noted, corroboration requirements rely on the view that "female evidence in such cases is intrinsically unreliable."

There is no legitimate reason for the application of a different approach to corroboration with regards to the testimony of survivors of sexual violence than with regards to the testimony of victims of other crimes. As the Court of Appeal of Kenya observed, "there is neither scientific proof nor research findings that we know of to show that women and girls will, as a general rule, give false testimony or fabricate cases against men in sexual offences."

As the Bangladesh High Court held, "the testimony of a victim of sexual assault is vital, and unless there are compelling reasons which necessitate corroboration of her statement, the court should find no difficulty in convicting an accused on her testimony alone if it inspires confidence and is found to be reliable." To do so, the Court noted, would be to treat victims of sexual violence equally with other victims and witnesses of violent crimes, for whom decisions of credibility are made on a case by case basis and not subject to general rules.

The *per se* imposition of a requirement that a victim's testimony be corroborated in sexual assault cases is discriminatory and contradicts the duty of the authorities, outlined by the Committee on the Elimination of Discrimination against Women to ensure that "legal procedures in cases involving crimes of rape and other sexual offenses ... be impartial and fair, and not affected by prejudices or stereotypical gender notions."

Corroboration requirements also reflect often mistaken notions of how sexual assault occurs and what kind of conduct it involves. For example, it is often assumed that true allegations of any sexual assault crime will be easily 'corroborated' or substantiated by physical evidence because such crimes involve physical force or a physical struggle in which the victim or perpetrator suffers injury. However, as will be discussed in Section IV, these assumptions are inaccurate.

- **Handout B: Guidelines to be Followed in Gender-Based Violence Cases (Issued by the Lahore High Court)**

LAHORE HIGH COURT, LAHORE

Phone No. 042-99212951 Ext.274
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Fax No. 042-99212281

No. 22325 /HC/DDJ/DRIT
Dated 17 /October, 2017

From

The Director General,
Directorate of District Judiciary,
Lahore High Court, Lahore.

To

All the District & Sessions Judges,
In the Punjab.

Subject: - **GUIDELINES TO BE FOLLOWED IN CASES OF GENDER BASED VIOLENCE (GBV)**

Dear Sir,

I am directed to refer to the subject cited above and to inform that **Hon'ble the Chief Justice** has been pleased to approve guidelines to be followed in cases of Gender Based Violence (GBV) in the light of **Salman Akram Raja Case (PLJ 2013 SC 107).**

2. You are, therefore, requested to circulate these guidelines among all respected Judges working on Criminal side under your kind control, to comply with in letter and spirit.

Yours faithfully,

MUHAMMAD AKMAL KHAN
Director General
Directorate of District Judiciary

NUMBER & DATE EVEN

Copy is forwarded for kind information to: -

i. Principal Staff Officer to Hon'ble Chief Justice, Lahore High Court, Lahore.
ii. Private Secretary to Hon'ble Justice Ayesha A. Malik, Judge, Lahore High Court, Lahore.
iii. Staff Officer to Registrar, Lahore High Court, Lahore.

Director General
Directorate of District Judiciary

- **Handout B: Guidelines to be Followed in Gender-Based Violence Cases (Issued by the Lahore High Court)**

GUIDELINES TO BE FOLLOWED IN CASES OF GENDER BASED VIOLENCE (GBV) IN THE LIGHT OF PLJ 2013 SC 107 (SALMAN AKRAM RAJA CASE)

1. And Whereas there is a need to build upon the directives given by the Supreme Court in Salman Akram Raja vs. The Government of Punjab through Chief Secretary, Civil Secretariat, Lahore and others[1] in respect of victims and vulnerable witnesses in rape trials, and extend them with suitable adaption to apply to women complainants, victims and vulnerable witnesses, such as women , children or persons with disabilities who are giving evidence in cases of violence;
2. The Lahore High Court, Lahore shall prioritize the gender-based violence cases. The courts shall conduct trials in a gender-sensitive manner and incorporate the directions of the Supreme Court in Salman AkramRaja vs. The Government of Punjab through Chief Secretary, Civil Secretariat, Lahore and others[2], Section 13 of the Criminal Law (Amendment) (Offences related to Rape) Act 2016[3]. The international best practices shall be followed in dealing with gender-based violence cases, such as a courtroom set-up responsive to the needs of women and other vulnerable witnesses. In particular, the courts shall act upon the guidelines issued by Lahore High Court, Lahore, as follows:
    1) *The magistrate unless there are compelling reasons shall record thestatement of the Victim under Section 164, Cr.P.C. in the day on which the application is moved by the Investigation Officer. The Magistrate before proceeding to record the statement shall ensure that the victim (child, women or any vulnerable person) is made comfortable and he/she is free of any extraneous pressure.*
    2) *If the victims of rape are reluctant to appear before a male magistrate as they cannot express their agony appropriately before them, therefore if requested the statement of victim be recorded before female Magistrate, where ever is available.*
    3) *An endeavor shall be made to commit such cases of offence to the Court of Sessions expeditiously and preferably within 15 days.*

[1] 2013 SCMR 203.
[1] See note 9.
[1] Section 13 provides:
"13. Amendment of section 352, Act V of 1898.-In the Code, in section 352, the existing provision shall be re-numbered as sub-section (1) of that section and after sub-section (1) re-numbered as aforesaid, the following new sub-sections shall be inserted namely:-
'(2) Notwithstanding anything contained in sub-section (1), the trial of offences under section 354A, 376, 376A, 377 and 377B of the Pakistan Penal Code. 1860 (Act XLV of 1860) shall be conducted in camera;
Provided that the Presiding Officer, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the Court.
(3) Where any proceedings are held under sub-section (2), the Government may adopt appropriate measures, including holding of the trial through video link or usage of screens, for the protection of the victim and the witnesses.
(4) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish or broadcast any matter in relation to any such proceedings, except with the permission of the Court.'"

- **Handout B: Guidelines to be Followed in Gender-Based Violence Cases (Issued by the Lahore High Court)**

4) In such cases where a victim shall be given an opportunity to have a state counsel and in cases where a victim has a private lawyer, she may be allowed to retain the private lawyer.
5) That as far as possible Chief examination and cross-examination of the victim must be conducted on the same day.
6) The Court shall maintain a panel of psychiatrists, psychologists and experts in sign language etc. who would assist in recording the statement of victim are vulnerable as and when requested by the Sessions Court.
7) If it is brought to the notice of the Court from a support person/advocate/victim/Police/Prosecution department regarding threats received by the victim or his/her family members to compromise the matter, the Court shall immediately direct the Assistant Superintendent of Police to look into the matter and provide an action taken report before the Court within 2 days. The Court must ensure that protection is provided to the victim and her family.
8) In cases in which the witness is sent back unexamined and is bound down, the Court shall ensure that at least the travelling expenses for coming to and from for attending the Court are paid.
9) At the time of recording of evidence of the victim or vulnerable witness irrelevant persons be excluded from the Court. This may include an order that the accused is to be excluded from the court provided that the accused shall be able to see and hear the evidence given.
10) The proceedings of such cases be conducted in camera.
11) Conducting a trial after regular court hours where appropriate.
12) Where possible evidence of victim of violence should be recorded through video conferencing so that the victims do not need to be present in the Court
13) Availability of screens, one-way glass, or other arrangements such as closed circuit television so that a victim does not have to see the accused person in court when giving evidence.
14) Questions put in cross-examination on behalf of accused should be given in writing to the Presiding Officer who should put them to the victim or to a vulnerable witness in a language which is clear and not degrading.

There are certain oth[illegible] international best practices and guidelines to be incrementally introduced into the courts: -

1) A supportive person/Advocate may be allowed to the victim/survivors or witness' choice to be present while evidence is being given.
2) To make adjustments to the proximity of lawyers the dock and the witness box to the witness giving evidence in
3) Examination and cross examination of the victim/survivor are restricted to issue relevant to the case and are not frivolous or for the purposes of embarrassing or humiliating the victim/survivor including through the introduction of evidence of victim/survivor's past sexual behavior, history, or reputation.

- **Handout B: Guidelines to be Followed in Gender-Based Violence Cases (Issued by the Lahore High Court)**

4) To develop practice guideline for the examination and cross-examination of such a witness to help ensure that questions are asked to the victim/witness using appropriate language manner and content.

5) Witness Care Video Link Rooms may be established to record evidence of the victim or vulnerable witness so that they feel comfortable in recording of their statement at a place where there is no physical interaction with the accused.

6) An audio-visual pre-recording of a statement or evidence of the victim may be allowed, either in part or in whole, to be replayed and admitted as their evidence at the trial. Such pre-recording can include the whole of the evidence of the victim; their evidence in chief cross examination, and re-examination.

7) Other procedural or practice guidelines to be developed where women or their relatives and representatives indicate their wish not to proceed with a case of violence or witnesses resile from their earlier statements;

8) Such other procedural or practical guidelines for other issues which ever so to overcome or remove constraints and barriers to women's access to justice in cases of gender-based violence.

MUHAMMAD AKMAL KHAN
Director General
Directorate of District Judiciary

• Handout C: Practice Note For Cases In Gender-Based Violence Courts ("GBV Courts")

PRACTICE NOTE FOR CASES IN GENDER – BASED VIOLENCE COURTS ("GBV COURTS")

THE PURPOSE OF THE GBV COURT

1. The purpose of the GBV Court is to enable cases which concern gender-based violence offences[1] to be prioritized and conducted in a gender- sensitive manner. The GBV Court applies to the victims of gender-based violence; these victims would include women, children, and other vulnerable witnesses[2] including persons who may regard themselves as having a different gender identity[3]. The purpose of GBV Court also recognises the fact that the victims of gender-based violence are mainly women (and girl children) and they often do not report violence against them for fear of retribution, shame, social stigma and lack of community support. In addition victims may also be not confident or fearful of coming to the court to give evidence because the court processes are intimidating and they feel re-victimised. The GBV Court and the Practice Note are a response to provide court and judicial officials who are specialized and gender-sensitive regarding gender-based violence and include procedures to ensure cases are heard fairly and expeditiously and in a way that will avoid or minimize undue trauma to victims, children and other vulnerable witnesses.

PURPOSE OF THE PRACTICE NOTE

2. The purpose of this Practice Note is to enable the "Guidelines to be followed in Cases of gender-based violence (GBV)" No. 22325 dated 17 October 2017 ("the Guidelines), to be implemented in practice with clarity and consistency.
3. At the same time the Practice Note is to be applied flexibly if particular situations require some modification in order to maintain the purpose and principles of the Guidelines.
4. The Practice Note will also apply to the treatment of other witnesses giving evidence in such cases, either for the prosecution or defense, and it includes the accused, with modifications as the situation may require. It is important for all witnesses in the court to have the best conditions be able to give their best evidence.

OUTSIDE THE COURT ROOM

5. On reaching the Court to precinct, the victim is to be met by a "Female Support Officer"[4], who will escort the victim to a protected place so as to avoid contact with the accused or their family or friends as well as the general public.

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[1] Gender based violence (GBV) is an act of violence that results in or is likely to result in physical, sexual, psychological or economic harm or suffering. It includes threats of such acts, coercion or arbitrary deprivations of liberty whether occurring public or in private and it includes domestic violence. The violence is primarily committed on the victim by reason of her/his sex or gender. Examples of gender based violence include offences under Sections 300-302, 310 - A, 315, 324, 332**,** 336-A and B, 337, 337-A – 337-Z, 354, 354A, 359 to 369, 362 to 374, 364 - A, 365- B, 376, 376(2) – 376(4), 371- A, 377, 496, 496 - A, 498 – A, 498 – B, 498 – C and 509 of PPC and Sections 3, 4, 11, 12,14,17 – 23 of the Prevention of Electronic Crimes Act.

[2] Vulnerable witnesses would include also persons with mental or other disabilities.

[3] Including persons protected under the Transgender Persons (Protection of Rights) Act 2018.

[4] A "Female Support Officer" is an employee of the court which is designated to fulfil this role.

Handout C: Practice Note For Cases In Gender-Based Violence Courts ("GBV Courts")

6. The Female Support Person is to settle victim, but is not to talk about any of the details of the case.
7. The Female Support Person is to bring the victim either to the "*e*- court room" or to the court as required, and remain with the victim while the victim gives evidence.
8. The victim may be accompanied or spoken to by their private counsel or prosecutor as required.
9. The prosecutor or counsel for the victim should speak with the victim and find out whether the victim wishes to give evidence from the "*e*- court room", or in the courtroom with a screen, or in the court room without a screen. This may also be confirmed by the Female Support Officer.

THE SET UP OF THE COURT ROOM

10. Adjustments are to be made to the courtroom to improve the comfort for persons in the court which include, making adjustments to the witness box and the accused box so that the witnesses and the accused are able to sit and have water and tissues available to them during the trial process.
11. The lawyers, both prosecution and defence, are to be seated at a separate bar table during the trial process. Lawyers are to remain seated during the trial process unless they are speaking or are questioning the witnesses, in which case the counsel may either sit or stand.
12. If the victim gives evidence in the court room, it is required that the victim be allowed to enter the court room in the absence of the accused and be seated in the witness box behind a screen. When the accused returns to the court room, the accused should not be visible to the victim.
13. The victim will then give evidence with a screen which prevents the victim from seeing and being seen by the accused, unless identification of the perpetrator is required. If identification is required then the victim may move away from behind the screen to also be able to view accused person. The female support person should be seated near to where the victim is giving evidence.
14. If the victim so chooses, the victim may give evidence in court without the use a screen.
15. Further, other arrangements may be made by the Judge in the court room according to the needs of the victim and having regard to the particular circumstances.

SET UP AND USE OF THE *e*-COURT ROOM

16. Video facilities are to be made available in the trial court room to permit evidence to be given by the victim from the *e* - Court room outside the trial court and be seen and heard on a screen in the trial court. This is to enable the victim to give evidence without coming into the trial court.
17. The e-court room used for child victims or child witnesses should preferably be in a child court precinct if one is conveniently available, or if not, in a room which has a child friendly environment[5] and away from contact with adult court participants.

[5] A Child friendly environment is a space, even if small, which includes removable toys and decor which are age appropriate to help the child feel more comfortable when giving evidence.

• Handout C: Practice Note For Cases In Gender-Based Violence Courts ("GBV Courts")

18. The positioning of the video camera should allow the victim to see the trial courtroom and particularly the Judge and counsel, but not the accused person, unless it is necessary for the victim to identify the person whom the victim says was the perpetrator of the conduct alleged.
19. If identification is required then the camera may be repositioned so as to include a view of the accused person.
20. The view that persons in the trial court will have is of the victim only, who will be seated unless there is, a need for identification or as per the requirement of the case.
21. Persons present in the *e*-Court room will be the female support officer and or any person such as an interpreter as required.
22. The Female Support Officer is to settle the victim in the room before commencement of their evidence.
23. If the victim is required to use communication aids[6] to assist in giving their evidence or to draw or identify certain objects then the Female Support Officer is to show this to the victim.
24. The Female Support Officer is also to inform the Judge if the victim indicates that she/he needs a break because she/he is tired or becomes upset.

PROCESSES FOR THE TRIAL AND TAKING OF EVIDENCE

25. The Judge will usually list three cases on each day of hearing unless the circumstances suggest a different listing arrangement
26. The Judge at the commencement of the trial may acquaint counsel and the accused on matters related to the procedures to be followed in the Court.

PROCESS FOR TAKING OF THE EVIDENCE OF THE VICTIM AND THE WITNESSES

Settling the victim and witnesses

27. The judge shall decide the procedure to be followed, which in his/her opinion is most appropriate for both prosecution and defence with modification as required including evidence of the victim. Additional or modified requirements are to be made for child victims and child witnesses as set out below under "Child Victim and Child Witness Requirements"
28. The Judge will introduce himself or herself to all including the victim and explain who the other persons in the court room are.
29. Questions asked by the Judge would include the following from the witnesses including the victims:
    a. asking whether they have any concerns about security for themselves or their family in relation to the case and may make orders as may be appropriate.
    b. asking questions to settle them and to ensure that they are comfortable for the giving of the evidence, including whether they are comfortable with giving evidence, from the "e-court, or in the court with or without the screen as they choose;.

[6] Communication aids include paper, markers, anatomically detailed drawings or dolls or toys, or cards which give short answers or other means as required for the witness and to include requirements for a child as well as persons with mental or physical or other disabilities.

• Handout C: Practice Note For Cases In Gender-Based Violence Courts ("GBV Courts")

c. explaining to the witness the importance of their telling the Judge if they do not understand the questions and that is not shameful to say they do not understand;
d. explaining to the witness that it is very important to know if the witness does not understand as the witness may give an unintended answer;
e. informing the witness that if they feel tired or need a break they should tell the Female Support Officer.

30. A similar overall procedure should also be followed by the Judge with other witnesses as well as the accused if this is appropriate, with modification as required.

Trial process

31. The trial is to proceed and be completed without any adjournment where possible. Adjournment is only be permitted by the Judge for good reason. In particular, the whole of the evidence of the victim, including examination, cross examination and re-examination, is as far as possible to be conducted on the same day.
32. The Judge is to ensure that all questions asked of the victim are to be done with gender sensitivity and in appropriate language having regard to the victim's age, educational level, cultural background, physical or mental disabilities as well as being asked in an appropriate manner and tone. (Qanun-e-Shadat, Order 1984 (QSO) Arts 146 and 148).
33. In addition the court may also limit questions asked of the victim where that is appropriate and it includes unnecessarily repetitive questions.
34. In accordance with the Guidelines, questions put in cross-examination on behalf of the accused should be given in writing or as the court think fit according to circumstances of the case, the Judge who should put them to the victim or to a vulnerable witness in a language which is clear and not degrading. The Judge may give directions as to the manner in which this is to be undertaken.
35. Additional or modified requirements are to be made for child victims and child witnesses as set out below under the "Child Victim and Child Witness Requirements".

PROTECTION ORDERS

36. When the Judge orders that a summons be issued to the victim or witnesses, the Judge may include a further direction endorsed or attached to the summons form which asks the victim or witness "Do you require any police protection for yourself or family prior to the trial"
37. The process server is to be directed to ask this question of the victim or witness, or in relation to a child, the parent or guardian of the child as appropriate.
38. If the victim indicates "yes" by a signature or mark, the process server is then to arrange that protection requested be provided by the relevant SP cell. The SP Cell without any delay inform to the court of arrangements done.
39. The process server is then to report back to the court on the process, which was followed, and the protection, which was arranged.
40. Any person-receiving summons who is related to the case including victim or witnesses may file an application to the court through their counsel as early as possible for protection.

• Handout C: Practice Note For Cases In Gender-Based Violence Courts ("GBV Courts")

41. The Judge may at any time make orders to provide specific protection and arrangements in order to give security for the victim/witnesses and or other relevant family or persons. Further the Judge may direct that the SP Cell to arrange for any person related to the case applying for protection.

PROCEDURES WHEN THE VICTIM OR OTHER WITNESSES RESILE FROM PREVIOUS STATEMENTS

42. Having regard to the concerning number of cases involving non-compoundable offences in which on the date of trial, the victim resiles from earlier statements and further where other witnesses also resile from their statements, the Judge may adopt any of the following procedures or a combination of such procedures or another procedure which the Judge considers appropriate to address this issue. Additional or modified requirements are to be made for child victims and child witnesses as set out below under "Child Victim and Child Witness Requirements".

    a. **Procedure 1.** The Judge may clear the court of all persons (including the accused) leaving only the victim and a court reporter person or alternatively the Judge may bring the victim and a court reporter into chambers. The Judge may then ask questions of the victim as to why she/he has resiled and ascertain whether the victim has been exposed to any pressure and further whether there has been any compromise of the case through family pressure or agreement between the accused and the victim's family. These questions and answers are to be recorded. The Judge may thereafter make appropriate orders as to the process of the case and this may include making appropriate protection orders.

    b. **Procedure 2.**The Judge may adjourn the case until the following day or some other early suitable day, and make appropriate protection orders and arrangements to protect the victim or witness and or other relevant family or persons. On the resumed day the Judge may undertake Procedure 1.

    c. Procedure 3. The Judge may adjourn the case to another day. The Judge may direct that the Assistant Superintendent of Police/Sub-Divisional Police Officer of Concerned Area, look into the matter including whether the victim and/or other witnesses have been pressured into making a false statements and provide a report on the actions before the court within 7 days, or such further extension as the Judge may order. The Judge may make appropriate protection orders.

    d. **Procedure 4.** The Judge may instead direct that the trial continue and that the victim and other witnesses be required to give evidence either on that day or another early day with appropriate protection orders. If this Procedure is directed by the Judge, then the following processes would apply:
        i. The victim and other witnesses who seek to resile are to be informed about in an appropriate sensitive manner of the process which will take place in the court them to give evidence.

Handout C: Practice Note For Cases In Gender-Based Violence Courts ("GBV Courts")

ii. If the victim or witness is an adult and is declared hostile, the cross examination of the victim by both the prosecutor and the defendant is not required to be in writing in the manner indicated in the Guidelines and Practice Note No. 2 paragraph 33.
iii. Particular care needs to be taken by the Judge to ensure that the victim is not subjected to undue pressure by the nature and manner of this procedure.
iv. After all of the relevant evidence in the case is called, the facts and the findings of the Judge will be assessed and based on the totality of the evidence.

PROCEDURES WHERE THE VICTIM DOES NOT ATTEND COURT

43. If the victim does not attend Court on the day set for hearing, the case may be adjourned to another date and a further summons may be issued for her attendance as provided in sections 87 and 88 Cr P.C
44. If a further summons is so issued, then the Judge should give directions on the manner in which the victim is to be brought to the court, so as to ensure this is undertaken sensitively.
45. If the victim cannot be found or again does not attend, the prosecution may still proceed with the trial if there appears to be sufficient evidence which can be called to prove the commission of the offence, even without the attendance of the victim, subject to the Judge deciding that the accused should be acquitted pursuant to S 265K Cr P.C.

CHILD VICTIM AND CHILD WITNESS REQUIREMENTS[7]

Settling the child victim and witness

46. The questions asked to settle the child should be open questions which are short, simple, one topic at a time, using language and expressions which are appropriate to age, educational level, cultural background, physical or mental disabilities of the child.
47. The questions should be limited in number and not connected in any way to the circumstances of the alleged offending.
48. The manner of questioning should be empathetic but not overly friendly and allow the child to respond in their own way.
49. The answers to these questions will assist the judge in understanding the communication capacity of the child and also the ability of the child to know the importance of telling the truth when giving their evidence.[8]

Trial process for child victim and witness

[7] Additional assistance is set out in the materials in the GBV Court Training Handbook and Manual "Questioning of Child Witnesses".
[8] Additional assistance is set out in the materials in the GBV Court Training Handbook and Manual "Questioning of Child Witnesses".

• Handout C: Practice Note For Cases In Gender-Based Violence Courts ("GBV Courts")

50. In additions to items 31 to 34, best practice indicates that every child should be given a break at least after 45 mins of questioning, or earlier if they appear tired or stressed.
51. It is critical that item 34 is followed and that questions to be asked in cross examination are put in writing first by counsel and then asked by the Judge. Preferably the questions should be open questions which allow the child to respond in their own way.[9]

Resiling of child victim or witness

52. If the victim or witness is a child then the Judge is to discuss the process to be followed with prosecution and defence counsel, in particular in relation to Item 42 Procedure 4 so that questions are still in writing with modifications to ensure that the best interest of the child is taken into account in the questioning process.

COURTS POWER TO ASK QUESTION, CALL WITNESSES, ETC.

53. In relation to the cases which come before the court, in particular in relation to cases where there is resiling or where the victim does not attend court, it is important for the court to appropriately utilise its powers given pursuant to Sections 540 CrP.C and 161 QS0
54. Pursuant to Section 540 CrP.C the Judge is empowered to summon any person as a witness, or examine any person in attendance, although not summoned as a witness. The Judge may also recall and re-examine any person already examined, if the evidence of such a witness appears to be essential to the just decision of the case.
55. Pursuant to Article 161 QSO. In order to discover or to obtain proper proof of relevant facts, the Judge may ask any question the Judge pleases, in any form at any time, of any witness, or of the parties about any fact either relevant or irrelevant. In addition the Judge may order the production of any document or thing. Neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross examine any witness upon any answer given in reply to any such question. This is subject to the proviso contained in that section
56. This would include processes of the prosecutor giving up the victim and witnesses and having them declared hostile and then opening the victim and witnesses for cross examination by the Prosecutor and Defence Counsel.

[9] Additional assistance is set out in the materials in the GBV Court Training Handbook and Manual "Questioning of Child Witnesses"

• Handout D: Suggested Procedure to be Followed for Cross-Examination of Victim by Defence Counsel

SUGGESTED PROCEDURE TO BE FOLLOWED FOR

CROSS-EXAMINATION OF VICTIM BY DEFENCE COUNSEL

The overall purpose of the process suggested below recognises that the judge is the conduit for asking the questions in XXN sought to be put behalf of the defence. This is not the usual process followed in cases and every attempt should be made to ensure that the defendant is able to properly and fairly conduct a defence and that the questions which defence counsel seeks to ask of the victim are asked, so long as they are relevant and also appropriate (see Practice Notes 32 and 33).

Paragraph 2(14) of the Guidelines and paragraph 34 of the Practice Note provides:

> "In accordance with the Guidelines, questions put in cross-examination on behalf of the accused should be given in writing to the Judge who should put them to the victim or to a vulnerable witness in a language which is clear and not degrading. The Judge may give directions as to the manner in which this is to be undertaken"

This process requires a number of steps. The following is an example of the process which could be followed and conveyed to the defence counsel:

Step 1

1. The defence counsel is to hand up the list of questions that he/she seeks to have the judge ask the victim
2. The judge should look at the XXN questions and assess their suitability for asking the victim (see Practice Note 32 and 33). This would probably be by the judge looking at the questions in chambers and adjourning the court for a short time to enable that to happen
3. If when looking at the questions the judge has concern about the suitability of the XXN questions, the judge should take this up with defence counsel.[1] The ruling should be done in open court and recorded in a way which does not state the content of the questions in advance of them being asked.

Step 2

4. The judge should resume the trial and ask the XXN questions of the victim in a language which is clear and not degrading and suitable for the victim especially a child.
5. At the end of the list of XXN questions the judge could ask the defence counsel whether there are further question which defence counsel wish to ask the victim. If defence counsel seeks to ask further questions then they could be indicated and the judge could ask those questions. It would not be necessary for these to be put in writing if they are short and can be done straight away. This is just a pragmatic sensible variation of the procedure which otherwise requires them to be in writing.

[1] Note this should perhaps be done in chambers and not in open court as otherwise the defence will be prematurely disclosing aspects of their defence. Defence counsel may agree with any changes suggested by the judge. If not, the judge would need to make a ruling on the suitability of the questions.

Handout D: Suggested Procedure to be Followed for Cross-Examination of Victim by Defence Counsel

Step 3

6. Prosecution counsel should be asked whether there is any re-examination of the victim.

ADDITIONAL NOTES

7. If during the process of the Judge asking the questions of the witness as in 4. there are answers by the victim are such that counsel wishes to ask an additional question(s), straight away, defence counsel could indicate to the judge as to what the questions are.[2] The judge may grant permission and then immediately ask those additional questions of the witness. It would not be necessary for these to be put in writing if they are short and can be done straight away.
8. HOWEVER, it is important that the process of requiring the list of questions should not by unduly modified. If for some reason some bigger issues arise that cannot be done by questions at the end, defence counsel should seek to amend the written list of questions.
9. It is important to ensure that fairness is given to the defendant in putting a defence at every stage in this process.

[2] If necessary in chambers

Module 7:
GENDER SENSITIZED CONDUCT OF GBV OFFENCES: CHILDREN

A. Module Activities

- **Activity 1: General Discussion**

  Short general discussion about the following:
  - What is your personal experience about children giving evidence?
  - What are some of the issues and concerns about children giving evidence?
  - What are some of the matters you think will need to be addressed when assessing their evidence?

- **Activity 2: Children as Witnesses Stereotypes and Myths**

  Mark with a tick in the box as to whether the statement is true of false

  Assume the child is 6 years old or more and that sexual assault excludes rape and sodomy.

Number	Statement	True?	False?
1	Sexual assault of a child is more likely to be committed by a stranger than by a person known to them such as friend, family member or neighbour.		
2	Because I have children I know what a child would do and how they would behave if they had been sexually assaulted.		
3	A child will always tell someone straight away if they have been sexually assaulted.		
4	(a) A child will tell all about the circumstances of sexual assault on the first occasion they are questioned. (b) If a child gives more information after the first occasion they are questioned, such as in a later interview or in court, that information is likely to be made up or inaccurate.		
5	A child will not maintain an emotional bond with a sexual offender.		
6	A child is easily influenced into making false statements about having been sexually assault.		
7	(a) Children are prone to fantasy and making up false allegations of sexual assault. (b) The younger the child the more likely that the allegations will be false.		

Number	Statement	True?	False?
8	Children are highly suggestible and can be influenced into making false allegations of sexual abuse by suggestive questioning by an adult.		
9	If a child has been sexually assaulted there will be physical signs of abuse.		
10	Generally - children do not retain their memory of events which occur to them as well as adults.		
11	Generally - children lie more than adults when giving evidence in court about sexual assault.		
12	Children are always less reliable than an adult when giving their evidence.		
13	If children give inconsistencies in their evidence about some circumstances of the sexual assault, they cannot be relied on as credible witnesses for the sexual assault.		
14	There must always be corroboration of the evidence of children about sexual assault by independent witnesses or evidence.		

B. Case Law

- **EMBELLISHMENTS, OMISSIONS, CONTRADICTIONS, INCONSISTENCIES OR IMPROVEMENTS**

In relation to children, the court needs to be aware of their common delayed disclosure when applying the usual test, noting the focus on "truthfulness" and "credibility".

▶ ***IJAZ HUSSAIN V. THE STATE AND ORS***
2017 YLR Note 96
Criminal Appeal No. 38 and Criminal Revision No. 80 of 2014
Aalia Neelum, J. (Lahore High Court)

Facts:

The appellants were convicted under Section 302(b), P.P.C. read with section 34, P.P.C.

The entire prosecution case against the appellants rests on the oral evidence of Mst. Hameedan Bibi (the complainant (PW-6)) and Nazir Hussain (PW-7) who claimed to be an eyewitnesses to the incident which took place at about 6.00 p.m. on 14.06.2011 wherein Madah Hussain, the father of the complainant (PW-6) succumbed at the spot due to throttling.

The earliest version by the prosecution given in the FIR (Exh.PD) was that the accused persons again caught hold of her father after chasing and started beating him. Complainant's father then fell down on the ground, after which accused Rab Nawaz caught hold of her father from his legs and remaining accused persons pressed his neck, The earliest version of the prosecution was that the accused persons except accused Rab Nawaz collectively pressed the neck of the deceased.

Appellants on appeal contend that Mst. Hameedan Bibi-the complainant (PW-6) and Nazir Hussain (PW-7) made major contradictions and dishonest improvements in their testimonies, and the latter should thus be rejected as having no substance.

Decision:

While appreciating the evidence, the court has to take into consideration whether the contradictions / omissions had been of such magnitude that they may materially affect the prosecution's case. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. However, where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness and [the] other witness also makes material improvements before the court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence.

First I would like to refer the evidence of Mst. Hameedan Bibi-the complainant (PW-6) who reiterates that she is an eye-witness of the alleged incident. Her (PW-6) cross-examination is material, wherein most of the omissions have been brought on record by the defence. I, find it necessary to reproduce herein below the material facts which she (PW-6) had stated before the court, but had not stated in her statement given by her to the police. The contradictions and omissions brought on the record in the evidence of the prosecution witnesses by the defence, which are reproduced below:

Statement of Mst. Hameeda Bibi-the complainant (PW-6) who deposed during cross-examination that,

> "I have stated before the police that Rab Nawaz accused caught hold of my father from legs, Aman Ullah put his hands on the neck of my father, Riaz accused put his knee on the chest of my father, Ijaz Hussain accused caught hold of my father from his arms and Aman Ullah pressed the neck of my father. Confronted with Ex.PD where it is not so recorded. I have not stated in Ex.PD that Rab Nawaz accused caught hold of my father from his legs while all the other accused persons pressed the throat of my father. Confronted with the Ex.PD where all the other accused persons pressed the throat of my father is recorded. I had moved an application for disinterment of body of deceased father for re-post mortem examination. I had myself got dictated that application. I did not dictate to my counsel in the application Ex.PE that Riaz Hussain, Ijaz Hussain and Aman Ullah accused pressed the throat of my father. Confronted with Ex.PE where it is so recorded. I had not narrated the time of occurrence at the time of moving application for disinterment of dead body as 4.00 p.m. Confronted with application Ex.PE where time of occurrence is mentioned as 4.00 p.m."

Similar contradictions and omissions are brought on record in the evidence of Nazir Hussain (PW-7), who deposed during cross-examination that,

> "I have got recorded in my statement before the Police that Aman Ullah accused present in the Court pressed the neck of Madah Hussain deceased. Confronted with Ex.D.C where it is not so recorded. I had got recorded in my statement under section 161, Cr.P.C. that Ijaz Hussain accused present in court caught hold the arms of deceased Madah Hussain. Confronted with Ex.D.C where it is not so recorded. I had got record-

ed in my statement before the police that Riaz Hussain accused pressed his knees upon the chest of Madah Hussain deceased. Confronted with Ex.DC where it is not so recorded."

The story regarding specific role of the accused persons by the complainant (PW-6) and the witness (PW-7) is nothing but an improvement. Besides, both prosecution witnesses denied the suggestions that Aqsa Bibi (daughter of Nazir Hussain, (PW-7) was residing with the complainant (PW-6) and she (Aqsa Bibi) appeared before the Investigating Officer and stated that his deceased "Nana" was alone. Whereas, the Investigating Officer-Hafiz Muhammad Rustam Inspector (PW-10) deposed during cross-examination that, "It is correct that Aqsa Bibi daughter of Nazir Hussain PW joined the investigation before me and I recorded her statement. It is also correct that in her statement, she stated that she informed the complainant about the occurrence." He (PW-10) also deposed that, "I found Riaz Hussain as innocent after thorough investigation after recording statements of so many persons who appeared in defence of Raiz Hussain accused. It is also correct that I found no role on the part of accused Rab Nawaz in my investigation though he was present at the spot." Serious doubts are, therefore, raised about the fact whether or not the aforesaid witnesses had witnessed the alleged incident. The effect of the proof of contradictions is to discredit the witness as being unreliable as substantive evidence in the court is contrary to what they stated before the police as well as they suppressed material facts from the court. In such case, the only option before the Court will be to hold the substantive evidence of the said witnesses in the Court as unreliable. Having regard to the contradictions and omissions in the evidence of the prosecution witnesses, I find it unsafe to rely on such evidence to base conviction of the appellants.

Appeal allowed and appellants acquitted.

▶ ***TAKDIR SAMSUDDIN SHEIKH V. STATE OF GUJARAT AND ANOTHER***
2012 SCMR 1869
Criminal Appeals Nos. 831 with 832 of 2010, decided on 21 October 2011
Dr. B.S. Chauhan, J (Supreme Court of India)

Facts:

Complainant (PW.1), deceased, and appellant No.1 were partners in the business of sale and purchase of lands.

Shri Bharat Rajendraprasad Trivedi (PW.1) lodged the complaint on 21.9.2000 that the complainant, deceased, and both appellants had gone to see the land in their two cars. The complainant (PW.1) and deceased were in one car, while appellant No.1 in another car being driven by the appellant No.2. Thereafter, they came back and decided to meet the owner of the land Smt. Jadaavben Ambalal Parmar (PW.3). Thereafter, at about 2.30 p.m. when they were coming back in their respective cars, both the appellants asked the deceased and complainant to stop their car. Both the appellants got down from the car with swords and started giving indiscriminate blows to Moiyuddin Shaikh, deceased, when the complainant and deceased had come out from their cars after receiving the signal given by the appellants. The complainant got scared and started running away. He was chased by the appellant Rameshbhai Ramlal Kahar.

According to the post-mortem report, a total of 33 injuries had been caused on the body of the deceased. In the opinion of the Doctor, the cause of death was shock and haemorrhage following multiple incised wounds.

The appellants were convicted by the trial court under Section 302 read with Section 114 of the Indian Penal Code (IPC). The High Court affirmed the judgment, hence the appeal to the Supreme Court. On appeal, the appellants contend that material contradictions / embellishments / improvements in the statements of witnesses made the case of the prosecution totally improbable. They assert that:

(i) there is sufficient material on record to show that in the sale transaction of land from Smt. Jadaavben Ambalal Parmar (PW.3), as the entire amount of consideration had not been paid to her by the deceased Moiyuddin Shaikh and she had raised hue and cry, a large number of persons from the village had gathered and there was a scuffle. Therefore it was probable that those villagers might have killed Moiyuddin Shaikh, deceased; and

(ii) it was not even possible for two appellants to cause as much as 33 injuries to the deceased.

Decision:

The sheet anchor of the argument on behalf of the appellants had been the contradictions/ improvements in the statement of the witnesses. They are most immaterial and irrelevant for the trial. In case the earnest deed had not been seen/examined by the complainant (PW.1), as deposed by him, it could not be presumed that the complainant, who was a partner in the Firm had seen it. In case, the complainant had not been the witness to the said earnest deed it is quite natural that though he was present at the time of executing the earnest deed he might have not seen it. Another incident cited is that he did not disclose as to whether he had not told the deceased as what was the agreement/understanding in respect of sharing the benefit in the transaction of land with Smt. Jadaavben Ambalal Parmar (PW.3).

We are of the view that all omissions / contradictions pointed out by the appellants' counsel had been trivial in nature, which do not go to the root of the cause. It is settled legal proposition that while appreciating the evidence, the court has to take into consideration whether the contradictions / omissions / improvements/ embellishments etc. had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, omissions or improvements on trivial matters without affecting the case of the prosecution should not be made the court to reject the evidence in its entirety. The court after going through the entire evidence must form an opinion about the credibility of the witnesses and the appellate court in natural course would not be justified in reviewing the same again without justifiable reasons.

The complainant Shri Bharat Rajendraprasad Trivedi (PW.1) is the sole eyewitness. It has been submitted on behalf of the appellants that being a sole and an interested witness, his evidence cannot be relied upon without corroboration. The submissions advanced in this respect had been that Shri Bharat Rajendraprasad Trivedi (PW.1) being a partner in the Firm would be beneficiary in the transaction of land involved herein in case one partner had been eliminated and other partner landed in jail. Such an argument is not acceptable for two reasons:

(i) While appreciating the evidence of witness considering him as the interested witness, the court must bear in mind that the term `interested' postulates that the witness must have some direct interest in having the accused somehow or the other convicted for some other reason.

(ii) This Court has consistently held that as a general rule the Court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But if there are doubts about the testimony, the court will insist on corroboration. In fact, it is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence.

We do not find any force in the submissions advanced on behalf of the appellants that it was not possible for two persons to cause 33 injuries on the person of the deceased and therefore, the villagers could have caused such injuries. Had it been so, as the scuffle took place in the presence of the appellants, they could have given the full details of the incident and further disclosed as to whether those villagers reached the place of occurrence with swords.

Had it been so, Smt. Jadaavben Ambalal Parmar (PW.3) and her son Sureshbhai Ambalal Parmar (PW.5) could have also been involved in the case.

As the courts below have discussed each and every factual and legal aspect of the case elaborately, we do not think it proper to re-examine every point. Presence of the complainant along with deceased and appellants was natural as being partners, they had gone to see the land. In case, there was some scuffle at the place of incident for the reason that the entire consideration for land had not been paid to Smt. Jadaavben Ambalal Parmar (PW.3), what was the occasion for the villagers to chase the deceased and kill him and that is too, without harming complainant and the appellants. More so, in case only agreement to sell had been executed, question of making payment of full consideration would not arise. However, Sureshbhai Ambalal Parmar (PW.5) had stated that sale deed and agreement to sell had been executed simultaneously. We fail to understand in case the sale deed is being executed, what was the occasion for executing the agreement to sell in respect of the same land in the same transaction. Shri Vasimuddin Jenuddin Shaikh (PW.4), brother of the deceased has admitted that immediately after the incident he received the phone call from the complainant regarding the incident. This very fact makes the prosecution case most probable. FIR had been lodged promptly. Thus, there was no time for any kind of manipulation.

• MODIFIED APPROACH: CORROBORATION OF THE EVIDENCE OF CHILDREN WAS NOT MANDATORY, BUT A "RULE OF PRUDENCE".

▶ ***PARVEEN AKHTAR AND OTHERS V. THE STATE***
2011 YLR 1899
Special Anti-Terrorism Jail Appeals Nos. 4 to 6 of 2009, decided on 8 April 2011
Muhammad Athar Saeed and Irfan Saadat Khan, JJ. (Sindh High Court)

Facts:

This was a kidnapping case. Appellants, who allegedly kidnapped a child, appeal from their conviction. One of the witnesses against them was the child who was allegedly abducted.

On appeal, appellants submit that that they want to read the deposition of abductee Sher Dil, which is available on Page No.199 of the paper book. They assert that perusal of this statement would reveal that the child was tutored by some persons outside the court before he was to give his deposition in the Court. They submit that it has clearly been mentioned in the deposition of the child that he was told that the accused sitting in the Court had abducted him.

Decision:

The deposition of the child is not confidence inspiring as he has categorically stated in his deposition that "he was informed by the uncle sitting in the office of the Prosecution Branch to say that accused sitting in the court had abducted him." In the present case also the deposition of the child clearly stipulates that he admitted that he was not only tutored but was also asked to say that the persons sitting in the court had abducted him.

Hence in view of this statement of the child his deposition has become highly doubtful. It is also a well settled proposition of Jaw that while examining a child witness great care and caution is to be taken. In the decision reported as the State v. Farman Hussain (PLD 1995 SC 1) the Hon'ble Apex Court while dilating upon the evidence of child witness observed as under:

> "Evidence of child witness is a delicate matter and normally it is not safe to rely upon it unless corroborated as rule of prudence. Great care is to be taken that in the evidence of child element of coaching is not involved. Evidence of child came up for examination before Division Bench of the High Court in the case of Amir Khan and others v. The State PLD 1985 Lah. 18 in which after consideration of the relevant case-law on the subject, Abdul Shakurul Salam, J. (as he then was) as author of the judgment observed that "children are a most untrustworthy class of witnesses, for, when the tender age, as our common experience teaches us, they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others and are greatly influences by fear of punishment, by hope of reward and the desire of notoriety. In any case the mile of prudence requires that the testimony of child witness should not be relied upon unless it is corroborated by some evidence on the record."

It is also a well-settled proposition of law that if a legal infirmity creating reasonable doubt in fulfilling the requirements of law is created the whole case becomes doubtful and benefit of the same is to be given to the accused. [...]

We, therefore, in the light of the above facts and circumstances of the case have come to the conclusion that the cases made out by the prosecution against the accused persons are full of doubt and the benefit in this regard should go to them. We are therefore of the considered opinion that the order of the Trial Court convicting the appellants can not be sustained. We therefore, allow the appeals set aside the impugned order.

• NO SCIENTIFIC BASIS FOR ANY PRESUMPTION AGAINST A CHILD'S CREDIBILITY AS A WITNESS

▶ ***R V. BARKER***
[2010] EWCA Crim 4
Case No: 2009/02867/C5, 21 January 2010
Lord Judge CJ, Hallett LJ and Macur JJ (Court of Appeal Criminal Division)

Facts:

S. B. was convicted of anal rape of a child under 13 years of age. On appeal, his argument was that it is not acceptable for a conviction, very heavily dependent on the evidence of a child as young as 4½ years, describing events said to have occurred when she was not yet 3 years old, to be regarded as safe: more formally, the competency requirement was not satisfied.

Issue:

Whether credence could be given to the testimony of the child witness.

Decision:

Section 53 of the Youth Justice and Criminal Evidence Act 1999 provides that:
"Competence of witnesses to give evidence.

(1) At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence.
(2) Subsection (1) has effect subject to subsection (3) and (4).
(3) A person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who is able to –
    (a) Understand questions put to him as a witness and
    (b) Give answers to them which can be understood.
(4) A person charged in criminal proceedings is not competent to give evidence in the proceedings for the prosecution (whether he is the only person, or is one of two or more persons, charged in the proceedings).
(5) In sub-section (4) the reference to a person charged in criminal proceedings does not include a person who is not, or is no longer, liable to be convicted of any offence in the proceedings (whether as a result of pleading guilty or for any other reason)."

These statutory provisions are not limited to the evidence of children. They apply to individuals of unsound mind. They apply to the infirm. The question in each case is whether the individual witness, or, as in this case, the individual child, is competent to give evidence in the particular

trial. The question is entirely witness or child specific. There are no presumptions or preconceptions. The witness need not understand the special importance that the truth should be told in court, and the witness need not understand every single question or give a readily understood answer to every question. Many competent adult witnesses would fail such a competency test. Dealing with it broadly and fairly, provided the witness can understand the questions put to him and can also provide understandable answers, he or she is competent. If the witness cannot understand the questions or his answers to questions which he understands cannot themselves be understood he is not. The questions come, of course, from both sides. If the child is called as a witness by the prosecution he or she must have the ability to understand the questions put to him by the defence as well as the prosecution and to provide answers to them which are understandable. The provisions of the statute are clear and unequivocal, and do not require reinterpretation.

We should perhaps add that although the distinction is a fine one, whenever the competency question is addressed, what is required is not the exercise of a discretion but the making of a judgment, that is whether the witness fulfils the statutory criteria. In short, it is not open to the judge to create or impose some additional but non-statutory criteria based on the approach of earlier generations to the evidence of small children. In particular, although the chronological age of the child will inevitably help to inform the judicial decision about competency, in the end the decision is a decision about the individual child and his or her competence to give evidence in the particular trial.

We emphasise that in our collective experience the age of a witness is not determinative on his or her ability to give truthful and accurate evidence. Like adults some children will provide truthful and accurate testimony, and some will not. However children are not miniature adults, but children, and to be treated and judged for what they are, not what they will, in years ahead, grow to be. Therefore, although due allowance must be made in the trial process for the fact that they are children with, for example, a shorter attention span than most adults, none of the characteristics of childhood, and none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults. The purpose of the trial process is to identify the evidence which is reliable and that which is not, whether it comes from an adult or a child. If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness starts off on the basis of equality with every other witness. In trial by jury, his or her credibility is to be assessed by the jury, taking into account every specific personal characteristic which may bear on the issue of credibility, along with the rest of the available evidence.

The judge determines the competency question, by distinguishing carefully between the issues of competence and credibility. At the stage when the competency question is determined the judge is not deciding whether a witness is or will be telling the truth and giving accurate evidence. Provided the witness is competent, the weight to be attached to the evidence is for the jury.

The trial process must, of course, and increasingly has, catered for the needs of child witnesses, as indeed it has increasingly catered for the use of adult witnesses whose evidence in former years would not have been heard, by, for example, the now well understood and valuable use of intermediaries. In short, the competency test is not failed because the forensic techniques

of the advocate (in particular in relation to cross-examination) or the processes of the court (for example, in relation to the patient expenditure of time) have to be adapted to enable the child to give the best evidence of which he or she is capable. At the same time the right of the defendant to a fair trial must be undiminished. When the issue is whether the child is lying or mistaken in claiming that the defendant behaved indecently towards him or her, it should not be over-problematic for the advocate to formulate short, simple questions which put the essential elements of the defendant's case to the witness, and fully to ventilate before the jury the areas of evidence which bear on the child's credibility. Aspects of evidence which undermine or are believed to undermine the child's credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of detailed cross-examination of the child and the advocate may have to forego much of the kind of contemporary cross-examination which consists of no more than comment on matters which will be before the jury in any event from different sources. Notwithstanding some of the difficulties, when all is said and done, the witness whose cross-examination is in contemplation is a child, sometimes very young, and it should not take very lengthy cross-examination to demonstrate, when it is the case, that the child may indeed be fabricating, or fantasising, or imagining, or reciting a well rehearsed untruthful script, learned by rote, or simply just suggestible, or contaminated by or in collusion with others to make false allegations, or making assertions in language which is beyond his or her level of comprehension, and therefore likely to be derived from another source. Comment on the evidence, including comment on evidence which may bear adversely on the credibility of the child, should be addressed after the child has finished giving evidence.

The competency test may be re-analysed at the end of the child's evidence. This extra statutory jurisdiction is a judicial creation, clearly established in a number of decisions of this court (R v MacPherson: R v Powell: R v M: R v Malicki; see to the contrary effect DPP v R [2007] EWHC 1842 (Admin)), where it was emphasised that an asserted loss of memory by a witness does not necessarily justify the conclusion that the appropriate level of understanding is absent.) If we were inclined to do so, and we are not, it would be too late to question this jurisdiction. This second test should be viewed as an element in the defendant's entitlement to a fair trial, at which he must be, and must have been, provided with a reasonable opportunity to challenge the allegations against him, a valuable adjunct to the process, just because it provides an additional safeguard for the defendant. If the child witness has been unable to provide intelligible answers to questions in cross-examination (as in Powell) or a meaningful cross-examination was impossible (as in Malicki) the first competency decision will not have produced a fair trial, and in that event, the evidence admitted on the basis of a competency decision which turned out to be wrong could reasonably be excluded under section 78 of the 1984 Act. The second test should be seen in that context, but, and it is an important but, the judge is not addressing credibility questions at that stage of the process any more than he was when conducting the first competency test.

In this case, we are very conscious of the extreme youth of the child, and that the ABE interview took place long after the alleged indecency occurred. The first question for decision is whether the judge was wrong when he concluded that the child's competence had been established not only before she gave evidence but after its conclusion. We have the advantage of the ABE interview of the child, which we studied closely. As we have recorded, we ourselves are satisfied that both the child's answers and her behaviour during the interview demonstrated her competence to give evidence. We did not observe the child being

cross-examined: the judge did. We have studied the transcript of her evidence, and taken note and commented on specific features of it which concerned Mr Richmond. We note that she gave clear answers although, from time to time, she responded by nodding her head or shaking it. That is what she had done during the ABE interview. No one entertained the slightest doubt that a nod meant "yes", and a shake of a head meant "no". Neither indicated uncertainty nor lack of comprehension by her of the question or her intended response, or left any doubt about her meaning. Having reflected on these submissions, and considering the matter with anxious care, there is in our judgment no basis which would justify this court interfering with the judge's conclusion that the competency of the child as a witness was established, and remained established after her evidence had concluded.

We are unable to accept that Mr Richmond could not put his case to X. Indeed as the transcript demonstrates, he did. His case was that the child was not telling the truth, and that she was advancing fabricated allegations against the appellant because of the influence and pressure exerted on her by her older sisters to improve the position of her mother at the expense of the appellant. He also asked questions with a view to demonstrating that the child's responses to the first interview with the police officer, when she did not formulate a complaint of sexual misbehaviour against the appellant, represented the truth. Her answers were that she was telling the truth about what had happened to her and that she was not acting on her sister's instructions or at her behest to fabricate a false story. Indeed given the extreme youth of the child, it seems plain that if she had been advancing a story manufactured for her by her older sisters, a very short cross-examination would have revealed, "ingenuously", as W.G. Dixon had observed in 1864, that the child had been tutored, and what she was "desired to say".

Both [the cases of] Powell and Malicki underlined the importance to the trial and investigative process of keeping any delay in a case involving a child complainant to an irreducible minimum. Unsurprisingly, we agree, although we draw attention to the circumstances which did not appear to arise in either Powell or Malicki, that the complaint itself, for a variety of understandable reasons, in the case of a child or other vulnerable witness may itself be delayed pending "removal" to a safe environment. The trial of this particular issue was delayed because of the trial arising from the death of Baby P. With hindsight it can now be suggested that perhaps the better course, given the age of X, would have been to try her allegation first. Be that as it may, in our judgment the decisions in Powell and Malicki should not be understood to establish as a matter of principle is that where the complainant is a young child, delay which does not constitute an abuse of process within well understood principles, can give rise to some special form of defence, or that, if it does not, a submission based on "unfairness" within the ambit of section 78 of the 1984 Act is bound to succeed, or that there is some kind of unspecified limitation period. There will naturally and inevitably be case specific occasions when undue delay may render a trial unfair, and may lead to the exclusion of the evidence of the child on competency grounds. Powell, for example, was a case in which after the evidence was concluded it was clear that the child did not satisfy the competency test, and if the child in Malicki was indeed "incapable of distinguishing between what she had said on the video and the underlying events themselves" it is at least doubtful that the competency requirement was satisfied. However, in cases involving very young children delay on its own does not automatically require the court to prevent or stop the evidence of the child from being considered by the jury. That would represent a significant and unjustified gloss on the statute. In the present case, of course, we have reflected, as no doubt the jury

did, on the fact of delay, and the relevant timetable. Making all allowances for these considerations, we are satisfied, as the judge was, that this particular child continued to satisfy the competency requirement.

There remains the broad question whether the conviction which is effectively dependent upon the truthfulness and accuracy of this young child is safe. In reality what we are being asked to consider is an underlying submission that no such conviction can ever be safe. The short answer is that it is open to a properly directed jury, unequivocally directed about the dangers and difficulties of doing so, to reach a safe conclusion on the basis of the evidence of a single competent witness, whatever his or her age, and whatever his or her disability. The ultimate verdict is the responsibility of the jury.

We have examined the evidence and asked ourselves whether there is any basis for interfering with the jury's verdict. Despite justified concerns about some aspects of the way in which it was conducted, the ABE interview shows an utterly guileless child, too naive and innocent for any deficiencies in her evidence to remain undiscovered, speaking in matter of fact terms. She was indeed a compelling as well as a competent witness. On all the evidence, this jury was entitled to conclude that the allegation was proved. Unless we simply resuscitate the tired and outdated misconceptions about the evidence of children, there is no justifiable basis for interfering with the verdict.

C. Handouts

- **Handout A: The Australasian Institute of Judicial Administration Incorporated (AIJA) Bench Book for Children Giving Evidence in Australian Courts (pages i–xii)**
- **Handout B: Essays in Advocacy, Chapter 19 "The Child and the Trial" by Dr. R.A Layton QC, University of Adelaide's Bar Smith Press, University of Adelaide, South Australia (2012)**
- **Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection**
- **Handout D: 'Child Forensic Interviewing Best Practices' of the U.S. Department of Justice Program (September 2015)**
- **Handout E: News Article – 'Two-year-old girl helps convict abuser after becoming youngest person in UK to give evidence in court' by Natasha Salmon. The Independent, 11 October 2017.**

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The Australasian Institute of Judicial Administration for access to the Aboriginal Bench Book for Western Australian Courts (2nd ed.).

The Judicial College of Victoria for access to the Victorian Criminal Charge Book.

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Foreword

In July 2004 the AIJA convened a Seminar on "Child Witnesses – Best Practice for Courts". The Seminar was held in the District Court of New South Wales at Parramatta which hosts a special facility for child witnesses.
The idea for the Parramatta Seminar was a proposal then under consideration by the AIJA's Project and Research Committee for the development of a best practice in relation to the taking of evidence from child witnesses, together with the development of a benchbook.

There has been considerable consideration of the particular issues and difficulties attendant upon the giving of evidence by child witnesses in criminal proceedings over the past 10 years or so. Many jurisdictions have considered the matter and have adopted procedures for the taking of such evidence. The Project and Research Committee formed the view that any project for the development of a benchbook would be best informed by a Seminar at which ideas and concerns could be canvassed. The Seminar involved presentations from the judicial perspective, the practising profession's perspective and the particular difficulties attendant upon child witnesses giving evidence in jury trials.

A Committee was formed, consequent upon the Seminar, to prepare a child witnesses' benchbook. Judge Helen O'Sullivan of the District Court of Queensland was appointed to chair the Committee. The other members of the Committee were Justice Marcia Neave AO, Court of Appeal, Melbourne, Dr Annie Cossins, Faculty of Law, University of New South Wales, Justice Robyn Layton, Supreme Court, Adelaide, Justice Richard Refshauge, Supreme Court of the Australian Capital Territory, Judge Meryl Sexton, County Court of Victoria, Judge Ann M Ainslie-Wallace, District Court of New South Wales and Judge Kevin Sleight, District Court of Western Australia. Judge Hal Jackson QC, District Court of Western Australia and Judge David Freeman, District Court of New South Wales also served upon the Committee.
An initial working draft was prepared by Dr Michael King, former Western Australian magistrate and now Senior Lecturer, Faculty of Law, Monash University.
The Committee has worked tirelessly in relation to the preparation of the benchbook and the quality of the benchbook is to be commended. The Committee is to be commended for its work and also Ms Danielle Andrewartha for her editing. The benchbook looks at the position of child witnesses not only from the viewpoint of the

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legal issues involved but with a view to the psychological aspects of the child giving evidence. It will be a valuable resource for both judicial officers and practitioners.

The AIJA has committed resources to the continuing update of the benchbook to ensure its ongoing accuracy and relevance.

Virginia Bell
Justice, High Court of Australia
Former President of the AIJA

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Introduction

1. This Bench Book is intended primarily for judicial officers who deal with children giving evidence in criminal proceedings as complainants or witnesses, not as accused. It is not limited to child sexual abuse, although this forms a substantial proportion of criminal proceedings involving children. The Bench Book does not deal with the sentencing of child offenders or child protection hearings.

2. The objectives of this Bench Book are:

    i. To promote accurate knowledge and understanding of children and their ability to give evidence.

    ii. To assist judicial officers to realise the goal of a fair trial for both the accused and the child complainant.

    iii. To assist judicial officers to create an environment that allows children to give the best evidence in the courtroom.

3. The material currently available to judicial officers in each jurisdiction varies greatly and includes articles, websites, detailed jury directions, Bench Books, and Practice Directions. This Bench Book is an attempt to collate these materials and write a comprehensive text. The focus throughout the Bench Book is on the provision of helpful information to judicial officers for use in court. This Bench Book is not intended to duplicate existing materials, or to be in any way inconsistent with them. The value of existing Bench Books is acknowledged and respected.

4. This Bench Book is the first attempt in Australia, and possibly internationally, to collate legal material and psychological material on child witnesses in the same text, with an emphasis on usefulness for judicial officers.

5. In July 2004, the Australasian Institute of Judicial Administration (AIJA) held a conference 'Child Witnesses - Best Practice for Courts' at the Parramatta Court in Sydney. This was prompted by the NSW Specialist Child Sexual Assault

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Jurisdiction Pilot. The need for judicial officers to be provided with clear information about child witnesses became apparent from informal discussions at the conference.

6. Initial members of the AIJA Committee 'Children Giving Evidence' were Judge Helen O'Sullivan and Judge Hal Jackson (Co-Chairs), Dr Annie Cossins, Judge Shauna Deane, Judge David Freeman, Justice Robyn Layton, Professor Marcia Neave, and Judge Roy Punshon.

7. Current members of the Committee are Judge Helen O'Sullivan (Chair), Judge Ann Ainslie-Wallace (New South Wales), Dr Annie Cossins (New South Wales), Justice Robyn Layton (South Australia), Justice Marcia Neave (Victoria), Justice Richard Refshauge (Australian Capital Territory), Judge Meryl Sexton (Victoria), and Judge Kevin Sleight (Western Australia).

8. Dr Michael King undertook initial research of the existing literature and produced a compilation. This work was then expanded and refined into Bench Book format by the members of the Committee.

9. The members of the Committee are mindful that this is a first attempt and there may be errors and omissions. The Committee warmly welcomes comments and suggestions to be sent to the AIJA so that these may be incorporated on a continuing basis.

10. The Benchbook was updated by Associate Professor Annie Cossins, 2010, 2012 and 2015. The law is stated as at February 2015.

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Disclaimer

The *Bench Book for Children Giving Evidence in Australian Courts* contains information prepared and collated by the Australasian Institute of Judicial Administration Committee (the Committee).

The Committee does not warrant or represent that the information contained within this publication is free of errors or omissions. The *Bench Book for Children Giving Evidence in Australian Courts* is considered to be correct as at the date of publication. However, changes in circumstances after the time of issue may impact the accuracy and reliability of the information within.

The Committee takes no responsibility for and makes no representation or warranty regarding the accuracy, currency, reliability and correctness of any information provided to the Committee by third parties.

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Essays in Advocacy Chapter 19

THE CHILD AND THE TRIAL[1]

The advocacy skills required of counsel when witnesses are children are particularly difficult. Whether a person is acting on behalf of the child or calling the evidence of children as part of a client's case, or alternatively whether one is cross-examining a child, there are certain common matters that an advocate must keep in mind. Walker[2] encapsulated part of the problem when she said:

> The external forensic system in which children are expected to retrieve information is a system that was built *by* adults *for* adults. It is a system that uses often arcane language in an adult environment under adult rules which are frequently intimidating even for adults themselves. Under such circumstances, it is not surprising that some inconsistencies – both real and imagined – should occur in a child's testimony.

Walker outlined six different requirements for the competency of children when giving evidence, namely whether the witness:[3]

(1) has observed or experienced the event in question;

(2) can recollect the event in question;

(3) can communicate their recollection verbally;

(4) understands the questions put to them;

(5) is able to give intelligent answers to the questions put to them; and

(6) is aware of their duty to speak the truth.

Each of these requirements and their relevance to the role of counsel will be discussed below. The purpose of this chapter is to outline some findings in the relevant research that help to understand the particular issues that are relevant to children as witnesses. It will be seen that a child is often a perfectly competent witness so long as questions are posed in a fair and considerate manner. It will also be explained that, in the case of children who make complaints of offending, early questioning by a competent and unbiased questioner is important to preserve the reliability of the child's evidence. Part 5 of this chapter gives examples of proper and improper questioning techniques for counsel when dealing with child witnesses.

---

1 This chapter draws substantially on a previous publication for which I was a contributing author: *Bench Book for Children Giving Evidence in Australian Courts* (2009) Australian Institute of Judicial Administration Incorporated <http://www.aija.org.au/Child%20Witness%20Bch%20Bk/Child%20Witness%20BB%202009.pdf> at 5 February 2010.

2 A G Walker, *Handbook on Questioning Children: A Linguistic Perspective* (2nd ed, 1999, ABA Center on Children and the Law, American Bar Association) 84.

3 A G Walker, 'Questioning Young Children in Court: A Linguistic Case Study' (1993) 17 *Law and Human Behavior* 59.

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Understanding children

Before considering the role of counsel in respect of questioning children, it is essential to understand the development of children and the ways in which they understand the world around them as well as their abilities to understand and communicate events.

An overriding feature of children, which impinges on all aspects of children giving evidence as witnesses in a trial, is that they lack power.

Lack of Power

Children are more vulnerable than adults because of their physical size and intellectual development which can be physically and emotionally exploited by adults. This vulnerability is also the feature of their constitution which often leads to children being the victims of adult behaviour or offending. Particularly when young, children are also often reluctant to contradict an adult. In addition, children lack power throughout the whole court process commencing from the complaint about conduct through to the giving of evidence in court. This lack of power can mean that the trial process is particularly burdensome on a child as the court process requires them to:

- complain to a person in authority;
- be questioned by police or other authority figures;
- be subjected to family responses;
- await trial, undergo proofing and experience court delays;
- give evidence in chief and then be subjected to cross-examination; and
- when they give evidence they are older with different ways of expressing themselves than the time when the event occurred and the complaint was made.

This lack of power is further affected by the following factors:

- family, social and environmental circumstances;
- socio-economic disadvantage and educational background;
- physical, intellectual or mental health problems;
- the child being non-English speaking or from culturally different places; and
- the child having an Aboriginal background.

One can also add to those factors, the circumstances of being in court, in a formal and unfamiliar environment.

Fair Trial

The purpose of understanding matters about child development, is to provide an appropriate balance so that children are given the opportunity to give their best evidence, particularly if it relates to an alleged offence committed against them. At the same time it is necessary to recognise that the accused in a criminal trial has the right to a fair trial, which includes the ability to test the prosecution's case through cross-examination of witnesses.

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Sections 22 and 25 of the *Evidence Act 1929* (SA) seeks to strike this balance by providing that questions asked of a witness may be disallowed and the witness told that the question need not be answered if the question is vexatious and not relevant or is otherwise 'improper'. A question is 'improper' if it is:

- misleading or confusing;
- based on a stereotype including a sexual, racial, ethnic or cultural stereotype or a stereotype based on age or physical or mental disability;
- unnecessarily repetitive, offensive or oppressive or one of a series of questions that is repetitive, offensive or oppressive; or
- said in a humiliating, insulting or otherwise inappropriate manner or tone.

The provision also allows the Court to take into account the age, personality and educational level of a witness as well as their mental or physical disabilities, cultural background, nature of the proceedings etc.

The role of the judge in balancing the interests of the witness and those of the accused has been discussed in cases such as *R v TA* (2003) 57 NSWLR 444 where Spigelmann CJ stated (at 446):

> Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused. That role is perfectly consistent with the requirements of a fair trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance.

It is the responsibility of counsel to ensure that, no matter which party they act for, they treat each witness with appropriate respect, particularly if the witness is a child. In the case of a child who is alleged to be the victim of a crime, which is often the context in which they give evidence, it is important that they do not become re-victimised as a consequence of improper questioning by counsel. This is a duty owed by a counsel to the court in the interests of justice. It is a higher duty than the interests of the client, and the client should be advised of this overriding duty.

1. Has a child observed or experienced the event in question?

Sometimes it may be apparent from the behaviour of the child, either by actions or words, that the child has observed or experienced an event. This may be contemporaneous with the event or subsequent to the event. Sometimes the occurrence of an event may be apparent from sources or evidence independent of the child. Frequently however, that is not the case, particularly when the alleged event is sexual abuse in which the child and the alleged abuser were the sole witnesses. Research has consistently shown that sexually abused children commonly delay their complaint of abuse for months or years.[4] Still further research suggests that some children do not disclose the abuse within the first year after the abuse.[5]

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[4] See eg, K London et al, 'Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?' (2005) 11 *Psychology, Public Policy, and Law* 194; T A Roesler, 'Reactions to Disclosure of Childhood Sexual Abuse: The Effect on Adult Symptoms' (1994) 182 *Journal of Nervous and Mental Disease* 618; H S Resnick et al, 'Prevalence of Civilian Trauma and Posttraumatic Stress Disorder in a Representative National Sample of Women' (1993) 61 *Journal of Consulting and Clinical Psychology 984*; D Finkelhor et al, 'Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics, and Risk Factors' (1990) 14 *Child Abuse & Neglect* 19.

[5] J Henry, 'System Intervention Trauma to Child Sexual Abuse Victims Following Disclosure' (1997) 12 *Journal of Interpersonal Violence* 499; L D Sas and A H Cunningham, *Tipping the Balance to Tell the Secret:*

• Handout B: Essays in Advocacy, Chapter 19 "The Child and the Trial" by Dr. R.A Layton QC, University of Adelaide's Bar Smith Press, University of Adelaide, South Australia (2012)

Many will never disclose it.[6] A comprehensive study funded by the Public Health Agency of Canada and undertaken by Directors at the Centre for Children and Families in the Justice System in London investigated the phenomenona of non-disclosure and delay in disclosure by victims of sexual abuse.[7] Key findings of that report included:

- A majority of sexually abused children do not disclose immediately or within one month of abuse. Most report the abuse one or more years after it occurred or not at all.
- Children abused by strangers are more likely to disclose within one month.
- Children abused by family members are more likely to delay disclosure longer than one month.
- Repeated abuse is more likely to occur if the abuser is a relative.
- Children who experience multiple abuses are less likely to disclose.
- Less intrusive forms of abuse are more likely to be reported.
- The younger the child at onset of abuse, the less likely they will disclose.
- Threats and use of force may be associated with delay in reporting.
- Authority figures (police, clergy, social workers etc) are the least common type of confidant for a child.
- Friends are the most common type of confidant and disclosure to peers increases with age.

Failure by a child to disclose at the time of offending can be explained by factors such as:

- not understanding the significance of the event;
- embarrassment, shame or self blame;
- fear of reprisals such as punishment, harm to others or abandonment;
- perceiving that they won't be believed;
- believing that they have to keep their promise not to tell;
- loyalty conflicts; and
- lack of adult support.

It is quite common for children in subsequent interviews or questioning and even at the time when giving evidence in court, to disclose certain events that have not been disclosed before. This is not necessarily lying. As with adults, something may trigger remembrance of a matter not previously mentioned.

The Public Discovery of Child Sexual Abuse (London, Ontario, Canada: London Family Court Clinic, 1995); D M Elliott and J Briere, 'Forensic Sexual Abuse Evaluations of Older children: Disclosures and Symptomatology' (1994) *Behavioral Sciences and the Law* 261.

[6] In their meta-analysis, London et al concluded that two thirds of adults who stated in retrospective surveys that they had been abused as children reported that they did not disclose the abuse during childhood: London et al, above n 4.

[7] A Cunningham and L Baker, *Little Eyes, Little Ears: How Violence against a Mother Shapes Children as They Grow* (2007) Public Health Agency of Canada <http://www.lfcc.on.ca/little_eyes_little_ears.pdf> at 5 February 2010.

• Handout B: Essays in Advocacy, Chapter 19 "The Child and the Trial" by Dr. R.A Layton QC, University of Adelaide's Bar Smith Press, University of Adelaide, South Australia (2012)

The first interview is vital and the earlier the better. What children tell is more reliable when it is done by an experienced and unbiased interviewer using open-ended questions.

2. Can children recollect the event in question?

In order to give evidence a child must be able to have a memory retrieval ability.

Memory retrieval requires three stages:

- recognition;
- storage; and
- retrieval and its expression.

Recognition

Recognition is the encoding of information about an event which has happened. The nature and extent of encoding depends on:

- What the event was; its meaningfulness; in particular whether it was traumatic or unusual or whether there was some specific memorable feature at the time.
- The child's existing knowledge and how the event was understood at the time.
- The age and general intelligence of the child.

Children have a different perspective from adults as to what is important to remember. This facet itself can be a useful guide to the accuracy or otherwise of a child's memory. A child may not entirely understand what is happening or what they are observing, but they may be able to still recall and relate details of the event. Sometimes the detail recalled may be trivial but it gives credibility to what is described. For example:

- I was worried about my new pyjamas with the bears on them.
- He came into my room with a box of tissues.
- He then "wee'd" on me or he "milked" on me (ejaculation).

Storage of memory

The storage of memory is also dependent on the meaningfulness of the event. In addition it depends on:

- Whether the child re-experiences the event or remembers it because something triggers the memory.
- The quality of memory of an event is affected by the passage of time before the child either remembers it voluntarily or is reminded in some way of the event.
- The extent to which there are later competing events of a similar nature.
- Subsequent events may impact positively or adversely upon the quality of memory.
- Depending on the nature of intervening events, memory may be diminished or strengthened.
- The longer the gap between an event and its recall, the more likely it is that the memory details will be lost, particularly with respect to peripheral details. Some

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exceptions may be details that are of interest to the child, such as smell, a look on the face, or sounds of groaning etc.

Retrieval

Children generally lack the same memory retrieval strategies that are available to an adult. Retrieval depends on what attention the child paid at the time of the event and the detail noted.

Children's recall also depends on language development, conceptual development, memory and emotional development as well as the context in which recall is undertaken.

Emotional factors may affect memory, particularly in relation to questions about abuse where there can be signs of embarrassment, disgust, surprise or disbelief, each of which depends on the age of the child. This may affect the motivation to retrieve the particular memory. The child may wish not to remember and thereby avoid recounting a terrible and frightening memory.

General features about the memory of children

Research indicates that there is no universal rule concerning children's memory, particularly in the context of giving evidence. Children may give very detailed accounts of an event, or they may provide little detail. Memory, either of child or adult, does not operate like a video recorder; it is a product of subjective reality of the individual and the interaction of the individual with his or her environment and it can change over time.[8]

A Child's ability to encode, store and retrieve information develops over time and improves with their age at the time of the event. From three years of age children form detailed and enduring memories of events that happen to them, particularly if they are distinctive or emotionally positive or negative.[9] Children older than three are also more able to engage in a conversation about such events with others, which may serve to reinforce their memories.

Children may provide different but nonetheless accurate details about the same event at different interviews.[10] This discrepancy may be due to the fact that young children have difficulty presenting information in an organised manner. This is because different aspects of the experience may become more relevant to them as they develop.[11] This means that inconsistency in children's accounts do not necessarily equate to inaccuracy, especially in repeated recalls that follow open ended questioning.

Young children have particular difficulty isolating a specific incident that occurred as part of a routine experience and may not differentiate a discrete event from that routine experience.

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[8] L Baker-Ward and P A Ornstein, 'Cognitive Underpinnings of Children's Testimony', in Westcott, Davies and Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (2002) 22.

[9] Cunningham and Baker, above n 7, 11.

[10] R Fivush and A Schwarzmueller, 'Say It Once Again; Effects of Repeated Questions on Children's Event Recall' (1995) 8 *Journal of Traumatic Stress* 555; R Fivush, 'The Development of Autobiographical Memory', in Westcott, Davies and Bull (eds.) *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (2002) 58.

[11] R Fivush and A Schwarzmueller, 'Say It Once Again; Effects of Repeated Questions on Children's Event Recall' (1995) 8 *Journal of Traumatic Stress* 555; R Fivush, 'The Development of Autobiographical Memory', in Westcott, Davies and Bull (eds.) *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (2002) 58.

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For example, a child giving evidence about having been inappropriately touched following a family dinner might, in response to a question inquiring whether a sister was present at that *dinner*, answer "yes" even though the sister was not there, because it was the child's routine experience that the sister generally was there for all family dinners.[12]

Literature indicates that repeated experiences of an event – such as repeated acts of abuse – decrease a child's ability to remember the specific details of each experience.[13] With a lapse of time, the interference in memory is likely to increase, particularly with younger children. However, if a particular incident of abuse was distinctive in some way – such as being the first or the last act, or being in a different location or at night rather than in the daytime, or in some other way an unusual and different feature – then the child is more likely to be able to distinguish the individual event from others.[14]

Further, the fact that certain experiences were traumatic does not in itself prevent or hinder them being recalled. In relation to the effect of high levels of stress in relation to memory, there are some contradictory findings. Some studies suggest that high levels of stress increase children's abilities to focus and encode information.[15] Others have suggested that too much stress at the time of the event can cause memory impediment.[16]

Accuracy of memory and suggestibility

The extent to which children of different ages are vulnerable to suggestion has been the subject of much research, largely with inconsistent results, because of the use of different methodologies. However, some common conclusions can be drawn:

- Children may be particularly prone to answering questions that they do not understand during the cross-examination process.[17]
- If children are asked open questions such as who, what, where, why, when and how, this permits free narrative and the completeness of their accounts is increased without decreasing its accuracy.[18]

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[12] L Sas, 'The Interaction between Children's Developmental Capabilities and the Courtroom Environment: The Impact on Testimonial Competency' (2002) Department of Justice, 40 <http://www.justice.gc.ca/eng/pi/rs/rep-rap/2002/rr02_6/index.html> at 5 February 2010.

[13] M Powell and D Thomson, 'Children's Memories for Repeated Events', in Westcott, Davies and Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (2002) 72.

[14] Ibid.

[15] L Terr, 'What Happens to Early Memories of Trauma? A Study of Twenty Children under Age Five at the Time of Documented Traumatic Events' (1988) 27 *Journal of Amer Academy of Child & Adolescent Psychiatry* 96.

[16] S J Ceci and M Bruck, 'Suggestibility of the Child Witness: A Historical Review and Synthesis' (1993) 113 *psychological* Bulletin 403, 434; K A Merritt, P A Ornstein and B Spicker, 'Children's Memory for a Salient Medical Procedure: Implications for Testimony' (1994) 94 *Pediatrics* 17; D P Peters (ed.), *The Child Witness: Cognitive and Social Issues* (1989); D P Peters, 'The Influence of Stress and Arousal on the Child Witness', in Doris (ed.), *The Suggestibility of Children's Recollections: Implications for Eyewitness Testimony* (1991) 60.

[17] R Zajac, J Gross and H Hayne, 'Asked and Answered: Questioning Children in the Courtroom' (2003) 10 *Psychiatry, Psychology and Law* 201 <http://www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/abstract_zajac-questioning_children_in_the_courtroom.html> at 5 February 2010 citing A H Waterman, M Blades and C Spender, 'Do Children Try to Answer Nonsensical Questions?' (2000) 18 *British Journal of Developmental Psychology* 211.

[18] D A Poole and D S Lindsay, 'Interviewing Preschoolers: Effects of Non-Suggestive Techniques, Parental Coaching, and Leading Questions on Reports of Non-Experienced Events' (1995) 60 *Journal of Experimental Child Psychology* 129.

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- The degree of suggestibility varies markedly between children who have participated in an event as distinct from merely being observers of events.[19]
- Reports of misinformation in free recall by children are rare.[20]
- Generally it is more difficult to mislead children to report negative or abuse-related events than positive events, regardless of age.[21]
- Children are fairly resistant to suggestions that they have been hurt when they have not.[22]
- Two factors that predict children's suggestibility are:
    - 'Yield' – a tendency to respond affirmatively to leading questions; and
    - 'Shift' – a tendency to be socially sensitive to negative feedback which may cause a child to change his or her responses to please the questioner.[23]
- Young children are more suggestible than older children and adults.
- Children with disabilities can be more vulnerable to suggestibility depending on their level of intellectual functioning and the nature of the disability.
- False reports can be due to a combination of social and cognitive problems such as suggestibility or a weak memory for an event.

It is very important on all occasions that children are questioned using an open-ended free narrative. This form of questioning best ensures the accuracy of their information and their evidence. The strength of memory for an event may be less than the strength of new suggested information by an interviewer. There is potential for children to be influenced by information suggested to them by an interviewer using leading questions when this information has not been previously volunteered by the child, eg. "Did daddy put his fingers inside you?"

Unfortunately early and unwitting questioning of children may result in tainting a child's information by the introduction of elements or assumptions not volunteered by the child. This may occur at the time of disclosure to a parent or other adult, or even by inappropriate questioning by police. It is therefore important that a child is questioned by a competent and experienced person as soon as possible.

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[19] G Goodman et al, 'Children's Concerns and Memory; Issues of Ecological Validity in the Study of Children's Eyewitness Testimony', in Fivush and Hudson (eds.) *Knowing and Remembering in Young Children* (1990) 249; C Gobbo, C Mega and M-E Pipe, 'Does the Nature of the Experience Influence Suggestibility? A Study of Children's Event Memory' (2002) 81 *Journal of Experimental Child Psychology* 502, 504.

[20] K Pezdek, K Finger and D Hodge, 'Planting False Childhood Memories: The Role of Event Plausibility' (1997) 8 *Psychological Science* 437; K Pezdek and T Hinz, 'The Construction of False Events in Memory', in Westcott, Davies and Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (2002) 99; B M Schwartz-Kenney and G S Goodman, 'Children's Memory of a Naturalistic Event Following Misinformation' (1999) 3 *Applied Developmental Science* 34.

[21] M L Eisen et al, 'Memory and Suggestibility in Maltreated Children: New Research Relevant to Evaluating Allegations of Abuse', in Lynn and McConkey (eds.), *Truth in Memory* vol. 67, (1998) 163; Sas, above n 12.

[22] Sas, above n 12, 40.

[23] G S Goodman and A Melinder, 'Child Witness Research and Forensic Interviews of Young Children: A Review' (2007) 12 *Legal and Criminological Psychology* 1, 9-10, citing G H Gudjonsson, 'A New Scale of Interrogative Suggestibility' (1984) 5 *Personality and Individual Differences* 303; G H Gudjonsson, 'A Parallel Form of the Gudjonsson Suggestibility Scale' (1987) 26 *British Journal of Clinical Psychology* 215.

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3. Can children communicate their recollection verbally?

Children differ in their language development. Whilst most children's speech sounds a lot like adults by the age of five, their cognitive understanding of language may differ.

Vocabulary and understanding for the purposes of communication gradually increases with age. Each child has their own unique word pattern which is shaped by family and social circumstances, education and upbringing.

Children have a limited ability to correct a misunderstanding and are reluctant to contradict an adult questioner.

Children use words which may differ from the way in which adults use the same words. For example, in sexual matters children often use different language and are certainly unlikely to understand words such as semen; vagina; penis; ejaculation etc. Accordingly, being hurt during a sexual encounter might be described as being "stabbed".

Children suffer from cognitive limitations which differ from adults. Research has provided certain indicators of general age-determined language faculties:

Pre-schoolers

- use words connoting time, distance, relationship or size, well before they understand their meaning;
- are confused by the use of negatives. For example, "Did you not go to the door?";
- may only answer one aspect of a complicated question;
- usually do not know that they do not understand something; and
- believe that adults generally speak the truth, are sincere and would not trick them.

Children aged 7-10 years

- the word "touching" involves a hand, and touching by a mouth or penis is not included;
- may have problems with questions considering the future from the perspective of the past; for example, "Was Uncle John supposed to take you to the movies that day?";
- have difficulties with the passive tense;
- do not have the skills to deal with irony, sarcasm and insincerity;
- still believe that generally adults tell the truth;
- do not understand that other people do not know what they know. That includes a lawyer asking questions. They do not tend to offer spontaneous information;
- < 6 to 7 years they are unable to say how long an activity went on for and will typically say about 5 mins;
- < 7 years they are unable to distinguish between "before" and "after";
- < 7 to 8 years they do not fully understand the difference between "come", "go", "bring" and "take";

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- < 7 to 10 years they are not able to tell the difference between "ask" and "tell";
- < 7 years they have problems describing what others are feeling and may simply project their own feelings and perception;
- < 7 years they have trouble with the sequence of events. This includes the order in which events took place. They tend to simply remember the fact that events have occurred;
- < 8 years they have difficulty knowing the day of the week and seasons;
- < 8 to 9 years they have not acquired the adult concept of "remember". A younger child may use the word "forget" in the sense of not having known;
- < 9 years are not able to provide accurate measurements; and
- < 10 years they do not realise that they have insufficient information to correctly interpret the world around them. They are unaware, in giving an answer, that they did not understand the question.

It is useful for a questioner to check comprehension by asking a child to either paraphrase what they understand the question to be or to ask further questions to explain their answers.

4. Can children understand the questions put to them?

The language used in a courtroom is often very intimidating. Children generally have little ability to deal with legal jargon. Of necessity, any lawyer is in a powerful position and children often do not know how to disagree. Children of all ages, like adults, are less likely to admit that they do not understand a question if they think they should understand it, particularly if the atmosphere is forbidding and formal.[24] It is common for children under pressure in the witness box to simply repeat a previous answer.[25]

Children may also have problems in dealing with questions that limit choice as to answers, such as that allow only a yes or no answer, particularly when the child knows that neither answer applies in the circumstances.

It has sometimes been said that a helpful rule of thumb to enhance the ability of a child to understand a question, is to match the number of words in the question with the age of the child. For example, for a six year old child, there would be six words in the question.

Two separate studies conducted by Zajac and Hayne (2003)[26] raise serious issues about the appropriateness of cross-examination in order to test the accuracy of the evidence of children aged between 5 and 13. A study of court transcripts of the evidence of children in that age group in sexual abuse cases and controlled studies done in respect of children aged 5 to 6 years, demonstrated that closed questions simulating cross-examination and usual cross-examination techniques, resulted in 75% of children in the court environment changing at least one aspect of their evidence.[27] In the controlled studies, which involved a true situation,

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[24] Walker, above n 2, 60.
[25] Ibid, 69.
[26] R Zajac, J Gross and H Hayne, 'Asked and Answered: Questioning of Children in the Courtroom' (2003) 10 *Psychiatry, Psychology and Law* 199; Zajac and Hayne, 'The effect of cross-examination on the accuracy of children's reports' (2003) 9 *Journal of Experimental Psychology* 187.
[27] R Zajac, J Gross and H Hayne, 'Asked and Answered: Questioning of Children in the Courtroom' (2003) 10 *Psychiatry, Psychology and Law* 199, 206.

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closed questions, and a younger age group, 85% changed one aspect of their statement. Also in the controlled study, 33% of the children changed all of their original responses to what was a true situation.[28]

Further, the study of the court transcripts revealed that children were also prone to answering questions even if they were ambiguous, or did not make sense. It also revealed that children's responses largely depended on the type of questions asked rather than the lawyer posing them. Both articles reinforced the need for questions to be age-appropriate and open-ended. The questions should not involve complex language structure, contain more than one part, include inappropriate negatives, be ambiguous or be tagged.[29]

Therefore, as one of the prime purposes of cross-examination is to discredit the child's testimony through controlling questioning techniques, the unfortunate outcome is that it is the least likely technique to allow children to give their most accurate evidence.

5. Are children able to give intelligent answers to the questions put to them?

As discussed earlier, intelligent, accurate responses depend primarily upon the way in which the child is questioned.

How to question children for the most reliable evidence

- use simple, jargon-free language which is appropriate to the child's age or development;
- use simple construction consisting of subject, verb and object;
- use the active rather than the passive voice;
- try to convey only one idea at a time;
- avoid complex concepts, phrases and negatives;
- ask open questions which commence with who, where, what, why, how etc.
- require an answer that is within the child's cognitive capabilities;
- use a pleasant clear tone of voice, but not over-friendly; and
- watch to see whether or not a child is tiring and if the judge has not picked it up, do so.

Questions which produce the least reliable evidence from children

- **Legalese.**
  Examples:
  - Q: You told "my friend" that…
  - Q: No, I'll withdraw that…
  - Q: I put it to you that….

- **Unmarked questions or propositions** where there is no indication that a response is required; it is simply a proposition.
  Example:
  - Q: I put it to you that you are telling a lie.

[28] Zajac and Hayne, above n 26, 193.
[29] Ibid. The term "tagged questions" essentially refers to a question which is essentially a statement phrase but which is transformed into a question by an interrogative phrase which is 'tagged' to the end of the sentence. Eg "He took you straight to the football, did he?".

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- **Double negatives.**
  Example:
  - Q: He did not suggest to you that you should not go outside the door did he?

- **Tagging of questions** at the end of a sentence.
  Examples:
  - Q: He didn't do it, did he? (It has been recognised in one study that the answer to this question requires seven different cognitive operations to be in process.)
  - Q: If something happens today and then something happens tomorrow, you are not going to say they are a year apart, are you?

- **Negative tagging** by adding a negative construction at the end of a sentence.
  Examples:
  - Q: He took you on a picnic to the park by the river, did he not?

  Contrast with:
  - Q: Did he take you on a picnic to the park by the river?

- **Ambiguous questions.**
  Examples:
  - Q: How many times did you tell the policeman that Frank touched you on the buttocks? (It is ambiguous because of uncertainty as to whether the question is directed to the *number of times this topic* was raised with police officer, or whether it was asking *how many times* Frank touched the child on the buttocks.)
  - Q: How do you say he forced you to touch him?
    A: I was forced to…[literal interpretation].
    Q: How do you say you were forced to?
    A: I just said it.

- **Specific and difficult questions.**
  Examples:
  - Q: You walked <u>perpendicular</u> to the road didn't you?
  - Q: Its pure <u>fabrication</u> isn't it?

- **Repeated questioning.**
  Asking the same questions over and over again. This may result in the child thinking that the wrong answer must have been given to the lawyer therefore the child may change his/her answer. This is more particularly an issue with young children. This process may not only be very demoralising, but the child may get exhausted by the process and start responding by saying "I do not know" to questions which have previously been answered.

- **Rapid fire questioning.**

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A series of very quick questions, particularly if done in a commanding style, may eventually lead a child to offer a random response to stop the questioning and therefore the responses may be unreliable.

- **Negative rhetorical questions.**
  Examples:
  - Q: Now you had a bruise did you not, near one of your breasts, do you remember this?
  - Q: It's the case is it not that you didn't….
  - Q: Are you saying none of that ever happened?
    A: (Child shakes head.)
    Q: Does that mean it did happen or it didn't happen? (It is easier for a child to answer "yes" to such a question than interpret the different phrases of the question in the context of the whole so as to understand that one would say "no".)

- **Multi-faceted questions.**
  Examples**:**
  - Q: Well did he take hold of you and make you do anything? Did he grab hold of your hand and do anything with your hand?
  - Q: You told the police officer you were kicked on the shin did you not, and that you had a bruise, do you remember that?

- **Multiple questions** within a question.
  Example:
  - Q: When was the last time he did this to you before the time we have been speaking of? We have been speaking of one in February obviously, when was the last time he interfered with you before that?

- **Juxtaposition of unrelated topics** or jumping quickly from one topic to another.
  Examples:
  - Q: On that occasion when mum went to the youth group, you were at Glenelg?
    A: I have made a mistake, it wasn't Glenelg it was Brighton.
    Q: Right, it should be Brighton – you did not see the defendant at anytime when he put his penis in your bottom did you?

  (Actual transcript of XXN of a 13 year old, with suburbs changed.)
  - Q: You then said he tried to put his finger in your vagina – did he put his finger on your vagina or in your vagina?
    A: In my vagina.
    Q: Did you have your green pyjama top on?
    A: Yes
    Q: Did he do anything else to you?
    A: No
    Q: Were you wearing a watch when all of this happened?

- **Passive voice.**
  Examples:

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- Q: The door was then closed behind Frank wasn't it?
- Q: The door was then closed behind the person. Is that what you are really saying?

- **Imbedding,** which is a series of qualifying phrases within a sentence.
  Example:
  - Q: Taking you back to the time when you were living in Sydney, when you first met Fred, at that time and throughout the period that Fred was living with your family, he used to work as a baker didn't he?

- **Backward referencing.**
  Example:
  - Q: So you told us that you don't remember - do you remember saying that a moment ago?

6. Are children aware of their duty to speak the truth?

Before a child can even commence giving evidence, the child must satisfy the requirements of being aware of their duty to speak the truth. A judge undertakes the enquiry to decide whether or not a child is competent to give evidence. There is a presumption of competency of a child to give sworn evidence unless the judge determines that the child does not have sufficient understanding of the obligation to be truthful.[30] Counsel for the accused does not have the right to ask questions of the child in relation to competency testing. The Judge is not concerned with substantive issues to be raised at trial, but only whether the relevant criteria have been met under the legislation for the giving of sworn evidence. Section 9 of the *Evidence Act 1929* (SA) sets out the relevant criteria for the giving of evidence, and this applies to children as well as adults.

If a judge determines that the child does not have a sufficient understanding of the obligation to be truthful for the purposes of sworn evidence, the judge may permit the child to give unsworn evidence provided that the Judge is satisfied that the child understands the difference between the truth and the lie; the Judge tells the child that it is important to tell the truth and the child agrees that he or she will tell the truth.[31]

Lies and truth

Lying is the deliberate intention to deceive a questioner. It may result from true information being withheld (an act of omission) or false information being given (an act of commission). Children are likely to commit errors of omission rather than commission. However it must be remembered that both children and adults lie. There is no evidence to suggest that children lie more than adults. The circumstances in which children may lie however differ from that of adults.

In relation to truth and lies, so far as a jury is concerned often this is judged by behaviour in the witness box, confidence with which evidence is given and whether there are inconsistencies in evidence.

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30 See discussion in Lunn, *Civil Procedure South Australia* (Butterworths, loose leaf) [1048].
31 Section 9(2), *Evidence Act 1929* (SA).

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Juries should be informed that inconsistencies may not be indications of lying in a child. They may be due to a misunderstanding or confusion which has not been clarified.

Omissions and keeping secrets

One reason that a child may lie by omission is because of a perceived requirement to keep a secret. With respect to keeping secrets:

- Children aged 5 to 6 years are more likely to keep a secret than if they are only 3 years of age.
- Children aged between 9 and 10 years are not likely to report a matter that they were asked to keep secret about but they will respond to direct questioning.

Other motivations for children lying include:

- avoiding punishment;
- avoiding embarrassment or shame;
- getting a reward;
- being accepted; or
- protecting a loved one.

It is common for offenders to groom a child prior to offences being committed. Often an offender is somebody known to the child or even a relative. Rewards are often given for "favours" and a child may be asked to keep their "little secret". All of these may lead to a child not disclosing.

Special procedures

Finally and in brief, there are special provisions and procedures which relate to children giving evidence.

Witness Assistance Service

There is a child Witness Assistance Service available to assist children when giving evidence.

Director of Public Prosecutions – South Australian Witness Assistance Service http://www.dpp.sa.gov.au/02/was.php?s=02

Directions Hearings

Arrangements for children giving evidence may be the subject of Directions Hearings.

Criminal Practice Directions 2007 (SA) PD 10 and 10A. http://www.courts.sa.gov.au/lawyers/practice_directions/joint-crim-PDs-07/joint-crim-PDs-07-am01.pdf

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Arrangements to give evidence and recording of evidence

Sections 12, 13, 13A, 13C and 13D of the *Evidence Act 1929* (SA) are of particular relevance. These sections concern physical arrangements which can be made for the taking of evidence from children, including the use of closed circuit TV. The court is also enabled to make an audiovisual record of evidence given by a child in criminal proceedings which may be then admitted as evidence in later proceedings.

Jury Directions

There are also provisions which deal with the content of jury directions. South Australia has abolished the common law rule that juries are required to be warned about the dangers of convicting an accused person on the basis of uncorroborated evidence of a child in sexual assault charges.[32]
There are also statutory provisions which modify the common law requirements set out in certain case law.

***Legislation on* Longman**[33]

Evidence Act 1929 (SA) s 34CB http://www.legislation.sa.gov.au/LZ/C/A/EVIDENCE%20ACT%201929.aspx

***Legislation on* Kilby**[34] ***and* Crofts**[35]

Evidence Act 1929 (SA) s 34M http://www.legislation.sa.gov.au/LZ/C/A/EVIDENCE%20ACT%201929.aspx

[32] Section 12A, *Evidence Act 1929* (SA).
[33] *Longman v The Queen* (1989) 168 CLR 79.
[34] *Kilby v The Queen* (1973) 129 CLR 560.
[35] *Crofts v The Queen* (1996) 186 CLR 427.

- **Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection**

Government of **Western Australia**
Department for **Child Protection**

Child development and trauma guide

Some important points about this guide

This guide has been prepared because of the importance of professionals in the Out-of-Home Care, Child Protection and Individual and Family Support areas to understand the typical developmental pathways of children and the typical indicators of trauma at differing ages and stages. It is intended to inform good practice and assist with the task of an overall assessment, and of itself is not a developmental or risk assessment framework. Rather, it is a prompt for busy workers to integrate knowledge from child development, child abuse and trauma and importantly to offer practical, age appropriate advice as to the needs of children and their parents and carers when trauma has occurred.

Engaging families, carers, significant people and other professionals who know the child well as a source of information about the child, will result in a more complete picture. It is essential to have accurate information about the values and child rearing practices of the cultural group to which a child belongs, in order to appreciate that child's development.

The following points give an essential perspective for using the information in the child development and trauma resource sheets about specific age groups:

- Children, even at birth, are not 'blank slates'; they are born with a certain neurological make-up and temperament. As children get older, these individual differences become greater as they are affected by their experiences and environment. This is particularly the case where the child is born either drug dependent or with foetal alcohol syndrome.
- Even very young babies differ in temperament eg. activity level, amount and intensity of crying, ability to adapt to changes, general mood, etc.
- From birth on, children play an active role in their own development and impact on others around them.
- Culture, family, home and community play an important role in children's development, as they impact on a child's experiences and opportunities. Cultural groups are likely to have particular values, priorities and practices in child rearing that will influence children's development and learning of particular skills and behaviours. The development of children from some cultural backgrounds will vary from traditional developmental norms, which usually reflect an Anglo-Western perspective.
- As children get older, it becomes increasingly difficult to list specific developmental milestones, as the achievement of many of these depends very much on the opportunities that the child has to practise them, and also, on the experiences available to the child. A child will not be able to ride a bicycle unless they have access to a bicycle.
- Development does not occur in a straight line or evenly. Development progresses in a sequential manner, although it is essential to note that while the path of development is somewhat predictable, there is variation in what is considered normal development. That is to say no two children develop in exactly the same way.
- The pace of development is more rapid in the very early years than at any other time in life.
- Every area of development impacts on other areas. Developmental delays in one area will impact on the child's ability to consolidate skills and progress through to the next developmental stage.
- Most experts now agree that both nature and nurture interact to influence almost every significant aspect of a child's development.
- General health affects development and behaviour. Minor illnesses will have short to medium term effects, while chronic health conditions can have long-term effects. Nutritional deficiencies will also have negative impacts on developmental progression.

Specific characteristics and behaviours are indicative only. Many specific developmental characteristics should be seen as 'flags' of a child's behaviour, which may need to be looked at more closely, if a child is not meeting them. Workers should refer to the Casework Practice Manual and relevant specialist assessment guides in undertaking further assessments of child and family.

- **Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection**

Some important points about development

The information in this resource provides a brief overview of typically developing children. Except where there are obvious signs, you would need to see a child a number of times to establish that there is something wrong. Keep in mind that if children are in a new or 'artificial' situation, unwell, stressed, interacting with someone they do not know, or if they need to be fed or changed, then their behaviour will be affected and is not likely to be typical for that child. Premature babies, or those with low birth weights, or a chemical dependency, will generally take longer to reach developmental milestones.

The indicators of trauma listed in this guide should not become judgements about the particular child or family made in isolation from others who know the child and family well, or from other sources of information. However, they are a useful alert that a more thorough contextual assessment may be required.

There has been an explosion of knowledge in regard to the detrimental impact of neglect and child abuse trauma on the developing child, and particularly on the neurological development of infants. It is critical to have a good working knowledge of this growing evidence base so that we can be more helpful to families and child focused.

The following basic points are useful to keep in mind and to discuss with parents and young people:

- Children need stable, sensitive, loving, stimulating relationships and environments in order to reach their potential. They are particularly vulnerable to witnessing and experiencing violence, abuse and neglectful circumstances. Abuse and neglect at the hands of those who are meant to care is particularly distressing and harmful for infants, children and adolescents.
- Given that the infant's primary drive is towards attachment, not safety, they will accommodate to the parenting style they experience. Obviously they have no choice given their age and vulnerability, and in more chronic and extreme circumstances, they will show a complex trauma response. They can eventually make meaning of their circumstances by believing that the abuse is their fault and that they are inherently bad.
- Infants, children and adults will adapt to frightening and overwhelming circumstances by the body's survival response, where the autonomic nervous system will become activated and switch on to the freeze/fight/flight response. Immediately the body is flooded with a biochemical response which includes adrenalin and cortisol, and the child feels agitated and hypervigilant. Infants may show a 'frozen watchfulness' and children and young people can dissociate and appear to be 'zoned out'.
- Prolonged exposure to these circumstances can lead to 'toxic stress' for a child which changes the child's brain development, sensitises the child to further stress, leads to heightened activity levels and affects future learning and concentration. Most importantly, it impairs the child's ability to trust and relate to others. When children are traumatised, they find it very hard to regulate behaviour and soothe or calm themselves. They often attract the description of being 'hyperactive'.



0 - 12 months • 12 months - 3 years • 3 - 5 years • 5 - 7 years • 7 - 9 years • 9 - 12 years • 12 - 18 years

Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection

- Babies are particularly attuned to their primary carer and will sense their fear and traumatic stress; this is particularly the case where family violence is present. They will become unsettled and therefore more demanding of an already overwhelmed parent. The first task of any service is to support the nonoffending parent and to engage the family in safety.
- Traumatic memories are stored differently in the brain compared to everyday memories. They are encoded in vivid images and sensations and lack a verbal narrative and context. As they are unprocessed and more primitive, they are likely to flood the child or adult when triggers like smells, sights, sounds or internal or external reminders present at a later stage.
- These flashbacks can be affective, i.e. intense feelings, that are often unspeakable; or cognitive, i.e. vivid memories or parts of memories, which seem to be actually occurring. Alcohol and drug abuse are the classic and usually most destructive attempts to numb out the pain and avoid these distressing and intrusive experiences.
- Children are particularly vulnerable to flashbacks at quiet times or at bedtimes and will often avoid both, by acting out at school and bedtimes. They can experience severe sleep disruption, intrusive nightmares which add to their 'dysregulated' behaviour, and limits their capacity at school the next day. Adolescents will often stay up all night to avoid the nightmares and sleep in the safety of the daylight. Self harming behaviours release endorphins which can become an habitual response.
- Cumulative harm can overwhelm the most resilient child and particular attention needs to be given to understanding the complexity of the child's experience. These children require calm, patient, safe and nurturing parenting in order to recover, and may well require a multi-systemic response to engage the required services to assist.
- The recovery process for children and young people is enhanced by the belief and support of non-offending family members and significant others. They need to be made safe and given opportunities to integrate and make sense of their experiences.
- It is important to acknowledge that parents can have the same post-traumatic responses and may need ongoing support. Workers need to engage parents in managing their responses to their children's trauma. It is normal for parents to feel overwhelmed and suffer shock, anger, severe grief, sleep disturbances and other trauma related responses. Case practice needs to be child centred and family sensitive.



0 - 12 months • 12 months - 3 years • 3 - 5 years • 5 - 7 years • 7 - 9 years • 9 - 12 years • 12 - 18 years

• Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection

Factors which pose risks to healthy child development

The presence of one or more risk factors, alongside a cluster of trauma indicators, may greatly increase the risk to the child's wellbeing and should flag the need for further child and family assessment.

The following risk factors can impact on children and families and the caregiving environment:

Child and family risk factors

- family violence, current or past
- mental health issue or disorder, current or past (including self-harm and suicide attempts)
- alcohol/substance abuse, current or past, addictive behaviours
- disability or complex medical needs eg. intellectual or physical disability, acquired brain injury
- newborn, prematurity, low birth weight, chemically dependent, foetal alcohol syndrome, feeding/sleeping/settling difficulties, prolonged and frequent crying
- unsafe sleeping practices for infants eg. side or tummy sleeping, ill-fitting mattress, cot cluttered with pillows, bedding, or soft toys which can cover infant's face, co-sleeping with sibling or with parent who is on medication, drugs/alcohol or smokes, using other unsafe sleeping place such as a couch, or exposure to cigarette smoke
- disorganised or insecure attachment relationship (child does not seek comfort or affection from caregivers when in need)
- developmental delay
- history of neglect or abuse, state care, child death or placement of child or siblings
- separations from parents or caregivers
- parent, partner, close relative or sibling with a history of assault, prostitution or sexual offences
- experience of intergenerational abuse/trauma
- compounded or unresolved experiences of loss and grief
- chaotic household/lifestyle/problem gambling
- poverty, financial hardship, unemployment
- social isolation (family, extended family, community and cultural isolation)
- inadequate housing/transience/homelessness
- lack of stimulation and learning opportunities, disengagement from school, truanting
- inattention to developmental health needs/poor diet
- disadvantaged community
- racism
- recent refugee experience

Parent risk factors

- parent/carer under 20 years or under 20 years at birth of first child
- lack of willingness or ability to prioritise child's needs above own
- rejection or scapegoating of child
- harsh, inconsistent discipline, neglect or abuse
- inadequate supervision of child or emotional enmeshment
- single parenting/multiple partners
- inadequate antenatal care or alcohol/substance abuse during pregnancy

Wider factors that influence positive outcomes

- sense of belonging to home, family, community and a strong cultural identity
- pro-social peer group
- positive parental expectations, home learning environment and opportunities at major life transitions
- access to child and adult focused services eg. health, mental health, maternal and child health, early intervention, disability, drug and alcohol, family support, family preservation, parenting education, recreational facilities and other child and family support and therapeutic services
- accessible and affordable child care and high quality preschool programs
- inclusive community neighbourhoods/settings
- service system's understanding of neglect and abuse.

0 - 12 months • 12 months - 3 years • 3 - 5 years • 5 - 7 years • 7 - 9 years • 9 - 12 years • 12 - 18 years

- **Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection**

Resources

Other useful websites

The Raising Children Network
raisingchildren.net.au

An essential part of this resource is the references to the Raising Children Network. This is an Australian website, launched in 2006, on the basics of raising children aged 0-15 years.

Talaris Developmental Timeline
www.talaris.org

A research based timeline about how children develop in the first five years.

Infant Mental Health
www.zerotothree.org

Zero to Three website has a relational and mental health focus.

Secretariat of National Aboriginal and Islander Child Care (SNAICC)
www.snaicc.asn.au

The national non-government peak body in Australia representing the interests of Aboriginal and Torres Strait Islander children and families.

Parenting Research Centre
www.parentingrc.org.au

Independent non-profit research and development organisation with an exclusive focus on parenting.

Ngala
www.ngala.com.au

A provider of early parenting and early childhood services. The website includes parenting information on antenatal and 0-4 years.

Western Australian Government

Department for Child Protection
www.dcp.wa.gov.au

Provides a range of child safety and family support services to Western Australian individuals, children and their families.

Parenting WA
www.communities.wa.gov.au/childrenandfamilies/parentingwa/

Parenting WA offers an information, support and referral service to parents, carers, grandparents and families with children up to 18 years of age.

WA Health
www.health.wa.gov.au

WA Health is responsible for promoting, maintaining and restoring the health of the people of WA, including the provision of child health and child adolescent mental health services.

Department of Education Student Support Services
http://det.wa.edu.au/studentsupport/statewidespecialistservices/detcms/portal/

Trauma websites

Child Trauma Academy
www.childtrauma.org

International Society for Traumatic Stress Studies
www.istss.org

Traumatology
www.fsu.edu/~trauma

Traumatic Stress Institute/Center for Adult & Adolescent Psychotherapy
www.tsicaap.com

Telephone services

Parenting WA Line
(08) 6279 1200 or 1800 654 432

healthdirect Australia (24 hour)
1800 022 222

Family Helpline
(08) 9223 1100 or 1800 643 000

• Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection

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Bibliography

Raising Children Network raisingchildren.net.au

Zero to Three website www.zerotothree.org

Levy, T.M and Orlans, M. 1998, *Attachment, Trauma and Healing*. CWLA Press, Washington.

Department of Human Services, May 2001, *Child Health and Development: Birth to 18 Years for Professionals* (Chart), Melbourne, Victoria.

Frederico, M., Jackson, A. and Jones, S. July 2006, '*Child Death Group Analysis: Effective Responses to Chronic Neglect.'* Victorian Child Death Review Committee. Office of the Child Safety Commissioner, Melbourne, Victoria.

Monaghan, C. 1993, *'Children and Trauma:* A Guide for Parents and Professionals.' Jossey-Bass, San Francisco.

Paxton, G and Munro, J and Marks, M. (Editors), 2003, '*Paediatric Handbook, Seventh Edition'* by the staff of the Royal Children's Hospital. Blackwell Publishing Pty Ltd, Melbourne, Victoria.

Jim Greenman and Anne Stonehouse, 1996, *Prime Times: a Handbook for Excellence in Infant and Toddler Care* (1st edition), Redleaf Press, St Paul Minnesota.

Sheridan, M. Revised and updated by Frost, M and Dr Sharma, A. 1988, '*From Birth to Five Years: Children's Developmental Progress'*. ACER press.

Shonkoff, Jack. P. and Phillips, Deborah. A. 2000, *'From Neurons to Neighbourhoods: the Science of Early Childhood Development'*, National Research Council Institute of Medicine, National Academy Press, Washington DC.





- **Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection**

Government of **Western Australia**
Department for **Child Protection**

Child development and trauma guide
0 - 12 months

Developmental trends

The following information needs to be understood in the context of the overview statement on child development:

0-2 weeks

- anticipates in relationship with caregivers through facial expression, gazing, fussing, crying
- is unable to support head unaided
- hands closed involuntarily in the grasp reflex
- startles at sudden loud noises
- reflexively asks for a break by looking away, arching back, frowning, and crying

By 4 weeks

- focuses on a face
- follows an object moved in an arc about 15 cm above face until straight ahead
- changes vocalisation to communicate hunger, boredom and tiredness

By 6-8 weeks

- participates in and initiates interactions with caregivers through vocalisation, eye contact, fussing, and crying
- may start to smile at familiar faces
- may start to 'coo'
- turns in the direction of a voice

By 3-4 months

- increasing initiation of interaction with caregivers
- begins to regulate emotions and self soothe through attachment to primary carer
- can lie on tummy with head held up to 90 degrees, looking around
- can wave a rattle, starts to play with own fingers and toes
- may reach for things to try and hold them
- learns by looking at, holding, and mouthing different objects
- laughs out loud
- follows an object in an arc about 15 cm above the face for 180 degrees (from one side to the other)
- notices strangers

May even be able to:
- keep head level with body when pulled to sitting
- say "ah", "goo" or similar vowel consonant combinations
- blow a raspberry
- bear some weight on legs when held upright
- object if you try to take a toy away

By 6 months

- uses carer for comfort and security as attachment increases
- is likely to be wary of strangers
- keeps head level with body when pulled to sitting
- says "ah", "goo" or similar vowel consonant combinations
- sits without support
- makes associations between what is heard, tasted and felt
- may even be able to roll both ways and help to feed himself
- learns and grows by touching and tasting different foods

By 9 months

- strongly participates in, and initiates interactions with, caregivers
- lets you know when help is wanted and communicates with facial expressions, gestures, sounds or one or two words like "dada" and "mamma"
- watches reactions to emotions and by seeing you express your feelings, starts to recognise and imitates happy, sad,excited or fearful emotions
- unusually high anxiety when separated from parents/carers
- is likely to be wary of, and anxious with, strangers
- expresses positive and negative emotions
- learns to trust that basic needs will be met
- works to get to a toy out of reach
- looks for a dropped object
- may even be able to bottom shuffle, crawl, stand
- knows that a hidden object exists
- waves goodbye, plays peekaboo





- **Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection**

Child development and trauma guide
0 - 12 months

Possible indicators of trauma

- increased tension, irritability, reactivity, and inability to relax
- increased startle response
- lack of eye contact
- sleep and eating disruption
- loss of eating skills
- loss of acquired motor skills
- avoidance of eye contact
- arching back/inability to be soothed
- uncharacteristic aggression
- avoids touching new surfaces eg. grass, sand and other tactile experiences
- avoids, or is alarmed by, trauma related reminders, eg sights, sounds, smells, textures, tastes and physical triggers
- fight, flight, freeze response
- uncharacteristic, inconsolable or rageful crying, and neediness
- increased fussiness, separation fears, and clinginess
- withdrawal/lack of usual responsiveness
- limp, displays no interest
- unusually high anxiety when separated from primary caregivers
- heightened indiscriminate attachment behaviour
- reduced capacity to feel emotions – can appear 'numb'
- 'frozen watchfulness'
- loss of acquired language skills
- genital pain: including signs of inflammation, bruising, bleeding or diagnosis of sexually transmitted disease

Trauma impact

- neurobiology of brain and central nervous system altered by switched on alarm response
- behavioural changes
- regression in recently acquired developmental gains
- hyperarousal, hypervigilance and hyperactivity
- sleep disruption
- loss of acquired motor skills
- lowered stress threshold
- lowered immune system
- fear response to reminders of trauma
- mood and personality changes
- loss of, or reduced capacity to attune with caregiver
- loss of, or reduced capacity to manage
- emotional states or self soothe
- insecure, anxious, or disorganised attachment behaviour
- heightened anxiety when separated from primary parent/carer
- indiscriminate relating
- reduced capacity to feel emotions - can appear 'numb'
- cognitive delays and memory difficulties
- loss of acquired communication skills

Parental / carer support following trauma

Encourage parent(s)/carers to:

- seek, accept and increase support for themselves, to manage their own shock and emotional responses
- seek information and advice about the child's developmental progress
- maintain the child's routines around holding, sleeping and eating
- seek support (from partner, kin, child health nurse) to understand, and respond to, infant's cues
- avoid unnecessary separations from important caregivers
- maintain calm atmosphere in child's presence. Provide additional soothing activities
- avoid exposing child to reminders of trauma
- expect child's temporary regression; and clinginess - don't panic
- tolerate clinginess and independence
- take time out to recharge





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- **Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection**

Government of **Western Australia**
Department for **Child Protection**

Child development and trauma guide
12 months - 3 years

Developmental trends

The following information needs to be understood in the context of the overview statement on child development:

By 12 months

- enjoys communicating with family and other familiar people
- seeks comfort, and reassurance from familiar objects, family, carers, and is able to be soothed by them
- begins to self soothe when distressed
- understands a lot more than he can say
- expresses feelings with gestures sounds and facial expressions
- expresses more intense emotions and moods
- does not like to be separated from familiar people
- moves away from things that upset or annoy
- can walk with assistance holding on to furniture or hands
- pulls up to standing position
- gets into a sitting position
- claps hands (play pat-a-cake)
- indicates wants in ways other than crying
- learns and grows in confidence by doing things repeatedly and exploring
- picks up objects using thumb and forefinger in opposition (pincer) grasp
- is sensitive to approval and disapproval

May even be able to:
- understand cause and effect
- understand that when you leave, you still exist
- crawl, stand, walk
- follow a one step instruction – "go get your shoes"
- respond to music

By 18 months

- can use at least two words and learning many more
- drinks from a cup
- can walk and run
- says "no" a lot
- is beginning to develop a sense of individuality
- needs structure, routine and limits to manage intense emotions

May even be able to:
- let you know what he is thinking and feeling through gestures
- pretend play and play alongside others

By 2 years

- takes off clothing
- 'feeds'/'bathes' a doll, 'washes' dishes, likes to 'help'
- builds a tower of four or more cubes
- recognises/identifies two items in a picture by pointing
- plays alone but needs a familiar adult nearby
- actively plays and explores in complex ways

May even be:
- able to string words together
- eager to control, unable to share
- unable to stop himself doing something unacceptable even after reminders
- tantrums

By 2 1/2 years

- uses 50 words or more
- combines words (by about 25 months)
- follows a two-step command without gestures (by 25 months)
- alternates between clinginess and independence
- helps with simple household routines
- conscience is undeveloped; child thinks "I want it, I will take it"

By 3 years

- washes and dries hands
- identifies a friend by naming
- throws a ball overhand
- speaks and can be usually understood half the time
- uses prepositions (by, to, in, on top of)
- carries on a conversation of two or three sentences
- helps with simple chores
- may be toilet trained
- conscience is starting to develop; child thinks "I would take it but my parents will be upset with me"





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Child development and trauma guide
12 months - 3 years

Possible indicators of trauma

- behavioural changes, regression to behaviour of a younger child
- increased tension, irritability, reactivity, and inability to relax
- increased startle response
- reduced eye contact
- sleep and eating disruption
- loss of eating skills
- loss of recently acquired motor skills
- avoidance of eye contact
- inability to be soothed
- uncharacteristic aggression
- avoids touching new surfaces eg. grass, sand and other tactile experiences
- avoids, or is alarmed by, trauma related reminders, eg sights, sounds, smells textures, tastes and physical triggers
- fight, flight, freeze
- uncharacteristic, inconsolable, or rageful crying, and neediness
- fussiness, separation fears, and clinginess
- withdrawal/lack of usual responsiveness
- loss of self-confidence
- unusually anxious when separated from primary caregivers
- heightened indiscriminate attachment behaviour
- reduced capacity to feel emotions – can appear 'numb', apathetic or limp
- 'frozen watchfulness'
- loss of acquired language skills
- inappropriate sexualised behaviour/ touching
- sexualised play with toys
- genital pain, inflammation, bruising, bleeding or diagnosis of sexually transmitted disease

Trauma impact

- neurobiology of brain and central nervous system altered by switched on alarm response
- behavioural changes
- regression in recently acquired developmental gains
- hyperarousal, hypervigilance and hyperactivity
- sleep disruption
- loss of acquired motor skills
- lowered stress threshold
- lowered immune system
- greater food sensitivities
- fear response to reminders of trauma
- mood and personality changes
- loss of, or reduced capacity to attune with caregiver
- loss of, or reduced capacity to manage emotional states or self soothe
- insecure, anxious, or disorganised attachment behaviour
- heightened anxiety when separated from primary parent/carer
- indiscriminate relating
- increased resistance to parental direction
- memory for trauma may be evident in behaviour, language or play
- cognitive delays and memory difficulties
- loss of acquired communication skills

Parental / carer support following trauma

Encourage parent(s)/carers to:

- seek, accept and increase support for themselves, to manage their own shock and emotional responses
- seek information and advice about the child's developmental progress
- maintain the child's routines around holding, sleeping and eating
- seek support (from partner, kin, child health nurse) to understand, and respond to, infant's cues
- avoid unnecessary separations from important caregivers
- maintain calm atmosphere in child's presence. Provide additional soothing activities
- avoid exposing child to reminders of trauma
- expect child's temporary regression; and clinginess - don't panic
- tolerate clinginess and independence
- take time out to recharge





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Government of **Western Australia**
Department for **Child Protection**

3 - 5 years

Child development and trauma guide
3 - 5 years

Developmental trends

The following information needs to be understood in the context of the overview statement on child development:

Between 3-4 years

- communicates freely with family members and familiar others
- seeks comfort, and reassurance from familiar family and carers, and is able to be soothed by them
- has developing capacity to self soothe when distressed
- understands the cause of feelings and can label them
- extends the circle of special adults eg. to grandparents, baby-sitter
- needs adult help to negotiate conflict
- is starting to manage emotions
- is starting to play with other children and share
- has real friendships with other children
- is becoming more coordinated at running, climbing, and other large-muscle play
- can walk up steps, throw and catch a large ball using two hands and body
- use play tools and may be able to ride a tricycle
- holds crayons with fingers, not fists
- dresses and undresses without much help
- communicates well in simple sentences and may understand about 1000 words
- pronunciation has improved, likes to talk about own interests
- fine motor skill increases, can mark with crayons, turn pages in a book
- day time toilet training often attained

Between 4-5 years

- knows own name and age
- is becoming more independent from family
- needs structure, routine and limits to manage intense emotions
- is asking lots of questions
- is learning about differences between people
- takes time making up his mind
- is developing confidence in physical feats but can misjudge abilities
- likes active play and exercise and needs at least 60 minutes of this per day
- eye-hand coordination is becoming more practised and refined
- cuts along the line with scissors/can draw people with at least four 'parts'
- shows a preference for being right-handed or left-handed
- converses about topics and understands 2500 to 3000 words
- loves silly jokes and 'rude' words
- is curious about body and sexuality and role-plays at being grown-up
- may show pride in accomplishing tasks
- conscience is starting to develop, child weighs risks and actions; "I would take it but my parents would find out"





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Child development and trauma guide
3 - 5 years

Possible indicators of trauma

- behavioural change
- increased tension, irritability, reactivity and inability to relax
- regression to behaviour of younger child
- uncharacteristic aggression
- Reduced eye contact
- loss of focus, lack of concentration and inattentiveness
- complains of bodily aches, pains or illness with no explanation
- loss of recently acquired skills (toileting, eating, self-care)
- enuresis, encopresis
- sleep disturbances, nightmares, night terrors, sleepwalking
- fearfulness of going to sleep and being alone at night
- inability to seek comfort or to be comforted

- mood and personality changes
- obvious anxiety and fearfulness
- withdrawal and quieting
- specific, trauma-related fears; general fearfulness
- intense repetitive play often obvious
- involvement of playmates in traumarelated play at school and day care
- separation anxiety with parents/others
- loss of self-esteem and self confidence
- reduced capacity to feel emotions - may appear 'numb', limp, apathetic
- repeated retelling of traumatic event
- loss of recently acquired language and vocabulary
- loss of interest in activities
- loss of energy and concentration at school
- sudden intense masturbation
- demonstration of adult sexual knowledge through inappropriate sexualised behaviour
- genital pain, inflammation, bruising, bleeding or diagnosis of sexually transmitted disease
- sexualised play with toys
- may verbally describe sexual abuse, pointing to body parts and telling about the 'game' they played
- sexualised drawing

Trauma impact

- behavioural changes
- hyperarousal, hypervigilance, hyperactivity
- loss of toileting and eating skills
- regression in recently acquired developmental gains
- sleep disturbances, night terrors
- enuresis and encopresis
- delayed gross motor and visualperceptual skills

- fear of trauma recurring
- mood and personality changes
- loss of, or reduced capacity to attune with caregiver
- loss of, or reduced capacity to manage emotional states or self soothe
- increased need for control
- fear of separation
- loss of self-esteem and self confidence
- confusion about trauma evident in play, magical explanations and unclear understanding of causes of bad events
- vulnerable to anniversary reactions set off by seasonal reminders, holidays, and other events
- memory of intrusive visual images from traumatic event may be demonstrated/ recalled in words and play
- at the older end of this age range, children are more likely to have lasting, accurate verbal and pictorial memory for central events of trauma
- speech, cognitive and auditory processing delays

Parental / carer support following trauma

Encourage parent(s)/carers to:

- seek, accept and increase support for themselves, to manage their own shock and emotional responses
- remain calm. Listen to and tolerate child's retelling of event
- respect child's fears; give child time to cope with fears
- protect child from re-exposure to frightening situations and reminders of trauma, including scary T.V. programs, movies, stories, and physical or locational reminders of trauma
- accept and help the child to name strong feelings during brief conversations (the child cannot talk about these feelings or the experience for long)
- expect and understand child's regression while maintaining basic household rules
- expect some difficult or uncharacteristic behaviour
- seek information and advice about child's developmental and educational progress
- take time out to recharge

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5 - 7 years

Child development and trauma guide
5 - 7 years

Developmental trends

The following information needs to be understood in the context of the overview statement on child development:

Physical skills

- active, involved in physical activity, vigorous play
- may tire easily
- variation in levels of coordination and skill
- many become increasingly proficient in skills, games, sports
- some may be able to ride bicycle
- may use hands with dexterity and skill to make things, do craft and build things

Social-emotional development

- has strong relationships within the family and integral place in family dynamics
- needs caregiver assistance and structure to regulate extremes of emotion
- generally anxious to please and to gain adult approval, praise and reassurance
- conscience is starting to be influenced by internal control or doing the right thing "I would take it, but if my parents found out, they would be disapproving"
- not fully capable of estimating own abilities, may become frustrated by failure
- reassured by predictable routines
- friendships are very important, although they may change regularly
- may need help moving into and becoming part of a group
- some children will maintain strong friendships over the period
- may have mood swings
- able to share, although not all the time
- perception of, and level of regard for self, fairly well developed

Cognitive and creative characteristics

- emerging literacy and numeracy abilities, gaining skills in reading and writing
- variable attention and ability to stay on task; attends better if interested
- good communication skills, remembers, tells and enjoys jokes
- may require verbal, written or behavioural cues and reminders to follow directions and obey rules
- skills in listening and understanding may be more advanced than expression
- perspective broadens as experiences at school and in the community expand
- most valuable learning occurs through play
- rules more likely to be followed if he/she has contributed to them
- may have strong creative urges to make things

Possible indicators of trauma

- behavioural change
- increased tension, irritability, reactivity and inability to relax
- sleep disturbances, nightmares, night terrors, difficulty falling or staying asleep
- regression to behaviour of younger child
- lack of eye contact
- 'spacey', distractible, or hyperactive behaviour
- toileting accidents/enuresis, encopresis or smearing of faeces
- eating disturbances
- bodily aches and pains – no apparent reason
- accident proneness
- absconding/truanting from school
- firelighting, hurting animals

- obvious anxiety, fearfulness and loss of self esteem
- frightened by own intensity of feelings
- specific fears
- efforts to distance from feelings of shame, guilt, humiliation and reduced capacity to feel emotions
- reduced capacity to feel emotions - may appear 'numb', or apathetic
- 'frozen watchfulness'
- vulnerable to anniversary reactions caused by seasonal events, holidays, etc
- repeated retelling of traumatic event
- withdrawal, depressed affect
- 'blanking out' or loss of concentration when under stress at school with lowering of performance
- explicit, aggressive, exploitative, sexualised relating/engagement with other children, older children or adults
- verbally describes experiences of sexual abuse pointing to body parts and telling about the 'game' they played
- sexualised drawing
- excessive concern or preoccupation with private parts and adult sexual behaviour
- hinting about sexual experience and sexualised drawing
- verbal or behavioural indications of age-inappropriate knowledge of adult sexual behaviour
- running away from home

• Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection

Child development and trauma guide
5 - 7 years

Trauma impact

- changes in behaviour
- hyperarousal, hypervigilance, hyperactivity
- regression in recently acquired developmental gains
- sleep disturbances due to intrusive imagery
- enuresis and encopresis
- trauma driven, acting out, risk taking behaviour
- eating disturbances
- loss of concentration and memory
- flight into driven activity or retreat from others to manage inner turmoil
- post-traumatic re-enactments of traumatic event that may occur secretly and involve siblings or playmates
- loss of interest in previously pleasurable activities

- fear of trauma recurring
- mood or personality change
- loss of, or reduced capacity to attune with caregiver
- loss of, or reduced capacity to manage emotional states or self soothe
- increased self-focusing and withdrawal
- concern about personal responsibility for trauma
- wish for revenge and action oriented responses to trauma
- may experience acute distress when encountering any reminder of trauma
- lowered self-esteem
- increased anxiety or depression
- fearful of closeness and love
- child is likely to have detailed, long-term and sensory memory for traumatic event
- Sometimes the memory is fragmented or repressed
- factual, accurate memory may be embellished by elements of fear or wish; perception of duration may be distorted
- intrusion of unwanted visual images and traumatic reactions disrupt concentration and create anxiety often without parent awareness
- vulnerable to flashbacks of recall and anniversary reactions to reminders of trauma
- speech and cognitive delays

Parental / carer support following trauma

Encourage parent(s)/carers to:

- seek, accept and increase support for themselves to manage their own shock and emotional responses
- listen to and tolerate child's retelling of event – respect child's fears; give child time to cope with fears
- increase monitoring and awareness of child's play, which may involve secretive re-enactments of trauma with peers and siblings; set limits on scary or harmful play
- permit child to try out new ideas to cope with fearfulness at bedtime: extra reading time, radio on, listening to a tape in the middle of the night to undo the residue of fear from a nightmare
- reassure the older child that feelings of fear or behaviours that feel out of control or babyish eg. night wetting are normal after a frightening experience and that the child will feel more like himself or herself with time
- encourage child to talk about confusing feelings, worries, daydreams, mental review of traumatic images, and disruptions of concentration by accepting the feelings, listening carefully, and reminding child that these are normal but hard reactions following a very scary event
- maintain communication with school staff and monitor how the child is coping with demands at school or in community activities
- expect some time-limited decrease in child's school performance and help the child to accept this as a temporary result of the trauma
- protect child from re-exposure to frightening situations and reminders of trauma, including scary television programs, movies, stories, and physical or locational reminders of trauma
- expect and understand child's regression or some difficult or uncharacteristic behaviour while maintaining basic household rules
- listen for a child's misunderstanding of a traumatic event, particularly those that involve self-blame and magical thinking
- gently help child develop a realistic understanding of event. Be mindful of the possibility of anniversary reactions
- remain aware of your own reactions to the child's trauma. Provide reassurance to child that feelings will diminish over time
- provide opportunities for child to experience control and make choices in daily activities
- seek information and advice on child's developmental and educational progress
- provide the child with frequent high protein snacks/meals during the day
- take time out to recharge





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- **Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection**

Government of **Western Australia**
Department for **Child Protection**

Child development and trauma guide
7 - 9 years

7 - 9 years

Developmental trends

The following information needs to be understood in the context of the overview statement on child development:

Physical skills

- improved coordination, control and agility compared to younger children
- skilled at large motor movements such as skipping and playing ball games
- often practises new physical skills over and over for mastery
- enjoys team and competitive sports and games
- improved stamina and strength

Social-emotional development

- strong need to belong to, and be a part of, family and peer relationships
- is increasingly able to regulate emotions
- increasingly independent of parents; still needs their comfort and security
- begins to see situations from others perspective – empathy
- able to resolve conflicts verbally and knows when to seek adult help
- conscience and moral values become internalised "I want it, but I don't feel good about doing things like that"
- increased confidence, more independent and takes greater responsibility
- needs reassurance; understands increased effort leads to improvements
- humour is component of interactions with others
- peers seen as important, spends more time with them
- friendships are based on common interests and are likely to be enduring
- feelings of self worth come increasingly from peers
- friends often same gender, friendship groups small

Self concept

- can take some responsibility for self and as a family member
- increasingly influenced by media and by peers
- learns to deal with success and failure
- may compare self with others and find self wanting, not measuring up
- can exercise self control and curb desires to engage in undesirable behaviour - has understanding of right and wrong
- can manage own daily routines
- may experience signs of onset of puberty near end of this age range (girls particularly)

Cognitive and creative characteristics

- can contribute to long-term plans
- engages in long and complex conversations
- has increasingly sophisticated literacy and numeracy skills
- may be a competent user of computers or play a musical instrument

Possible indicators of trauma

- behavioural change
- increased tension, irritability, reactivity and inability to relax
- sleep disturbances, nightmares, night terrors, difficulty falling or staying asleep
- regression to behaviour of younger child
- lack of eye contact
- 'spacey' or distractible behaviour
- 'blanking out' or lacks concentration when under stress at school with lowering of performance
- eating disturbances
- toileting accidents/enuresis, encopresis or smearing of faeces
- bodily aches and pains - no apparent reason
- accident proneness
- absconding/truanting from school
- firelighting, hurting animals

- obvious anxiety, fearfulness and loss of self-esteem
- frightened by own intensity of feelings
- specific post-traumatic fears
- efforts to distance from feelings of shame, guilt, humiliation
- reduced capacity to feel emotions - may appear 'numb'
- vulnerable to anniversary reactions caused by seasonal events, holidays, etc.
- repeated retelling of traumatic event
- withdrawal, depressed affect or black outs in concentration
- blanking out/loss of ability to concentrate when under learning stress at school with lowering of performance
- explicit, aggressive, exploitative, sexualised relating/engagement with other children, older children or adults
- hinting about sexual experience
- verbally describes experiences of sexual abuse and tells stories about the 'game' they played
- excessive concern or preoccupation with private parts and adult sexual behaviour
- verbal or behavioural indications of age-inappropriate knowledge of adult sexual behaviour
- sexualised drawing or written 'stories'
- running away from home

• Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection

Child development and trauma guide

7 - 9 years

Trauma impact

- changes in behaviour
- hyperarousal, hypervigilance, hyperactivity
- regression in recently acquired developmental gains
- sleep disturbances due to intrusive imagery
- enuresis and encopresis
- eating disturbances
- loss of concentration and memory
- post-traumatic re-enactments of traumatic event that may occur secretly and involve siblings or playmates
- trauma driven, acting out, risk taking behaviour
- flight into driven activity or retreat from others to manage inner turmoil
- loss of interest in previously pleasurable activities
- fear of trauma recurring
- mood or personality changes
- loss of, or reduced capacity to attune with caregiver
- loss of, or reduced capacity to manage emotional states or self soothe
- increased self-focusing and withdrawal
- concern about personal responsibility for trauma
- wish for revenge and action oriented responses to trauma
- may experience acute distress when encountering any reminder of trauma
- lowered self-esteem
- increased anxiety or depression
- fearful of closeness and love
- child is likely to have detailed, long-term and sensory memory for traumatic event. Sometimes the memory is fragmented or repressed
- factual, accurate memory may be embellished by elements of fear or wish; perception of duration may be distorted
- intrusion of unwanted visual images and traumatic reactions disrupt concentration and create anxiety often without parent awareness
- vulnerable to flashbacks of recall and anniversary reactions to reminders of trauma
- speech and cognitive delays

Parental / carer support following trauma

Encourage parent(s)/carers to:

- seek, accept and increase support for themselves to manage their own shock and emotional responses
- listen to and tolerate child's retelling of event – respect child's fears; give child time to cope with fears
- increase monitoring and awareness of child's play, which may involve secretive re-enactments of trauma with peers and siblings; set limits on scary or harmful play
- permit child to try out new ideas to cope with fearfulness at bedtime: extra reading time, radio on, listening to a tape in the middle of the night to undo the residue of fear from a nightmare
- reassure the older child that feelings of fear or behaviours that feel out of control or babyish eg. night wetting are normal after a frightening experience and that the child will feel more like himself or herself with time
- encourage child to talk about confusing feelings, worries, daydreams, mental review of traumatic images, and disruptions of concentration by accepting the feelings, listening carefully, and reminding child that these are normal but hard reactions following a very scary event
- maintain communication with school staff and monitor how the child is coping with demands at school or in community activities
- expect some time-limited decrease in child's school performance and help the child to accept this as a temporary result of the trauma
- protect child from re-exposure to frightening situations and reminders of trauma, including scary television programs, movies, stories, and physical or locational reminders of trauma
- expect and understand child's regression or some difficult or uncharacteristic behaviour while maintaining basic household rules
- listen for a child's misunderstanding of a traumatic event, particularly those that involve self-blame and magical thinking
- gently help child develop a realistic understanding of event. Be mindful of the possibility of anniversary reactions
- remain aware of your own reactions to the child's trauma. Provide reassurance to child that feelings will diminish over time
- provide opportunities for child to experience control and make choices in daily activities
- seek information and advice on child's developmental and educational progress
- provide the child with frequent high protein snacks/meals during the day
- take time out to recharge





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- **Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection**

Government of **Western Australia**
Department for **Child Protection**

9 - 12 years

Child development and trauma guide
9 - 12 years

Developmental trends

The following information needs to be understood in the context of the overview statement on child development:

Physical skills

- large and fine motor skills becoming highly coordinated
- enjoys risk taking
- does well at games/sports requiring skill, strength and agility
- may look more adult-like in body shape, height and weight

Social-emotional development

- growing need and desire for independence and separate identity
- may challenge parents and other family members
- parents and home important, particularly for support and reassurance
- growing sexual awareness and interest in the opposite gender
- may experience embarrassment, guilt, curiosity and excitement because of sexual awareness
- girls may reach puberty during this time
- belonging to a group is extremely important; peers largely influence identity/self-esteem
- often interact in pairs or small groups; each member has status and position
- groups generally one gender, although interact with the other
- strong desire to have opinions sought and respected

Social-emotional development

- beginning to think and reason in a more logical adult-like way
- capable of abstract thinking, complex problem solving, considers alternative possibilities and broadening perspectives
- concentrates for long periods of time if interested, but needs worries to be sorted
- may have sophisticated literacy and numeracy skills
- popular culture of great interest and major influence
- uses language in sophisticated ways; for example, tells stories, argues, debates
- knows the difference between fantasy and what is real
- has some appreciation of the value of money

Possible indicators of trauma

- increased tension, irritability, reactivity and inability to relax
- sleep disturbances, nightmares, night terrors, difficulty falling or staying asleep
- regression to behaviour of younger child
- reduced eye contact
- 'spacey' or distractible behaviour
- toileting accidents/enuresis, encopresis or smearing of faeces
- eating disturbances
- bodily aches and pains - no reason
- accident proneness
- absconding or truanting from school
- firelighting, hurting animals

- obvious anxiety, fearfulness and loss of self-esteem/self confidence
- frightened by own intensity of feelings
- specific post-traumatic fears
- efforts to distance from feelings of shame, guilt, humiliation and reduced capacity to feel emotions
- reduced capacity to feel emotions - may appear 'numb' or apathetic
- vulnerable to anniversary reactions caused by seasonal events, holidays, etc.
- repeated retelling of traumatic event
- 'frozen watchfulness'
- withdrawal, depressed affect, or black outs in concentration
- 'blanking out' or lacks concentration when under stress at school with lowering of performance
- explicit, aggressive, exploitative, sexualised relating/engagement with other children, older children or adults
- verbally describes experiences of sexual abuse and tells 'stories' about the 'game' they played
- excessive concern or preoccupation with private parts and adult sexual behaviour
- hinting about sexual experience and telling stories
- verbal or behavioural indications of age-inappropriate knowledge of adult sexual behaviour
- sexualised drawing or written 'stories'
- running away from home

• Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection

Child development and trauma guide
9 - 12 years

Trauma impact

- changes in behaviour
- hyperarousal, hypervigilance, hyperactivity
- regression in recently acquired developmental gains
- sleep disturbances due to intrusive imagery
- enuresis and encopresis
- eating disturbances
- loss of concentration and memory
- post-traumatic re-enactments of traumatic event that may occur secretly and involve siblings or playmates
- trauma driven, acting out, risk taking behaviour
- flight into driven activity or retreat from others to manage inner turmoil
- loss of interest in previously pleasurable activities

- fear of trauma recurring
- mood or personality changes
- loss of, or reduced capacity to attune with caregiver
- loss of, or reduced capacity to manage emotional states or self soothe
- increased self-focusing and withdrawal
- concern about personal responsibility for trauma
- wish for revenge and action oriented responses to trauma
- may experience acute distress when encountering any reminder of trauma
- lowered self-esteem
- increased anxiety or depression
- fearful of closeness and love
- child is likely to have detailed, long-term and sensory memory for traumatic event. Sometimes the memory is fragmented or repressed
- factual, accurate memory may be embellished by elements of fear or wish; perception of duration may be distorted
- intrusion of unwanted visual images and traumatic reactions disrupt concentration and create anxiety often without parent awareness
- vulnerable to flashbacks of recall and anniversary reactions to reminders of trauma
- speech and cognitive delays

Parental / carer support following trauma

Encourage parent(s)/carers to:

- seek, accept and increase support for themselves to manage their own shock and emotional responses
- listen to and tolerate child's retelling of event – respect child's fears; give child time to cope with fears
- increase monitoring and awareness of child's play, which may involve secretive re-enactments of trauma with peers and siblings; set limits on scary or harmful play
- permit child to try out new ideas to cope with fearfulness at bedtime: extra reading time, radio on, listening to a tape in the middle of the night to undo the residue of fear from a nightmare
- reassure the older child that feelings of fear or behaviours that feel out of control or babyish eg. night wetting are normal after a frightening experience and that the child will feel more like himself or herself with time
- encourage child to talk about confusing feelings, worries, daydreams, mental review of traumatic images, and disruptions of concentration by accepting the feelings, listening carefully, and reminding child that these are normal but hard reactions following a very scary event
- maintain communication with school staff and monitor how the child is coping with demands at school or in community activities
- expect some time-limited decrease in child's school performance and help the child to accept this as a temporary result of the trauma
- protect child from re-exposure to frightening situations and reminders of trauma, including scary television programs, movies, stories, and physical or locational reminders of trauma
- expect and understand child's regression or some difficult or uncharacteristic behaviour while maintaining basic household rules
- listen for a child's misunderstanding of a traumatic event, particularly those that involve self-blame and magical thinking
- gently help child develop a realistic understanding of event. Be mindful of the possibility of anniversary reactions
- remain aware of your own reactions to the child's trauma. Provide reassurance to child that feelings will diminish over time
- provide opportunities for child to experience control and make choices in daily activities
- seek information and advice on child's developmental and educational progress
- provide the child with frequent high protein snacks/meals during the day
- take time out to recharge



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- **Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection**

Government of **Western Australia**
Department for **Child Protection**

12 - 18 years

Child development and trauma guide
12 - 18 years

Developmental trends

The following information needs to be understood in the context of the overview statement on child development:

Physical skills

- significant physical growth and body changes
- develops greater expertise/skills in sport
- changing health needs for diet, rest, exercise, hygiene and dental care
- puberty, menstruation, sexuality and contraception
- nutritious balanced diet including adequate calcium, protein and iron

Self concept

- can be pre-occupied with self
- secondary sex characteristics affect self concept, relationships with others and activities undertaken
- dealing with own sexuality and that of peers
- developing identity based on gender and culture
- becoming an adult, including opportunities and challenges

Social-emotional development

- empathy for others
- ability to make decisions (moral)
- values and a moral system become firmer and affect views and opinions
- spends time with peers for social and emotional needs beyond parents and family
- peer assessment influences self concept, behaviour/need to conform
- girls have 'best friends', boys have 'mates'
- may explore sexuality by engaging in sexual behaviours and intimate relationships
- develops wider interests
- seeks greater autonomy personally, in decision making
- more responsible in tasks at home, school and work
- experiences emotional turmoil, strong feelings and unpredictable mood swings
- interdependent with parents and family
- conflict with family more likely through puberty
- able to negotiate and assert boundaries
- learning to give and take (reciprocity)
- focus is on the present - may take significant risks
- understands appropriate behaviour but may lack self control/insight

Cognitive and creative characteristics

- thinks logically, abstractly and solves problems, thinking like an adult
- may take an interest in/develop opinions about community or world events
- can appreciate others' perspectives and see a problem or situation from different angles
- career choice may be realistic, or at odds with school performance and talents





• Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection

Child development and trauma guide
12 - 18 years

Possible indicators of trauma

- increased tension, irritability, reactivity and inability to relax
- accident proneness
- reduced eye contact
- sleep disturbances, nightmares
- enuresis, encopresis
- eating disturbances/disorders
- absconding or truanting and challenging behaviours
- substance abuse
- aggressive/violent behaviour
- firelighting, hurting animals
- suicidal ideation
- self harming eg. cutting, burning

- efforts to distance from feelings of shame and humiliation
- loss of self-esteem and self confidence
- acute psychological distress
- personality changes and changes in quality of important relationships evident
- increased self-focusing and withdrawal
- reduced capacity to feel emotions – may appear 'numb'
- wish for revenge and action oriented responses to trauma
- partial loss of memory and ability to concentrate
- trauma flashbacks
- acute awareness of parental reactions; wish to protect parents from own distress
- sexually exploitative or aggressive interactions with younger children
- sexually promiscuous behaviour or total avoidance of sexual involvement
- running away from home

Trauma impact

- sleep disturbances, nightmares
- hyperarousal, hypervigilance, hyperactivity
- eating disturbances or disorders
- trauma acting out, risk taking, sexualised, reckless, regressive or violent behaviour
- flight into driven activity and involvement with others or retreat from others in order to manage inner turmoil
- vulnerability to withdrawal and pessimistic world view
- vulnerability to depression, anxiety, stress disorders, and suicidal ideation
- vulnerability to conduct, attachment, eating and behavioural disorders

- mood and personality changes and changes in quality of important relationships evident
- loss of, or reduced capacity to attune with caregiver
- loss of, or reduced capacity to manage emotional states or self soothe
- lowered self-esteem
- flight into adulthood seen as way of escaping impact and memory of trauma (early marriage, pregnancy, dropping out of school, abandoning peer group for older set of friends)
- fear of growing up and need to stay within family orbit

Memory for trauma includes:
- acute awareness of and distress with intrusive imagery and memories of trauma
- vulnerability to flash backs, episodes of recall, anniversary reactions and seasonal reminders of trauma
- may experience acute distress when encountering any reminder of trauma
- partial loss of memory and concentration

Parental / carer support following trauma

Encourage parent(s)/carers to:
- seek, accept and increase support for themselves to manage their own shock and emotions
- remain calm. Encourage younger and older adolescents to talk about traumatic event with family members
- provide opportunities for young person to spend time with friends who are supportive and meaningful
- reassure young person that strong feelings - whether of guilt, shame, embarrassment, or wish for revenge - are normal following a trauma
- help young person find activities that offer opportunities to experience mastery, control, and self-esteem
- encourage pleasurable physical activities such as sports and dancing
- monitor young person's coping at home, school, and in peer group
- address acting-out behaviour involving aggression or self destructive behaviour quickly and firmly with limit setting and professional help
- take signs of depression, self harm, accident proneness, recklessness, and persistent personality change seriously by seeking help
- help young person develop a sense of perspective on the impact of the traumatic event and a sense of the importance of time in recovering
- encourage delaying big decisions
- seek information/advice about young person's developmental and educational progress
- provide the young person with frequent high protein snacks/meals during the day
- take time to recharge

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- **Handout D: 'Child Forensic Interviewing Best Practices' of the U.S. Department of Justice Program (September 2015)**

U.S. Department of Justice
Office of Justice Programs
Office of Juvenile Justice and Delinquency Prevention



Working for Youth Justice and Safety
JUVENILE JUSTICE BULLETIN

September 2015 *Robert L. Listenbee, Administrator*

From the Administrator

The Office of Juvenile Justice and Delinquency Prevention is committed to preventing the victimization of children and ensuring the well-being of all youth. In suspected abuse or maltreatment cases, law enforcement, medical, court, and other child protection professionals must respond swiftly and effectively and in a manner that avoids retraumatizing the affected youth.

To assist those who work in this field, the National Children's Advocacy Center convened experts from the major national forensic interview training programs to identify best practices in child forensic interviewing in cases of alleged abuse or exposure to violence.

The resulting discussions led to this publication, which provides guidance on topics, such as interview timing and setting, question type, rapport-building between the interviewer and the victim, interview aids as well as vicarious trauma and self-care.

This bulletin represents commendable collaboration across multiple entities and is an effort to build consensus within the field. We hope that the information contained within it will aid practitioners' efforts to protect children from abuse and bring those who prey upon them to justice.

Robert L. Listenbee
Administrator

OJJDP

Child Forensic Interviewing: Best Practices

Chris Newlin, Linda Cordisco Steele, Andra Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden

Highlights

This bulletin consolidates the current knowledge of professionals from several major forensic interview training programs on best practices for interviewing children in cases of alleged abuse. The authors discuss the purpose of the child forensic interview, provide historical context, review overall considerations, and outline each stage of the interview in more detail.

Among the topics that the authors discuss are the following:

- No two children will relate their experiences in the same way or with the same level of detail and clarity. Individual characteristics, interviewer behavior, family relationships, community influences, and cultural and societal attitudes determine whether, when, and how they disclose abuse.
- The literature clearly explains the dangers of repeated questioning and duplicative interviews; however, some children require more time to become comfortable with the process and the interviewer.
- Encouraging children to give detailed responses early in the interview enhances their responses later on.
- Forensic interviewers should use open-ended questions and should allow for silence or hesitation without moving to more focused prompts too quickly. Although such questions may encourage greater detail, they may also elicit potentially erroneous responses if the child feels compelled to reach beyond his or her stored memory.

- **Handout D: 'Child Forensic Interviewing Best Practices' of the U.S. Department of Justice Program (September 2015)**



SEPTEMBER 2015

Child Forensic Interviewing: Best Practices

Chris Newlin, Linda Cordisco Steele, Andra Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden

During the last quarter of the 20th century, the United States began to fully recognize the incidence of child abuse and neglect affecting our country. Increased public awareness and empirical literature have improved efforts to intervene effectively on behalf of children. One of the most significant interventions has centered on how to elicit accurate information from children regarding abuse and neglect—a process commonly referred to as "forensic interviewing" (Saywitz, Lyon, and Goodman, 2011). Following two decades of research and practice, professionals have gained significant insight into how to maximize children's potential to accurately convey information about their past experiences. Yet, as this effort continues and practice evolves, professionals face new challenges in standardizing forensic interviewing practice throughout the country.

A relative lack of both research and practice experience challenged pioneers in the field. As such, protocols and training efforts underwent significant revisions as more research was conducted and people began gaining practice-based experience, which informed further training. Additionally, given the dearth of resources at the time, geographically diverse training programs began to develop naturally throughout the United States, emanating from frontline service providers who struggled to provide quality services themselves and who also wanted to help fellow professionals. Different case experiences, contextual perspectives, and community standards influenced these training efforts. In addition, these service providers were not directly communicating with one another about the content of their training or their theoretical approaches. This further supported the existence of various approaches and the lack of standardized training language regarding forensic interviewing.

It is now widely accepted that professionals should have formal initial and ongoing forensic interview training (National Children's Alliance [NCA], 2011). However, the field has yet to determine one standardized practice to follow throughout the country. Although national training programs are generally based on the same body of research, some differences exist. Focusing on the variations among them often obscures consistencies within the various forensic interview models. In some cases, the veracity of the child's statement or the performance of the forensic interviewer has been questioned solely on the basis of the model being used. However, forensic interviewers often receive training in multiple models and use a blended approach to best meet the needs of the child they are interviewing (Midwest Regional Children's Advocacy Center [MRCAC], 2014). Furthermore, the model being used and any subsequent adaptations to it are often rooted in jurisdictional expectations. State statutes and case law dictate aspects of interview practice, further demonstrating that no one method can always be the best choice for every forensic interview.

In 2010, representatives of several major forensic interview training programs—the American Professional Society on the Abuse of Children, the CornerHouse Interagency Child Abuse Evaluation and Training Center, the Gundersen National Child Protection Training Center, the National Children's Advocacy Center, and the National Institute of Child Health and Human Development—gathered to review their programs' differences and similarities. The resulting discussions led to this bulletin, which consolidates current knowledge on the generally accepted best practices of those conducting forensic interviews of children in cases of alleged abuse or exposure to violence.

Handout D: 'Child Forensic Interviewing Best Practices' of the U.S. Department of Justice Program (September 2015)

This nation must remain committed to consistently putting the needs of children first. It is the authors' hope that this document will become an essential part of every forensic interview training program and will be widely used as an authoritative treatise on the implementation of best practices in forensic interviewing.

Purpose of the Child Forensic Interview

The forensic interview is one component of a comprehensive child abuse investigation, which includes, but is not limited to, the following disciplines: law enforcement and child protection investigators, prosecutors, child protection attorneys, victim advocates, and medical and mental health practitioners. Although not all of the concerned disciplines may directly participate in or observe the forensic interview, each party may benefit from the information obtained during the interview (Jones et al., 2005).

Most child abuse investigations begin with a forensic interview of the child, which then provides direction for other aspects of the investigation. Although forensic interviewers are trained to conduct quality interviews, it is important to note there is no "perfect" interview.

For the purposes of this bulletin, and in an effort to build consensus within the field, the authors offer the following definition of a child forensic interview:

> A forensic interview of a child is a developmentally sensitive and legally sound method of gathering factual information regarding allegations of abuse or exposure to violence. This interview is conducted by a competently trained, neutral professional utilizing research and practice-informed techniques as part of a larger investigative process.

Historical Context

In the 1980s, several high-profile cases involving allegations that daycare providers had sexually abused multiple children in their care became the subject of considerable analysis because of the interview techniques that were used (Ceci and Bruck, 1995). Law enforcement depended on mental health practitioners because of their ability to establish rapport with children. However, mental health practitioners often used therapeutic techniques that were later deemed inappropriate for forensic purposes, primarily because of concerns regarding suggestibility. The courts scrutinized the interview procedures used in these early cases and found that techniques that invited make-believe or pretending were inappropriate for criminal investigations.

As awareness of child abuse grew, professionals realized that it might take special skills to interview children. Sgroi (1978) was the first medical/mental health professional to address the issue of investigative interviewing in the literature. The American Professional Society on the Abuse of Children (APSAC) wrote the first practice guidelines—*Psychosocial Evaluation of Suspected Sexual Abuse in Young Children* (APSAC, 1990)—the title of which reflects the initial focus of these interviews: mental health. Today, the focus has shifted from the mental health or clinical perspective to a forensic perspective. Even the nomenclature changed to include terms such as "forensic interview" and "child forensic interview training."

In the late 1980s and early 1990s, substantial empirical literature discussed children's developmental capabilities and appropriate ways of engaging them in the interview process. The Cognitive Interview (Fisher and Geiselman, 1992) and Narrative Elaboration (Saywitz, Geiselman, and Bornstein, 1992) models included specific strategies that applied memory-based techniques to elicit detailed information from witnesses. Traces of both models remain in current approaches to evidence-based forensic interviewing (Saywitz and Camparo, 2009; Saywitz, Lyon, and Goodman, 2011).

Considerations Regarding the Child

Many influences have an impact on a child's experience of abuse and on his or her ability to encode and communicate information. These influences interact in a uniquely individual manner, such that no two children will ever engage or relate their experiences in the same way or with the same level of detail and clarity. This section describes the major influences on children's memory, language abilities, and motivation to converse.

Development

All of the forensic interviewing models agree that considering the age and development of the child is essential. Lamb and colleagues (2015) state that "age is the most important determinant of children's memory capacity." A child's age and developmental abilities influence his or her perception of an experience and the amount of information that they can store in long-term memory (Pipe and Salmon, 2002). Infants and toddlers can recall experiences, as demonstrated through behavioral reactions to people, objects, and environments; however, these early memories are not associated with verbal descriptions. Even as they begin to develop their language

• Handout D: 'Child Forensic Interviewing Best Practices' of the U.S. Department of Justice Program (September 2015)



capabilities, young children are less able to make sense of unfamiliar experiences, have a more limited vocabulary, and are less accustomed to engaging in conversations about past experiences than older children. As children age, their attention span improves and they are better prepared to comprehend, notice unique elements, and describe their experiences verbally. This, in turn, allows them to store more information and also allows them to discuss remembered events with others, which further serves to consolidate and strengthen memories. Children of all ages are more likely to recall salient and personally experienced details rather than peripheral details (Perona, Bottoms, and Sorenson, 2006).

Metacognition—the ability to recognize whether one understands a question and has stored and can retrieve relevant information—also improves as children mature. Very young children find it difficult to focus their attention and to search their memory effectively when interviewed. They may simply respond to recognized words or simple phrases without considering the entire question, and they are unable to monitor their comprehension or answers to questions (Lamb et al., 2015). As children grow older, both natural development and knowledge gained from school improve their skills.

Remembering an experience does not ensure that a child will be able to describe it for others. Forensic interviews are challenging for children, as they involve very different conversational patterns and an unfamiliar demand for detail (Lamb and Brown, 2006). Young children may use words before they completely understand their meaning and may continue to confuse even simple concepts and terms such as "tomorrow," "a lot," or "a long time." As children mature, they acquire the ability to use words in a more culturally normative way, although terminology for sexual encounters, internal thoughts and feelings, and particularly forensic and legal matters may be beyond their grasp (Walker, 2013). Forensic interviewers and those who evaluate the statements that children make in a legal context would do well to appreciate the many extraordinary demands made on child witnesses.

Although concerns about younger children's verbal and cognitive abilities are well recognized, the challenges of effectively interviewing adolescents are often overlooked. Because adolescents look much like adults, forensic interviewers and multidisciplinary team members may fail to appreciate that adolescents vary greatly in their verbal and cognitive abilities and thus fail to build rapport, provide interview instructions, or ensure the comprehension of questions (Walker, 2013). Ever conscious of wanting to appear competent, adolescents may be reluctant to ask for assistance. Forensic interviewers and investigators must guard against unreasonably high expectations for teenage witnesses and should not adopt a less supportive approach or use convoluted language, which will complicate matters.

Culture and Development

A child's family, social network, socioeconomic environment, and culture influence his or her development, linguistic style, perception of experiences, and ability to focus attention (Alaggia, 2010). Cultural differences may present communication challenges and can lead to misunderstandings within the forensic interview. Fontes (2008) highlights the importance of having clear-cut guidelines and strategies for taking culture into account when assessing whether child abuse or neglect has occurred. Forensic interviewers and investigators must consider the influence of culture on perception of experiences, memory formation, language, linguistic style, comfort with talking to strangers in a formal setting, and values about family loyalty and privacy when questioning children and evaluating their statements (Fontes, 2005, 2008; Perona, Bottoms, and Sorenson, 2006).

Disabilities

Children with disabilities are potentially at greater risk for abuse and neglect than children without disabilities (Hershkowitz, Lamb, and Horowitz, 2007; Kendall-Tackett et al., 2005). Forensic interviewers are unlikely

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"Cultural differences may present communication challenges and can lead to misunderstandings within the forensic interview."

to have specialized training or experience in the broad field of disabilities or regarding developmental or medical concerns; thus, collaboration is often necessary to successfully interview these children. Interviewers should use local resources—including disability specialists or other professionals who work with children and their primary caregivers—to gain insight into the functioning of specific children and any needs they may have for special accommodations (Davies and Faller, 2007). The interviewer may have to adapt each stage of the interview, balancing these adaptations with the demand for forensic integrity (Baladerian, 1997; Hershkowitz, Lamb, and Horowitz, 2007). More than one interview session may be necessary to gain the child's trust, adapt to the child's communication style and limitations, and allow adequate time to gather information (Faller, Cordisco Steele, and Nelson-Gardell, 2010).

Trauma

Children who have been victims of maltreatment or were witnesses to violent crime often react uniquely to their experiences. Forensic interviewers must be cognizant of factors that mitigate or enhance the impact, as trauma symptoms may interfere with a child's ability or willingness to report information about violent incidents (Ziegler, 2002). The memories of children who have suffered extreme forms of trauma may be impaired or distorted (Feiring and Tasca, 2005); these children may not recall their experiences in a linear fashion but, instead, as "flashbulb memories" or snapshots of their victimization (Berliner et al., 2003). In addition, their memories of traumatic experiences may be limited, with a particular emphasis on central rather than peripheral details (Fivush, Peterson, and Schwarzmueller, 2002). Interviewers and those involved in investigating child abuse may need to modify their expectations of what a traumatized child is able to report. They should not attempt to force a disclosure or continue an interview when a child becomes overly distressed, which may revictimize the child. Children who are severely traumatized may benefit from additional support and multiple, nonduplicative interview sessions (Faller, Cordisco Steele, and Nelson-Gardell, 2010; La Rooy et al., 2010).

Disclosure

Understanding the disclosure process is critical for both the investigative process and child protection outcomes. Research to date on children's disclosure of sexual abuse—based mainly on retrospective surveys of adults and reviews of past child abuse investigations—indicates that no single pattern of disclosure is predominant (Lyon and Ahern, 2010). Disclosure happens along a continuum ranging from denial to nondisclosure to reluctant disclosure to incomplete disclosure to a full accounting of an abusive incident (Olafson and Lederman, 2006). Some children also disclose less directly, over a period of time, through a variety of behaviors and actions, including discussions and indirect nonverbal cues (Alaggia, 2004).

The interaction of individual characteristics, interviewer behavior, family relationships, community influences, and cultural and societal attitudes determines whether, when, and how children disclose abuse (Alaggia, 2010; Bottoms, Quas, and Davis, 2007; Hershkowitz et al., 2006; Lyon and Ahern, 2010). Factors that help to explain a child's reluctance are age, relationship with the alleged offender, lack of parental support, gender, fear of consequences for disclosing, and fear of not being believed (Malloy, Brubacher, and Lamb, 2011; McElvaney, 2013). A review of contemporary literature reveals that when disclosure does occur, significant delays are common. In a recent analysis of child sexual abuse disclosure patterns, Alaggia (2010) found that as many as 60 to 80 percent of children and adolescents do not disclose until adulthood. If outside corroborative evidence exists (e.g., physical evidence, offender confessions, recordings, witness statements), there is still a high rate of nondisclosure (Lyon, 2007; Sjoberg and Lindblad, 2002). Furthermore, children who disclose often do not recount their experiences fully and may, over time, provide additional information (McElvaney, 2013).

Current literature on children's disclosure of sexual abuse has implications for practice. According to Malloy, Brubacher, and Lamb (2013), precipitating events or people frequently motivate children to disclose abuse. Some children require a triggering event, such as a school

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safety presentation, to allow them to discuss abuse without being the one to broach the subject (McElvaney, 2013). Other children may need to be questioned specifically about the possibility of abuse. Child abuse professionals should understand the many intersecting dynamics that help a child disclose maltreatment and should be open to the possibility that disclosure is not an all-or-nothing event.

Considerations Regarding the Interview

Almost universal agreement exists regarding the need to interview children about allegations of abuse. Once this is accepted, there are a number of important considerations, such as timing, documentation, setting, interviewer, questions to be asked, and whether to use interview aids/media.

Timing

Conduct the forensic interview as soon after the initial disclosure of abuse, or after witnessing violence, as the child's mental status will permit and as soon as a multidisciplinary team response can be coordinated (APSAC, 2012; Saywitz and Camparo, 2009). As time passes, the opportunity to collect potential corroborative evidence may diminish, children's fortitude to disclose may wane, and opportunities for contamination, whether intentional or accidental, increase (Johnson, 2009). However, children who are overly fatigued, hungry, frightened, suffering from shock, or still processing their traumatic experiences may not be effective reporters in a forensic interview (APSAC, 2012; Home Office, 2007; Myers, 2005).

Documentation

Electronic recordings are the most complete and accurate way to document forensic interviews (Cauchi and Powell, 2009; Lamb et al., 2000), capturing the exchange between the child and the interviewer and the exact wording of questions (Faller, 2007; Warren and Woodall, 1999). Video recordings, used in 90 percent of Children's Advocacy Centers (CACs) nationally (MRCAC, 2014), allow the trier of fact in legal proceedings to witness all forms of the child's communication. Recordings make the interview process transparent, documenting that the interviewer and the multidisciplinary team avoided inappropriate interactions with the child (Faller, 2007). Recorded forensic interviews also allow interviewers and others to review their work and facilitate skill development and integrity of practice (Lamb, Sternberg, Orbach, Esplin, and Mitchell, 2002; Price and Roberts, 2011; Stewart, Katz, and La Rooy, 2011).

Neutral and Objective Setting

The National Children's Alliance (NCA), as a part of its accreditation process, requires CACs to provide child-focused settings that are "comfortable, private, and both physically and psychologically safe for diverse populations of children and their non-offending family members" (NCA, 2011:36). However, there is a dearth of literature on what constitutes a child-friendly environment (NCA, 2013).

Interview rooms come in all shapes and sizes, are often painted in warm colors, may incorporate child-sized furniture, and should only use artwork of a non-fantasy nature. The room should be equipped for audio- and video-recording, and case investigators and other CAC staff should be able to observe the forensic interview (Myers, 2005; NCA, 2013; Pence and Wilson, 1994). Although it is generally recommended that there be minimal distractions in the interview room (APSAC, 2012; Saywitz, Camparo, and Romanoff, 2010), opinions differ about the allowance of simple media, such as paper and markers. More recently published literature suggests that younger children may benefit from having access to paper and markers during the forensic interview (Poole and Dickinson, 2014). Materials that encourage play or fantasy are uniformly discouraged, as is any interpretation by the interviewer of the child's use of media or other products.

Role of the Interviewer

Forensic interviewers should encourage the most accurate, complete, and candid information from a child and, to this end, the child should be the most communicative during the forensic interview (Teoh and Lamb, 2013). Interviewers must balance forensic concerns with decisions about how much information to introduce (APSAC, 2012; Orbach and Pipe, 2011). In addition, they should be attentive to the possibility that their preconceived ideas may bias the information gathered—particularly if the interview is conducted in an unduly leading or suggestive manner—and should avoid such practices (Ceci and Bruck, 1995; Faller, 2007).

Question Type

Maximizing the amount of information obtained through children's free recall memory is universally accepted among forensic interview models as a best practice. Forensic interviewers should use open-ended and cued questions skillfully and appropriately to support children's ability and willingness to describe remembered experiences in their own words (Lamb, Orbach, Hershkowitz, Esplin, and Horowitz, 2007; Myers, 2005; Saywitz and Camparo, 2009; Saywitz, Lyon, and Goodman, 2011). Ask more focused questions later in the interview, depending on the developmental abilities of the child, the child's degree of

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candor or reluctance, the immediacy of child protection issues, and the existence of reliable information previously gathered (e.g., suspect confession, photographs) (Imhoff and Baker-Ward, 1999; Lamb et al., 2003; Perona, Bottoms, and Sorenson, 2006). This approach reduces the risk of the interviewer contaminating the child's account.

A common language for labeling the format of questions does not exist; however, similarities in currently used labels do exist (Anderson, 2013; APSAC, 2012; Lyon, 2010). Agreement also exists that questions should not be judged in isolation. The labels for memory prompts may be classified into two main categories—recall and recognition—and are based on the type of memory accessed.

Recall prompts are open-ended, inviting the child to tell everything he or she remembers in his or her own words; such prompts have been shown to increase accuracy (Lamb, Orbach, Hershkowitz, Horowitz, and Abbott, 2007; Lamb et al., 2008). Open-ended questions encourage children to elaborate and to include salient details without significant input from the interviewer, who should use them throughout the interview. Recall prompts may include directives or questions, such as "Tell me everything that happened," "And then what happened?" and "Tell me more about (specific person/action/place that the child previously mentioned)." Although the accounts retrieved through the use of recall prompts can be quite detailed and accurate, they may not be complete. Interviewers may ask specific, focused questions to obtain additional details about topics the child has already mentioned, using a "who, what, where, when, and how" format. Although these detailed questions focus the child on certain aspects of his or her report that are missing, the child may or may not recall such information. These questions may promote a narrative response or may elicit brief answers (Saywitz and Camparo, 2009; Hershkowitz et al., 2012). They do not introduce information or pose options to the child: "You said you were in the house. What room were you in?" followed by "Tell me about that."

Once open-ended questions are exhausted, it may be necessary to progressively focus the query. Children may omit details because they do not know the significance of the information sought or because they are reluctant to divulge certain information. In contrast to recall prompts, recognition prompts provide the child with context or offer interviewer-created options. Recognition prompts may elicit greater detail once the child has exhausted his or her capability for narrative or when a child cannot comprehend a more open-ended question. The risk of using recognition prompts is that they may elicit responses that are less accurate or potentially erroneous if the child feels compelled to reach beyond his or her stored memory. It is essential to use these questions judiciously, as over-use can significantly affect the integrity and fact-finding function of the interview (Faller, 2007; Lamb, Orbach, Hershkowitz, Horowitz, and Abbott, 2007; Myers, 2005; Perona, Bottoms, and Sorenson, 2006). Suggestive questions are those that "to one degree or another, [suggest] that the questioner is looking for a particular answer" (Myers, Saywitz, and Goodman, 1996) and should be avoided.

Interview Aids/Media

The goal of a forensic interview is to have the child verbally describe his or her experience. A question remains, however, as to whether limiting children to verbal responses allows all children to fully recount their experiences, or whether media (e.g., paper, markers, anatomically detailed drawings or dolls) may be used during the interview to aid in descriptions (Brown et al., 2007; Katz and Hamama, 2013; Macleod, Gross, and Hayne, 2013; Patterson and Hayne, 2011; Poole and Dickinson, 2011; Russell, 2008). The use of media varies greatly by model and professional training. Decisions are most often made at the local level, and interviewer comfort and multidisciplinary team preferences may influence them. Ongoing research is necessary to shed further light on the influence of various types of media on children's verbal descriptions of remembered events.

The Forensic Interview

Forensic interview models guide the interviewer through the various stages of a legally sound interview; they vary from highly structured/scripted to semi-structured (interviewers cover predetermined topics) to flexible (interviewers have greater latitude). All models include the following phases:

- The initial **rapport-building phase** typically comprises introductions with an age- and context-appropriate explanation of documentation methods, a review of interview instructions, a discussion of the importance of telling the truth, and practice providing narratives and episodic memory training.
- The **substantive phase** most often includes a narrative description of events, detail-seeking strategies, clarification, and testing of alternative hypotheses, when appropriate.
- The **closure phase** gives more attention to the socioemotional needs of a child, transitioning to nonsubstantive topics, allowing for questions, and discussing safety or educational messages.

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Divergent research, state statutes, community standards, and identified child/case populations contribute to the variations among models. Lack of adherence to a particular model does not, in and of itself, deem an interview forensically unsound. Increasingly, forensic interviewers receive training in multiple models and use a blend of models individualized to the needs of the child and the case (MRCAC, 2014).

Rapport-Building Phase

All interview models acknowledge that building rapport is important for both the child and the interviewer. During this phase, the child can begin to trust the interviewer and become oriented to the interview process. The interviewer can begin to understand the child's linguistic patterns, gauge the child's willingness to participate, and start to respond appropriately to the child's developmental, emotional, and cultural needs. A narrative approach to building rapport sets a pattern of interaction that should be maintained throughout the interview (Hershkowitz et al., 2015; Collins, Lincoln, and Frank, 2002; Hershkowitz, 2011).

Interview Instructions

Giving interview instructions during the rapport-building phase sets expectations that the child should provide accurate and complete information and also mitigates suggestibility. The child's age may influence the number of instructions and, perhaps, the type of instructions that may be most helpful. Interviewers may want to include some of the following instructions:

- "I was not there and don't know what happened. When I ask you questions, I don't know the answer to those questions."
- "It's okay to say 'I don't know' or 'I don't understand that question.'"
- "Only talk about things that really happened." (This emphasizes the importance of the conversation.)

For younger children, interviewers may want to have them "practice" following each guideline to demonstrate their understanding (APSAC, 2012; Saywitz and Camparo, 2009; Saywitz, Lyon, and Goodman, 2011). When children demonstrate these skills spontaneously, interviewers should reinforce them.

"Truth Versus Lies" Discussion

Recent research indicates that children may be less likely to make false statements if they have promised to tell the truth before the substantive phase of the interview (Lyon and Evans, 2014; Lyon and Dorado, 2008; Talwar et al., 2002). State statutes and community practices may vary about whether to include a "truth versus lies" discussion in forensic interviews. Some states require such a discussion or mandate that children take a developmentally appropriate oath before the substantive phase of the interview. In other states, interviewers have more autonomy regarding the techniques they use to encourage truth telling—to assess whether the child will be a competent witness in court and to increase the likelihood that the recorded interview will be admitted into evidence (Russell, 2006).

Narrative Practice/Episodic Memory Training

A substantial body of research indicates that encouraging children to give detailed responses early in the interview (i.e., during the rapport-building phase) enhances their informative responses to open-ended prompts in the substantive portion of the interview. When interviewers encourage these narrative descriptions early on, children typically will begin to provide more details without interviewers having to resort to more direct or leading prompts (Brubacher, Roberts, and Powell, 2011; Lamb et al., 2008; Poole and Lamb, 1998).

To help a child practice providing narratives, the interviewer may select a topic that was raised during a response to an earlier question, such as "Tell me some things about yourself," "What do you like to do for fun?" or "What did you do this morning?"; ask a question about a favorite activity; or ask for a description of the child's morning. The interviewer should then instruct the child to describe that topic from "beginning to end and not to leave anything out." The interviewer should continue to use cued, open-ended questions that incorporate the child's own words or phrases to prompt the child to greater elaboration. The interviewer may cue the child to tell more about an object, person, location, details of the activity, or a particular segment of time. This allows the child to provide a forensically detailed description of a nonabuse event and enables the interviewer to begin to

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understand the child's linguistic ability and style (APSAC, 2012; Saywitz and Camparo 2009; Saywitz, Lyon, and Goodman, 2011; Walker, 2013).

Substantive Phase

The interviewer should be as open-ended and nonsuggestive as possible when introducing the topic of suspected abuse, using a prompt such as "What are you here to talk to me about today?" If the child acknowledges the target topic, the interviewer should follow up with another open invitation, such as "Tell me everything and don't leave anything out" (APSAC, 2012; Lamb et al., 2008; Orbach and Pipe, 2011; Saywitz and Camparo, 2009; Saywitz, Lyon, and Goodman, 2011) and proceed to the narrative and detail-gathering phase of the interview.

However, if a child is anxious or embarrassed, has been threatened or cautioned not to talk, or has not made a prior outcry of abuse, the interviewer may need a more focused approach (Pipe et al., 2007). There is a distinction between real and apparent reluctance. Real reluctance refers to children who are cautious and significantly unwilling to respond to questions, whereas apparent reluctance refers to children who are introspective before responding to questions. Interviewers should therefore allow for silence or hesitation without moving to more focused prompts too quickly. In many cases, gently reassuring the child that it is important for the interviewer to understand everything that happened can effectively combat a child's reluctance.

Interviewers should plan for this transitional period deliberately, taking into account the child's characteristics, information included in the initial report, and any case concerns (Smith and Milne, 2011). Variations exist among interviewing models as to the most effective and defensible way to help a reluctant child transition to the substantive portion of the interview. Broadly speaking, options range from (1) the use of escalating and focused prompts gleaned from information in the allegation report (APSAC, 2012; Lamb et al., 2008; Saywitz, Lyon, and Goodman, 2011) to (2) the use of an incremental approach exploring various topics, such as family members, caregiving routines, body safety, and so forth (APSAC, 2012; Faller, 2007) to (3) the use of human figure drawings along with a discussion of body safety and appropriate and inappropriate contact (Anderson et al., 2010).

Forensic interviewers who have been trained in multiple models may use a variety of options, depending on child and case characteristics. Use focused or direct prompts only if good reason exists to believe the child has been abused and the risk of continued abuse is greater than the risk of proceeding with an interview if no abuse has occurred (Lamb et al., 2008; Orbach and Pipe, 2011).

Narrative and Detail Gathering

All forensic interview models direct the interviewer to ask the child to provide a narrative account of his or her experience to gain a clear and accurate description of alleged events in the child's own words. Do not interrupt this narrative, as it is the primary purpose of the forensic interview. Open-ended invitations ("Tell me more" or "What happened next?") and cued narrative requests ("Tell me more about [fill in with child's word]") elicit longer, more detailed, and less self-contradictory information from children and adolescents (Lamb et al., 2008; Orbach and Pipe, 2011; Perona, Bottoms, and Sorenson, 2006). Because of their relatively underdeveloped memory retrieval processes, very young or less cognitively and linguistically skilled children may require greater scaffolding and more narrowly focused open-ended questions to elicit information regarding remembered events (Faller, 2007; Hershkowitz et al., 2012; Lamb et al., 2003; Orbach and Pipe, 2011). Cued and open-ended prompts, attentive listening, silence, and facilitators, such as reflection and paraphrasing, may help (Evans and Roberts, 2009). Additionally, "wh" questions are the least leading way to ask about important but missing details and can either be open-ended ("What happened?") or more direct ("What was the man's name?") (Hershkowitz et al., 2006; Orbach and Pipe, 2011). Interviewers should delay the use of recognition prompts and questions that pose options for as long as possible (APSAC, 2012; Lamb et al., 2008; Saywitz and Camparo, 2009; Saywitz, Lyon, and Goodman, 2011).

Because many children experience multiple incidents of abuse, interviewers should ask them whether an event happened "one time or more than one time." If a child has been abused more than once, the interviewer should explore details regarding specific occurrences in a developmentally appropriate way (Walker, 2013), using the child's own wording to best cue the child to each incident (Brubacher, Roberts, and Powell, 2011; Brubacher et al., 2013; Brubacher and La Rooy, 2014; Schneider et al., 2011). Using prompts such as "first time," "last time," and other appropriate labels may lead to additional locations, acts, witnesses, or potential evidence.

No one recalls every detail about even well-remembered experiences. Questions related to core elements of the abuse can maximize the quantity and quality of information a child provides. Research suggests that children and adults may recall personally experienced events better than they recall peripheral details or events they witnessed (Perona, Bottoms, and Sorenson, 2006; Peterson, 2012).

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Once the child's narrative account of an alleged incident(s) has been fully explored, the interviewer can then follow with focused questions, asking for sensory details, clarification, and other missing elements. If a child provides only brief responses, the interviewer should follow up by asking for additional information or explanation using focused questions that incorporate terms the child previously provided. Although particular elements may have forensic significance (e.g., temporal dating, number of events, sexual intent, penetration), the child may not have accurately perceived or stored the information in long-term memory (Friedman and Lyon, 2005; Hershkowitz et al., 2012; Orbach and Lamb, 2007; Lamb et al., 2015). Forensic interviewers should proceed with caution when encouraging children through the use of recognition prompts to provide such information.

Introducing externally derived information (e.g., information gathered outside the interview or that the child has not divulged) may be appropriate in some interviews. There is broad consensus, however, that interviewers should use such information with caution and only after attempting other questioning methods. It is important to understand the suggestibility of such information within the context of the overall interview, the other questions asked, the child's presentation and development, and the strength of any external evidence obtained. Before or during the interview, multidisciplinary teams should discuss how, if, and when to introduce externally derived information or evidence. The manner and extent to which this information is presented varies across jurisdictions and models.

Alternative Hypotheses

Contextually appropriate questions that explore other viable hypotheses for a child's behaviors or statements are essential to the overall integrity of the interview. Allow the child to explain apparently contradictory information, particularly as it concerns forensically relevant details (e.g., the suspect's identity or specific acts committed). Additionally, the interviewer may need to explore the circumstances surrounding the targeted event to distinguish abuse from caregiving activities, particularly with a young child or one with limited abilities.

Questions about the child's source of information or prior conversations or instructions may be helpful if there are concerns about possible coaching or contamination. There is no one set of questions used routinely in every interview, as child characteristics, contextual settings, allegations, and case specifics vary greatly.

Consultation With the Multidisciplinary Team

Forensic interviews are best conducted within a multidisciplinary team context, as coordinating an investigation has been shown to increase the efficiency of the investigation while minimizing system-induced trauma in the child (Cronch, Viljoen, and Hansen, 2006; Jones et al., 2005). Before the interview, multidisciplinary team members should discuss possible barriers, case-specific concerns, and interviewing strategies, such as how best to introduce externally derived information, should that be necessary. Regardless of whether the forensic interview is conducted at a CAC or other child-friendly facility, the interviewer should communicate with the team members observing the interview to determine whether to raise additional questions or whether there are any ambiguities or apparent contradictions to resolve (Home Office, 2007; Jones et al., 2005). The interviewer often has to balance the team's request for further questions with the need to maintain legal defensibility and with the child's ability to provide the information requested.

Closure Phase

The closure phase helps provide a respectful end to a conversation that may have been emotionally challenging for the child. The interviewer may use various strategies during this phase (Anderson et al., 2010; APSAC, 2012; Home Office, 2007; Poole and Lamb, 1998):

- Ask the child if there is something else the interviewer needs to know.
- Ask the child if there is something he or she wants to tell or ask the interviewer.
- Thank the child for his or her effort rather than for specific content.

"Because many children experience multiple incidents of abuse, interviewers should ask them whether an event happened 'one time or more than one time.'"

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- Address the topic of safety plans and educational materials and provide a contact number for additional help.

Other Considerations

Multiple evidence-supported forensic interview models are used throughout the United States, and all of these require the interviewer to adapt the model to the needs of each child based on unique situational variables. Some of the more commonly faced situational variables are highlighted below.

Multiple, Nonduplicative Interviews

One comprehensive forensic interview is sufficient for many children, particularly if the child made a previous disclosure, possesses adequate language skills, and has the support of a family member or other close adult (APSAC, 2002; Faller, 2007; London et al., 2007; NCA, 2011; Olafson and Lederman, 2006). The literature clearly demonstrates the dangers of multiple interviewers repeatedly questioning a child or conducting duplicative interviews (Ceci and Bruck, 1995; Fivush, Peterson, and Schwarzmueller, 2002; Malloy and Quas, 2009; Poole and Lamb, 1998; Poole and Lindsay, 2002). However, some children require more time and familiarity to become comfortable and to develop trust in both the process and the interviewer. Recent research indicates that multiple interview sessions may allow reluctant, young, or traumatized children the opportunity to more clearly and completely share information (Leander, 2010; Pipe et al., 2007). Multiple, nonduplicative interviews are most effective when the interviewer uses best practices in forensic interviewing; adapts the interview structure to the developmental, cultural, and emotional needs of the child; and avoids suggestive and coercive approaches (Faller, Cordisco Steele, and Nelson-Gardell, 2010; La Rooy et al., 2010; La Rooy, Lamb, and Pipe, 2009).

Supervision and Peer Review

Although agreement exists that knowledge of forensic interviewing significantly increases through training, this newly acquired knowledge does not always translate into significant changes in interviewer practices (Lamb, Sternberg, Orbach, Hershkowitz, Horowitz, and Esplin, 2002; Lamb et al., 2008; Price and Roberts, 2011; Stewart, Katz, and La Rooy, 2011). Supervision, peer reviews, and other forms of feedback should help forensic interviewers integrate the skills they learned during initial training and also improve their practice over time.

Supervision facilitates one-on-one interaction between a more experienced forensic interviewer and a professional new to the job and may or may not include assessment of the interviewer's performance (Price and Roberts, 2011; Stewart, Katz, and La Rooy, 2011). Larger CACs may employ multiple forensic interviewers who can provide individual support to newly trained interviewers. Often, CACs operating within a regional service area undertake similar efforts.

Peer review is a facilitated discussion with other interviewers or team members and is intended to both maintain and increase desirable practices in forensic interviewing (Stewart, Katz, and La Rooy, 2011). It is an opportunity for forensic interviewers to receive emotional and professional support and for other professionals to critique their work. The peer review should be a formalized process in a neutral environment with established group norms and a shared understanding of goals, processes, and purpose. Power dynamics, a lack of cohesion, and differing expectations can easily derail peer review efforts, leading to a failure to achieve real improvements in practice. Training in the use of tools for providing more effective feedback (e.g., guidelines for giving and receiving feedback), checklists to assist peer reviewers in defining practice aspects for review, and strong leadership can assist practitioners in establishing a meaningful and productive process.



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Vicarious Trauma and Self-Care

Professionals exposed to the reports of abuse and victimization of children often suffer from vicarious traumatization, an affliction commonly called "the cost of caring" that has symptoms similar to those of posttraumatic stress disorder (Figley, 1995; Perron and Hiltz, 2006; Lipsky and Burk, 2009). Studies suggest that forensic interviewers, law enforcement officers, child protection workers, victim advocates, therapists, medical personnel, attorneys, and judges can all suffer from repeatedly hearing reports of child victimization (Conrad and Kellar-Guenther, 2006; Perron and Hiltz, 2006; Russell, 2010).

Vicarious trauma can be mitigated at multiple levels. Supervisors and organizations should be particularly attentive to the mental health of their staff and should be aware of factors that can exacerbate the development of vicarious trauma, including gender, past personal trauma, work dissatisfaction, large caseloads, long hours, and a lack of personal and professional support systems (Meyers and Cornille, 2002). Individuals should recognize the benefits of the work they undertake in their professional lives and celebrate their successes, knowing they have made a difference in a child's life.

Summary

The CAC movement was born out of the concept that the traditional fragmented and duplicative child abuse investigative process was not in the best interests of children. The multidisciplinary team approach has proven to be more child-friendly and better able to meet the needs of children and their families (Bonarch, Mabry, and Potts-Henry, 2010; Miller and Rubin, 2009). This revolutionary approach should continue to guide the nation's response to child abuse investigations. To increase the likelihood of successful outcomes for all children, it is imperative to continue ongoing discussions among professionals in both direct service delivery and program planning.

Although there have been significant efforts over the past several decades to improve the nation's response to child maltreatment, these efforts have often emanated from a single program or region without leading to a national debate on a particular topic, such as the development of forensic interviewing with children. This bulletin serves as the first collaborative effort, by professionals from many nationally recognized forensic interview training programs, to summarize the current knowledge and application of best practices in the field.

INTERVIEWER TIPS

Overall Considerations

- Conduct the interview as soon as possible after initial disclosure.
- Record the interview electronically.
- Hold the interview in a safe, child-friendly environment.
- Use open-ended questions throughout the interview, delaying the use of more focused questions for as long as possible.
- Consider the child's age, developmental ability, and culture.

Building Rapport With the Child

- Engage the child in brief conversation about his or her interests or activities.
- Provide an opportunity for the child to describe a recent nonabuse-related experience in detail.
- Describe the interview ground rules.
- Discuss the importance of telling the truth.

Conducting the Interview

- Transition to the topic of the suspected abuse carefully, taking into account the characteristics of the child and the case.
- Ask the child to describe his or her experience in detail, and do not interrupt the child during this initial narrative account.
- Once the initial account is fully explored, begin to ask more focused questions if needed to gather additional details, get clarification, or fill in missing information.
- Mirror the child's wording when asking followup questions.
- Exercise caution at this stage. Use focused queries judiciously and avoid suggestive questions that could compel the child to respond inaccurately.
- Explore other viable hypotheses for the child's behaviors or statements.
- Consult with those observing the interview to determine whether to raise additional questions or whether to resolve any ambiguities or contradictions.

Ending the Interview

- Ask the child if there is anything else he or she would like to share or to ask.
- Discuss safety plans and provide educational materials.
- Thank the child for participating.

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References

Alaggia, R. 2004. Many ways of telling: Expanding conceptualizations of child sexual abuse disclosure. *Child Abuse & Neglect* 28(11):1213–1227.

Alaggia, R. 2010. An ecological analysis of child sexual abuse disclosure: Considerations for child and adolescent mental health. *Journal of the Canadian Academy of Child and Adolescent Psychiatry* 19(1):32–39.

American Professional Society on the Abuse of Children (APSAC). 1990. *Psychosocial Evaluation of Suspected Sexual Abuse in Young Children*. Chicago, IL: APSAC.

American Professional Society on the Abuse of Children. 2002. *Practice Guidelines: Investigative Interviewing in Cases of Alleged Child Sexual Abuse*. Chicago, IL: APSAC.

American Professional Society on the Abuse of Children. 2012. *Practice Guidelines: Forensic Interviewing in Cases of Suspected Child Abuse*. Chicago, IL: APSAC.

Anderson, J., Ellefson, J., Lashley, J., Lukas-Miller, A., Olinger, S., Russell, A., Stauffer, J., and Weigman, J. 2010. The CornerHouse forensic interview protocol: RATAC®. *Thomas M. Cooley Journal of Practical & Clinical Law* 12(2):193–331.

Anderson, J.N. 2013. The CornerHouse forensic interview protocol: An evolution in practice for almost 25 years. *APSAC Advisor* 25(4):2–7.

Baladerian, N. 1997. *Forensic Interviews Guidebook To Use With Suspected Assault Victims With Cognitive and/or Communication Impairments*. Washington, DC: National Aging Resource Center on Elder Abuse.

Berliner, L., Hyman, I., Thomas, A., and Fitzgerald, M. 2003. Children's memory for trauma and positive experiences. *Journal of Traumatic Stress* 16(3):229–236.

Bonarch, K., Mabry, J.B., and Potts-Henry, C. 2010. Exploring nonoffending caregiver satisfaction with a children's advocacy center. *Journal of Child Sexual Abuse* 19(6):687–708.

Bottoms, B., Quas, J., and Davis, S. 2007. The influence of interviewer-provided social support on children's suggestibility, memory, and disclosures. In *Child Sexual Abuse: Disclosure, Delay, and Denial,* edited by M.-E. Pipe, M.E. Lamb, Y. Orbach, and A. Cederborg. Mahwah, NJ: Lawrence Erlbaum Associates.

Brown, D.A., Pipe, M.-E., Lewis, C., Lamb, M.E., and Orbach, Y. 2007. Supportive or suggestive: Do human figure drawings help 5- to 7-year-old children to report touch? *Journal of Consulting and Clinical Psychology* 75(1):33–42.

Brubacher, S., and La Rooy, D. 2014. Witness recall across repeated interviews in a case of repeated abuse. *Child Abuse & Neglect* 38(2):202–211.

Brubacher, S., Roberts, K., and Powell, M. 2011. Effects of practicing episodic versus scripted recall on children's subsequent narratives of a repeated event. *Psychology, Public Policy & Law* 17(2):286–314.

Brubacher, S.P., Malloy, L.C., Lamb, M.E., and Roberts, K.P. 2013. How do interviewers and children discuss individual occurrences of alleged repeated abuse in forensic interviews? *Applied Cognitive Psychology* 27(4):443–450.

Cauchi, R., and Powell, M.B. 2009. An examination of police officers' notes of interviews with alleged child abuse victims. *International Journal of Police Science and Management* 11(4):505–515.

Ceci, S., and Bruck, M. 1995. J*eopardy in the Courtroom: A Scientific Analysis of Children's Testimony*. Washington, DC: American Psychological Association.

Collins, R., Lincoln, R., and Frank, M.G. 2002. The effect of rapport in forensic interviewing. *Psychiatry, Psychology and Law* 9(1):69–78.

Conrad, D., and Kellar-Guenther, Y. 2006. Compassion fatigue, burnout, and compassion satisfaction among Colorado child protection workers. *Child Abuse & Neglect* 30(10):1071–1080.

Cronch, L.E., Viljoen, J.L., and Hansen, D.J. 2006. Forensic interviewing in child sexual abuse cases: Current techniques and future directions. *Aggression and Violent Behavior* 11(3):195–207.

Davies, D., and Faller, K. 2007. Interviewing children with special needs. In *Interviewing Children About Sexual Abuse: Controversies and Best Practice,* edited by K. Faller. New York, NY: Oxford University Press, pp. 152–163.

Evans, A., and Roberts, K. 2009. The effects of different paraphrasing styles on the quality of reports from young child witnesses. *Psychology, Crime & Law* 15(6):531–546.

Faller, K.C. (ed.). 2007. *Interviewing Children About Sexual Abuse: Controversies and Best Practices*. New York, NY: Oxford University Press.

Faller, K.C., Cordisco Steele, L., and Nelson-Gardell, D. 2010. Allegations of sexual abuse of a child: What to do when a single forensic interview isn't enough. *Journal of Child Sexual Abuse* 19(5):572–589.

Feiring, C., and Taska, L. 2005. The persistence of shame following sexual abuse: A longitudinal look at risk and recovery. *Child Maltreatment* 10(4):337–349.

Figley, C.R. 1995. *Compassion Fatigue: Coping With Secondary Traumatic Stress Disorder in Those Who Treat the Traumatized*. Bristol, PA: Brunner/Mazel.

Fisher, R.P., and Geiselman, R.E. 1992. *Memory-Enhancing Techniques for Investigative Interviewing: The Cognitive Interview*. Springfield, IL: Charles C. Thomas.

• Handout D: 'Child Forensic Interviewing Best Practices' of the U.S. Department of Justice Program (September 2015)

Fivush, R., Peterson, C., and Schwarzmueller, A. 2002. Questions and answers: The credibility of child witnesses in the context of specific questioning techniques. In *Memory and Suggestibility in the Forensic Interview,* edited by M. Eisen, J. Quas, and G. Goodman. Mahwah, NJ: Lawrence Erlbaum Associates, pp. 331–354.

Fontes, L.A. 2005. *Child Abuse and Culture: Working With Diverse Families.* New York, NY: Guilford Press.

Fontes, L.A. 2008. *Interviewing Clients Across Cultures: A Practitioner's Guide*. New York, NY: Guilford Press.

Friedman, W.J., and Lyon, T.D. 2005. The development of temporal-reconstructive abilities. *Child Development* 76(6):1202–1216.

Hershkowitz, I. 2011. Rapport building in investigative interviews of children. In *Children's Testimony: A Handbook of Psychological Research and Forensic Practice,* 2d ed., edited by M.E. Lamb, D.J. La Rooy, L.C. Malloy, and C. Katz. Oxford, England: Wiley/Blackwell, pp. 109–128.

Hershkowitz, I., Lamb, M., and Horowitz, D. 2007. Victimization of children with disabilities. *American Journal of Orthopsychiatry* 77(4):629–635.

Hershkowitz, I., Lamb, M.E., Katz, C., and Malloy, L.C. 2015. Does enhanced rapport-building alter the dynamics of investigative interviews with suspected victims of intra-familial abuse? *Journal of Police and Criminal Psychology.* 30(1):6–14.

Hershkowitz, I., Lamb, M.E., Orbach, Y., Katz, C., and Horowitz, D. 2012. The development of communicative and narrative skills among preschoolers: Lessons from forensic interviews about child abuse. *Child Development* 83(2):611–622.

Hershkowitz, I., Orbach, Y., Lamb, M.E., Sternberg, K.J., and Horowitz, D. 2006. Dynamics of forensic interviews with suspected abuse victims who do not disclose abuse. *Child Abuse & Neglect* 30(7):753–769.

Home Office. 2007. *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures.* London, England: Author. Available online: www.justice.gov.uk/downloads/victims-and-witnesses/vulnerable-witnesses/achieving-best-evidence-criminal-proceedings.pdf.

Imhoff, M.C., and Baker-Ward, L. 1999. Preschoolers' suggestibility: Effects of developmentally appropriate language and interviewer supportiveness. *Journal of Applied Developmental Psychology* 20(3):407–429.

Johnson, M. 2009. The investigative windows of opportunity: The vital link to corroboration in child sexual abuse cases. *Centerpiece: The Official Newsletter of the National Child Protection Training Center* 1(9):1–4.

Jones, L.M., Cross, T.P., Walsh, W.A., and Simone, M. 2005. Criminal investigations of child abuse: The research behind "best practices." *Trauma, Violence, & Abuse* 6(3):254–268.

Katz, C., and Hamama, L. 2013. "Draw me everything that happened to you": Exploring children's drawings of sexual abuse. *Children and Youth Services Review* 35(5):877–882.

Kendall-Tackett, K., Lyon, T., Taliaferro, G., and Little, L. 2005. Why child maltreatment researchers should include children's disability status in their maltreatment studies. *Child Abuse & Neglect* 29(2):147–151.

La Rooy, D., Katz, C., Malloy, L., and Lamb, M. 2010. Do we need to rethink guidance on repeated interviews? *Psychology, Public Policy and Law* 16(4):373–392.

La Rooy, D., Lamb, M., and Pipe, M.-E. 2009. Repeated interviewing: A critical evaluation of risks and potential benefits. In *The Evaluation of Child Sexual Abuse Allegations,* edited by K. Kuehnle and M. Connell. Hoboken, NJ: Wiley, pp. 327–361.

Lamb, M.E., and Brown, D.A. 2006. Conversational apprentices: Helping children become competent informants about their own experiences. *British Journal of Developmental Psychology* 24(1):215–234.

Lamb, M.E., Hershkowitz, I., Orbach, Y., and Esplin, P.W. 2008. *Tell Me What Happened: Structured Investigative Interviews of Child Victims and Witnesses.* West Sussex, England: John Wiley & Sons.

Lamb, M.E., Malloy, L.C., Hershkowitz, I., and La Rooy, D. 2015. Children and the law. In *Handbook of Child Psychology and Developmental Science,* 7th ed., vol. 3: Socioemotional Processes, edited by R.M. Lerner and M.E. Lamb. Hoboken, NJ: Wiley, pp. 464–512.

Lamb, M.E., Orbach, Y., Hershkowitz, I., Esplin, P.W., and Horowitz, D. 2007. Structured forensic interview protocols improve the quality and effectiveness of investigative interviews with children: A review of research using the NICHD Investigative Interview Protocol. *Child Abuse & Neglect* 31(11–12):1201–1231.

Lamb, M.E., Orbach, Y., Hershkowitz, I., Horowitz, D., and Abbott, C.B. 2007. Does the type of prompt affect the accuracy of information provided by alleged victims of abuse in forensic interviews? *Applied Cognitive Psychology* 21(9):1117–1130.

Lamb, M.E., Orbach, Y., Sternberg, K.J., Hershkowitz, I., and Horowitz, D. 2000. Accuracy of investigators' verbatim notes of their forensic interviews with alleged child abuse victims. *Law and Human Behavior* 24(6):699–708.

Lamb, M.E., Sternberg, K.J., Orbach, Y., Esplin, P.W., and Mitchell, S. 2002. Is ongoing feedback necessary to maintain the quality of investigative interviews with allegedly abused children? *Applied Developmental Science* 6(1):35–41.

• Handout D: 'Child Forensic Interviewing Best Practices' of the U.S. Department of Justice Program (September 2015)

Lamb, M.E., Sternberg, K.J., Orbach, Y., Esplin, P.W., Stewart, H., and Mitchell, S. 2003. Age differences in young children's responses to open-ended invitations in the course of forensic interviews. *Journal of Consulting and Clinical Psychology* 7(5):926–934.

Lamb, M.E., Sternberg, K.J., Orbach, Y., Hershkowitz, I., Horowitz, D., and Esplin, P.W. 2002. The effects of intensive training and ongoing supervision on the quality of investigative interviews with alleged sex abuse victims. *Applied Developmental Science* 6(3):114–125.

Leander, L. 2010. Police interviews with child sexual abuse victims: Patterns of reporting, avoidance and denial. *Child Abuse & Neglect* 34(3):192–205.

Lipsky, L.D., and Burk, C. 2009. *Trauma Stewardship: An Everyday Guide to Caring for Self While Caring for Others.* San Francisco, CA: Berrett-Koehler Publishers.

London, K., Bruck, M., Ceci, S.J., and Shuman, D.W. 2007. Disclosure of child sexual abuse: A review of the contemporary empirical literature. In *Child Sexual Abuse: Disclosure, Delay, and Denial,* edited by M.-E. Pipe, M.E. Lamb, Y. Orbach, and A.-C. Cederborg. Mahwah, NJ: Lawrence Erlbaum Associates, pp. 11–40.

Lyon, T.D. 2007. False denials: Overcoming methodological biases in abuse disclosure research. In *Child Sexual Abuse: Disclosure, Delay, and Denial,* edited by M.-E. Pipe, M.E. Lamb, Y. Orbach, and A.-C. Cederborg. Mahwah, NJ: Lawrence Erlbaum Associates, pp. 41–62.

Lyon, T.D. 2010. Investigative interviewing of the child. In *Child Welfare Law and Practice,* 2d ed., edited by D.N. Duquette and A.M. Haralambie. Denver, CO: Bradford, pp. 87–109.

Lyon, T.D., and Ahern, E.C. 2010. Disclosure of child sexual abuse. In *The APSAC Handbook on Child Maltreatment,* 3d ed., edited by J.E.B. Myers. Newbury Park, CA: Sage, pp. 233–252.

Lyon, T.D., and Dorado, J.S. 2008. Truth induction in young maltreated children: The effects of oath-taking and reassurance on true and false disclosures. *Child Abuse & Neglect* 32(7):738–748.

Lyon, T.D., and Evans, A.D. 2014. Young children's understanding that promising guarantees performance: The effects of age and maltreatment. *Law and Human Behavior* 38(2):162–170.

Macleod, E., Gross, J., and Hayne, H. 2013. The clinical and forensic value of information that children report while drawing. *Applied Cognitive Psychology* 27(5):564–573.

Malloy, L.C., Brubacher, S.P., and Lamb, M.E. 2011. Expected consequences of disclosure revealed in investigative interviews with suspected victims of child sexual abuse. *Applied Developmental Science* 15(1):8–19.



Malloy, L.C., Brubacher, S.P., and Lamb, M.E. 2013. Because she's one who listens: Children discuss disclosure recipients in forensic interviews. *Child Maltreatment* 18(4):245–251.

Malloy, L.C., and Quas, J.A. 2009. Children's suggestibility: Areas of consensus and controversy. In *The Evaluation of Child Sexual Abuse Allegations: A Comprehensive Guide to Assessment and Testimony,* edited by K. Kuehnle and M. Connell. Hoboken, NJ: Wiley, pp. 267–297.

McElvaney, R. 2013. Disclosure of child sexual abuse: Delays, non-disclosure and partial disclosure. What the research tells us and implications for practice. *Child Abuse Review.* DOI: 10.1002/car.2280.

Meyers, T.W., and Cornille, T. 2002. The trauma of working with traumatized children. In *Treating Compassion Fatigue,* edited by C. Figley. New York, NY: Brunner-Routledge, pp. 39–55.

Midwest Regional Children's Advocacy Center (MRCAC). 2014. *Key Survey Findings: National Multi-Site Survey of Children's Advocacy Centers.* St. Paul, MN: Author. Available online: www.mrcac.org/wp-content/uploads/2014/02/2013-Key-Survey-Findings.FINAL_.pdf

Miller, A., and Rubin, D. 2009. The contributions of children's advocacy centers to felony prosecutions of child sexual abuse. *Child Abuse & Neglect* 33(1):12–18.

Myers, J.E.B. 2005. *Myers on Evidence in Child, Domestic and Elder Abuse Cases,* vol. 1. New York, NY: Aspen Publishers.

Myers, J.E.B., Saywitz, K.J., and Goodman, G.S. 1996. Psychological research on children as witnesses: Practical implications for forensic interviews and courtroom testimony. *Pacific Law Journal* 28(1):3–91.

National Children's Alliance. 2011. Child-focused setting. In *Standards for Accredited Members.* Washington, DC: National Children's Alliance. Available online: www.nationalchildrensalliance.org/sites/default/files/download-files/NCARevisedStandardsforMembers_0.pdf.

• Handout D: 'Child Forensic Interviewing Best Practices' of the U.S. Department of Justice Program (September 2015)

National Children's Alliance. 2013. *Annotated Bibliography of the Empirical and Scholarly Literature Supporting the Ten Standards for Accreditation by the National Children's Alliance,* 2d ed. Washington, DC: National Children's Alliance. Available online: www.nationalcac.org/images/pdfs/CALiO/Bibliographies/annotated-bibliography-standards-second-ed.pdf.

Olafson, E., and Lederman, C. 2006. The state of the debate about children's disclosure patterns in child sexual abuse cases. *Juvenile & Family Court Journal* 57(1):27–40.

Orbach, Y., and Lamb, M.E. 2007. Young children's references to temporal attributes of allegedly experienced events in the course of forensic interviews. *Child Development* 78(4):1100–1120.

Orbach, Y., and Pipe, M.-E. 2011. Investigating substantive issues. In *Children's Testimony: A Handbook of Psychological Research and Forensic Practice,* 2d ed., edited by M.E. Lamb, D.J. La Rooy, L.C. Malloy, and C. Katz. Chichester, England: John Wiley & Sons, Ltd., pp. 199–216.

Patterson, T., and Hayne, H. 2011. Does drawing facilitate older children's reports of emotionally laden events? *Applied Cognitive Psychology* 25(1):119–126.

Pence, D., and Wilson, C. 1994. T*eam Investigation of Child Sexual Abuse.* Thousand Oaks, CA: Sage Publications.

Perona, A.R., Bottoms, B.L., and Sorenson, E. 2006. Research-based guidelines for child forensic interviews. J*ournal of Aggression, Maltreatment & Trauma* 12(3):81–130.

Perron, B.E., and Hiltz, B.S. 2006. Burnout and secondary trauma among forensic interviewers of children. *Child & Adolescent Social Work Journal* 23(2):216–234.

Peterson, C. 2012. Children's autobiographical memories across the years: Forensic implications of childhood amnesia and eyewitness memory for stressful events. *Developmental Review* 32(3):287–306.

Pipe, M.-E., Lamb, M.E., Orbach, Y., and Cederborg, A. (eds.). 2007. *Child Sexual Abuse: Disclosure, Delay, and Denial.* Mahwah, NJ: Lawrence Erlbaum Associates.

Pipe, M.-E., and Salmon, K. 2002. What children bring to the interview context: Individual differences in children's event reports. In *Memory and Suggestibility in the Forensic Interview,* edited by M.L. Eisen, J.A. Quas, and G.S. Goodman. Mahwah, NJ: Lawrence Erlbaum Associates, pp. 235–261.

Poole, D.A., and Dickinson, J.J. 2011. Evidence supporting restrictions on uses of body diagrams in forensic interviews. *Child Abuse and Neglect* 35(9):659–699.

Poole, D.A., and Dickinson, J.J. 2014. Comfort drawing during investigative interviews: Evidence of the safety of a popular practice. *Child Abuse & Neglect* 38(2):192–201.

Poole, D.A., and Lamb, M.E. 1998. *Investigative Interviews of Children: A Guide for Helping Professionals.* Washington, DC: American Psychological Association.

Poole, D.A., and Lindsay, D.S. 2002. Children's suggestibility in the forensic context. In *Memory and Suggestibility in the Forensic Interview,* edited by M.L. Eisen, J.A. Quas, and G.S. Goodman. Mahwah, NJ: Lawrence Erlbaum Associates, pp. 355–382.

Price, H., and Roberts, K. 2011. The effects of an intensive training and feedback program on police and social workers' investigative interviews of children. *Canadian Journal of Behavioral Science* 43(3):235–244.

Russell, A. 2006. Best practices in child forensic interviews: Interview instructions and truth-lie discussions. *Hamline Journal of Public Law and Policy* 28:99–130.

Russell, A. 2008. Out of the woods: A case for using anatomical diagrams in forensic interviews. *Update* 21(1):2–6.

Russell, A. 2010. Vicarious trauma in child sexual abuse prosecutors. *Centerpiece* 2(6):1–7. Available online: www.gundersenhealth.org/upload/docs/NCPTC/CenterPiece/Vol%202%20Issue%206.pdf.

Saywitz, K.J., and Camparo, L.B. 2009. Contemporary child forensic interviewing: Evolving consensus and innovation over 25 years. In *Children as Victims, Witnesses, and Offenders: Psychological Science and the Law,* edited by B. Bottoms, C. Najdowski, and G. Goodwin. New York, NY: Guilford Press, pp. 102–127.

Saywitz, K.J., Camparo, L.B., and Romanoff, A. 2010. Interviewing children in custody cases: Implications of research and policy for practice. *Behavioral Sciences & the Law* 28(4):542–562.

Saywitz, K.J., Geiselman, R., and Bornstein, G. 1992. Effects of cognitive interviewing and practice on children's recall performance. *Journal of Applied Psychology* 77(5):744–756.

Saywitz, K.J., Lyon, T.D., and Goodman, G.S. 2011. Interviewing children. In *The APSAC Handbook on Child Maltreatment,* 3d ed., edited by J.E.B. Myers. Los Angeles, CA: Sage, pp. 337–360.

Schneider, L., Price, H.L., Roberts, K.P., and Hedrick, A.M. 2011. Children's episodic and generic reports of alleged abuse. *Applied Cognitive Psychology* 25(6):862–870.

Sgroi, S.M. 1978. Child sexual assault: Some guidelines for intervention and assessment. In *Sexual Assault of Children and Adolescents,* edited by A.W. Burgess, A.N. Groth, L.L. Holmstrom, and S.M. Sgroi. Lexington, MA: Lexington Books, pp. 129–142.

Sjoberg, R.L., and Lindblad, F. 2002. Delayed disclosure and disrupted communication during forensic investigation of child sexual abuse: A study of 47 corroborated cases. *Acta Paediatrica* 91(12):1391–1396.

• Handout D: 'Child Forensic Interviewing Best Practices' of the U.S. Department of Justice Program (September 2015)

Smith, K., and Milne, R. 2011. Planning the interview. In *Children's Testimony: A Handbook of Psychological Research and Forensic Practice,* 2d ed., edited by M.E. Lamb, D.J. La Rooy, L.C. Malloy, and C. Katz. Chichester, England: John Wiley & Sons, Ltd., pp. 87–107.

Stewart, H., Katz, C., and La Rooy, D.J. 2011. Training forensic interviewers. In *Children's Testimony: A Handbook of Psychological Research and Forensic Practice,* 2d ed., edited by M.E. Lamb, D.J. La Rooy, L.C. Malloy, and C. Katz. Chichester, England: John Wiley & Sons, Ltd., pp. 199–216.

Talwar, V., Lee, K., Bala, N., and Lindsay, R.C.L. 2002. Children's conceptual knowledge of lying and its relation to their actual behaviors: Implications for court competence examinations. *Law and Human Behavior* 26(4):395–415.

Teoh, Y.S., and Lamb, M. 2013. Interviewer demeanor in forensic interviews of children. *Psychology, Crime & Law* 19(2):145–159.

Walker, A.G. 2013. *Handbook on Questioning Children: A Linguistic Perspective,* 3d ed. Washington, DC: ABA Center on Children and the Law.

Warren, A.R., and Woodall, C.E. 1999. The reliability of hearsay testimony: How well do interviewers recall their interviews with children? *Psychology, Public Policy and Law* 5(2):355–371.

Ziegler, D. 2002. *Traumatic Experience and the Brain: A Handbook for Understanding and Treating Those Traumatized as Children*. Phoenix, AZ: Acacia Press.

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- **Handout E: News Article – 'Two-year-old girl helps convict abuser after becoming youngest person in UK to give evidence in court' by Natasha Salmon. The Independent, 11 October 2017.**

News › UK › Crime

Two-year-old girl helps convict abuser after becoming youngest person in UK to give evidence in court

Man sentenced to 10-years in prison as a result of her evidence

Natasha Salmon | Wednesday 11 October 2017 11:19 BST



Concentrix is understood to be the only company being considered to become the Ministry of Justice's debt collector (Getty) *Getty*

A two-year-old girl is believed to have become the youngest person to give evidence in a UK criminal case, which led to her abuser is sent to prison for more than 10 years for sexual offences against the child.

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The toddler was interviewed by a specialist child abuse police officer, assisted by a Ministry of Justice-registered intermediary who advised on the best way to question the child.

The decison appears to have been justified by the defendant's decision to plead guilty before the case came to trial. The man was sentenced to more than 10 years behind bars for sexual offences against the child.

> Abuse survivors are being re-traumatised by the NHS
>
> A dozen more men charged in Rotherham child sexual abuse probe
>
> Paedophile director added jokes about child abuse into new film

Neither the police force involved or the defendant has been named in order to protect the identity of the girl, according to *The Guardian* which originally reported the story.

Officers who used simple "who", "what" and "where" questions, with the child. A paper figure was used so she could point to parts of the body.

At one point the girl was put off when an officer wearing blue medical gloves attemped to take a mouth swab for forensic analysis.

But investigators turned it into a game and everyone in the room was given gloves and swabs.

They played for several minutes pretending to brush their teeth and, once comfortable, the child gave a mouth swab without difficulty.

Eventually the gilr named her abuser and described what had happened.

Children's charity the NSPCC now hope the case will demonstrate that sexual predators are wrong to believe very young children will not be able to give evidence against them.

A spokesman for the children's charity said the girl was "incredibly brave" and called on the Ministry of Justice to drastically increase the availability of "well-trained experts" in this area.

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He said: "An independent specialist who can ensure children are questioned appropriately and their evidence is understood is as important for justice as providing an interpreter for a witness who can't speak the language."

Speaking on behalf of the organisation Intermediaries for Justice, criminologist Dame Joyce Plotnikoff said: "Offenders may target the most vulnerable in society in the belief that they won't be able to tell what happened, so this is an important case."

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Module 8:
ADJUDICATION AND ACQUITTAL IN GBV CASES
PART 1

A. Module Activities

- **Activity 1: Hypothetical Cases: Application of the Practice Directions on Resiling**

CASE 1

Basima and Hassan have known each other since they were children. They lived in the same village. Hassan is the brother of Basima's girl friend Amira. As they grew older and Basima was 18 and Hassan was 20, they still saw each other regularly, particularly when Basima stayed at the family house with Amira.

The parents of Basima from an early age told Basima that they wanted her to marry the oldest son from a good family who were close friends of Basima's parents. Also Hassan was told by his parents that they wanted him to marry the youngest daughter of their close friends.

One night, Basima stayed overnight at Amira's family house. Basima and Hassan were no longer there in the morning.

Basima's father went to the police alleging that Basima had been abducted and raped. An FIR was registered. Basima's parents caught up with them 1 week later. They found them staying with friends of Hassan in Lahore.

Basima came home with her parents. A day later she went with her father and made a statement to police that Hassan had abducted and raped her. She presented the police with the results of a medical examination which showed that she was no longer a virgin. She made a section 164 statement alleging abduction and rape by Hassan.

Hassan denied the charge. The case was Challaned. Hassan is charged with Abduction and Rape and after the usual processes comes up for a trial hearing.

At the hearing Basima indicates that she wished to resile from her section 164 statement. She says that Hassan had not abducted and raped her.

Question 1
- If you were the **JUDGE**, what would you do? With reasons.
- If you were the **PROSECUTOR**, what procedure would you submit that the judge should apply? With reasons.

Further information: Assume that Basima was 14 years of age and Hassan was 27 years of age when the events took place.

Question 2
- If you were the **JUDGE,** what would you do? With reasons.
- If you were the **PROSECUTOR**, what procedure would you submit that the judge should apply? With reasons.

Further information: Assume further information comes before you, namely that when Basima's parents found her in Lahore, they forced Basima to (i) return home; (ii) make a statement to police to say that Hassan had abducted and raped her; (iii) undergo a medical examination; and (iv) make a section 164 statement making allegations against Hassan, even though she told them that she had gone voluntarily with Hassan to Lahore and that she wanted to marry him.

Question 3
- If you were the **JUDGE** what would you do? With reasons.
- If you were the **PROSECUTOR**, what procedure would you submit that the judge should apply? With reasons.

CASE 2

Farida is an 8-year-old girl. She was visiting the house of her maternal Aunt Amal and Uncle Salman's place, and stayed overnight which she did regularly. When her Aunty Amal went out to the shops, Uncle Salman took Farida to the bedroom to have "cuddles" which began as hugs but later became sexual fondling. He used to do this regularly when Aunty Amal went out since Farida was 5 years old.

On 13 October 2016 when Aunty Amal went out, he took her to the bedroom. This time after cuddling her he dropped his trousers, undressed her and started to insert his penis into her vagina. It hurt her and she cried out loud. He stopped. Uncle Salman told Farida not to tell anyone because otherwise she would be in trouble with both her Aunty Amal and also her mother because he would tell them that she had spoken to him rudely, refused to get him a glass of water, and refused to wash the dishes. She had previously been in trouble for not washing the dishes a month earlier and her mother was very angry. When her Aunty Amal returned she did not say anything.

Farida went home later that day and it was only in the evening at bed time when she was crying in her room that her mother asked her what was wrong and she said what had happened. Her mother did not believe her and was very angry with her and told her not to say anything to anyone.

A week later a teacher at her school saw her crying and asked her what was wrong. She told the teacher what had happened. The teacher reported this to the police. The police took a statement from Farida. An FIR was registered. The police sent Farida for a medical examination which confirmed that her hymen was partially torn but no further physical injury was seen. A section 164 statement was taken from Farida by a Supervising Magistrate.

The case was Challaned and sent to the District and Sessions Court where Uncle Salman was charged with attempted rape. Uncle Salman denies the attempted rape and says that Farida made it all up to get back at him for telling her off for her behaviour.

The case comes on for hearing. On the day of the hearing, Farida (who is now 10 years of age) does not want to give evidence and wants to resile from her statement and says that Uncle Salman did not do this.

Question 1
- If you were the **JUDGE**, what would you do? With reasons.
- If you were the **PROSECUTOR**, what procedure would you submit that the judge should apply? With reasons.

CASE 3

Jasmin is a 19-year-old who went to a party at her cousin Ayesha's place. Ayesha's parents were away. Jasmin stayed overnight as did a couple of other guests which included both males and females. Around 2:00 in the morning, Sohail, whom she had met at the party, came into the bedroom where she was alone and forcibly undressed her and inserted his penis into her vagina. She could not shout out while this happened as he held his hands over her mouth and also he was very strong and she was scared to move. He told her not to tell anyone as otherwise he would say that Jasmin had encouraged him to have sex and he would tell everybody. Jasmin was also worried as she had had some alcohol that night which meant she would be in trouble if her parents found out.

Jasmin did not tell anyone until she broke down in front of a girl friend and told her everything 3 days later. Her girlfriend encouraged her to go to the police which she did. An FIR was registered and Jasmin gave a section 164 statement to a supervising Magistrate. She was medically examined and slight bruises were found on her upper body and thighs and her hymen was ruptured. Her underclothing from that night was subjected to DNA testing which identified Sohail. The case was Challaned and sent to the District and Sessions Court.

Sohail was charged with rape. He pleaded not guilty and his defence was that Jasmin consented.

On the day of the trial Jasmin indicates she wishes to resile from her statement. She no longer wishes to give evidence against the accused.

Question 1
- If you were the **JUDGE**, what would you do? With reasons.
- If you were the **PROSECUTOR**, what procedure would you submit that the judge should apply? With reasons.

Further information: Assume that Jasmin is ability challenged and has a mental capability of a 12 year old.

Question 2
- If you were the **JUDGE**, what would you do? With reasons.
- If you were the **PROSECUTOR**, what procedure would you submit that the judge should apply? With reasons.

B. Case Law

• COMPOUNDING OFFENCES

▶ ***ZAHID REHMAN V. THE STATE***
PLD 2016 SC 77
Criminal Appeal No. 126 of 2012
Asif Saeed Khan Khosa, J. (Supreme Court of Pakistan)

Issue:

Whether the principles regarding compounding of an offence applicable to a case of Qisas (e.g., waiver and compounding) are relevant or applicable to a case of Ta'zir.

Decision:

[P]utting it in its broadest terms, Qisas in Islamic terms is Almighty Allah's law dealing with the offences of murder and bodily hurt and Ta'zir is the manmade law for such offences and the standards of proof and the punishments provided therefor are by and large different. It is generally understood that the two concepts are mutually exclusive and they represent separate legal regimes. Since the year 1990 the concepts of Qisas and Ta'zir have coexisted in our criminal jurisprudence and for the purposes of the present cases the following provisions of the Pakistan Penal Code are relevant:

> Section 299. Definitions.- In this Chapter, unless there is anything repugnant in the subject or context,-
>
> ----------
>
> (k) "qisas" means punishment by causing similar hurt at the same part of the body of the convict as he has caused to the victim or by causing his death if he has committed qatl-i-amd and in exercise of the right of the victim or a wali;
>
> (l) "ta'zir" means punishment other than qisas, diyat, arsh or daman; -------
>
> Section 302. Punishment of qatl-i-amd.-- Whoever commits qatl-i-amd shall, subject to the provisions of this Chapter be --
>
> (a) punished with death as qisas;
>
> (b) punished with death or imprisonment for life as ta'zir having regard to the facts and circumstances of the case, if the proof in either of the forms specified in section 304 is not available; or

(c) punished with imprisonment of either description for a term which may extend to twenty-five years where according to the Injunctions of Islam the punishment of qisas is not applicable:

Provided that nothing in this clause shall apply to the offence of qatl-i-amd if committed in the name or on the pretext of honour and the same shall fall within the ambit of clause (a) or clause (b), as the case may be.

Section 304. Proof of qatl-i-amd liable to qisas, etc.-- (1) Proof of qatl-i-amd shall be in any of the following forms, namely:-

a) the accused makes before a Court competent to try the offence a voluntary and true confession of the commission of the offence; or

b) by the evidence as provided in Article 17 of the Qanun-e-Shahadat, 1984 (P.O. No. 10 of 1984).

(2) The provisions of sub-section (1) shall, mutatis mutandis, apply to a hurt liable to qisas.

Section 305. Wali.- In case of qatl, the wali shall be-

a) the heirs of the victim, according to his personal law but shall not include the accused or the convict in case of qatl-i-amd if committed in the name or on the pretext of honour; and

b) the Government, if there is no heir.

Section 306. Qatl-i-amd not liable to qisas. -- Qatl-i-amd shall not be liable to qisas in the following cases, namely:-

a) when an offender is a minor or insane:
Provided that, where a person liable to qisas associates with himself in the commission of the offence a person not liable to qisas with the intention of saving himself from qisas, he shall not be exempted from qisas;

(b) when an offender causes death of his child or grandchild, how low-so-ever; and

(c) when any wali of the victim is a direct descendant, how low-so-ever, of the offender.

Section 307. Cases in which qisas for qatl-i-amd shall not be enforced.- (1) Qisas for qatl-i-amd shall not be enforced in the following cases namely:-

a) when the offender dies before the enforcement of qisas;

b) when any wali, voluntarily and without duress, to the satisfaction of the Court, waives the right of qisas under section 309 or compounds under section 310; and

c) when the right of qisas devolves on the offender as a result of the death of the wali of the victim, or on the person who has no right of qisas against the offender.

(2) To satisfy itself that the wali has waived the right of qisas under section 309 or compounded the right of qisas under section 310 voluntarily and without duress the Court shall take down the statement of the wali and such other persons as it may deem necessary on oath and record an opinion that it is satisfied that the waiver or, as the case may be, the composition was voluntary and not the result of any duress.

Illustrations

(i) A kills Z, the maternal uncle of his son B. Z has no other wali except D the wife of A. D has the right of qisas from A. But if D dies, the right of qisas shall devolve on her son B who is also the son of the offender A. B cannot claim qisas against his father. Therefore, the qisas cannot be enforced.

(ii) B kills Z, the brother of her husband A. Z has no heir except A. Here A can claim qisas from his wife B. But if A dies, the right of qisas shall devolve on his son D who is also son of B, the qisas cannot be enforced against B.

Section 308. Punishment in qatl-i-amd not liable to qisas, etc. -- (1) Where an offender guilty of qatl-i-amd is not liable to qisas under section 306 or the qisas is not enforceable under clause (c) of section 307, he shall be liable to diyat:

Provided that, where the offender is minor or insane, diyat shall be payable either from his property or by such person as may be determined by the Court:

Provided further that where at the time of committing qatl-i-amd the offender being a minor, had attained sufficient maturity or being insane, had a lucid interval, so as to be able to realize the consequences of his act, he may also be punished with imprisonment of either description for a term which may extend to twenty-five years as ta'zir.

Provided further that where the qisas is not enforceable under clause (c) of section 307 the offender shall be liable to diyat only if there is any wali other than offender and if there is no wali other than the offender, he shall be punished with imprisonment of either description for a term which may extend to twenty-five years as ta'zir.

(2) Notwithstanding anything contained in sub-section (1), the Court having regard to the facts and circumstances of the case in addition to the punishment of diyat, may punish the offender with imprisonment of either description for a term which may extend to twenty-five years as ta'zir.

Section 311. Ta'zir after waiver or compounding of right of qisas in qatl-i-amd:-- Notwithstanding anything contained in section 309 or section 310 where all the walis do not waive or compound the right of qisas, or if the principle of fasad-fil-arz is attracted the Court may, having regard to the facts and circumstances of the case, punish an offender against whom the right of qisas has been waived or compounded with death or imprisonment for life or imprisonment of either description for a term which may extend to fourteen years as ta'zir:

> Provided that if the offence has been committed in the name or on the pretext of honour, the imprisonment shall not be less than ten years.
>
> **Explanation.**- For the purpose of this section, the expression fasad-fil-arz shall include the past conduct of the offender, or whether he has any previous convictions, or the brutal or shocking manner in which the offence has been committed which is outrageous to the public conscience, or if the offender is considered a potential danger to the community, or if the offence has been committed in the name or on the pretext of honour.

The provisions of section 299, PPC clearly show that in the context of a Qatl-i-amd (intentional murder) Qisas and Ta'zir are simply two different kinds of punishments for such offence and that they are different from conviction for the said offence. As is evident from the provisions of section 304, PPC a conviction for an intentional murder can entail the punishment of Qisas only if the accused person makes before a court competent to try the offence a voluntary and true confession of commission of the offence or the requisite number of witnesses are produced by the prosecution before the trial court and their competence to testify is established through Tazkiya-tul-shahood (scrutiny of the witness before trial of the accused person) as required by Article 17 of the Qanun-e-Shahadat Order, 1984 and this was also so declared by this Court in the case of Abdus Salam v. The State (2000 SCMR 338). The cases of intentional murder other than those fulfilling the requirements of section 304, PPC are cases entailing the punishment of Ta'zir, as provided in and declared by section 302(b), PPC, and the provisions relating to the punishment of Qisas are to have no application or relevance to the same.

The relevant statutory provisions reproduced above make it abundantly clear to me that in all cases of conviction for the offence of intentional murder the question as to whether the convict is to be punished with Qisas or with Ta'zir is dependant upon the fact whether the conviction is brought about on the basis of proof in either of the forms mentioned in section 304, PPC or not. If the conviction is based upon proof as required by section 304, PPC then the sentencing regime applicable to such convict is to be that of Qisas but if the conviction is based upon proof other than that required by section 304, PPC then the sentencing regime relevant to such convict is to be that of Ta'zir. It is only after determining that the sentencing regime of Qisas is applicable to the case of a convict that a further consideration may become relevant as to whether such convict is to be punished with Qisas under the general provisions of section 302(a), PPC or his case attracts the exceptions to section 302(a) in the shape of sections 306 or 307, PPC in which cases punishments different from that under section 302(a), PPC are provided.

I have entertained no manner of doubt that the general provision regarding an intentional murder being punishable through Qisas is section 302(a), PPC carrying only the punishment of death but section 302, PPC is subject to the other relevant provisions of Chapter XVI of the Pakistan Penal Code which provide punishments different from that of death for certain special classes of murderers mentioned therein despite their cases otherwise attracting a punishment of Qisas. Sections 306, 307 and 308, PPC belong to such category of cases which cases are exceptions to the general provisions of section 302(a), PPC but nonetheless all such cases are to be initially proved as cases entailing a punishment of Qisas which punishment is then to be withheld because the offender belongs to a special class for which

an exception is created in the matter of his punishment. A plain reading of the provisions of sections 306 and 307, PPC shows, and shows quite unmistakably, that the cases covered by those provisions are primarily cases of Qisas but because of certain considerations the punishment of Qisas is not liable or enforceable in those cases. It goes without saying that before considering the question of his punishment in such a case a convict must have incurred the liability or enforceability of the punishment of Qisas against him which punishment is to be withheld from him in view of the considerations mentioned in sections 306 and 307, PPC and that is why some alternate punishments for such offenders are provided for in section 308, PPC. In other words a conviction for an offence entailing the punishment of Qisas must precede a punishment under section 308, PPC and such conviction can only be recorded if proof in either of the forms mentioned in section 304, PPC is available before the trial court and not otherwise. The provisions of section 311, PPC provide another example in this context showing how in a case otherwise entailing a punishment of Qisas the offender may be handed down a punishment of Ta'zir and the said section also falls in Chapter XVI of the Pakistan Penal Code specifying an exception to the general provisions of section 302(a), PPC.

It, thus, ought not to require much straining of mind to appreciate that the provisions of and the punishments provided in section 308, PPC are relevant only to cases of Qisas and that they have no relevance to cases of Ta'zir as in the latter category of cases a totally different legal regime of proofs and punishments is applicable.

I have not found Kh. Haris Ahmed, ASC to be justified in maintaining that section 306, PPC constitutes a distinct offence and the same entails different punishments under section 308, PPC and, therefore, in a case attracting the provisions of section 306, PPC there is hardly any relevance of sections 302 or 304, PPC. The general scheme of the Pakistan Penal Code shows that a section constituting a distinct offence specifies and contains the essential ingredients of such offence and thereafter either the same section or some following section prescribes the punishment for such offence. A bare look at section 306, PPC, however, shows that no constituting ingredient of any offence is mentioned therein and the same only provides that the punishment of Qisas shall not be liable in cases of certain classes of murderers specified therein. According to my understanding that section provides an exception to the general provision regarding liability to the punishment of Qisas contained in section 302(a), PPC and for such an exceptional case a set of different concessional punishments is provided in section 308, PPC. A section dealing only with the issue of a punishment cannot be accepted as a section constituting a distinct offence nor can a section catering for a concession in the matter of a punishment be allowed to be treated as a provision altering the basis or foundation of a conviction. Any latitude or concession in the matter of punishments contemplated by the provisions of sections 306, 307 and 308, PPC and extended to certain special categories of offenders in cases of Qisas mentioned in such provisions ought not to be mistaken as turning those cases into cases of Ta'zir with the same latitude or concession in the punishments. This is the fine point of distinction which needs to be understood with clarity if the distinction between the provisions of section 302(b), PPC on the one hand and the provisions of sections 306, 307 and 308, PPC on the other is to be correctly grasped. [...]

[...] [I]n view of the provisions of section 304, PPC a case is one of Qisas only if the accused person makes before a court competent to try the offence a voluntary and true confession of commission of the offence or the requisite number of witnesses are produced by the

prosecution before the trial court and their competence to testify is established through Tazkiya-tul-shahood (scrutiny of the witness before trial of the accused person) as required by Article 17 of the Qanun-e-Shahadat Order, 1984. I also find that the cases not fulfilling the requirements of section 304, PPC are cases of Ta'zir and the provisions relating to Qisas have no relevance to the same. It is also evident to me that the cases covered by the provisions of sections 306 and 307, PPC are primarily cases of Qisas but because of certain considerations the punishment of Qisas is not liable or enforceable in those cases and instead some alternate punishments for such offenders are provided for in section 308, PPC. I, thus, feel no hesitation in concluding that the provisions of and the punishments provided in section 308, PPC are relevant only to cases of Qisas and that they have no relevance to cases of Ta'zir and also that any latitude or concession in the matter of punishments contemplated by the provisions of sections 306, 307 and 308, PPC and extended to certain categories of offenders in Qisas cases mentioned in such provisions ought not to be mistaken as turning those cases into cases of Ta'zir with the same latitude or concession in the punishments.

[...] I, therefore, declare that Qisas and Ta'zir are two distinct and separate legal regimes which are mutually exclusive and not overlapping and they are to be understood and applied as such. I expect that with this categorical declaration the controversy at hand shall conclusively be put to rest.

[...] There are certain other issues relevant to cases of Qisas and Ta'zir and I take this opportunity to clarify the legal position in respect of such issues as well. The matter of compromise in cases of murder has also remained subject of some controversy before this Court in the past but the legal position in that respect has now been settled and I would like to restate the settled legal position so as to remove all doubts. Sections 309, 310 and 338-E, PPC and section 345, Cr.P.C. are relevant in this respect. [...]

This Court has already declared that section 309, PPC pertaining to waiver (Afw) and section 310, PPC pertaining to compounding (Sulh) in cases of murder are relevant only to cases of Qisas and not to cases of Ta'zir and a reference in this respect may be made to the cases of Sh. Muhammad Aslam and another v. Shaukat Ali alias Shauka and others (1997 SCMR 1307), Niaz Ahmad v. The State (PLD 2003 SC 635) and Abdul Jabbar v. The State and others (2007 SCMR 1496). In the said cases it had also been clarified by this Court that in cases of Ta'zir the matter of compromise between the parties is governed and regulated by the provisions of section 345(2), Cr.P.C. read with section 338-E, PPC. In the same cases it had further been explained and clarified by this Court that a partial compromise may be acceptable in cases of Qisas but a partial compromise is not acceptable in cases of Ta'zir. The cases of Manzoor Hussain and 4 others v. The State (1994 SCMR 1327), Muhammad Saleem v. The State (PLD 2003 SC 512), Muhammad Arshad alias Pappu v. Additional Sessions Judge, Lahore and 3 others (PLD 2003 SC 547), Niaz Ahmad v. The State (PLD 2003 SC 635), Riaz Ahmad v. The State (2003 SCMR 1067), Bashir Ahmed v. The State and another (2004 SCMR 236) and Khan Muhammad v. The State (2005 SCMR 599) also throw sufficient light on such aspects relating to the matter of compromise. It may be true that compounding of an offence falling in Chapter XVI of the Pakistan Penal Code is permissible under some conditions both in cases of Qisas as well as Ta'zir but at the same time it is equally true that such compounding is regulated by separate and distinct provisions and that such limited common ground between the two does not obliterate the clear distinction otherwise existing between the two separate legal regimes.

The provisions of section 311, PPC had also posed some difficulty in the past and had remained a subject of controversy before different courts of the country but that difficulty has now dissipated and the controversy now stands resolved by this Court. Section 311, PPC is reproduced below:

> **Section 311. Ta'zir after waiver or compounding of right of qisas in qatl-i-amd:**-- Notwithstanding anything contained in section 309 or section 310 where all the walis do not waive or compound the right of qisas, or if the principle of fasad-fil-arz is attracted the Court may, having regard to the facts and circumstances of the case, punish an offender against whom the right of qisas has been waived or compounded with death or imprisonment for life or imprisonment of either description for a term which may extend to fourteen years as ta'zir:
>
> Provided that if the offence has been committed in the name or on the pretext of honour, the imprisonment shall not be less than ten years.
>
> **Explanation.**- For the purpose of this section, the expression fasad-fil-arz shall include the past conduct of the offender, or whether he has any previous convictions, or the brutal or shocking manner in which the offence has been committed which is outrageous to the public conscience, or if the offender is considered a potential danger to the community, or if the offence has been committed in the name or on the pretext of honour.

In the cases of Manzoor Hussain and 4 others v. The State (1994 SCMR 1327), Khan Muhammad v. The State (2005 SCMR 599), Iftikhar-ul-Hassan v. Israr Bashir and another (PLD 2007 SC 111) and Iqrar Hussain and others v. The State and another (2014 SCMR 1155), this Court has already declared that the provisions of section 311, PPC are relevant to and can be pressed into service in cases of Qisas only and not in cases of Ta'zir.

• THE COMPOSITION SHALL HAVE THE EFFECT OF AN ACQUITTAL OF THE ACCUSED.

▶ ***CHAIRMAN AGRICULTURAL DEVELOPMENT BANK OF PAKISTAN AND ANOTHER V. MUMTAZ KHAN***
PLD 2010 Supreme Court 695
Civil Appeal No. 589 of 2002, decided on 8 April 2010.
Asif Saeed Khan Khosa, J. (Supreme Court of Pakistan)

Facts:

Mumtaz Khan respondent was a Mobile Credit Officer serving with the Agricultural Development Bank of Pakistan when he was implicated in a case of murder through F.I.R. No.327 in respect of an offence under section 302, P.P.C. read with section 34, P.P.C.

As a result of trial of that criminal case the respondent was convicted by the learned Sessions Judge, Lakki Marwat for an offence under section 302(b), P.P.C. read with section 34, P.P.C. and was sentenced to imprisonment for life and a fine of Rs.40,000 or in default of payment whereof to undergo simple imprisonment for five years. The respondent's appeal was dismissed by the Peshawar High Court.

Respondent had not challenged his conviction and sentence any further. After a few months of the decision of his appeal an application had been submitted by him seeking his acquittal on the basis of a compromise arrived at between him and the heirs of the deceased. That application submitted by the respondent was allowed by the learned Sessions Judge and the respondent was acquitted of the charge on the basis of compromise.

On the departmental side, the respondent was served with a show cause notice on 22-1-1996 as by then he had already been convicted and sentenced by the criminal Court on the charge of murder and the respondent submitted a reply thereto on 28-1-1996. In view of the respondent's already recorded conviction on the charge of murder by the criminal Court the respondent was removed from service on 3-3-1996. After earning his acquittal from the criminal Court on the basis of compromise the respondent filed a departmental appeal on 12-10-1998 seeking his reinstatement in service with all the back benefits but that appeal was dismissed by the competent authority on 26-2-1999.

Thereafter the respondent's appeal was allowed by the Federal Service Tribunal, Islamabad and the respondent was ordered to be reinstated in service with all the back benefits. That judgment rendered by the Federal Service Tribunal, Islamabad had been assailed by the appellants before this Court.

Decision:

We may observe that prior to introduction of the Islamic provisions in the Pakistan Penal Code, 1860 an acquittal of an accused person could be recorded when the prosecution failed to prove its case against him beyond reasonable doubt or when faced with two possibilities, one favouring the prosecution and the other favouring the, defence, the Court decided to extend the benefit of doubt to the accused person and an acquittal could also be recorded under section 249-A, Cr. P. C. or section 265-K, Cr. P. C. when the charge against the accused person was found to be groundless or there appeared to be no probability of his being convicted of any offence. After introduction of the Islamic provisions in the Pakistan Penal Code, 1860 it has now also become possible for an accused person to seek and obtain his acquittal in a case of murder either through waiver/Afw under section 309, P.P.C. or on the basis of compounding/Sulh under section 310, P.P.C. In the case of waiver/Afw an acquittal can be earned without any monetary payment to the heirs of the deceased but in the case of compounding/Sulh an acquittal may be obtained upon acceptance of Badal-i-Sulh by the heirs of the deceased from the accused person. In the present case the respondent had been acquitted of the charge of murder by the learned Sessions Judge, Lakki Marwat as a result of compounding of the offence and such compounding had come about on the basis of acceptance of Badal-i-Sulh by the heirs of the deceased from the respondent.

It is true that Diyat is one of the forms of punishment specified in section 53, P.P.C. but any discussion about Diyat has been found by us to be totally irrelevant to the case in hand because the respondent had not paid any Diyat to the heirs of the deceased but he had in fact paid Badal-i-Sulh to them for the purpose of compounding of the offence. It goes without saying that the concept of Badal-i-Sulh is totally different from the concept of Diyat inasmuch as the provisions of subsection (5) of section 310, P.P.C. and the Explanation attached therewith show that Badl-i-Sulh is to be "mutually agreed" between the parties as a term of Sulh between them whereas under section 53, P.P.C. C Diyat is a punishment and the provisions of section 299(e), P.P.C. and section 323, P.P.C. manifest that the amount of Diyat is

to be fixed by the Court. The whole edifice of his arguments built by the learned counsel for the appellants upon Diyat being a form of punishment has, thus, appeared tows to be utterly misconceived.

The provisions of the first proviso to subsection (1) of section 338-E, P.P.C. clearly contemplate acquittal of an accused person on the basis of compounding of an offence by invoking the provisions of section 310, P.P.C. and the effect of such compounding has also been clarified in most explicit terms by the provisions of subsection (6) of section 345, Cr.P.C. in the following words:--

> "The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded."

The legal provision mentioned above leave no ambiguity or room for doubt that compounding of an offence of murder upon payment of Badal-i-Sulh is not a result of payment of Diyat which is a form of punishment and that such compounding of the offence leads to nothing but an acquittal of the accused person. [...]

[A]n acquittal [has] no shades and there [is] no concept of honourable or dishonourable acquittals. If that be the case then the respondent in the present case could not be stigmatized or penalized on account of his acquittal on the basis of compromise. [...]

As regards the submission made by the learned counsel for the appellants based upon the issue of propriety of reinstating in service a person who, by virtue of compounding of an offence of murder, is a self-condemned murderer we may observe that we have pondered over the said issue from diverse angles and have not felt persuaded to agree with the learned counsel for the appellants. Experience shows that it is not always that a compromise is entered into by an accused person on the basis of admission of guilt by him and in many cases of false implication or spreading the net wide by the complainant party accused persons compound the offence only to get rid of the case and to save themselves from the hassle or trouble of getting themselves acquitted from Courts of law after arduous, expensive and long legal battles. Even in the present case the respondent and his brother were accused of launching a joint assault upon the deceased upon the bidding and command of their father and before the learned trial Court the respondent's brother had maintained in unequivocal terms that he alone had murdered the deceased and the respondent and their father had falsely been implicated in this case. Be that as it may, [an] ultimate acquittal in a criminal case exonerates the accused person completely for all future purpose vis-a-vis the criminal charge against him as is evident from the concept of autrefois acquit embodied in section 403, Cr.P.C. and the protection guaranteed by Article 13(a) of the Constitution of Islamic Republic of Pakistan, 1973 and, according to our humble understanding of the Islamic jurisprudence, Afw (waiver) of Sulh (compounding) in respect of an offence has the effect of purging the offender of the crime.

In this backdrop we have found it difficult as well as imprudent to lay it down as a general rule that compounding of an offence invariably amounts to admission of guilt on the part of the accused person or that an acquittal earned through such compounding may have ramifications qua all spheres of activity of the acquitted person's life, including his service or employment, beyond the criminal case against him. [...] The sway of those observations made by this

Court would surely also encompass an acquittal obtained on the basis of compounding of the offence. It is admitted at all hands that no allegation had been levelled against the respondent in the present case regarding any illegality, irregularity or impropriety committed by him in relation to his service and his acquittal in the case of murder had removed the only blemish cast upon him. His conviction in the case of murder was the only ground on which he had been removed from service and the said ground had subsequently disappeared through his acquittal, making him re-emerge as a fit and proper person entitled to continue with his service.

- ***SUO MOTU CASE NO. 03 OF 2017***
  Decided on 27 June 2018.
  Asif Saeed Khan Khosa, J. (Supreme Court of Pakistan)

Facts:

Waheed Ahmad allegedly murdered Tariq Hussain, and for committing the said offence he was booked in case FIR No. 68 for an offence under section 302 of the Pakistan Penal Code, 1860 (PPC). He was thereafter convicted after a regular trial and was sentenced to death as Ta'zir and to pay a sum of Rs. 1,00,000/- to the heirs of the deceased by way of compensation under section 544-A of the Code of Criminal Procedure, 1898 (Cr.P.C.) or in default of payment thereof to undergo simple imprisonment for six months. The Lahore High Court, Rawalpindi Bench, Rawalpindi dismissed the appeal, and the conviction and sentence were upheld and the sentence of death was confirmed.

Waheed Ahmad then filed Criminal Petition for Leave to Appeal No. 216 of 2012 before the Supreme Court, and leave to appeal was granted by the Court in order to reappraise the evidence in the interest of safe administration of criminal justice. During the pendency of that appeal Criminal Miscellaneous Application No. 185 of 2017 was filed seeking acquittal of the convict-appellant on the basis of a compromise with the heirs of Tariq Hussain. The report submitted by the learned District & Sessions Judge confirmed the fact that a genuine, voluntary and complete compromise between the parties had been affected, and the heirs of Tariq Hussain deceased had forgiven the convict-appellant, had waived their right of Qisas and had not claimed any Diyat in that respect.

After going through the said report a 3-member Bench of this Court comprising of our learned brothers Amir Hani Muslim, Qazi Faez Isa and Sardar Tariq Masood, JJJ. unanimously accepted Criminal Miscellaneous Application No. 185 of 2017 on 21.03.2017 and allowed the compromise between the parties but their lordships differed on how the main appeal was to be disposed of upon acceptance of the compromise. The majority cited sub-section (6) of Section 345 of the Code of Criminal Procedure, 1898, and stated that "the composition of an offence shall have the effect of an acquittal, hence Criminal Appeal No. 328 of 2012 is allowed, the sentence of Waheed Ahmad (appellant) recorded and upheld by the courts below is set aside and he is acquitted of the charges on the basis of the compromise."

Justice Isa wrote a separate note on that occasion, which reads in part:

> "Whilst I agree with my learned brother that the application under section 345(6) of the Code of Criminal Procedure ("the Code") be accepted, I most respectfully cannot bring myself to agree that the convict/appellant be "acquitted of the charges on the basis

of the compromise". Subsection (6) of section 345 of the Code does not envisage an acquittal, as it provides:

> "(6) The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded."

[...] In my opinion "the effect of an acquittal" is different from an acquittal. The guilt of an accused, that is ascertaining whether the accused has committed the offence for which he is charged, is determined by the Trial Court. Once the guilt of the accused has been determined the judgment is delivered by the Court. The judgment has two components, conviction, which means he is guilty, and the sentence, which is the punishment awarded to him. If the legal heirs of the deceased compound the offence it does not mean that the appellant/convict was not guilty of the murder for which he was convicted, which would be the case if, as a consequence of allowing the composition, he is "acquitted". Subsection (6) of section 345 also avoids creating such a fiction as it provides that the "composition of an offence ... shall have the effect of an acquittal", which means that the punishment (sentence) part of the judgment is brought to an end; neither this subsection states, nor it could, that the convict is "acquitted of the charges". The verdict of guilt (the conviction part of the judgment) that the Trial Court had recorded could only have been undone by the High Court, failing which by this Court; it cannot be undone by the legal heirs of the murdered person.

The law permits the legal heirs of a murdered person to compound the offence with the convict, with or without receiving badal-i-sulh/diyat (sections 310 and 323 PPC). When the legal heirs compounded the offence they elected not to seek retribution or the enforcement of the sentence. The very premise of compounding the offence is the acknowledgment of guilt by the accused who is then forgiven by the legal heirs; the affidavits filed by the legal heirs clearly also state this.

Section 338-F of the PPC stipulates that in the interpretation and application of Chapter XVI ("Offences Affecting the Human Body") "and in respect of matters ancillary or akin thereto, the Court shall be guided by the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah". The aforesaid interpretation of subsection (6) of section 345 is in conformity with a number of verses of the Holy Qur'an: surah Al-Baqarah (2) verses 178-9, surah Al-Maidah (5) verse 45, surah Al-Isra (17) verse 33 and surah Ash-Shura (42) verse 40. In these verses our Merciful Creator suggests that forgiveness and reconciliation is preferable to revenge or retaliation. A person can only be forgiven if he is guilty. The cited verses neither state nor imply that the finding of guilt is effaced."

The matter was thereafter put up before the Chief Justice, who ordered that the issue raised by Justice Isa be taken up under Art. 184(3) of the Constitution and the matter fixed by a 3-member bench of the Court headed by Justice Khosa.

Issue:

Whether a successful and complete compounding of an offence leads to acquittal of the accused person or convict from the allegation or charge, or it is only to have an effect of acquittal which may be something short of or other than acquittal.

Decision:

Before we dig deep into the controversy at hand it may be advantageous to mention that there are shorter answers available to the questions involved in this matter and they may be recorded straightaway. Chapter XVI of the Pakistan Penal Code, 1860 deals with offences affecting human body including murder and causing of hurt and all such offences are compoundable by virtue of the provisions of section 309, PPC (Waiver-Afw), section 310, PPC (Compounding-Sulh) and section 345, Cr.P.C. Section 338-E(1), PPC. [...] These provisions show, and show quite clearly, that all the offences affecting human body including murder and causing of hurt falling in Chapter XVI of the Pakistan Penal Code, 1860 are capable of being waived or compounded and that in case of waiver or compounding of such offences the court concerned, after granting the discretionary permission or leave to compound where necessary, is to acquit the person accused or convicted if it is a case of Ta'zir but in a case of Qisas it has a discretion either to acquit or to pass a sentence of Ta'zir against the accused person or convict in view of the peculiar facts and circumstances of the case. It has already been clarified by this Court in the case of Zahid Rehman v. The State (PLD 2015 SC 77) that the discretion to punish by way of Ta'zir under section 311, PPC and other similar provisions after waiver or compounding of the right of Qisas is relevant only to cases of Qisas and not to cases of Ta'zir. It is true that section 345(6), Cr.P.C. does not speak of "acquittal" as a consequence of compounding of an offence and it only speaks of the "effect of an acquittal" but it is now clear through the subsequently introduced section 338-E, PPC that a compounding of a compoundable offence in a case of Ta'zir is to lead to acquittal of the accused person or convict. When the law itself, as it stands today, speaks of acquittal as a consequence of compounding of an offence then any ambiguity in that regard created by the previous state of the law may not confound us anymore.

Another short answer to the core question involved in this matter is available in the judgment handed down by this Court in the case of Chairman Agricultural Development Bank of Pakistan and another v. Mumtaz Khan (PLD 2010 SC 695) involving the same issue which is under our consideration in the present matter. In that case the respondent was an employee of a Bank and on account of his involvement in and conviction for an offence of murder he was removed from service but later on he was acquitted on the basis of a compromise with the heirs of the deceased and a question arose as to whether a compromise or compounding could validly be treated as acquittal or not for the purposes of his reinstatement in service of the Bank. This Court had categorically held in that case that compounding of an offence through a court in a case of Ta'zir amounted to an acquittal and speaking for the Court on that occasion one of us (Asif Saeed Khan Khosa, J.) had observed that:

> "Be that as it may, an ultimate acquittal in a criminal case exonerates the accused person completely for all future purposes vis-à-vis the criminal charge against him as is evident from the concept of autrefois acquit embodied in section 403, Cr.P.C. and the protection guaranteed by Article 13(a) of the Constitution of the Islamic Republic of Pakistan, 1973 and, according to our humble understanding of the Islamic jurisprudence, Afw (waiver) or Sulh (compounding) in respect of an offence has the effect of purging the offender of the crime. In this backdrop we have found it difficult as well as imprudent to lay it down as a general rule that compounding of an offence invariably amounts to admission of guilt on the part of the accused person -------."

In Pakistan the Islamic concepts of Afw and Sulh (two different ways of compounding an offence which is made compoundable by the legislature) are an important part of our criminal law and in cases of murder and causing of hurt sections 309, 310 and 338-E, PPC provide for Waiver-Afw (forgiveness without accepting any compensation) and Compounding-Sulh (compounding on accepting badal-i-sulh/compensation) and section 345, Cr.P.C. provides the mechanism for such compounding. According to Islamic jurisprudence Afw and Sulh are based upon forgiveness and reconciliation and in his lordship's separate note dated 21.03.2017 passed in this very matter our learned brother Qazi Faez Isa, J. had referred to the verses of the Holy Qur'an [Surah Al-Baqarah (2) verses 178-9, Surah Al-Maidah (5) verse 45, Surah Al-Isra (17) verse 33 and Surah Ash-Shura (42) verse 40] wherein our Merciful Creator has suggested that forgiveness and reconciliation is preferable to revenge or retaliation. Without burdening this judgment with copious references in that regard it may suffice to state for the present purposes that the Islamic scholars around the globe agree that Afw (forgiveness) means to hide an act, to obliterate, remove and pardon it and to erase and efface it from the record as if it had never been committed and, likewise, Sulh (reconciliation) means that the act or offence is forgiven and forgotten as if it had never happened.

[...] [O]bliteration and removal of the offence and its erasing and effacing from the record as a result of compounding has the effect of absolving the accused person or convict of the act, acquittal from the charge and clearance from the actual guilt and the legislature in 1898, when section 345, Cr.P.C. was introduced, was aware of the fact that in English language as well as in legal literature the word 'absolve' was synonymous with the words 'acquit' and 'clear'. The legislature was cognizant of the legal position at that time that compounding of an offence *ipso facto* amounted to absolution which automatically had the effect of acquittal from the charge and clearance from guilt and, therefore, there was hardly any occasion for the legislature to provide in section 345, Cr.P.C. that upon a successful composition of an offence the accused person or convict would be acquitted by the court concerned. It was already understood quite well that compounding of an offence would have an automatic "effect of an acquittal" and that was exactly what was legislated through section 345(6), Cr.P.C. and no need was felt to expressly provide for an order of acquittal to be passed by a court on the basis of compounding.

In the context of the issue at hand it is of critical importance to notice that the heading of section 345, Cr.P.C. is 'Compounding of offences' and the said heading itself says it all that we are trying to find out. A compounding is in respect of the offence regarding which a person has been accused or convicted and it has no direct relevance to his guilt or punishment or even to his conviction or sentence and this is more so because a compounding can take place even before any finding of guilt or conviction is recorded. Through compounding the offence itself is compounded and resultantly the accused person or convict ipso facto stands absolved of the allegation leveled or the charge framed against him regarding commission of that offence and that is why there is no need for recording his acquittal in that connection because through the act of compounding the offence itself has disappeared or vanished. As already mentioned above, in English language the words "absolve", "acquit" and "clear" are synonymous words and can be used interchangeably in the context of criminal law and this was so acknowledged in the treatises referred to hereinbefore.

We find that the controversy over "acquittal" and "effect of an acquittal" in the context of section 345(6), Cr.P.C. and drawing a distinction in this regard between guilt and punish-

ment may be quite unnecessary because for all practical purposes an acquittal or any other dispensation having the effect of an acquittal may not make any difference to the parties to the case or the system of administration of justice in the larger context. An acquittal of an accused person or convict from an allegation or charge of committing an offence entails that he cannot again be subjected to investigation in connection with the same allegation, he cannot be arrested, prosecuted or punished again for committing the same offence and the principle of autrefois acquit enshrined in Article 13(a) of the Constitution of Pakistan and also in section 403, Cr.P.C. becomes applicable to him. The acquittal of an accused person or convict also leads to his release from custody if he is in confinement and discharge of his bail bonds and sureties if he is on bail. Such consequences of an acquittal of an accused person or convict can also quite conveniently be called or termed as effects of his acquittal. In this backdrop the only rationale we can decipher as to why the legislature spoke of "effect of an acquittal" in the context of compounding of an offence and did not use the word "acquittal" in section 345(6), Cr.P.C. is that it could not employ or utilize the word acquittal in that context because an acquittal can be ordered in connection with an existing allegation or charge but where the allegation or the charge itself has disappeared, evaporated or vanished or it stands erased or effaced on account of composition of the offence itself there is hardly any occasion for recording an acquittal. In case of such a metamorphosis brought about by a composition of the offence the best that the legislature could do was to extend all the benefits and effects of an acquittal to the concerned person and this is exactly what had been done by it through the provisions of section 345(6), Cr.P.C.

The issue regarding compounding being relevant only to punishment and not to guilt of the accused person or convict may also be viewed from the angle of conviction and sentence and we note in that context that in the Code of Criminal Procedure, 1898 the legislature was quite conscious of the distinction between a conviction and a sentence or, in other words, between guilt and punishment. Section 412, Cr.P.C. speaks of conviction and sentence separately and provides for a situation where relief may be extended only in the matter of sentence and not in the matter of conviction. Sections 169 and 249, Cr.P.C. speak only of an accused person's release pending an investigation or trial when he is in custody without making any mention of his guilt. In the same statute the legislature, if it was so minded, could have provided in section 345, Cr.P.C. that as a result of compounding of an offence the person concerned would be released from custody or that he would not be liable to any punishment but his guilt in the matter would stand undisturbed but the legislature did not say that. In that section the legislature did not even provide for release of the accused person or convict from custody or his acquittal as a consequence of compounding and such silence of the legislature in those regards was a silence which said it all when it mentioned that all the effects of acquittal would automatically flow from the compounding. Such effects of acquittal could not be ordered to flow from the compounding unless the compounding itself amounted to, without saying so, nothing but acquittal by operation of the law. It may be appreciated in this context that an acquittal or the effects of it in criminal law are necessarily relevant to guilt of a person and criminal jurisprudence and law do not envisage or contemplate removal of punishment while impliedly maintaining a person's guilt. Such an approach may be debated in theological or sociological contexts and that too only in an academic sense but for importing the same into criminal jurisprudence and law one would have to rewrite the same which exercise we are neither ready nor equipped or qualified to undertake.

The stance sometimes taken in favour of keeping the relevant person's guilt intact while

doing away with his punishment on the basis of compounding of an offence is premised upon considerations other than legal. According to this stance such a person should be kept away from public offices and civil services, etc. because he is an adjudged criminal who was once found guilty of an offence but he got away with his punishment because of compounding of the relevant offence. [...] It is not for us to consider as to how such a person would be dealt with by Almighty Allah in the next world or on the Day of Judgment as our job is only to interpret and apply the law of the land as it exists. Our short response to such stance is that it is based upon nothing but good intentions and pious wishes, it stems from mere possibilities conjured up by a noble and public-spirited mind, it involves public policy and it is for the legislature to amend the relevant laws, etc. to keep such a person out of the public life, if it so desires and decides. Without introducing appropriate amendments in the criminal law in vogue in the country there is little scope for canvasing such collateral or incidental punishments for a person and as long as the law of the land stands as it is all the fruits and effects of acquittal have to be extended to such person on the basis of a complete and lawful compounding of the offence with him. [...]

Ordinarily an acquittal recorded by a trial court in a criminal case means that the charge framed against an accused person in respect of committing an offence has not been proved and he is, thus, judicially exonerated from the allegation. In our country in some special circumstances provided for in sections 249-A and 265-K, Cr.P.C. an acquittal can also be recorded by a trial court even before framing of a formal charge where the allegation levelled is found to be groundless or there is no probability of the accused person's conviction even if a trial is conducted. After an accused person is convicted and sentenced by a trial court he can be acquitted by a higher Court through an appeal or a revision petition and upon such acquittal his conviction and sentence are set aside. Compounding or composition of an offence is, however, a distinct dispensation of its own kind and it has to be understood in its own context without mixing or confusing it with concepts of conviction, sentence and acquittal. The references made above to Roscoe Pound's book, Black's Law Dictionary and Concise Oxford Dictionary show that composition of an offence serves a purpose different from that ordinarily served by the judicial process, i.e. retribution through law. Instead of retribution a composition brings about reconciliation between the parties, it buys off the vengeance of him to whom an injury had been done by buying spear from side rather than bearing it, through it vengeance of the victim is bought off through reparation, it achieves satisfaction for an injury rather than punishment for the injury and it deters acts of revenge by the injured party. Likewise, to compound means to agree not to prosecute a crime, to settle a dispute by concession or special agreement, to condone an offence in exchange for money or any other consideration, to forbear from prosecuting a crime and to come to terms with a person for forgoing a claim, etc. for an offence. We understand that the true meanings and objects of the special dispensation of compounding or composition of offences are to be appreciated and recognized in this context rather than in the narrow context of conviction, sentence and acquittal and this is probably why section 345(6), Cr.P.C. speaks of a composition to have the effect of an acquittal and does not speak of setting aside of conviction and sentence and the resultant acquittal from the charge.

Any controversy over the issue that a person's guilt already determined judicially cannot be undone by the victim or his heirs on their own has appeared to us to be misconceived as the same overlooks the provisions of sub-sections (5) and (5-A) of section 345, Cr.P.C. according to which

> (5) When the accused has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court before which the appeal is to be heard.
>
> (5-A) A High Court acting in the exercise of its power of revision under section 439 and a Court of Session so acting under section 439-A, may allow any person to compound any offence which he is competent to compound under this section.

It is, thus, obvious that in a case where a court has already convicted a person of a compoundable offence and has held him guilty there no compounding of the offence by the victim or his heirs with the convict can take effect or can be said to be successful or complete unless the relevant appellate or revisional court grants leave to compound or allows the proposed composition. The law, therefore, clearly envisages not only involvement but also decision of the relevant court in finalization of the proposed composition of offence in such a case and it cannot be said that guilt of the convicted person is undone by the victim or his heirs on their own. It goes without saying that the matter of granting or refusing leave to compound and allowing or disallowing the same lies in the discretion of the relevant court and before taking a decision in that regard the court concerned has to apply its judicial mind to the facts and circumstances of the case in their totality and also to consider desirability or otherwise of granting permission in that respect. [...]

There is no dearth of authority in our country where compounding of offences had been refused by the courts in view of some peculiar features of those cases which fact clearly demonstrates that the ultimate decision whether a compounding of an offence (in serious cases requiring permission or leave of the court as opposed to less serious cases involving petty offences not requiring permission of the court for the purpose) is allowed or not lies with the courts and not with the victims or their heirs. The issues highlighted by our learned brother Qazi Faez Isa, J. and mentioned above may be relevant to the concerned court at the time of granting or refusing permission or leave in respect of the proposed composition but after such permission or leave has been granted by the court and the proposed composition is successfully completed the accused person or convict is to be acquitted and such acquittal is to entail all the fruits and effects of a lawful acquittal. This Court has already declared, as referred to above, that an acquittal has no shades and there are no honourable or dishonourable acquittals.

[...] The decision not to prosecute a person for a compoundable offence allegedly committed by him or the decision to absolve him of his guilt even where it has been judicially determined are decisions which have been given by the legislature in the hands of the victims or their heirs by making the offence compoundable and in cases where permission or leave of a court is required for composition of such offence this spirit of the law is to be kept in view and the requisite permission or leave may ordinarily not be withheld or refused unless the facts and circumstances of the case persuade the relevant court otherwise. Carrying the spirit of composition (forgiveness and reconciliation) forward we may add that grant of the requisite permission or leave by the court in such cases should be a rule and its withholding or refusal an exception. Composition of a compoundable offence is a concession extended by the legislature and also by the religion of Islam to the victims and their heirs and the same may not lightly be taken away or whittled down by the courts.

As a result of the discussion made above we declare the legal position as follows:

(i) As provided by the provisions of section 338-E(1), PPC and the first proviso to the same and as already declared by this Court in the case of Chairman Agricultural Development Bank of Pakistan and another v. Mumtaz Khan (PLD 2010 SC 695) as a result of a successful and complete compounding of a compoundable offence in a case of Ta'zir under section 345, Cr.P.C., with permission or leave of the relevant court where required, an accused person or convict is to be acquitted by the relevant court which acquittal shall erase, efface, obliterate and wash away his alleged or already adjudged guilt in the matter apart from leading to setting aside of his sentence or punishment, if any.

(ii) In the context of the provisions of section 345(6), Cr.P.C. the effect of an acquittal recorded by a court on the basis of a successful and complete compounding of a compoundable offence shall include all the benefits and fruits of a lawful acquittal.

C. Handouts

- **Handout A: Directions to Police to Investigate and Report**

DIRECTION TO THE ASSISTANT SUPERINTENDENT OF POLICE / SUB-DIVISIONAL POLICE OFFICER OF....

In the matter of ....., the victim ..... (and the complainant, ..., where applicable) has(ve) deposed before the court on ... that she/he is (they are)

"no more interested to proceed further with the matter against the accused XXX" and have "no objection, if the accused is acquitted from the charge". They indicate that the case was registered against the accused "due to some misunderstanding" and that the accused "has given satisfaction of his innocence in the presence of respectable of the locality".

In the light of this indication I direct you to undertake an investigation in relation to the following matters and report back to the court on or before .....

The purpose of the investigation
The prime purpose of the investigation is to question the victim and the complainant and any other person to obtain information as to the following:

The Victim
- Why it is that the victim seeks to resile;
- What specific parts of the s164 statement does the victim seek to resile from and why;
- Whether there has been any pressure, coercion, inducement, offer or threats to the victim or any member of her family at any time in relation to the victim providing the s164 statement and the details;
- Whether there is any advice, pressure, encouragement, coercion, inducement, offer or threats to the victim or complainant or any member of her family which have led to the victim resiling;

- In a case where the complainant has also resiled, whether (and if so, how) that resiling has influenced the victim to resile;
- Whether there has been any compromise or deals done between the victim and or complainant (and/or their families) with either the accused or the accused's family or someone on behalf of the accused at any time, and if so, when (and details of the compromise whether in writing or otherwise);
- In relation to the resiling deposition of the victim:
  - What is the nature of the 'misunderstanding' to which the victim has deposed and when did the victim come to realise it (including details of when and how);
  - What is the 'satisfaction' that the accused gave of his innocence (and the details of when and how);
  - Who is the 'respectable of the locality' referred to in the deposition (and the details of when) and where possible, obtain the statement of the 'respectable of the locality';
- Take a full statement from the victim with all the details as to what the victim now says occurred and include the answers to the above questions.

A caution should be given to the victim before questions are asked of her about the possibility of being charged with giving false evidence if either her resiling statement or her s164 statement is false and that it is important for her to disclose any advice, pressure, encouragement, coercion, inducement, offer or threats to her by any person in relation to giving either of the statements. Further the victim should be asked whether she requires any security protection in relation to the case.

The Complainant

- Why it is that the complainant seeks to resile;
- What specific parts of the statement for registration of the case against the accused does the complainant seek to resile from and why;
- Whether there has been any pressure, coercion, inducement, offer or threats to the complainant or any member of the family at any time in relation to the complainant providing the statement for registering the case and the details;
- Whether there is any advice, pressure, encouragement, coercion, inducement, offer or threats to the complainant or any member of the family which have led to the complainant resiling;
- In a case where the victim has also resiled, whether (and if so, how) that resiling has influenced the complainant to resile;
- Whether there has been any compromise or deals done between the complainant and/or the victim (and/or their families) with either the accused or the accused's family or someone on behalf of the accused at any time, and if so, when (and details of the compromise whether in writing or otherwise);
- In relation to the resiling deposition of the complainant:
  - What is the nature of the 'misunderstanding' to which the complainant has deposed and when did the complainant come to realise it (including details of when and how);
  - What is the 'satisfaction' that the accused gave of his innocence (and the details of when and how);
  - Who is the 'respectable of the locality' referred to in the deposition (and the details of when) and where possible, obtain the statement of the 'respectable of the locality';
- Take a full statement from the complainant with all the details as to what the complainant now says occurred and include the answers to the above questions.

A caution should be given to the complainant before questions are asked of him/her about the possibility of being charged with giving false evidence if either the registration of the case or the resiling statement is false and that it is important for him/her to disclose any advice, pressure, encouragement, coercion, inducement, offer or threats to her by any person in relation to giving either of the registration of the charge or the resiling statement. Further the complainant should be asked whether he/she requires any security protection in relation to the case.

- **Handout B: Commonly Used Examples of Resiling Statements Used by Victims and/or the Complainant in Rape Cases**

These are three examples of resiling statements from three different files for discussion.

Example 1

Case circumstances alleged that four accused persons enticed the 17-18 year old daughter of the complainant away for the purposes of having illicit intercourse and thereafter one of them subjected her to rape and a beating. The daughter had gone to the bazaar in order to fetch groceries and was then abducted and subsequently raped. The complainant is a labourer and the daughter is a bagger.

The complainant deposed in his resiling statement:

> "I am the complainant of the instant case. I filed an application as Ex.PA, which bears my thumb impression as Ex.PA/1 for registration of the case against the accused persons, present before the Court. I registered this instant case, due to some misunderstanding and now the accused persons have given me satisfaction of their innocence in the presence of respectable of the locality. Therefore, I have no more interest to further proceed with the matter against the accused persons and I have no objection, if the accused persons are acquitted from the charge."

The alleged victim deposed in her resiling statement:

> "I am the alleged victim of the case. My father got registered this case against the accused persons, present before the Court. My father got registered this case against the accused persons, due to some misunderstanding and now the accused persons have given us satisfaction of their innocence in the presence of respectable of the locality. Therefore, I have no more interest to further pursue with the matter against the accused persons and I have no objection, if the accused persons are is acquitted from the charge."

The complainant when asked in cross examination about whether he had entered into a compromise and was now falsely deposing before the court in order to save the skin of the accused, answered

> "It is absolutely incorrect. I roped the accused persons in this case due to some misunderstanding."

Example 2

The second example also involved rape.

The resiling statement of the complainant read as follows;

> "I am the complainant of the instant case. I filed an application as Ex.PA, which bears my thumb impression as Ex.PA/1 for registration of case against the accused (named), present before the Court. I registered this instant case, due to some misunderstanding and now the accused (named) has given me satisfaction of his innocence in the presence of respectable of the locality. Therefore, I have no more interest to further proceed with the matter against the accused (named) and I have no objection, if the accused is acquitted from the charge."

The resiling statement of the victim read as follows:

> "I am the alleged victim of the case. My father got registered this case against the accused (named) present before the Court. My father got registered this case against the accused, due to some misunderstanding and now the accused has given us satisfaction about his innocence in the presence of respectable of the locality. Therefore, I have no more interest to further proceed with the matter against the accused and I have no objection, if the accused is acquitted from the charge."

During cross-examination as hostile witnesses, both the complainant who was a labourer and the alleged victim were both separately asked whether they had entered into a compromise after taking monetary benefits and were deposing falsely before the court in order to stave the skin of the accused. Both gave exactly the same answer to that question.

> "It is absolutely incorrect. I roped the accused in this case due to some misunderstanding."

Example 3

In another case it was alleged that the daughter of the complainant had been enticed by an accused and his wife to be taken away to the accused's village where the accused subjected her to rape.

The resiling statement of the complainant deposed as follows.

> "I am the complainant of the instant case. I filed Ex.PA for registration of case against some unknown person for the abduction of my daughter and my signature on the application is Ex.PA/1, on the basis of which, above said case/FIR was registered. I got registered this case due to some misunderstanding. The accused present in the court is innocent and is not involved in the occurrence. Therefore, I am not ready to prosecute the accused in this case."

The resiling statement of the alleged victim deposed as follows

> "I am the alleged victim of the instant case and sui juris. My father filed an application against the accused for the registration of a criminal case regarding my abd uction, on the basis of which, the above mentioned case/FIR was chalked out. My father got registered this case against the accused due to misunderstanding. Therefore, I am not ready to further proceed with the matter against the accused and I have no objection, if the accused is acquitted from the charge."

Module 8:
ADJUDICATION AND ACQUITTAL IN GBV CASES PART 2

A. Case Law

• DUTY OF THE STATE TO INVESTIGATE

States should meet their positive duty to investigate and not dismiss a case for lack of evidence without conducting a thorough investigation.

▶ ***M.C. V. BULGARIA***
Application no. 39272/98
Decided on 4 December 2003
European Court of Human Rights

Facts:[42]

MC, the Applicant, is a Bulgarian national. She alleges that she was raped twice in two consecutive days by two perpetrators (A and P) who were friends with each other, and acquaintances of the applicant. At the time of the alleged rape the applicant was 14 years and 10 months of age, and thus was of the age of consent (14 years) according to Bulgarian legislation.

Immediately after the first rape (which occurred in a car parked by a reservoir), the applicant was accompanied by the perpetrator and his friends, amongst which was the second perpetrator, to a restaurant and was witnessed there to have acted "normally." The applicant returned home that evening, and the following night, was raped for the second time at the residence of a friend of the second perpetrator.

After she failed to return home that night, the Applicant´s mother sought her whereabouts and located her, immediately accompanying the applicant to the hospital, where a medical examination was conducted. The Applicant's hymen was found to have been freshly torn, and minor abrasions were found on her body. At that time, the applicant reported only the

[42] The Facts section is a composite of the summary from Women's Link Worldwide https://www.womenslinkworldwide.org/en/gender-justice-observatory/court-rulings-database/m-c-v-bulgaria and Global Health Rights https://www.globalhealthrights.org/health-topics/child-and-adolescent-health/m-c-v-bulgaria/.

first incident, citing feelings of shame in light of the conservative nature of her upbringing and environment.

That evening, the perpetrator of the first assault visited the applicant at her familial residence where he sought forgiveness and assured the Applicant´s mother of his desire to marry the applicant. The mother, while initially accepting the idea, approached the parents of the first perpetrator, where she was informed of the second rape. Upon the return home of the Applicant's father, the family promptly decided to file a complaint with authorities and on the same day, both perpetrators were arrested.

On 14 November 1995, criminal proceedings were opened. No charges were brought in the course of the proceedings. No action was taken on the case between November 1995 and November 1996. On 18 December 1996, the investigator completed his work on the case. He found no evidence that P and A had used threats or violence and proposed that the prosecutor terminate proceedings. In January 1997 the District Prosecutor ordered an additional investigation, stating that the original investigation had not been objective, thorough and complete. The second finding was again that there was no evidence demonstrating the use of force or threats. The criminal proceedings were terminated on 17 March 1997 on this basis. In particular, because no resistance on MC's part or attempts to seek help from others had been established.

On 23 December 1997, MC filed an application with the Commission and submitted written expert opinions which identified 'frozen fright' as the most common response to rape, where the victim either submits impassively or dissociates psychologically from the rape. Bulgarian law recognizes rape only in situations of helplessness or when the victim was coerced through the use or threat of force, evidenced by the victim resisting the attack. MC claimed that the authorities had not investigated the events of 31 July (first rape) and 1 August 1995 (second rape) effectively. MC alleged breaches of Arts 3 (prohibition of torture), 8(1) (right to private and family life), 13 (right to an effective remedy) and 14 (prohibition of discrimination).

Issue:

The applicant complained that Bulgarian law and practice did not provide effective protection against rape and sexual abuse, as only cases where the victim had resisted actively were prosecuted, and that the authorities had not investigated the events of 31 July and 1 August 1995 effectively. In her view, the above amounted to a violation of the State's positive obligations to protect the individual's physical integrity and private life and to provide effective remedies in this respect.

Decision:

1. General approach

(a) The existence of a positive obligation to punish rape and to investigate rape cases

Having regard to the nature and the substance of the applicant's complaints in this particular case, the Court finds that they fall to be examined primarily under Articles 3 and 8 of the Convention.

The Court reiterates that the obligation of the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in

the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals [...].

Positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection [...].

In a number of cases, Article 3 of the Convention gives rise to a positive obligation to conduct an official investigation [...]. Such a positive obligation cannot be considered in principle to be limited solely to cases of ill-treatment by State agents [...].

Further, the Court has not excluded the possibility that the State's positive obligation under Article 8 to safeguard the individual's physical integrity may extend to questions relating to the effectiveness of a criminal investigation [...].

On that basis, the Court considers that States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.

(b) The modern conception of the elements of rape and its impact on the substance of member States' positive obligation to provide adequate protection

In respect of the means to ensure adequate protection against rape, States undoubtedly enjoy a wide margin of appreciation. In particular, perceptions of a cultural nature, local circumstances and traditional approaches are to be taken into account.

The limits of the national authorities' margin of appreciation are nonetheless circumscribed by the Convention provisions. In interpreting them, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within Contracting States and respond, for example, to any evolving convergence as to the standards to be achieved [...].

The Court observes that, historically, proof of physical force and physical resistance was required under domestic law and practice in rape cases in a number of countries. The last decades, however, have seen a clear and steady trend in Europe and some other parts of the world towards abandoning formalistic definitions and narrow interpretations of the law in this area [...].

Firstly, it appears that a requirement that the victim must resist physically is no longer present in the statutes of European countries. [...] Irish law explicitly states that consent cannot be inferred from lack of resistance.

In most European countries influenced by the continental legal tradition, the definition of rape contains references to the use of violence or threats of violence by the perpetrator. It is significant, however, that in case law and legal theory lack of consent, not force, is seen as the constituent element of the offence of rape [...].

The Court also notes that the member States of the Council of Europe, through the Committee of Ministers, have agreed that penalising non-consensual sexual acts, "[including] in cases where the victim does not show signs of resistance", is necessary for the effective protection of women against violence and have urged the implementation of further reforms in this area.

In international criminal law, it has recently been recognised that force is not an element of rape and that taking advantage of coercive circumstances to proceed with sexual acts is also punishable. The International Criminal Tribunal for the former Yugoslavia has found that, in international criminal law, any sexual penetration without the victim's consent constitutes rape and that consent must be given voluntarily, as a result of the person's free will, assessed in the context of the surrounding circumstances [...]. While the above definition was formulated in the particular context of rapes committed against the population in the conditions of an armed conflict, it also reflects a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse.

As submitted by the intervener, the evolving understanding of the manner in which rape is experienced by the victim has shown that victims of sexual abuse – in particular, girls below the age of majority – often provide no physical resistance because of a variety of psychological factors or because they fear violence on the part of the perpetrator.

Moreover, the development of law and practice in that area reflects the evolution of societies towards effective equality and respect for each individual's sexual autonomy.

In the light of the above, the Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.

(c) The Court's task in the present case

In the light of the above, the Court's task is to examine whether or not the impugned legislation and practice and their application in the case at hand, combined with the alleged shortcomings in the investigation, had such significant flaws as to amount to a breach of the respondent State's positive obligations under Articles 3 and 8 of the Convention. [...]

2. Application of the Court's approach

The applicant alleged that the authorities' attitude in her case was rooted in defective legislation and reflected a predominant practice of prosecuting rape perpetrators only in the presence of evidence of significant physical resistance.

The Court observes that Article 152 § 1 of the Bulgarian Criminal Code does not mention any requirement of physical resistance by the victim and defines rape in a manner which does not differ significantly from the wording found in statutes of other member States. [...]

What is decisive, however, is the meaning given to words such as "force" or "threats" or other terms used in legal definitions. For example, in some legal systems "force" is considered to be established in rape cases by the very fact that the perpetrator proceeded with a sexual act without the victim's consent or because he held her body and manipulated it in order to perform a sexual act without consent. As noted above, despite differences in statutory definitions, the courts in a number of countries have developed their interpretation so as to try to encompass any non-consensual sexual act [...].

In the present case, in the absence of case-law explicitly dealing with the question whether every sexual act carried out without the victim's consent is punishable under Bulgarian law, it is difficult to arrive at safe general conclusions on this issue on the basis of the Supreme Court's judgments and legal publications [...]. Whether or not a sexual act in a particular case is found to have involved coercion always depends on a judicial assessment of the facts. A further difficulty is the absence of a reliable study of prosecutorial practice in cases which never reached the courts.

Nonetheless, it is noteworthy that the Government were unable to provide copies of judgments or legal commentaries clearly disproving the allegations of a restrictive approach in the prosecution of rape. The Government's own submissions on the elements of rape in Bulgarian law were inconsistent and unclear [...]. Finally, the fact that the vast majority of the Supreme Court's reported judgments concerned rapes committed with the use of significant violence (except those where the victim was physically or mentally disabled), although not decisive, may be seen as an indication that most of the cases where little or no physical force and resistance were established were not prosecuted [...].

The Court is not required to seek conclusive answers about the practice of the Bulgarian authorities in rape cases in general. It is sufficient for the purposes of the present case to observe that the applicant's allegation of a restrictive practice is based on reasonable arguments and has not been disproved by the Government.

Turning to the particular facts of the applicant's case, the Court notes that, in the course of the investigation, many witnesses were heard and an expert report by a psychologist and a psychiatrist was ordered. The case was investigated and the prosecutors gave reasoned decisions, explaining their position in some detail [...].

The Court recognises that the Bulgarian authorities faced a difficult task, as they were confronted with two conflicting versions of the events and little "direct" evidence. The Court does not underestimate the efforts made by the investigator and the prosecutors in their work on the case.

It notes, nonetheless, that the presence of two irreconcilable versions of the facts obviously called for a context-sensitive assessment of the credibility of the statements made and for verification of all the surrounding circumstances. Little was done, however, to test the credibility of the version of the events proposed by P. and A. and the witnesses called by them. In particular, the witnesses whose statements contradicted each other, such as Ms T. and Mr

M., were not confronted. No attempt was made to establish with more precision the timing of the events. The applicant and her representative were not given the opportunity to put questions to the witnesses whom she accused of perjury. In their decisions, the prosecutors did not devote any attention to the question whether the story proposed by P. and A. was credible, although some of their statements called for caution, such as the assertion that the applicant, 14 years old at the time, had started caressing A. minutes after having sex for the first time in her life with another man [...].

The Court thus considers that the authorities failed to explore the available possibilities for establishing all the surrounding circumstances and did not assess sufficiently the credibility of the conflicting statements made.

It is highly significant that the reason for that failure was, apparently, the investigator's and the prosecutors' opinion that, since what was alleged to have occurred was a "date rape", in the absence of "direct" proof of rape such as traces of violence and resistance or calls for help, they could not infer proof of lack of consent and, therefore, of rape from an assessment of all the surrounding circumstances. That approach transpires clearly from the position of the investigator and, in particular, from the regional prosecutor's decision of 13 May 1997 and the Chief Public Prosecutor's decision of 24 June 1997 [...].

Furthermore, it appears that the prosecutors did not exclude the possibility that the applicant might not have consented, but adopted the view that in any event, in the absence of proof of resistance, it could not be concluded that the perpetrators had understood that the applicant had not consented [...]. The prosecutors forwent the possibility of proving the perpetrators' mens rea by assessing all the surrounding circumstances, such as evidence that they had deliberately misled the applicant in order to take her to a deserted area, thus creating an environment of coercion, and also by judging the credibility of the versions of the facts proposed by the three men and witnesses called by them [...].

The Court considers that, while in practice it may sometimes be difficult to prove lack of consent in the absence of "direct" proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions must be centred on the issue of non-consent.

That was not done in the applicant's case. The Court finds that the failure of the authorities in the applicant's case to investigate sufficiently the surrounding circumstances was the result of their putting undue emphasis on "direct" proof of rape. Their approach in the particular case was restrictive, practically elevating "resistance" to the status of defining element of the offence.

The authorities may also be criticised for having attached little weight to the particular vulnerability of young persons and the special psychological factors involved in cases concerning the rape of minors [...]. Furthermore, they handled the investigation with significant delays [...].

In sum, the Court, without expressing an opinion on the guilt of P. and A., finds that the investigation of the applicant's case and, in particular, the approach taken by the investigator and the prosecutors in the case fell short of the requirements inherent in the States' positive

obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.

As regards the Government's argument that the national legal system provided for the possibility of a civil action for damages against the perpetrators, the Court notes that this assertion has not been substantiated. In any event, as stated above, effective protection against rape and sexual abuse requires measures of a criminal-law nature [...].

• POLICE ARE THE FIRST ACTORS REQUIRED TO PROVIDE EFFECTIVE, PROMPT, IMPARTIAL AND THOROUGH INVESTIGATION.

▶ ***SALMAN AKRAM RAJA V. THE GOVERNMENT OF PUNJAB THROUGH CHIEF SECRETARY, CIVIL SECRETARIAT, LAHORE AND OTHERS***
2013 SCMR 203
Constitutional Petition No. 38 of 2012, decided on 2.10.2012
Iftikhar Muhammad Chaudhry, C.J., Jawwad S. Khawaja & Khilji Arif Hussain, JJ. (Supreme Court of Pakistan)

Facts:

A 13-year old girl was gang-raped in March 2012. Her father approached the concerned Police Station on 21.03.2012 for registration of FIR. No formal FIR was registered. However, upon entry of the complaint in the Roznamcha, the sub-inspector took the rape victim to District Headquarters Hospital, Dheenda Road, Rawalpindi for medical examination. The medical officer gave his findings/opinion after eight days of examination. Despite confirmation of commission of the offence, the FIR could not be registered.

The girl attempted to end her life by committing suicide on 16.04.2012. This incident was highlighted by the media, as such, it came into the notice of the Court. The suo moto action was initiated. The Prosecutor General, Punjab was directed to pursue the case against the accused persons as well as the concerned police officers/officials who delayed the registration of FIR. However, when the case came before the Sessions Judge, Rawalpindi, the complainant (victim's father) informed the Court that he had reached an out-of-Court settlement for a consideration of Rs. 1 million with the accused persons and would drop the charge of gang-rape against them. The accused were acquitted.

The petitioners approached the Supreme Court by means of a Constitutional Petition. According to them, the out-of-Court settlement constitutes a mockery of justice and abuse of law (Cr.P.C.). It also violates the fundamental rights of the victim because such offences i.e. rape etc. are not against a single person but affect the whole society.

Thereafter, it appeared that the aggrieved family did not receive any compensation for the Razinaamas (compromise) through which they forgave the accused, and that the said compromise was a result of violent intimidation and threat to their lives. Due to interjection by the Jirga, the prosecution witnesses had not supported the prosecution case and were compelled to make compromising statements before the Court, culminating into the acquittal of the accused.

Decision:

The Supreme Court agreed with the petitioner on the following points:

(a) Every Police Station that receives rape complaints should involve reputable civil society organizations for the purpose of legal aid and counseling. A list of such organizations may be provided by bodies such as the National Commission on the Status of Women. Each Police Station to maintain a register of such organization. On receipt of information regarding the commission of rape, the Investigating Officer(IO)/Station House Officer (SHO) should inform such organizations at the earliest.
(b) Administration of DNA tests and preservation of DNA evidence should be made mandatory in rape cases.
(c) As soon as the victim is composed, her statement should be recorded under Section 164, Code of Criminal Procedure, 1898, preferably by a female magistrate.
(d) Trials for rape should be conducted in camera and after regular Court hours.
(e) During a rape trial, screens or other arrangements should be made so that the victims and vulnerable witnesses do not have to face the accused persons.
(f) Evidence of rape victims should be recorded, in appropriate cases, through video conferencing so that the victims, particularly juvenile victims, do not need to be present in Court.

The Supreme Court directed concerned public authorities to enforce these guidelines through the course of investigation and prosecution of all rape matters in Pakistan.

• POLICE OFFICERS MAY BE EXPOSED TO CRIMINAL PROSECUTION (CRIMINAL NEGLIGENCE) FOR FAILURE TO INVESTIGATE WITH DUE DILIGENCE.

▶ ***HUMAN RIGHTS CASE NO.42389-P OF 2013***
(Action taken on news clipping from 'Daily Dunya' dated 4.11.2013 regarding rape on a deaf and mute lady at Nankana Sahib)
Decided on 20 November 2013.
Iftikhar Muhammad Chaudhry, CJ., Jawwad S. Khawaja and Amir Hani Muslim, JJ. (Supreme Court of Pakistan)

Facts:

'Deaf, mute victim' of a gang rape on 09/10/2013 was running from pillar to post for redressal of her grievance but nobody listened to her. Upon going to the local Magistrate, she was able to obtain a medical examination on 12/10/2013. Police began to investigate after the Magistrate became involved, on account of FIR No.364/13, under section 376(2) PPC, that was registered on the application of the victim's brother, Muhammad Ibrahim. However, the victim's statement was not recorded.

When this matter was reported in newspaper "Duniya" on 4.11.2013, the same was brought to the notice of the Chief Justice of Pakistan. A report was called from the Inspector General of Police, on 6.11.2013. But no report was submitted by the Inspector General of Police, Punjab, and it seems that instead of taking prompt action, he handed over the matter to some of his subordinate.

On account of non-receipt of the report, the case was ordered to be fixed in the Court with notice to the Advocate General, Punjab.

The S.H.O of Police Station City, Nankana Sahib, appeared and placed on record a report dated 6.11.2013, signed by the D.P.O Nankana Sahib, which stated, in part:

> "Having been found sensitive incident, I also visited the place of occurrence and interrogate the nominated accused as well as the victim. The victim told through indicators/beckon that she was sleeping at the roof of the house and 03 unknown accused persons committed rape with her forcibly while the complainant stated that 06 accused committed rape with her sister in a room. There is contradiction in the statements of brother and sister (victim) and this contradiction makes the story doubtful. It is pertinent to mention here that accused Muddasar and Muzzamal are also real paternal nephews of her husband Nawaz Ahmed and also living in this house so it is very astonishing thing that 06 accused can commit rape in the same house.
>
> The complainant also nominated Shahid accused in his supplementary statement but on the next day i.e. 22-10-13 the complainant, PWs and victim submitted their written stamp papers/affidavit in which they have been declared Shahid Iqbal as innocent. During investigation the complainant failed to produce the PWs. Only one PW Suleman came and stated that he did not see the incident. The victim has also denied to examine her DNA test. During investigation the incident narrated above by the complainant is not proved, please."

Decision:

Prima facie, it appears that the DPO, Muntazir Mehdi being in supervisory position did not probe diligently into the inquiry conducted by his juniors and exonerated the culprits on the ground that there was contradiction in the statements of the victim and her brother as to number of the accused; as according to the victim, rape was committed by three accused whereas her brother (complainant) stated that they were six in numbers. Not only this, even one Shahid culprit who was prima facie found to be involved was allowed to go scott free in view of the affidavit which was obtained from the complainant. The complainant has stated in the Court that he had given the affidavit under influence. It is to be noted that as per the medical report the happening of the incident cannot be denied. The opinion of the medical officer is reproduced as under:-

> "Two mild tears and very mild redness on vulva means inner side of wall of labia majora measuring .25 x .5 cm both no need to stitch just like abrasions. Progress with med."

Mr. Muntazir Mehdi, DPO appeared in person and offered explanation pleading innocence but the facts noted hereinabove are sufficient to conclude that on account of his criminal negligence a poor lady who is deaf and dumb subjected to criminal act and the police knowing well about their negligence were trying to cover up their defects.

In this view of the matter, we direct the Inspector General Police, Punjab to initiate criminal proceedings against all concerned delinquent police officers/officials including the said Muntazir Mehdi as early as could be possible. He shall make sure an independent investigation without being influenced by anyone who is allegedly involved in the case. In the mean-

while, for the purpose of initiating disciplinary proceedings against the DPO Muntazir Mehdi and other delinquents, the matter shall be referred to the concerned authority in accordance with law.

• DUTY OF THE STATE TO PROSECUTE

▶ *VERTIDO V. PHILIPPINES*

Communication No. 18/2008
16 July 2010
(Views adopted by the CEDAW Committee, forty-sixth session under the Optional Protocol to CEDAW)

Facts:

In 1996, Karen Tayag Vertido ("the author") worked as Executive Director of the Davao City Chamber of Commerce and Industry in the Philippines. She filed a complaint for rape against J. B. C. ("the accused"), who at that time was a former 60-year-old President of the Chamber. The rape allegedly took place on 29 March 1996.

Within 24 hours of being raped, the author underwent a medical and legal examination at the Davao City Medical Centre. Within 48 hours of being raped, the author reported the incident to the police. On 1 April 1996, she filed a complaint in which she accused J. B. C. of raping her.

The case remained at the trial court level from 1997 to 2005. The reasons for the prolonged trial included the fact that the trial court judge was changed several times and the accused filed several motions before the appellate courts. Three judges recused themselves from the case. The case was referred to Judge Virginia Hofileña-Europa in September 2002.

On 26 April 2005 Judge Hofileña-Europa issued a verdict acquitting J. B. C. The Court challenged the credibility of the author's testimony. Although the Court allegedly took into account a Supreme Court ruling according to which "the failure of the victim to try to escape does not negate the existence of rape", it concluded that that ruling could not apply in this case, as the Court did not understand why the author had not escaped when she allegedly appeared to have had so many opportunities to do so. The Court found the allegations of the complainant as to the sexual act itself to be implausible. Guided by a Supreme Court ruling, the Court concluded that had the author really fought off the accused when she had regained consciousness and when he was raping her, the accused would have been unable to proceed to the point of ejaculation, in particular bearing in mind that he was already in his sixties. It also concluded that the testimony of the accused was corroborated on some material points by the testimony of other witnesses (namely the motel room boy and the friend of the accused). The Court therefore concluded that the evidence presented by the prosecution, in particular the testimony of the complainant herself, left too many doubts in the mind of the Court to achieve the moral certainty necessary to merit a conviction.

Issue:

Did Judge Hofileña-Europa rely on gender-based myths and misconceptions about rape and rape victims in her decision? If so, did this amount to a violation of the rights of the complainant and a breach of the Philippines' obligations to end discrimination in the legal process under articles 2 (c), 2 (f) and 5 (a) of the Convention?

Decision:

Yes, the Philippines has failed to fulfill its obligations and has thereby violated the rights of the author under article 2 (c) and (f), and article 5 (a), read in conjunction with article 1 of the Convention and general recommendation No. 19 of the Committee.

With regard to the author's claim in relation to article 2 (c), the Committee, while acknowledging that the text of the Convention does not expressly provide for a right to a remedy, considers that such a right is implied in the Convention, in particular in article 2 (c), by which States parties are required "to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination". The Committee notes the undisputed fact that the case remained at the trial court level from 1997 to 2005. It considers that for a remedy to be effective, adjudication of a case involving rape and sexual offenses claims should be dealt with in a fair, impartial, timely and expeditious manner.

The Committee further reaffirms that the Convention places obligations on all State organs and that States parties can be responsible for judicial decisions which violate the provisions of the Convention. It notes that by articles 2 (f) and 5 (a), the State party is obligated to take appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women. In this regard, the Committee stresses that stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general. The Committee further recalls its general recommendation No. 19 on violence against women. This general recommendation addresses the question of whether States parties can be held accountable for the conduct of non-State actors in stating that "... discrimination under the Convention is not restricted to action by or on behalf of Governments ..." and that "under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation". In the particular case, the compliance of the State party's due diligence obligation to banish gender stereotypes on the grounds of articles 2 (f) and 5 (a) needs to be assessed in the light of the level of gender sensitivity applied in the judicial handling of the author's case.

The Committee notes that, under the doctrine of stare decisis, the Court referred to guiding principles derived from judicial precedents in applying the provisions of rape in the Revised Penal Code of 1930 and in deciding cases of rape with similar patterns. At the outset of the judgment, the Committee notes a reference in the judgment to three general guiding principles used in reviewing rape cases. It is its understanding that those guiding principles, even if not explicitly referred to in the decision itself, have been influential in the handling of the case. The Committee finds that one of them, in particular, according to which "an accusation for rape can be made with facility", reveals in itself a gender bias. With regard to the alleged gender-based myth and stereotypes spread throughout the judgment and classified by the author, the Committee, after a careful examination of the main points that determined the judgment, notes the following issues.

First of all, the judgment refers to principles such as that physical resistance is not an element to establish a case of rape, that people react differently under emotional stress, that the failure of the victim to try to escape does not negate the existence of the rape as well as to the fact that "in any case, the law does not impose upon a rape victim the burden of proving resistance". The decision shows, however, that the judge did not apply these principles in evaluating the author's credibility against expectations about how the author should have reacted before, during and after the rape owing to the circumstances and her character and personality. The judgment reveals that the judge came to the conclusion that the author had a contradictory attitude by reacting both with resistance at one time and submission at another time, and saw this as being a problem. The Committee notes that the Court did not apply the principle that "the failure of the victim to try and escape does not negate the existence of rape" and instead expected a certain behavior from the author, who was perceived by the court as being not "a timid woman who could easily be cowed". It is clear from the judgment that the assessment of the credibility of the author's version of events was influenced by a number of stereotypes, the author in this situation not having followed what was expected from a rational and "ideal victim" or what the judge considered to be the rational and ideal response of a woman in a rape situation.

Although there exists a legal precedent established by the Supreme Court of the Philippines that it is not necessary to establish that the accused had overcome the victim's physical resistance in order to prove lack of consent, the Committee finds that to expect the author to have resisted in the situation at stake reinforces in a particular manner the myth that women must physically resist the sexual assault. In this regard, the Committee stresses that there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.

Further misconceptions are to be found in the decision of the Court, which contains several references to stereotypes about male and female sexuality being more supportive for the credibility of the alleged perpetrator than for the credibility of the victim. In this regard, the Committee views with concern the findings of the judge according to which it is unbelievable that a man in his sixties would be able to proceed to ejaculation with the author resisting the sexual attack. Other factors taken into account in the judgment, such as the weight given to the fact that the author and the accused knew each other, constitute a further example of "gender-based myths and misconceptions".

B. Handouts

- **Handout A: Example - Lahore High Court setting up a GBV Cell within police investigations**

- **Handout A: Example - Lahore High Court setting up a GBV Cell within police investigations**

SUBJECT: ESTABLISHMENT OF GENDER BASED VIOLENCE CELL AT INVESTIGATION HEADQUARTERS DISTRICT LAHORE

Respectfully Sheweth,

INTRODUCTION

It is an alarming situation that number of the Gender Based Crime is increasing day by day in our society and this situation has created a chaos in the public at large. It has become the first and foremost priority of the four pillars of the state to curb this evil and to put the criminals behind the bars involved in this shabby crime at its earliest. New legislation is underway, new Court to tackle the Gender based violence/crimes has been established and the special cell to investigate such cases is being utilized to free the society from this apprehension.

DIRECTION OF HON'BLE JUSTICE MISS. AALIA NEELUM

On the guidelines & directions of Hon'ble Justice Miss. Aalia Neelum of Lahore High Court, Lahore regarding improving the quality of investigation in the cases of Gender Based Violence/Crime a meeting was held on 11.01.2018 at Lahore High Court, Lahore in the supervision of Hon'able Justice Miss. Aalia Neelum. Following officers/officials attended the same:-

- **Handout A: Example - Lahore High Court setting up a GBV Cell within police investigations**

1- Mr. Sultan Ahmad Chaudhry, DIG Investigation, Lahore.
2- Mr. Ghulam Mubashir Maken, SSP Investigation, Lahore.
3- Mr. Muhammad Waqas Anwar DPG, Lahore.
4- Mr. Muhammad Akhlaq, DPG, Lahore.
5- Rana Muhammad Latif, SP Legal CCPO Office Lahore.
6- Mr. Nasir Abbas Panjutha, DSP Legal Investigation, Lahore.

The participants considered different parameters and feasibility of the above said cell, several issues were explored comprehensively in this meeting about the functioning of the Gender Based Violence Cell.

ESTABLISHMENT OF SEPARATE SPECIAL CELL (GBVC)

A separate Cell of Gender based Violence cases keeping in view the sensitivity and modesty of the effectees, comprising of 06 Sub-Inspectors and 06 Lady Sub-Inspectors of the Investigation Wing, Lahore has been established under the direct supervision of SSP/Investigation, Lahore their names are as under:-

Sr.No.	Name and Rank of Male Officer	Name and Rank of Female officer	Division
1.	Nazir Ahmad SI No.1152/L	TSI Ayesha Azam	Saddar
2.	TSI Ahmad Tabasam	TSI Ambreen Rehman	Iqbal Town
3.	TSI Khalid Liaqat	TSI Sadaf Rasheed	Model Town
4.	TSI Ishtiaq Noor	TSI Jiaba Mansoor	City
5.	SI Ibrar Hussain No.1678/L	TSI Misbah Hafeez	Civil Lines
6.	SI Ashraf No.L/197	TSI Sadia Mehboob	Cantt:

After filling up all the post at the Divisional level, all kinds of logistic support in terms of vehicles/motorcycles with fuel and

- **Handout A: Example - Lahore High Court setting up a GBV Cell within police investigations**

subordinates (Head Constable & Constable) with each I.O have been disbursed. System of leave and welfare of the I.Os has also been devised.

HIERARCHY

SSP/Investigation

↓

Divisional SsP

↓

Concerned DSPs/SDPOs

↓

In-Charge GBVC

↓

City Div.	Sadar Div.	Cantt Div.	Model Town Div.	Iqbal Town Div.	Civil Line Div.
01 SI (Male) 01 SI (Female) 02 HC, 02 FC, 01 lady Const.	01 SI (Male) 01 SI (Female) 02 HC, 02 FC, 01 lady Const.	01 SI (Male) 01 SI (Female) 02 HC, 02 FC, 01 lady Const.	01 SI (Male) 01 SI (Female) 02 HC, 02 FC, 01 lady Const.	01 SI (Male) 01 SI (Female) 02 HC, 02 FC, 01 lady Const.	01 SI (Male) 01 SI (Female) 02 HC, 02 FC, 01 lady Const.

TRAINING OF THE IO'S.

The Learned Judge of Gender Based Violence Court delivered the lectures to the IOs and share their views amongst them to tackle the Gender based Violence/Crime and preparation of Police File and report u/s 173 Cr.P.C. in his chamber. Afterwards 03 days workshop to enhance and develop the investigation skills of the IOs was held at Investigation HQrs: Lahore in which expert investigating officers of Investigation Wing delivered the lectures to the participants regarding Gender Based Violence/Crime. The guidelines and check-lists regarding

- **Handout A: Example - Lahore High Court setting up a GBV Cell within police investigations**

Gender based violence cases have been prepared, circulated and communicated to all relevant staff.

GUIDANCE

Separate meetings with the learned Judges of District Lahore, NGOs like "Aurat Foundation" "Bedari Foundation" "APWA" in Pakistan and "UNDP" are going to be conducted so that the awareness can be created in the society and such violence be discouraged and to devise joint strategy about elimination and investigation, of Gender based Violence cases. Their recommendations will be considered with zeal and zest.

FLAWS OF INVESTIGATION

To eradicate the lacunas in investigation of Gender based violence/crimes cases are being corrected. In this regard consultation is being made Prosecution Department and guidance is being taken from the Judgments passed by the Hon'ble Judges in various cases of Gender based violence/crimes in which the accused persons were awarded rigorous imprisonment. A proposal has also been forwarded to appoint at least two special prosecutors at Gender based violence/crimes Court to assist the learned Court and to deliver guidance to the IOs of the special Cell.

RECOMMENDATION FOR INCREASING THE COST OF INVESTIGATION

It has been opined that cost of investigation be raised up to Rs. 10,000/- per case in addition to already

- **Handout A: Example - Lahore High Court setting up a GBV Cell within police investigations**

disbursing amount to the IOs so that they can conclude the case without any hindrance of lack of funds.

SUBMISSION OF SAMPLES IN PFSA

Meeting are being arranged with the high-ups of Forensic Lab Punjab, a mechanism is being developed to facilitate the IOs so that procedure for submission of DNA-samples can be made trouble-free, manageable and less time consuming. The IOs have already been directed to expedite and clear the pendency.

FUTURE ACTION PLAN

1- Meetings with the Prosecutors and learned Judges and the coordination with the Prosecution Department right from proceedings 154 Cr.P.C. till end of the trial.

2- Coordination with the PFSA authorities for early submission and generation of reports regarding samples (DNA/Swab etc)

3- Training of the witnesses in the cases of Gender based violence/crimes.

4- Appointment of the Pervi Officer in the Gender based violence/crimes Court.

5- Awareness programs with the liaison of NGOs on electronic and print media.

Sr. Superintendent of Police,
Investigation, Lahore.
17-1-18

- **Handout B: Qanun-e-Shahadat 1984 – Relevant Articles**

2. Interpretation: (1)
(d) "fact" includes—
(i) anything, state of things, or relation of things capable of being perceived by the senses and
(ii) any mental condition of which any person is conscious.

Illustrations:
(b) That a man heard or saw something is a fact.
(c) That a man said certain words is a fact.

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19. Relevancy of facts forming part of some transaction: Facts, which though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant whether they occurred at the same time and place or at different times and places.

Illustrations
(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the bystanders at the beating, or, so shortly before or after it as to form part of the transaction, is a relevant fact.

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27. Facts showing existence of state of mind, or of body, or bodily feeling: Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

Explanation 1: A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

Illustrations
(k) The question is, whether A has been guilty of cruelty towards B, his wife. Expressions of their feeling towards each other shortly before or after the alleged cruelty are relevant facts.

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28. Facts bearing on question whether act was accidental or intentional: When there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series or similar occurrence; in each of which the person doing the act was concerned, is relevant.

- **Handout C: Checklist of Evidence Relevant to Domestic Violence Cases**

VICTIMS:

- Statement(s) covering the incident; the symptoms and any previous similar conduct by accused;
- Photographs of injuries;
- Medical evidence (full examination of victim for injuries and evidence of force and the dating of injuries (including past));
- Clothing damaged or ripped;
- Cell phone calls to police or others

NEIGHBOURS OR FRIENDS:

- Statements covering:
  - Any previous violence by accused which could be relied on as bad character;
  - Observations of victims appearance and demeanour including injuries seen on that or other occasions;
  - Observations of damage to property caused by accused seen on that or other occasions;
  - Hearing sounds of arguments or crashing of furniture or objects seen on that or other occasions

EYEWITNESSES:

- Statements covering
  - Scene of the crime (damage to property, weapons, scuffle marks, bloodstains et cetera);
  - Injuries seen, clothing disarray;
  - Victim's demeanour

POLICE

- Emergency call;
- Crime scene, collecting items, photographing the scene as well as diagrams;
- Forensic examination, fingerprints, body fluids, footprints et cetera;
- Victim's statements and demeanour;
- Suspects statements and demeanour

COLLEAGUES AT WORK

- Behaviour changes
- Injuries seen

EXPERT EVIDENCE

- Complaints of symptoms and history given by the victim on hospital admission, or to a nurse of doctor
- Medical evidence, past and specific to the offence
- Demeanour of the victim
- Diagnosis and cause
- Forensic evidence

FAMILY MEMBERS

A family member includes adults and children. The type of evidence is similar to evidence of eyewitnesses and neighbours.

MULTI-MODULE COMPREHENSIVE ACTIVITIES

A. Activity 1: Role Play

Facts:

A woman, Safiya, was raped by her brother-in-law while her husband was serving time in prison. She lodged a police report. Her father got her to withdraw her complaint. It was believed that he received payment to 'settle' the case.

Safiya became pregnant. She was accused of zina by the villagers. Proof of her pregnancy was used as proof of zina. Since Safiya withdrew her complaint of rape, the inference was that she had sex with a man (unnamed) and conceived. Safiya's father-in-law then lodged a complaint with the court, saying that his daughter-in-law's pregnancy was proof of zina.

Safiya's husband, in order to save their family honour, claimed that the child was his, which was conceived during one of his wife's conjugal visits. Safiya supported her husband's claims.

Three months later, Safiya disappeared. Her husband lodged an FIR that she ran away with her lover.

Safiya's case was reported in an international newspaper and caused international outcry.

Role play actors:

1. **Safiya** (How autonomous is she? Did she lie? Should she be prosecuted for lying? Do women always lie when they complain of rape?)
2. **Police inspector** (How motivated is he to investigate - and what investigation does he prioritise? Was Safiya truthful when she said she was raped? Or did Safiya wrongfully accuse a man of rape when she became pregnant? Who is the father of the child?)
3. **Prosecutor** (Can he/she continue to prosecute despite the withdrawal? If he/she decides to prosecute, what evidence can she adduce?)
4. **Judge** (He/she must decide whether pregnancy is proof of fornication/zina. Should he take into account her withdrawn complaint of rape?)
5. **Politician** (What is his/her motivation? When and why would he/she decide to intervene?)
6. **Father-in-law** (Did he pay Safiya's father? Is he persecuting Safiya or protecting his son? Which son is he protecting? Whose honour?)
7. **Safiya's husband** (Is he capable of killing Safiya? Did he have a choice given the shame? If so, will the villagers support him?)
8. **Father** (What is his interest? Did he compromise with Safiya's in-laws?)
9. **Brother-in-law** (Is he a criminal? Does he enjoy impunity? Do the villagers blame him or Safiya? After all she was an attractive young woman whose husband was away.)
10. **Elders of the village** (Who do they blame? Is the honour of the village at stake?)

B. Activity 2: Role Play

Facts:

Iqbal and his wife Shazia were at a birthday party for Faisal. Faisal and Iqbal worked together. Faisal was married to Amal. Shazia is a shy 19 year old. There were 50 people at the party. During the party there was general conversation about where people had gone to school. Faisal and Shazia realised they had gone to the same school at about the same time and they began talking together about the school, the teachers and what had happened to some of the students. Iqbal became angry because Shazia was talking with Faisal by herself. He thought it was too long. Iqbal told her to come outside with him. She said she would and because she could not end the conversation abruptly, she continued to talk with Faisal for a short time. Iqbal then shouted at her to come outside. Shazia stopped talking straightaway and came out. When she got outside Iqbal shouted at her calling her a "slut" for talking to Faisal and slapped her so hard across the face that he knocked her over and she fell to the ground.

Shazia left and went to her parent's house 100 metres away. She was crying and told her parents what had happened. Shazia's father drove her to the police station 2 kilometres down the road to lay a complaint against Iqbal. She still had a visible red mark on her face and a graze on her elbow. It was not the first time Iqbal had hit her. Shazia alleged that Iqbal was overly jealous. In fact, Iqbal was regularly hitting her and wrongfully accusing her of being unfaithful. Only a month earlier Shazia went to the doctor with a split lip after Iqbal had hit her. Her mother had seen the split lip. Shazia had not complained to police.

An FIR was registered for the assault at the party. A magistrate took a s164 statement which included the history of earlier hitting. Shazia was sent for medical examination but the mark on her face and the graze were no longer visible. Shazia no longer lives with Iqbal, she is afraid to go back because he has threatened to kill her. She is living with her parents. A judge framed the charge against Iqbal for the assault on Shazia at the party under s337 –A (1) of the Penal Code. Iqbal is pleading not guilty. He says that he was angry, provoked and shamed by her conduct, he just lightly slapped her and she tripped on uneven ground. He denied that he had hit her before.

Roles for 3 people

- 1 person has the role of and aggressive defence counsel
- 1 person has the role of Judge
- 1 person has the role of Prosecutor

First scenario before the case starts

- **Defence Counsel** - demands that Shazia give her evidence in court and objects to her giving evidence by CCTV (with arguments).
- **Prosecutor** – opposes the demand (with arguments)
- **Judge** – rules with reasons

Second scenario after Shazia has given her evidence

- **Defence counsel** - refuses to put his cross-examination questions in writing (with arguments)
- **Prosecutor** – opposes the defence counsel approach (with arguments)
- **Judge** – rules with reasons

Third scenario

- **Defence counsel -** seeks to ask Shazia the following questions in cross examination
  1. Your husband had told you many times before that he did not like you talking to men by yourself but you disobeyed his orders.
  2. What else would you expect him to do when you were flirting so brazenly with Fasial in front of all people at the party?
  3. You still continued to talk with Faisal even after he told you to come outside
  4. You knew he would be humiliated by your outrageous behaviour.
  5. A good respectful wife would not have behaved as you did.
  6. Do you agree that you deserved to be slapped for your conduct?
- **Prosecutor –** objects to each question (with reasons)
- **Defence Counsel** – maintains that questions are appropriate and should be allowed to be asked (with reasons)
- **Judge –** rules with reasons

Fourth Scenario: after all evidence is finished

- **Defence counsel**: argues (rudely and aggressively) that Iqbal was provoked and that it was only a light slap which was justified by religious provisions related to a wife's behaviour and that she lost her balance on uneven ground. He also makes disparaging comments about Shazia and the lack of loyalty and respect for her husband, etc.
- **Prosecutor** – objects to Defence Counsel behaviour and argues to the contrary
- **Judge –** rules with reasons

INTERNATIONAL INSTRUMENTS AND NATIONAL LAWS ON WOMEN AND GIRLS



TREATY PROVISIONS / PROVISIONS FROM INTERNATIONAL HUMAN RIGHTS DECLARATIONS / RELATED COMMENTS OR RECOMMENDATIONS MENTIONED IN THE MODULES

UNIVERSAL DECLARATION OF HUMAN RIGHTS[43] (1948)

- **Article 1**

  All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

- **Article 2**

  Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

- **Article 3**

  Everyone has the right to life, liberty and security of person.

- **Article 7 - Equality Before the Law**

  All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

- **Article 8 – Right to Remedy**

  Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

- **Article 17**

  (1) Everyone has the right to own property alone as well as in association with others.
  (2) No one shall be arbitrarily deprived of his property.

- **Article 21**

  (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
  (2) Everyone has the right of equal access to public service in his country.
  (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

43 Declaration adopted by the UN General Assembly, 10 December 1948

- **Article 23 – Equality in Employment**
  (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
  (2) Everyone, without any discrimination, has the right to equal pay for equal work.
  (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
  (4) Everyone has the right to form and to join trade unions for the protection of his interests.

- **Article 25**
  (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
  (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

DECLARATION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN[44] (1967)

- **Article 1**

  Discrimination against women, denying or limiting as it does their equality of rights with men, is fundamentally unjust and constitutes an offence against human dignity.

- **Article 2**

  All appropriate measures shall be taken to abolish existing laws, customs, regulations and practices which are discriminatory against women, and to establish adequate legal protection for equal rights of men and women, in particular:

  a. The principle of equality of rights shall be embodied in the constitution or otherwise guaranteed by law;
  b. The international instruments of the United Nations and the specialized agencies relating to the elimination of discrimination against women shall be ratified or acceded to and fully implemented as soon as practicable.

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (SIGNED: 1979; ENTRY INTO FORCE: 1981)

- **Article 1 - Definition of Discrimination**

  For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

- **Article 2 - Measures to be Taken to Eliminate Discrimination**

  States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

  (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
  (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
  (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
  (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

44 Resolution adopted by the UN General Assembly, 7 November 1967

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
(g) To repeal all national penal provisions which constitute discrimination against women

- **Article 3 - Guarantees full development and advancement of women**

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

- **Article 4 - Special Measures**

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

- **Article 5 - Modifying Social and Cultural Patterns of Conduct**

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;
(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

- **Article 11 – Equality in Employment**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:
(a) The right to work as an inalienable right of all human beings;
(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.
2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

- **Article 15 – Equality Before the Law**

1. States Parties shall accord to women equality with men before the law.
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.
3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.
4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

- **Article 16 – Marriage**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
(a) The same right to enter into marriage;
(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
(c) The same rights and responsibilities during marriage and at its dissolution;
(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

BANGALORE PRINCIPLES (1988) – ON DOMESTICATION OF INTERNATIONAL HUMAN RIGHTS NORMS

1. Fundamental human rights and freedoms are inherent in all humankind and find expression in constitutions and legal systems throughout the world and in the international human rights instruments.
2. These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms.
3. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers generally.
4. In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete.
5. This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.
6. While it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.
7. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.
8. However, where national law is clear and inconsistent with the international obligation of the state concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.
9. It is essential to redress a situation where, by reason of traditional legal training which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the remarkable and comprehensive developments of statements of international human rights norms. For the practical implementation of these views it is desirable to make provision for appropriate courses in universities and colleges, and for lawyers and law enforcement officials; and meetings for exchanges of relevant information and experience.
10. These views are expressed in recognition of the fact that judges and lawyers have a special contribution to make in the administration of justice in fostering universal respect for fundamental human rights and freedoms.

CEDAW COMMITTEE GENERAL RECOMMENDATION NO. 12[45] (1989) – ON VIOLENCE AGAINST WOMEN

The [CEDAW Committee] [...] [r]ecommends to the States parties that they should include in their periodic reports to the Committee information about:

1. The legislation in force to protect women against the incidence of all kinds of violence in everyday life (including sexual violence, abuses in the family, sexual harassment at the work place etc.);
2. Other measures adopted to eradicate this violence;
3. The existence of support services for women who are the victims of aggression or abuses;
4. Statistical data on the incidence of violence of all kinds against women and on women who are the victims of violence.

CEDAW COMMITTEE GENERAL RECOMMENDATION NO. 19[46] (1992) – GENDER-BASED VIOLENCE

General comments

6. The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

7. Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include:

(a) The right to life;
(b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
(c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;
(d) The right to liberty and security of person;
(e) The right to equal protection under the law;
(f) The right to equality in the family;
(g) The right to the highest standard attainable of physical and mental health;
(h) The right to just and favourable conditions of work.

[...]

9. [...] Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to

45 http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom12

46 http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19

investigate and punish acts of violence, and for providing compensation.
Comments on specific articles of the Convention

[...]

Articles 2(f), 5 and 10(c)

11. Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to the low level of political participation and to their lower level of education, skills and work opportunities.

12. These attitudes also contribute to the propagation of pornography and the depiction and other commercial exploitation of women as sexual objects, rather than as individuals. This in turn contributes to gender-based violence.

[...]

Article 11

17. Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.

18. Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.

[...]

Article 14

21. Rural women are at risk of gender-based violence because traditional attitudes regarding the subordinate role of women that persist in many rural communities. Girls from rural communities are at special risk of violence and sexual exploitation when they leave the rural community to seek employment in towns.

[...]

Article 16 (and article 5)

23. Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which

are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality.

Specific recommendation

24. In light of these comments, the Committee on the Elimination of Discrimination against Women recommends that:

(a) States parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act;

(b) States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention;

[...]

(d) Effective measures should be taken to ensure that the media respect and promote respect for women;

[...]

(i) Effective complaints procedures and remedies, including compensation, should be provided;

[...]

(k) States parties should establish or support services for victims of family violence, rape, sexual assault and other forms of gender-based violence, including refuges, specially trained health workers, rehabilitation and counselling;

[...]

(r) Measures that are necessary to overcome family violence should include:

(i) Criminal penalties where necessary and civil remedies in cases of domestic violence;
(ii) Legislation to remove the defence of honour in regard to the assault or murder of a female family member;
(iii) Services to ensure the safety and security of victims of family violence, including refuges, counselling and rehabilitation programmes;
(iv) Rehabilitation programmes for perpetrators of domestic violence;
(v) Support services for families where incest or sexual abuse has occurred;

[...]

(t) States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, inter alia:

(i) Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace;
(ii) Preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women;
(iii) Protective measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence;

[...]

CEDAW COMMITTEE GENERAL RECOMMENDATION NO. 28[47] (2010) - ON THE CORE OBLIGATIONS OF STATES PARTIES UNDER ARTICLE 2 OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

9. Under article 2, States parties must address all aspects of their legal obligations under the Convention to respect, protect and fulfil women's right to non-discrimination and to the enjoyment of equality. The obligation to respect requires that States parties refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights. The obligation to protect requires that States parties protect women against discrimination by private actors and take steps directly aimed at eliminating customary and all other practices that prejudice and perpetuate the notion of inferiority or superiority of either of the sexes, and of stereotyped roles for men and women. The obligation to fulfil requires that States parties take a wide variety of steps to ensure that women and men enjoy equal rights de jure and de facto, including, where appropriate, the adoption of temporary special measures in line with article 4 (1) of the Convention and General Recommendation No. 25. This entails obligations of means or conduct and also obligations of results. States parties should consider that they have to fulfill their legal obligations to all women through designing public policies, programmes and institutional frameworks that are aimed at fulfilling the specific needs of women leading to the full development of their potential on an equal basis with men.

CEDAW COMMITTEE GENERAL RECOMMENDATION NO. 33[48] (2015) - WOMEN'S ACCESS TO JUSTICE

3. In practice, the Committee has observed a number of obstacles and restrictions that impede women from realizing their right of access to justice on a basis of equality. They include a lack of effective jurisdictional protection offered by the States Parties in relation to all dimensions of access to justice. These obstacles occur in a structural context of discrimination and inequality, due to factors such as gender stereotyping, discriminatory laws, intersecting or compounded discrimination, procedural and evidentiary requirements and practices, and a failure to systematically ensure that judicial mechanisms are physically, economically, socially and culturally accessible to all women. All of these obstacles constitute persistent violations of women's human rights.

[...]

47 CEDAW/C/2010/47/GC.2 (19 October 2010)
48 EDAW/C/GC/33 (23 July 2015)

5. The scope of the right of access to justice also includes plural justice systems. The term "plural justice systems" refers to the coexistence within a State party of State laws, regulations, procedures and decisions on one hand, and of religious, customary, indigenous or community laws and practices on the other hand. Therefore, plural justice systems include multiple sources of law, whether formal or informal – State, non-State and mixed – that women may encounter when seeking to exercise their right of access to justice. Religious, customary, indigenous and community justice systems – called traditional justice systems in this general recommendation – may be formally recognized by the State, operate with the State's acquiescence with or without any explicit status, or function outside of the State's regulatory framework.

[...]

9. Other factors also making it harder for women to access justice include: illiteracy, trafficking of women, armed conflict, seeking asylum, internal displacement, statelessness, migration, women heading households, widowhood, living with HIV/AIDS, deprivation of liberty, criminalization of prostitution, geographical remoteness, and stigmatization of women fighting for their rights. The fact that human rights defenders and organizations are frequently targeted because of their work must be emphasized and their own right to access justice protected.

[...]

13. The Committee has observed that the centralization of courts and quasi-judicial bodies in the main cities, their non-availability in rural and remote regions, the time and money needed to access them, the complexity of proceedings, the physical barriers for women with disabilities, the lack of access to quality, gender competent legal advice, including legal aid, as well as the deficiencies often noted in the quality of justice systems (gender-insensitive judgments/decisions due to the lack of trainings, delays and excessive length of proceedings, corruption, etc.) all prevent women from accessing justice.

14. Six interrelated and essential components — justiciability, availability, accessibility, good-quality, accountability of justice systems, and the provision of remedies for victims — are therefore necessary to ensure access to justice. While differences in prevailing legal, social, cultural, political and economic conditions will necessitate a differentiated application of these features in each State party, the basic elements of the approach are of universal relevance and of immediate application. Accordingly:

(a) Justiciability requires the unhindered access by women to justice as well as their ability and empowerment to claim their rights under the Convention as legal entitlements;

(b) Availability requires the establishment of courts and other quasi-judicial or other bodies across the State Party in both urban, rural and remote areas, as well as their maintenance and funding;

(c) Accessibility requires that all justice systems, both formal and quasi-judicial systems, are secure, affordable and physically accessible to women, and are adapted and appropriate to the needs of women including those who face intersectional or compounded forms of discrimination;

(d) Good quality of justice systems requires that all components of the system adhere to international standards of competence, efficiency, independence and impartiality5 and provide, in a timely fashion, appropriate and effective remedies that are enforced and that lead to sustainable gender-sensitive dispute resolution for all women. It also requires that justice systems are contextualized, dynamic, participatory, open to innovative practical measures, gender-sensitive, and take account of the increasing demands for justice by women;

(e) Provision of remedies requires the ability of women to receive from justice systems viable protection and meaningful redress for any harm that they may suffer (see article 2 of the Convention); and
(f) Accountability of justice systems is ensured through the monitoring of the functioning of justice systems to guarantee that they are in accordance with the principles of justiciability, availability, accessibility, good quality and provision of remedies. The accountability of justice systems also refers to the monitoring o f the actions of justice system professionals and of their legal responsibility in cases in which they violate the law.

[...]

22. Women, nonetheless, face many difficulties in gaining access to justice as a result of direct and indirect discrimination, as defined in paragraph 16 of General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention. Such inequality is not only apparent in the discriminatory content and/or impact of laws, regulations, procedures, customs and practices, but also in the lack of capacity and awareness of judicial and quasi-judicial institutions to address violations of women's human rights adequately. In its General Recommendation No. 28, the Committee therefore notes that judicial institutions must apply the principle of substantive or de facto equality as embodied in the Convention and interpret laws, including national, religious and customary laws, in line with that obligation. Article 15 of the Convention encompasses obligations for States parties to ensure that women enjoy substantive equality with men in all areas of the law.

[...]

26. Stereotyping and gender bias in the justice system have far-reaching consequences on women's full enjoyment of their human rights. They impede women's access to justice in all areas of law, and may particularly impact on women victims and survivors of violence. Stereotyping distorts perceptions and results in decisions based on preconceived beliefs and myths rather than relevant facts. Often judges adopt rigid standards about what they consider to be appropriate behavior for women and penalize those who do not conform to these stereotypes. Stereotyping as well affects the credibility given to women's voices, arguments and testimonies, as parties and witnesses. Such stereotyping can cause judges to misinterpret or misapply laws. This has far reaching consequences, for example, in criminal law where it results in perpetrators not being held legally accountable for violations of women's rights, thereby upholding a culture of impunity. In all areas of law, stereotyping compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice, including the revictimization of complainants.

27. Judges, magistrates and adjudicators are not the only actors in the justice system who apply, reinforce and perpetuate stereotypes. Prosecutors, law enforcement officials and other actors often allow stereotypes to influence investigations and trials, especially in cases of gender-based violence, with stereotypes, undermining the claims of the victim/survivor and simultaneously supporting the defences advanced by the alleged perpetrator. Stereotyping, therefore, permeates both the investigation and trial phases and finally shapes the judgment.

[...]

62. The presence of plural justice systems can in itself limit women's access to justice by perpetuating and reinforcing discriminatory social norms. In many contexts, the availability of multiple avenues for gaining access to justice within plural justice systems notwithstanding, women are unable to

effectively exercise a choice of forum. The Committee has observed that, in some States parties in which systems of family and/or personal law based on customs, religion or community norms coexist alongside civil law systems, individual women may not be as familiar with both systems and/or at liberty to decide which regime applies to them.

63. The Committee has observed a range of models through which practices embedded in plural justice systems could be harmonized with the Convention in order to minimize conflict of laws and guarantee that women have access to justice. They include the adoption of legislation that clearly defines the relationship between existing plural justice systems, the creation of State review mechanisms and the formal recognition and codification of religious, customary, indigenous, community and other systems. Joint efforts by States parties and non-State actors will be necessary to examine ways in which plural justice systems can work together to reinforce protection for women's rights.

CEDAW COMMITTEE GENERAL RECOMMENDATION NO. 35[49] (2017) - ON GENDER-BASED VIOLENCE AGAINST WOMEN, UPDATING GENERAL RECOMMENDATION NO. 19

2. For over 25 years, the practice of States parties has endorsed the Committee's interpretation. The opinio juris and State practice suggest that the prohibition of gender-based violence against women has evolved into a principle of customary international law. General Recommendation No. 19 has been a key catalyst for this process.

[...]

15. Women's right to a life free from gender-based violence is indivisible from and interdependent with other human rights, including the right to life, health, liberty and security of the person, the right to equality and equal protection within the family, freedom from torture, cruel, inhumane or degrading treatment, freedom of expression, movement, participation, assembly and association.

16. Gender-based violence against women, may amount to torture or cruel, inhuman or degrading treatment in certain circumstances, including in cases of rape, domestic violence or harmful practices, among others. In some cases, some forms of gender-based violence against women may also constitute international crimes.

17. The Committee endorses the view of other human rights treaty bodies and special procedures mandate-holders that in making the determination of when acts of gender-based violence against women amount to torture or cruel, inhuman or degrading treatment, a gender sensitive approach is required to understand the level of pain and suffering experienced by women, and that the purpose and intent requirement of torture are satisfied when acts or omissions are gender specific or perpetrated against a person on the basis of sex.

[...]

III. General obligations of States parties under the Convention relating to gender-based violence against women

[49] CEDAW/C/GC/35 (14 July 2017)

21. Gender-based violence against women constitutes discrimination against women under article 1 and therefore engages all of the obligations in the Convention. Article 2 establishes that the overarching obligation of States parties is to pursue by all appropriate means and without delay a policy of eliminating discrimination against women, including gender-based violence against women. This is an obligation of an immediate nature; delays cannot be justified on any grounds, including on economic, cultural or religious grounds. General recommendation No. 19 indicates that in respect of gender-based violence against women this obligation comprises two aspects of State responsibility: for such violence resulting from the actions or omissions of (a) the State party or its actors, and (b) non-State actors.

Responsibility for acts or omissions of State actors

22. Under the Convention and general international law, a State party is responsible for acts and omissions by its organs and agents that constitute gender-based violence against women. These include the acts or omissions of officials in its executive, legislative and judicial branches. Article 2 (d) of the Convention requires that States parties, and their organs and agents, refrain from engaging in any act or practice of direct or indirect discrimination against women and ensure that public authorities and institutions act in conformity with this obligation. Besides ensuring that laws, policies, programmes and procedures do not discriminate against women, according to article 2 (c) and (g), States parties must have an effective and accessible legal and services framework in place to address all forms of gender-based violence against women committed by State agents, on their territory or extraterritorially.

23. States parties are responsible for preventing these acts or omissions by their own organs and agents –including through training and the adoption, implementation and monitoring of legal provisions, administrative regulations and codes of conduct- and to investigate, prosecute and apply appropriate legal or disciplinary sanctions as well as provide reparation in all cases of gender-based violence against women, including those constituting international crimes, as well as in cases of failure, negligence or omission on the part of public authorities. In so doing, women's diversity and the risks of intersectional discrimination stemming from it should be taken into consideration.

Responsibility for acts or omissions of non-State actors

24. Under general international law, as well as under international treaties, a private actor's acts or omissions may engage the international responsibility of the State in certain cases. These include:

(a) Acts and omissions by non-state actors attributable to the States. The acts or omissions of private actors empowered by the law of that State to exercise elements of the governmental authority, including private bodies providing public services, such as healthcare or education, or operating places of detention, shall be considered as acts attributable to the State itself, as well as the acts or omissions of private agents in fact acting on the instructions of, or under the direction or control of that State, including when operating abroad.
(b) Due diligence obligations for acts and omissions of non-State actors. Article 2 (e) of the Convention explicitly provides that States parties are required to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise. This obligation, frequently referred to as an obligation of due diligence, underpins the Convention as a whole and accordingly States parties will be responsible if they fail to take all appropriate measures to prevent as well as to investigate, prosecute, punish and provide

reparation for acts or omissions by non-State actors which result in gender-based violence against women. This includes actions by corporations operating extraterritorially. In particular, States Parties are required to take necessary steps to prevent human rights violations abroad by corporations over which they may exercise influence, whether by regulatory means or by the use of incentives, including economic incentives. Under the obligation of due diligence, States parties have to adopt and implement diverse measures to tackle gender-based violence against women committed by non-State actors. They are required to have laws, institutions and a system in place to address such violence. Also, States parties are obliged to ensure that these function effectively in practice, and are supported and diligently enforced by all State agents and bodies. The failure of a State party to take all appropriate measures to prevent acts of gender-based violence against women when its authorities know or should know of the danger of violence, or a failure to investigate, prosecute and punish, and to provide reparation to victims/survivors of such acts, provides tacit permission or encouragement to acts of gender-based violence against women. These failures or omissions constitute human rights violations.

25. In addition, both international humanitarian law and human rights law have recognised the direct obligations of non-State actors, including as parties to an armed conflict, in specific circumstances. These include the prohibition of torture, which is part of customary international law and has become a peremptory norm (jus cogens).

26. The general obligations described in the paragraphs above encompass all areas of State action, including the legislative, executive and judicial branches, at the federal, national, sub-national, local and decentralised levels as well as privatised services. They require the formulation of legal norms, including at the constitutional level, the design of public policies, programmes, institutional frameworks and monitoring mechanisms, aimed at eliminating all forms of gender-based violence against women, whether committed by State or non-State actors. They also require, in accordance with articles 2 (f) and 5 (a) of the Convention, the adoption and implementation of measures to eradicate prejudices, stereotypes and practices that are the root cause of gender-based violence against women. In general terms, and without prejudice to the specific recommendations provided in the following section, these obligations include:

(a) At the legislative level, according to article 2 (b), (c), (e), (f) and (g) and article 5 (a), States are required to adopt legislation prohibiting all forms of gender-based violence against women and girls, harmonising domestic law with the Convention. This legislation should consider women victims/survivors as right holders and include age and gender-sensitive provisions and effective legal protection, including sanctions and reparation in cases of such violence. The Convention also requires the harmonization of any existing religious, customary, indigenous and community justice system norms with its standards, as well as the repeal of all laws that constitute discrimination against women, including those which cause, promote or justify gender-based violence or perpetuate impunity for these acts. Such norms may be part of statutory, customary, religious, indigenous or common law, constitutional, civil, family, criminal or administrative law, evidentiary and procedural law, such as provisions based on discriminatory or stereotypical attitudes or practices which allow for gender-based violence against women or mitigate sentences in this context.

(b) At the executive level, according to article 2 (c), (d) and (f) and article 5 (a), States are obliged to adopt and adequately budget diverse institutional measures, in coordination

with the relevant State branches. They include the design of focused public policies, the development and implementation of monitoring mechanisms and the establishment and/or funding of competent national tribunals. States parties should provide accessible, affordable and adequate services to protect women from gender-based violence, prevent its reoccurrence and provide or ensure funding for reparation to all its victims/survivors. States parties must also eliminate institutional practices and individual conduct and behaviours of public officials that constitute gender-based violence against women or tolerate such violence and which provide a context for lack of or for a negligent response. These include adequate investigation and sanctions for inefficiency, complicity and negligence by public authorities responsible for registration, prevention or investigation of this violence or for providing services to victims/survivors. Appropriate measures to modify or eradicate customs and practices that constitute discrimination against women, including those that justify or promote gender-based violence against women, must also be taken at this level.

(c) At the judicial level, according to articles 2 (d), (f) and 5 (a), all judicial bodies are required to refrain from engaging in any act or practice of discrimination or gender-based violence against women; and to strictly apply all criminal law provisions punishing this violence, ensuring all legal procedures in cases involving allegations of gender-based violence against women are impartial and fair, and unaffected by gender stereotypes or discriminatory interpretation of legal provisions, including international law. The application of preconceived and stereotyped notions of what constitutes gender-based violence against women, what women's responses to such violence should be and the standard of proof required to substantiate its occurrence can affect women's right to the enjoyment of equality before the law, fair trial and the right to an effective remedy established in articles 2 and 15 of the Convention.

IV. Recommendations

[...]

Protection

40. Adopt and implement effective measures to protect and assist women complainants and witnesses of gender-based violence before, during and after legal proceedings, including through:

(a) Protecting their privacy and safety, in line with general recommendation No. 33, including through gender-sensitive court procedures and measures, bearing in mind the victim/survivor's, witnesses' and defendant's due process rights.

(b) Providing appropriate and accessible protection mechanisms to prevent further or potential violence, without the precondition for victims/survivors to initiate legal actions, including through removal of communication barriers for victims with disabilities. This should include immediate risk assessment and protection, comprising a wide range of effective measures and, where appropriate, the issuance and monitoring of eviction, protection, restraining or emergency barring orders against alleged perpetrators, including adequate sanctions for non-compliance. Protection measures should avoid imposing an undue financial, bureaucratic or personal burden on women victims/survivors. Perpetrators or alleged perpetrators' rights or claims during and after judicial proceedings, including with respect to property, privacy, child custody, access, contact and visitation, should be determined in the light of

women's and children's human rights to life and physical, sexual and psychological integrity, and guided by the principle of the best interests of the child.

(c) Ensuring access to financial aid and free or low-cost high quality legal aid, medical, psychosocial and counselling services, education, affordable housing, land, child care, training and employment opportunities for women victims/survivors and their family members. Healthcare services should be responsive to trauma and include timely and comprehensive mental, sexual, reproductive health services, including emergency contraception and HIV Post Exposure Prophylaxis (PEP). States should provide specialist women's support services such as free of charge 24-hour helplines, and sufficient numbers of safe and adequately equipped crisis, support and referral centres, as well as adequate shelters for women, their children, and other family members as required;

(d) Providing protective and support measures in relation to gender-based violence to women in institutions, including residential care homes, asylum centres and places of deprivation of liberty;

(e) Establishing and implementing appropriate multi-sectoral referral mechanisms to ensure effective access of women survivors to comprehensive services, ensuring full participation of and cooperation with non-governmental women's organizations.

41. Ensuring all legal proceedings, protection and support measures and services to women's victims/survivors of gender-based violence respect and strengthen their autonomy. They should be accessible to all women, in particular to those affected by intersecting forms of discrimination, and take account of any specific needs of their children and other dependent persons. They should be available in the whole territory of the State party, and provided irrespective of women's residence status and their ability or willingness to cooperate in proceedings against the alleged perpetrator. States should also respect the principle of non-refoulement.

42. Addressing factors that heighten women's risk of exposure to serious forms of gender-based violence, such as the accessibility and availability of firearms, including their exportation, high rates of criminality and pervasiveness of impunity, which may be increased by armed conflict or heightened insecurity. Efforts to control the availability and accessibility of acid and other substances used to attack women should be undertaken.

43. Developing and disseminating accessible information aimed at women, in particular those affected by intersecting forms of discrimination such as those who live with a disability, are illiterate, or have no or limited knowledge of the official languages of the country, of the legal and social resources available to victims/survivors of gender-based violence against women, including reparation, through diverse and accessible media and community dialogue.

Prosecution and punishment

44. Ensure effective access of victims to courts and tribunals; ensure authorities adequately respond to all cases of gender-based violence against women, including by applying criminal law and as appropriate ex officio prosecution to bring the alleged perpetrators to trial in a fair, impartial, timely and expeditious manner and imposing adequate penalties. Fees or court charges should not be imposed on victims/survivors.

45. Ensure that gender-based violence against women is not mandatorily referred to alternative dispute resolution procedures, including mediation and conciliation. The use of these procedures should be strictly regulated and allowed only when a previous evaluation by a specialised team ensures the free and informed consent by the affected victim/survivor and that there are no indicators of further risks for the victim/survivor or their family members. These procedures should empower the women victims/survivors and be provided by professionals specially trained to understand and adequately intervene in cases of gender-based violence against women, ensuring an adequate protection of women's and children's rights as well as an intervention with no stereotyping or re-victimisation of women. These alternative procedures should not constitute an obstacle to women's access to formal justice.

Reparations

46. Provide effective reparation to women victims/survivors of gender-based violence. Reparation should include different measures, such as monetary compensation and the provision of legal, social and health services including sexual, reproductive and mental health for a complete recovery, and satisfaction and guarantees of non-repetition in line with general recommendations No. 28, 30 and 33. Such reparations should be adequate, promptly attributed, holistic and proportionate to the gravity of the harm suffered.

47. States parties should establish specific reparation funds, or include allocations for gender-based violence against women within existing funds, including under transitional justice mechanisms. States parties should implement administrative reparations schemes without prejudice to victims/survivors' rights to seek judicial remedies. States should design transformative reparation programmes that help to address the underlying discrimination or disadvantage which caused or contributed significantly to the violation, taking account of individual, institutional and structural aspects. Priority should be given to the victim/survivor's agency, wishes and decisions, safety, dignity and integrity.

Coordination, monitoring and data collection

48. Develop and evaluate all legislation, policies and programmes in consultation with civil society organisations, in particular women's organisations, including those that represent women who experience intersecting forms of discrimination. States parties should encourage cooperation among all levels and branches of the justice system and the organisations that work to protect and support women victims/survivors of gender-based violence, taking into account their views and expertise. States parties should encourage the work of human rights and women's non-governmental organisations.

49. Establish a system to regularly collect, analyse and publish statistical data on the number of complaints about all forms of gender-based violence against women, including technology mediated violence, the number and types of protection orders issued, the rates of dismissal and withdrawal of complaints, prosecution and conviction rates as well as time taken for disposal of cases. The system should include information on the sentences imposed on perpetrators and the reparation, including compensation, provided for victims/survivors. All data should be disaggregated by type of violence, relationship between the victim/survivor and the perpetrator, as well as in relation to intersecting forms of discrimination against women and other relevant socio-demographic characteristics, including the age of the victim. The analysis of the data should enable the identification of

protection failures and serve to improve and further develop preventive measures. This should, if necessary, include the establishment or designation of gender-based killing of women observatories to collect administrative data on gender related killings and attempted killings of women, also referred to as 'femicide' or 'feminicide.

50. Undertake or support surveys, research programmes and studies on gender-based violence against women, in order to, among other things, assess the prevalence of gender-based violence experienced by women and the social or cultural beliefs exacerbating such violence and shaping gender relations. These studies and surveys should take into account intersecting forms of discrimination, based upon the principle of self-identification.

51. Ensure that the process of collecting and maintaining data on gender-based violence against women complies with established international standards and safeguards, including legislation on data protection. The collection and use of statistics should conform to internationally accepted norms to protect human rights and fundamental freedoms and ethical principles.

52. Set up a mechanism or body, or mandate an existing mechanism or body, to coordinate, monitor and assess regularly the national, regional and local implementation and effectiveness of the measures, including those recommended in this document as well as other relevant regional and international standards and guidelines, to prevent and eliminate all forms of gender-based violence against women.

53. Allocate appropriate human and financial resources at national, regional and local levels to effectively implement laws and policies for the prevention, protection and victim/survivor support, investigation, prosecution and provision of reparations to victims/survivors of all forms of gender-based violence against women, including support to women's organisations.

DECLARATION ON THE ELIMINATION OF VIOLENCE AGAINST WOMEN[50] (1993)

- **Article 4**

  States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:

  (a) Consider, where they have not yet done so, ratifying or acceding to the Convention on the Elimination of All Forms of Discrimination against Women or withdrawing reservations to that Convention;

  (b) Refrain from engaging in violence against women;

  (c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;

  (d) Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered; States should also inform women of their rights in seeking redress through such mechanisms;

50 Resolution No. 48/104 adopted by the General Assembly on 19 December 1993

(e) Consider the possibility of developing national plans of action to promote the protection of women against any form of violence, or to include provisions for that purpose in plans already existing, taking into account, as appropriate, such cooperation as can be provided by non-governmental organizations, particularly those concerned with the issue of violence against women;
(f) Develop, in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions;
(g) Work to ensure, to the maximum extent feasible in the light of their available resources and, where needed, within the framework of international cooperation, that women subjected to violence and, where appropriate, their children have specialized assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counselling, and health and social services, facilities and programmes, as well as support structures, and should take all other appropriate measures to promote their safety and physical and psychological rehabilitation;
(h) Include in government budgets adequate resources for their activities related to the elimination of violence against women;
(i) Take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitize them to the needs of women;
(j) Adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women;
(k) Promote research, collect data and compile statistics, especially concerning domestic violence, relating to the prevalence of different forms of violence against women and encourage research on the causes, nature, seriousness and consequences of violence against women and on the effectiveness of measures implemented to prevent and redress violence against women; those statistics and findings of the research will be made public;
(l) Adopt measures directed towards the elimination of violence against women who are especially vulnerable to violence;
(m) Include, in submitting reports as required under relevant human rights instruments of the United Nations, information pertaining to violence against women and measures taken to implement the present Declaration;
(n) Encourage the development of appropriate guidelines to assist in the implementation of the principles set forth in the present Declaration;
(o) Recognize the important role of the women's movement and non-governmental organizations world wide in raising awareness and alleviating the problem of violence against women;
(p) Facilitate and enhance the work of the women's movement and non-governmental organizations and cooperate with them at local, national and regional levels;
(q) Encourage intergovernmental regional organizations of which they are members to include the elimination of violence against women in their programmes, as appropriate.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (SIGNED: 1966; ENTRY INTO FORCE: 1976)

- **Article 2**

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
   (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
   (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
   (c) To ensure that the competent authorities shall enforce such remedies when granted.

- **Article 14 – Criminal Cases**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
   (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
   (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
   (c) To be tried without undue delay;
   (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
   (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

- **Article 26 – Equality Before the Law**

  All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (SIGNED: 1966; ENTRY INTO FORCE: 1976)

- **Article 2**

  1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
  2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
  3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

- **Article 3**

  The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

CONVENTION ON THE RIGHTS OF THE CHILD (SIGNED: 1990; ENTRY INTO FORCE: 1990)

- **Article 3**

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

ECOSOC RESOLUTION 2005/20: GUIDELINES ON JUSTICE IN MATTERS INVOLVING CHILD VICTIMS AND WITNESSES OF CRIME (2005)

III. Principles

8. As stated in international instruments and in particular the Convention on the Rights of the Child as reflected in the work of the Committee on the Rights of the Child, and in order to ensure justice for child victims and witnesses of crime, professionals and others responsible for the well-being of those children must respect the following cross-cutting principles:

(a) Dignity. Every child is a unique and valuable human being and as such his or her individual dignity, special needs, interests and privacy should be respected and protected;

(b) Non-discrimination. Every child has the right to be treated fairly and equally, regardless of his or her or the parent's or legal guardian's race, ethnicity, colour, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth or other status;

(c) Best interests of the child. While the rights of accused and convicted offenders should be safeguarded, every child has the right to have his or her best interests given primary consideration. This includes the right to protection and to a chance for harmonious development:

(i) Protection. Every child has the right to life and survival and to be shielded from any form of hardship, abuse or neglect, including physical, psychological, mental and emotional abuse and neglect;
(ii) Harmonious development. Every child has the right to a chance for harmonious development and to a standard of living adequate for physical, mental, spiritual, moral and social growth. In the case of a child who has been traumatized, every step should be taken to enable the child to enjoy healthy development;

(d) Right to participation. Every child has, subject to national procedural law, the right to express his or her views, opinions and beliefs freely, in his or her own words, and to contribute especially to the

decisions affecting his or her life, including those taken in any judicial processes, and to have those views taken into consideration according to his or her abilities, age, intellectual maturity and evolving capacity.

[...]

V. The right to be treated with dignity and compassion

10. Child victims and witnesses should be treated in a caring and sensitive manner throughout the justice process, taking into account their personal situation and immediate needs, age, gender, disability and level of maturity and fully respecting their physical, mental and moral integrity.

11. Every child should be treated as an individual with his or her individual needs, wishes and feelings.

12. Interference in the child's private life should be limited to the minimum needed at the same time as high standards of evidence collection are maintained in order to ensure fair and equitable outcomes of the justice process.

13. In order to avoid further hardship to the child, interviews, examinations and other forms of investigation should be conducted by trained professionals who proceed in a sensitive, respectful and thorough manner.

14. All interactions described in these Guidelines should be conducted in a child-sensitive manner in a suitable environment that accommodates the special needs of the child, according to his or her abilities, age, intellectual maturity and evolving capacity. They should also take place in a language that the child uses and understands.

VI. The right to be protected from discrimination

15. Child victims and witnesses should have access to a justice process that protects them from discrimination based on the child's, parent's or legal guardian's race, colour, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth or other status.

16. The justice process and support services available to child victims and witnesses and their families should be sensitive to the child's age, wishes, understanding, gender, sexual orientation, ethnic, cultural, religious, linguistic and social background, caste, socio-economic condition and immigration or refugee status, as well as to the special needs of the child, including health, abilities and capacities. Professionals should be trained and educated about such differences.

17. In certain cases, special services and protection will need to be instituted to take account of gender and the different nature of specific offences against children, such as sexual assault involving children.

18. Age should not be a barrier to a child's right to participate fully in the justice process. Every child should be treated as a capable witness, subject to examination, and his or her testimony should not be presumed invalid or untrustworthy by reason of the child's age alone as long as his or her age and maturity allow the giving of intelligible and credible testimony, with or without communication aids and other assistance.

VII. The right to be informed

19. Child victims and witnesses, their parents or guardians and legal representatives, from their first contact with the justice process and throughout that process, should be promptly and adequately informed, to the extent feasible and appropriate, of, inter alia:

(a) The availability of health, psychological, social and other relevant services as well as the means of accessing such services along with legal or other advice or representation, compensation and emergency financial support, where applicable;

(b) The procedures for the adult and juvenile criminal justice process, including the role of child victims and witnesses, the importance, timing and manner of testimony, and ways in which "questioning" will be conducted during the investigation and trial;

(c) The existing support mechanisms for the child when making a complaint and participating in the investigation and court proceedings;

(d) The specific places and times of hearings and other relevant events;

(e) The availability of protective measures;

(f) The existing mechanisms for review of decisions affecting child victims and witnesses;

(g) The relevant rights for child victims and witnesses pursuant to the Convention on the Rights of the Child and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

20. In addition, child victims, their parents or guardians and legal representatives should be promptly and adequately informed, to the extent feasible and appropriate, of:

(a) The progress and disposition of the specific case, including the apprehension, arrest and custodial status of the accused and any pending changes to that status, the prosecutorial decision and relevant post-trial developments and the outcome of the case;

(b) The existing opportunities to obtain reparation from the offender or from the State through the justice process, through alternative civil proceedings or through other processes.

VIII. The right to be heard and to express views and concerns

21. Professionals should make every effort to enable child victims and witnesses to express their views and concerns related to their involvement in the justice process, including by:

(a) Ensuring that child victims and where appropriate witnesses are consulted on the matters set forth in paragraph 19 above;

(b) Ensuring that child victims and witnesses are enabled to express freely and in their own manner their views and concerns regarding their involvement in the justice process, their concerns regarding safety in relation to the accused, the manner in which they prefer to provide testimony and their feelings about the conclusions of the process;

(c) Giving due regard to the child's views and concerns and, if they are unable to accommodate them, explain the reasons to the child.

IX. The right to effective assistance

22. Child victims and witnesses and, where appropriate, family members should have access to assistance provided by professionals who have received relevant training as set out in paragraphs 40 to 42 below. This may include assistance and support services such as financial, legal, counselling, health, social and educational services, physical and psychological recovery services and other services necessary for the child's reintegration. All such assistance should address the child's needs and enable him or her to participate effectively at all stages of the justice process.

23. In assisting child victims and witnesses, professionals should make every effort to coordinate support so that the child is not subjected to excessive interventions.

24. Child victims and witnesses should receive assistance from support persons, such as child victim/witness specialists, commencing at the initial report and continuing until such services are no longer required.

25. Professionals should develop and implement measures to make it easier for children to testify or give evidence to improve communication and understanding at the pre-trial and trial stages. These measures may include:

(a) Child victim and witness specialists to address the child's special needs;

(b) Support persons, including specialists and appropriate family members to accompany the child during testimony;

(c) Where appropriate, to appoint guardians to protect the child's legal interests.

X. The right to privacy

26. Child victims and witnesses should have their privacy protected as a matter of primary importance.

27. Information relating to a child's involvement in the justice process should be protected. This can be achieved through maintaining confidentiality and restricting disclosure of information that may lead to identification of a child who is a victim or witness in the justice process.

28. Measures should be taken to protect children from undue exposure to the public by, for example, excluding the public and the media from the courtroom during the child's testimony, where permitted by national law.

XI. The right to be protected from hardship during the justice process

29. Professionals should take measures to prevent hardship during the detection, investigation and prosecution process in order to ensure that the best interests and dignity of child victims and witnesses are respected.

30. Professionals should approach child victims and witnesses with sensitivity, so that they:

(a) Provide support for child victims and witnesses, including accompanying the child throughout his or her involvement in the justice process, when it is in his or her best interests;

(b) Provide certainty about the process, including providing child victims and witnesses with clear expectations as to what to expect in the process, with as much certainty as possible. The child's participation in hearings and trials should be planned ahead of time and every effort should be made to ensure continuity in the relationships between children and the professionals in contact with them throughout the process;

(c) Ensure that trials take place as soon as practical, unless delays are in the child's best interest. Investigation of crimes involving child victims and witnesses should also be expedited and there should be procedures, laws or court rules that provide for cases involving child victims and witnesses to be expedited;

(d) Use child-sensitive procedures, including interview rooms designed for children, interdisciplinary services for child victims integrated in the same location, modified court environments that take child witnesses into consideration, recesses during a child's testimony, hearings scheduled at times of day appropriate to the age and maturity of the child, an appropriate notification system to ensure the child goes to court only when necessary and other appropriate measures to facilitate the child's testimony.

31. Professionals should also implement measures:

(a) To limit the number of interviews: special procedures for collection of evidence from child victims and witnesses should be implemented in order to reduce the number of interviews, statements, hearings and, specifically, unnecessary contact with the justice process, such as through use of video recording;

(b) To ensure that child victims and witnesses are protected, if compatible with the legal system and with due respect for the rights of the defence, from being cross-examined by the alleged perpetrator: as necessary, child victims and witnesses should be interviewed, and examined in court, out of sight of the alleged perpetrator, and separate courthouse waiting rooms and private interview areas should be provided;

(c) To ensure that child victims and witnesses are questioned in a child-sensitive manner and allow for the exercise of supervision by judges, facilitate testimony and reduce potential intimidation, for example by using testimonial aids or appointing psychological experts.

XII. The right to safety

32. Where the safety of a child victim or witness may be at risk, appropriate measures should be taken to require the reporting of those safety risks to appropriate authorities and to protect the child from such risk before, during and after the justice process.

33. Professionals who come into contact with children should be required to notify appropriate authorities if they suspect that a child victim or witness has been harmed, is being harmed or is likely to be harmed.

34. Professionals should be trained in recognizing and preventing intimidation, threats and harm to child victims and witnesses. Where child victims and witnesses may be the subject of intimidation, threats or harm, appropriate conditions should be put in place to ensure the safety of the child. Such safeguards could include:

(a) Avoiding direct contact between child victims and witnesses and the alleged perpetrators at any point in the justice process;

(b) Using court-ordered restraining orders supported by a registry system;

(c) Ordering pre-trial detention of the accused and setting special "no contact" bail conditions;

(d) Placing the accused under house arrest;

(e) Wherever possible and appropriate, giving child victims and witnesses protection by the police or other relevant agencies and safeguarding their whereabouts from disclosure.

XIII. The right to reparation

35. Child victims should, wherever possible, receive reparation in order to achieve full redress, reintegration and recovery. Procedures for obtaining and enforcing reparation should be readily accessible and child-sensitive.

36. Provided the proceedings are child-sensitive and respect these Guidelines, combined criminal and reparations proceedings should be encouraged, together with informal and community justice procedures such as restorative justice.

37. Reparation may include restitution from the offender ordered in the criminal court, aid from victim compensation programmes administered by the State and damages ordered to be paid in civil proceedings. Where possible, costs of social and educational reintegration, medical treatment, mental health care and legal services should be addressed. Procedures should be instituted to ensure enforcement of reparation orders and payment of reparation before fines.

XIV. The right to special preventive measures

38. In addition to preventive measures that should be in place for all children, special strategies are required for child victims and witnesses who are particularly vulnerable to recurring victimization or offending.

39. Professionals should develop and implement comprehensive and specially tailored strategies and interventions in cases where there are risks that child victims may be victimized further. These strategies and interventions should take into account the nature of the victimization, including victimization related to abuse in the home, sexual exploitation, abuse in institutional settings and trafficking. The strategies may include those based on government, neighbourhood and citizen initiatives.

[...]

COMMITTEE AGAINST TORTURE GENERAL COMMENT NO. 2[51] (2008)

18. The Committee has made clear that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.

[...]

22. State reports frequently lack specific and sufficient information on the implementation of the Convention with respect to women. The Committee emphasizes that gender is a key factor. Being female intersects with other identifying characteristics or status of the person such as race, nationality, religion, sexual orientation, age, immigrant status etc. to determine the ways that women and girls are subject to or at risk of torture or ill-treatment and the consequences thereof. The contexts in which females are at risk include deprivation of liberty, medical treatment, particularly involving reproductive decisions, and violence by private actors in communities and homes. Men are also subject to certain gendered violations of the Convention such as rape or sexual violence and abuse. Both men and women and boys and girls may be subject to violations of the Convention on the basis of their actual or perceived non-conformity with socially determined gender roles. States parties are requested to identify these situations and the measures taken to punish and prevent them in their reports.

VIENNA CONVENTION ON THE LAW OF TREATIES (1969)

- **Article 26: *Pacta sunt servanda***

  Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

- **Article 27: Internal law and observance of treaties**

  A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

- **Article 46 - Provisions of internal law regarding competence to conclude treaties**

  1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
  2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

[51] CAT/C/GC/2, 24 January 2008

UNESCO UNIVERSAL DECLARATION ON CULTURAL DIVERSITY (2001)

- Culture should be considered as a set of distinctive spiritual, material, intellectual and emotional features of society or a social group.

- **Article 4 – Human rights as guarantees of cultural diversity**
  The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.

FRIBOURG DECLARATION OF CULTURAL RIGHTS

- Cultural rights encompass ways of life language, literature, music, song, religion, belief systems, rites, ceremonies, sports, clothing, customs and traditions through which individuals and groups express their humanity, meaning they give to existence and build a worldview.

2012 REPORT OF UN SPECIAL RAPPORTEUR IN THE FIELD OF CULTURAL RIGHTS

- Preserving the existence and cohesion of a specific cultural community, national or subnational, should not be achieved to the detriment of one group within the community, for example, women.
- Importantly, combating cultural practices that are detrimental to human rights, far from jeopardizing the existence and cohesion of a specific cultural community, stimulates discussion, which facilitates an evolution towards embracing human rights, including in a very culturally specific way.

LIST OF PRO-WOMEN ACTS / PROVISIONS (DOMESTIC LAW)

CONSTITUTION

- **Article 25 - Equality of citizens**
  (1) All citizens are equal before law and are entitled to equal protection of law.
  (2) There shall be no discrimination on the basis of sex.
  (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

- **Article 28 - Preservation of language, script and culture**
  Subject to Article 251 any section of citizens having a distinct language, script or culture shall have the right to preserve and promote the same and subject to law, establish institutions for that purpose.

- **Article 34 - Full participation of women in national life**
  Steps shall be taken to ensure full participation of women in all spheres of national life.

- **Article 35 - Protection of family, etc.**
  The State shall protect the marriage, the family, the mother and the child.

- **Article 37 - Promotion of social justice and eradication of social evils.**
  The State shall:

  (a) promote, with special care, the educational and economic interests of backward classes or areas;
  (b) remove illiteracy and provide free and compulsory secondary education within minimum possible period;
  (c) make technical and professional education generally available and higher education equally accessible to all on the basis of merit;
  (d) ensure inexpensive and expeditious justice;
  (e) make provision for securing just and humane conditions of work, ensuring that children and women are not employed in vocations unsuited to their age or sex, and for maternity benefits for women in employment;
  (f) enable the people of different areas, through education, training, agricultural and industrial development and other methods, to participate fully in all forms of national activities, including employment in the service of Pakistan;
  (g) prevent prostitution, gambling and taking of injurious drugs, printing, publication, circulation and display of obscene literature and advertisements;
  (h) prevent the consumption of alcoholic liquor otherwise than for medicinal and, in the case of non-Muslims, religious purposes; and
  (i) decentralise the Government administration so as to facilitate expeditious disposal of its business to meet the convenience and requirements of the public.

- **Eighteenth Amendment**
  Devolves most social issues to provinces and gives them responsibility for legislation and initiatives regarding those women's rights issues that fall within the purview of provinces.[52]

52 Punjab Commission on the Status of Women. http://pcsw.punjab.gov.pk/constitutional_rights_of_women

NATIONAL LAWS[53]

- **Pakistan Penal Code, 1860**

  Offenses covered in the PPC include (but are not limited to):

Physical harm of any sort (illegal touching, violence and abuse)	Wrongful restraint	Assault and criminal force against a woman with intent to strip her of her clothes or outrage her modesty	Forced abortions and miscarriages
Mental harm	Trespass of all types and criminal offences committed during trespass	Unnatural Offences	Exchange of women for purposes of settling a dispute
Assault	Kidnapping and Abducting children and women	Human Trafficking	Depriving a woman of her inheritance
Murder	Deceiving a woman in affairs relating to marriage	Forced prostitution	Attempted Offences (including aiding and abetting)
Honour Killings	Wrongful confinement	Forced marriages	Marriage to the Holy Quran

Source: UN Women (http://asiapacific.unwomen.org/en/countries/pakistan/evaw-pakistan/legislation-on-vaw)

- **Child Marriage Restraint Act, 1929**

  The law defines "child", if male, as under eighteen years of age, and if female, as under sixteen years of age. The punishment for contracting marriage with a minor is imprisonment up to six month and fine of fifty thousand rupees. Similar punishments are prescribed for the person solemnizing the marriage. The parents or guardians are also liable to same punishment under the law.

- **Muslim Family Law Ordinance (MFLO), 1961**

  This law deals with all matters relating to marriage, including registration, polygamy, divorce, maintenance and other relevant processes and procedures.[54]

53 Note: The Domestic Violence (Prevention and Protection) Bill 2009 / 2012 was not passed in the Senate due in part to objections raised by the Council of Islamic Ideology. Subsequently, with the passage of the Eighteenth Constitutional Amendment, the matter became a provincial issue.

54 http://asiapacific.unwomen.org/en/countries/pakistan/evaw-pakistan/legislation-on-vaw

- **The Dissolution of Muslim Marriages Act, 1939**

  If a woman has not been delegated the right of divorce under section 8 of MFLO, the only course open to her if she wants to dissolve her marriage is Section 2[55] of the Dissolution of Muslim Marriage Act.

- **The Family Courts Act, 1964**

  The law as amended provides for special Family Courts to deal with all family-related issues, with at least one female judge in family courts in each district. The law has made the dissolution (khula) process easier for the woman. Prior to amendment, the law required the wife suing on the basis of khula to surrender 100% of the dower money. The amendment states that the Family Court may direct the wife to surrender 50% deferred dower and up to 25% admitted prompt dower to the husband. The Court shall also fix interim maintenance amount on first appearance of defendant. The Family Court may also exempt the personal appearance of pardahnashin lady (a lady who does not want to appear before men) and may permit her to be represented by an agent.

- **Dowry and Bridal Gifts (Restriction) Act, 1976**

  This law places restrictions on the amount of gifts to a bride and groom, while also requiring limited expenditure on the wedding functions. It also mandates all dowry items to be vested property of the bride. It further requires listing and valuation of all dowry and gift items.[56]

- **Anti-Terrorism Act 1997**

  This Act provides for the prevention of terrorism and sectarian violence and for speedy trial of

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55 *2. Grounds for decree for dissolution of marriage.*

A woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

(i) that the whereabouts of the husband have not been known for a period of four years;

(ii) that the husband has neglected or has filed to provide for her maintenance for a period of two years;

(ii-A) that the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961;

(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

(v) that the husband was impotent at the time of the marriage and continues to be so;

(vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of sixteen years, repudiated the marriage before attaining the age of eighteen years:

Provided that the marriage has not been consumated;

(viii) that the husband treats her with cruelty, that is to say,

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(b) associates with women of evil repute of leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e obstructs her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran,

(ix) on any other ground which is recognized as valid for the dissolution of marriages under Muslim Law,

Provided that:

(a) no decree passed on ground (i) shall take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court he is prepared to perform his conjugal duties the Court shall set aside the said decree; and

(b) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfied the Court within such period, no decree shall be passed on the said ground.

56 http://asiapacific.unwomen.org/en/countries/pakistan/evaw-pakistan/legislation-on-vaw

heinous offences (such as kidnapping for ransom). The law covers issues of child molestation and gang rape.[57]

- **Prevention and Control of Human Trafficking Ordinance, 2002**

  This law defines the crimes of human trafficking. It also provides punishments for such trafficking and identifies those responsible. However, this law only relates to external trafficking i.e. requiring a crossing of international borders. Internal trafficking (trafficking within the borders of Pakistan) is therefore not covered by this law.[58]

- **Criminal Law (Amendment) Act, 2004 of the Pakistan Penal Code (PPC)**

  This law introduced the definition of honor crimes within the PPC and outlawed karo kari, siyah kari and other similar customs. It recognized that killings committed in the name of honor were murders and must be booked and prosecuted as murder and that exemptions will not be given for honor killings or crimes. It also made illegal the exchange of women in marriage or otherwise for the purposes of settling disputes.[59]

- **The Protection for Women (Criminal Law Amendment) Act, 2006**

  This law created changes in two of the Hudood Ordinances, namely the Zina and Qazf Ordinance. It removed a number of clauses — such as the clause pertaining to rape, kidnapping, abducting or inducing a woman to compel for marriage, fornication, offences relating to buying and selling for prostitution, kidnapping or abducting for unnatural lust etc. – from the Zina Ordinance and placed them in the Pakistan Penal Code 1860. This has the result of the overarching rules and procedures of the PPC being applicable to these offences, such as investigation techniques and forms of evidence.[60] Section 5A[61] which states that no zina-bil-jabr complaint will be converted to zina, was inserted.

- **The Protection Against Harassment of Women at the Workplace Act, 2010**

  This law introduced the definition of harassment at the workplace as an offense. It provides for wide descriptions of the workplace to include premises out of the place of work, where any official work or work activity is being carried out. Harassment is defined within the concept of work. A number of penalties are identified for those found guilty of harassment, varying upon the degree and extent of harassment. It also spells out the procedures where cases of harassment come forward. It also requires all workplaces to set up a committee to deal with such cases. It also requires the Government to appoint an Ombudsman to deal with any such cases.[62]

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57 Id.

58 Id.

59 Id.

60 Id.

61 *Offence of Zina (Enforcement of Hadood) Ordinance, 1979 Section.5A (Inserted by Protection of Women (Criminal Laws Amendment) Act, 2006-Section.12A)*

No case to be converted, lodged or registered under certain provisions:- No complaint of zina under section 5 read with section 203A of the Code of Criminal Procedure, 1898 and no case where an allegation of rape is made shall at any stage be converted into a complaint of fornication under section 496A of the Pakistan Penal Code (Act XLV of 1860) and no complaint of lewdness shall at any stage be converted into a complaint of zina under section 5 of the Offence of Zina (Enforcement of Hudood) Ordinance 1979 (Ordinance No. VII of 1979) or an offence of similar nature under any other law for the time being in force.

62 http://asiapacific.unwomen.org/en/countries/pakistan/evaw-pakistan/legislation-on-vaw

- **Criminal Law Amendment Act, 2010**

  The law amended Section 509 of the PPC, replacing the original section with the offence of sexual harassment, which has a wide definition. This law deals specifically about harassment at public places.[63]

- **The Acid Control and Acid Crime Prevention Act - Criminal Law (Second Amendment) Act, 2011**

  This law amended the PPC to include acid crimes in the definition of "hurt". The definition now includes "hurt by dangerous means or substance, including any corrosive substance or acid."[64]

- **The Prevention of Anti-Women Practices - Criminal Law (Third Amendment) Act, 2011**

  This law amended the PPC to include a number of offenses considered to be customary practices.[65] These include: giving a female in marriage or otherwise in badla-e sulh, wanni or swara, depriving women from inheriting property, forced marriages, marriage with the Holy Quran.

- **The Women in Distress and Detention Fund (Amendment) Act, 2011**

  In 1996, a fund was created for women who were in distress and detention and needed financial support. The Act was amended in 2011 to make it operative under the Ministry of Human Rights. The Fund established under this Act also provides legal assistance to women in distress and detention.

- **The National Commission on the Status of Women Act 2012 -** This law makes the Commission autonomous with the power to raise its own finances while maintaining a separate and independent account.[66] Section 11 states the powers of the NCSW thus:
  - To examine policy, programs and other measures taken by the government for gender equality, women's empowerment, political participation, representation, assess implementation and make suitable recommendations.
  - To review all laws, rules, and regulations affecting the status of rights of women and suggest repeal, amendment, or new legislation essential to eliminate discrimination, safeguard and promote the interest of women and achieve gender equality before law in accordance with the constitution and obligations under international covenants and commitments.
  - To sponsor, steer, encourage research to generate information, analysis and studies and maintain a database relating to women and gender issues to provide knowledge and awareness for national policy and strategic action for women empowerment
  - To recommend to the government of Pakistan to sign [sic] and ratify international instruments designed to protect human rights.
  - To develop and maintain interaction and dialogue with non-governmental organizations, experts and individuals in society and active association with similar commission and institutions in other countries for collaboration and action to achieve gender equality at the national, regional and international level.
  - To mobilize grants from domestic and international including multi and bilateral agencies, for meeting any of its obligations or performing its functions.
  - To monitor the implementation of international instruments that Pakistan has signed

63 Id.

64 Sec. 336 A of Pakistan Penal Code, Hurt Caused by Coercive Substance: Whoever with the intention or knowingly causes or attempts to cause hurt by means of a coercive substance or any substance which is deleterious to human body when it is swallowed, inhaled, comes into contract or received into human body or otherwise shall he said to cause hurt by coercive substance.

65 http://asiapacific.unwomen.org/en/countries/pakistan/evaw-pakistan/legislation-on-vaw

66 NCSW Pakistan. http://www.ncsw.gov.pk/pro-women-legislation/national-commission-on-status-of-women-act-2012

- **Criminal Law (Amendment) (Offences Relating to Rape) Act 2016 –** This law amended sections of the Pakistan Penal Code, 1860, the Code of Criminal Procedures, 1898, and the Qanoon-i-Shahadat Order, 1984. The significant portions refer to: (i) tougher penalties for rape; (ii) mandatory collection and use of DNA evidence to prove that rape has been committed; (iii) provisions allowing in-camera trials and the use of technology such as video links to record statements of the victim and witnesses; and (iv) non-disclosure of the identity of the victim.
    - Rape, defined: When a man has sexual intercourse (penetration) with a woman
        - against her will;
        - without her consent;
        - with forced consent (due to fear of death or of hurt);
        - where the woman gives her consent because believes she is married to him, but in fac there is no marriage; or
        - with or without her consent if she is under sixteen years of age.
    - A female police officer or a female family member of the victim or any other person with the consent of the complainant must be present when the victim's statement is being recorded.
    - Medical examination of the victim can only be done by a female registered medical practitioner only after obtaining consent from the victim. DNA and other forensic evidence (from both the accused and the victim) will be collected during the examination.
    - Trial for rape and related crimes will now be conducted confidentially (in camera).[67]
    - Verdicts in rape cases are to be given within three months.
    - Punishment for Rape:
        - Death or imprisonment of minimum ten years and maximum twenty-five years and a fine.[68]
        - When rape is committed by two or more persons, each of them will be punished with death or imprisonment for life.
        - Of a minor or a person with mental or physical disability, will be punished with death or imprisonment for life and fine.
        - By a public servant, including a police officers, medical officers, or jailors, will be punished with death or imprisonment for life and fine.
    - Disclosing the Identity of the Victim: A person who prints or publishes material that may publicize the identity of an alleged victim of rape, gang rape will be punished with a maximum of 3 years imprisonment and fine.
    - Failing to Carry Out Investigation: Public servants (e.g. police) who fail to carry out investigation properly will be punished with imprisonment of 3 years or fine or both.

- **Criminal Law (Amendment) (Offences in the name or pretext of Honour) Act, 2016 –** This law amended sections of the Pakistan Penal Code, 1860 and the Code of Criminal Procedures, 1898. Relatives of the victim are allowed to pardon the killer only if he is sentenced to death, in which case the killer is to serve a mandatory life prison sentence.[69]

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67 "The amendment also deletes provisions in the Qanun-i-Shahadat (law of evidence) relating to questioning the character of the rape victim, so that sex workers are not excluded from the law's protection." Dawn Newspaper. Anti-honour killing, anti-rape bills finally passed. 7 October 2016. https://www.dawn.com/news/1288569

68 Several newspaper articles, including one from the New York Times, state that rape now carries a mandatory sentence of 25 years. However, the text of the law (as I understood it) actually specifies a range of 10 years to 25 years.

69 "Under the new law, relatives of the victim would only be able to pardon the killer if he is sentenced to capital punishment," Zahid Hamid, the law minister, said on the floor of the National Assembly. "However, the culprit would still face a mandatory life sentence."" New York Times. Pakistan Toughens Laws on Rape and 'Honor Killings' of Women. 6 October 2016. https://www.nytimes.com/2016/10/07/world/asia/pakistan-toughens-laws-on-rape-and-honor-killings-of-women.html

- **Prevention of Electronic Crimes Act, 2016**

  S. 20. Offences against dignity of a natural person. (1) Whoever intentionally and publicly exhibits or displays or transmits any information through any information system, which he knows to be false, and intimidates or harms the reputation or privacy of a natural person.

  S. 21. Offences against modesty of a natural person: address the exploitation of sexual imagery without consent. Regulates sexually explicit content, be it digital photographs or videos, taken or distributed without consent. - includes splicing a photo, dissemination of intimate images, sextortion.

  S. 22. Child pornography – produces, offers, make available, transmit or procures for himself or others

  S. 24: Cyberstalking: (1) A person commits the offence of cyber stalking – with intent to coerce, intimidate of harass [...]

ADB TEAM BIOGRAPHIES
(in alphabetical order)



Zarizana Abdul Aziz



Zarizana Abdul Aziz was involved in legal reform initiatives on gender equality and anti-violence legislative reform initiatives in Timor Leste, Bangladesh, Indonesia, Malaysia, Maldives, Myanmar and Afghanistan and in constitutional dialogues in the Middle East post Arab Spring. She trained lawyers, scholars and religious scholars to draft and oversaw the drafting of the Women Empowerment and Protection of Women Qanun for Indonesia (Aceh), was consultant-drafter of the Women's Gender Equality Law for the Maldives and technical consultant relating to Afghanistan's Elimination of Violence against Women Law.

Ms. Abdul Aziz was Human Rights Fellow and subsequently visiting scholar at Columbia University, New York, USA. Ms. Abdul Aziz was also adjunct professor and visiting scholar at Northeastern University School of Law, Boston, USA and is currently adjunct professor at George Washington University.

Ms. Abdul Aziz is a legal trainer, having trained lawyers, judges, civil society advocates, religious scholars and government officials in several countries. Ms. Abdul Aziz served as Chair of Women Living Under Muslim Laws. She also served as co-chairperson of the Human Rights Committee of the Malaysian Bar Council and President of the Women's Crisis Centre (now Women's Centre for Change) in Malaysia. Most recently, she was shortlisted for the UN Working Group on Discrimination against Women in Law and Practice (Asia-Pacific representative).

Ms. Abdul Aziz is currently director of the Due Diligence Project and had developed tools and guidelines on State responsibility and accountability based on the international legal principle of due diligence. She works with governments and civil society to close the implementation gap between law, policy and practice in relation to discrimination and violence against women.

Irum Ahsan



Irum Ahsan completed her legal education from the London School of Economics and Political Science. Before joining the Asian Development Bank (ADB), she practiced on contentious and non-contentious legal matters in Pakistan. In addition, Irum taught law at various prestigious institutions.

At ADB, she works in the Office of the General Counsel as Principal Counsel, where she advises on multi-sector projects for inclusive growth. Irum currently leads the Law and Policy Reform Program (LPR) with her projects focused on areas such as environmental and climate change adjudication and enforcement, legal literacy for women, corporate governance, energy laws, and regional cooperation. ADB's LPR work is based on the premise that a functioning legal system – anchored by the Rule of Law – is an essential component of sustainable development. Her work has led to the establishment of the Asian Judges Network on Environment, the first such network in the world; more than 6 green courts in Asia; and Asia's first gender-based violence court in Pakistan.

Irum has also organized several symposiums for Chief Justices on environmental and climate change laws, and presented her work at numerous international forums. She is also a member of ADB's Governance, Gender and Environment Thematic Groups.

Irum is an active advocate for gender consciousness and for women's rights and passionately steers the gender discussion in ADB. Her work led to ADB winning the 2018 Financial Times Most Innovative In-House Legal Team in Asia and the Pacific Award, and the Innovation in Rule of Law and Access to Justice Award.

Francesse Joy Cordon-Navarro



Atty. Francesse Joy J. Cordon-Navarro is a consultant senior legal and policy reform specialist at ADB's Law and Policy Reform (LPR) Program, working on projects focused on environment and climate change, corporate governance, international arbitration, and gender justice since 2013.

Outside ADB, Atty. Cordon-Navarro worked as an associate at Siguion Reyna, Montecillo & Ongsiako Law Offices, consultant for the University of the Philippines Law Center, lecturer on law, children, and the environment at the Oxbridge Academic Programs in Cambridge, and a mandatory continuing legal education (MCLE) seminar lecturer on international environmental law at the University of the Philippines. She graduated magna cum laude in BS Business Economics in 2007 and with a dean's medal for academic excellence in Juris Doctor (Law) in 2011 from the University of the Philippines. She finished her masters in Environmental Policy at the University of Cambridge.

Atty. Cordon-Navarro has published on international environmental law and sustainable development principles and international children's rights.

Saima Amin Khawaja



Partner, Progressive Advocates and Legal Consultants (Feb 2010–)
Partner, Afridi, Shah & Minallah, Advocates and Legal Consultants (Feb 2005–2010)
Senior-Associate, Afridi, Shah & Minallah, Advocates and Legal Consultants (1998–2005)
Associate, Surridge & Beecheno, Advocates and Legal Consultants (1995–1996).

Saima did her LLM from Kings College London. Her initial experience was in corporate and constitutional litigation, which subsequently expanded to transactional work and consultancy relating to legal reforms and development.

Her areas of interest include the Environmental, Constitution, Corporate Governance, Regulatory Laws, Land Acquisition, Not for Profit Laws and Public Interest Litigation. She has handled numerous development consultancies which vary from environment enforcement, development of SMEs, improvement in the Lower Judiciary, development in legal and regulatory framework for not for profit organizations, bringing in policy change in regulatory frame work of taxation regime, improving Urban development, Governance and corruption issues in water and sanitation and reforms in acquisition laws. She has received special training in Environment laws from M.C Metha Foundation Rishkish, India. She has also been trained in mediation and is an accredited mediator. She has taught various subjects at TILS, UCL, LUMS, Civil Services Academy and the Judicial Academy.

She has been an amicus and part of many commissions at the High Court, presently part of the Climate Change Commission constituted by the Lahore High Court. She is also a Board Member of LUMS Board of Trustees. Concurrently, she is part of the Board of Governors National Management Fund, Gurmani Foundation, The Citizens Foundation, LEAD Pakistan and Bali Memorial Trust.

Humaira Masihuddin



Humaira Masihuddin is a lawyer based in Islamabad and holds LLM in Public International Law from the University of London, LLB (shariah and law) from the International Islamic University, MA in Cultural Anthropology from University of Pittsburgh, USA, and an MSC in Criminal Justice Studies from University of Leicester in UK. She is a criminologist cum victimologist and visiting faculty in a number of law enforcement and security training schools including Punjab Police College Sihala, the Police Training School in Islamabad, the Federal Police Academy, the Federal Judicial Academy, and the Defence Services Academy.

She started judicial trainings in 2006 and has since then trained Family Court judges, Additional District and Session judges, ATC judges, and prosecutors. She teaches diverse subjects such as therapeutic jurisprudence, guardianship and custody issues, women-specific legislation, etc.

She has twenty-one years of experience as a trainer in the criminal justice system and has, besides judges, trained police officers, lawyers, prison staff and investigators. She regularly imparts trainings on Theories of Criminality, Criminology of Violent Extremism and Terrorism, Interrogation, Victimology, Gender-based Violence, Policing of Vulnerable Groups and Fundamental Rights in the Constitution of Pakistan. Diverse topics including the concept of multiculturalism and pluralism with special reference to Islamic teachings, human rights, rights of minorities in Islam, and other topics are also taught by her on various forums as part of her social engineering project.

As a consultant for various organizations, Humaira has worked on a wide range of issues including establishing an enabling environment for minorities in electoral and political processes. She was a technical advisor for the project Police Awam Saath Saath, and her assignment included sharing media products with police, lawyers, and others; research on police heroes and best practices; sexual harassment at the work place; procedural defects in laws relating to offences against religions; a comparative study of blasphemy laws in Pakistan, Iran, Bangladesh and India; pluralism and treatment of minorities; trafficking; child sexual abuse; and street children and prevention of HIV/AIDS.

Samar Minallah Khan



Since obtaining her Mphil in Anthropology and Development from the University of Cambridge, United Kingdom, Ms. Khan has been challenging child marriages and various forms of culturally sanctioned forms of violence against women and girls. This she does by reaching out to different audiences through trainings and screenings of documentaries. She has been part of training programs at the National Judicial Academy, National Police Academy and the Civil Services Academy.

Referred to by the media as 'The Savior of Soul',' Women who Rock the world', and 'The Crusader with the Camera', she continues to advocate against child marriages.

In parts of Pakistan, girls are given away as compensation to settle disputes or to pay for crimes committed by men in their family or tribe. The family receiving the girl can make her a child bride, enslaving her for the rest of her life. Swara, as this practice is known, was practiced in parts of Pakistan for generations—until one woman, Samar Minallah Khan, used a camera to catalyze change.

In 2003, Ms. Khan created a documentary on 'Swara'. Her goal was to raise awareness of the horrific custom and mobilize policymakers to abolish it. Thanks in part to her campaign, swara was made illegal in Pakistan in 2004. Dozens of girls were rescued.

She did not stop there — she made sure that the law was implemented. She took the cause to Pakistanis of all backgrounds, even convincing truck drivers to paint anti-swara slogans on their vehicles.

She sees her documentaries as a way to give voice to those who are seldom heard. Her films are made in regional languages and screened locally, so that people can relate and see themselves through her stories. She uses her lens to focus on unsung heroes within rural communities, such as Pakistani fathers who take enormous risks to stand up for their daughters. She believes in engaging men in order to end violence against women.

Ms. Khan has won several national and international awards including Vanguard Award 2015, DVF Award 2015, Women With Wings 2014, Roberto Rossellini Award, Canon Premio Internationale, Vital Voices Global Leadership Award, Pakistan Women's Day Award, The Asia Society Young Leader, Asia Foundation's Chang Lin Tein Fellowship, and Asia Society's Perdita Huston Award. She serves on the board of various reputable organizations.

The Hon. Dr. Robyn Layton AO QC



The Hon. Dr. Robyn Layton is a former Supreme Court Judge of South Australia. Prior to her Supreme Court appointment, she was a barrister and Queen's Counsel, then a Judge in the South Australian Industrial Court, and later a Deputy President of the Commonwealth Administrative Appeals Tribunal. As a judge in Australia, she was involved in developing and delivering judicial training courses on issues such as vulnerable witnesses including children and women in court. She and other judges produced a Bench book for all judges in Australia on children as witnesses.

Dr. Layton was a Member and later the Chair of the Committee of Experts on Application of Conventions of International Labour Office (ILO), Geneva, from 1993 to 2008. She has been an ILO consultant since 2000 to the present time, delivering training for judges and lawyers in labour law and human rights standards internationally, particularly in Asia (the Philippines, Indonesia, Malaysia, Thailand, India and Bangladesh)

Currently Justice Layton is an Adjunct Professor at the School of Law, University of South Australia. She also works independently as a Judicial Education and Program Development Consultant and has previously been a consultant for the Asia Development Bank on a Gender Development Poverty Reduction Project for Women in Kazakhstan, Cambodia and the Philippines. Her recent publications have been as a co-author of a book on Evidence Law in Australia in 2017 and two publications on equal remuneration and the gender pay gap. She is an accredited judicial educator and a Fellow of the Commonwealth Judicial Education Institute in Canada.

Ma. Celeste Grace Saniel-Gois



Ms. Ma. Celeste Grace A. Saniel-Gois is a senior legal operations officer at the Office of the General Counsel (OGC) of the Asian Development Bank (ADB). She provides technical, analytical, and coordination support for OGC's Law and Policy Reform Program.

Ms. Saniel-Gois has been with ADB for 22 years. Before joining OGC, she was a member of the urban sector team, administering regional technical assistance (TAs) on urban infrastructure projects. She was also a member of the gender and development team of ADB, serving as coordinator for the multi-donor Gender and Development Cooperation Fund, which provided resources for regional TAs aimed at building gender capacity and conducting research on emerging and critical gender issues.

Ms. Saniel-Gois holds a masters degree in Social Services and Development from the Asian Social Institute, Manila; academic credits for masters in Women and Development at the University of the Philippines; and a Bachelor's degree in Communication Arts at St. Scholastica's College, Manila.

Maria Cecilia T. Sicangco



Maria Cecilia T. Sicangco is Senior Legal and Policy Specialist (Consultant) under the Office of the General Counsel's Law and Policy Reform Program. Her work includes environmental law, climate change law and policy, women's legal literacy and access to justice in Islamic countries, gender sensitization, and energy and water sector regulation in Southeast Asia and small-island developing states (SIDS) in the Pacific.

Prior to joining ADB, Ms. Sicangco was a Fellow at the International Development Law Organization (IDLO) headquartered in Rome, Italy. IDLO is an international organization that supports developing and transitional economies in strengthening the rule of law to reduce poverty, stimulate sustainable economic and social development, and adhere to human rights commitments.

She holds a Bachelor of Applied Economics and Accountancy double degree (cum laude) from De La Salle University and a Bachelor of Laws degree (cum laude, salutatorian) from the University of the Philippines. Thereafter, she pursued a Master of Laws in International Legal Studies degree from New York University where she was the Starr Foundation Global Scholar, Hauser Scholar, and Thomas M. Franck Scholar in International Law.

She is qualified as an Attorney and Counsellor at Law in the State of New York (United States of America) and the Republic of the Philippines.

About the Asian Development Bank

ADB is committed to achieving a prosperous, inclusive, resilient, and sustainable Asia and the Pacific, while sustaining its efforts to eradicate extreme poverty. Established in 1966, it is owned by 68 members—49 from the region. Its main instruments for helping its developing member countries are policy dialogue, loans, equity investments, guarantees, grants, and technical assistance.

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